FROM RACE TO AGE: THE EXPANDING SCOPE OF EMPLOYMENT DISCRIMINATION LAW

GEORGE RUTHERGLEN*

ABSTRACT

The Age Discrimination in Employment Act (ADEA) goes beyond the model of racial discrimination in prohibiting discrimination on a ground not recognized in the Constitution. As a consequence, the individuals protected by the ADEA differ sharply from those protected by earlier statutes such as Title VII of the Civil Rights Act of 1964. An examination of empirical data reveals that claims under the ADEA are brought predominantly by white males who hold relatively high-status and high-paying jobs. These claims mainly allege discriminatory discharge and result in recovery of money judgments several times higher than other claims of employment discrimination. As a whole, claims under the ADEA more closely resemble claims for wrongful discharge than other claims of employment discrimination. It follows that the ADEA cannot be justified, either doctrinally or empirically, because it protects a disfavored and relatively powerless minority group from discrimination.

The law of employment discrimination was, and to a large extent still is, modeled on the constitutional law of racial discrimination. Segregation in employment, just like segregation in public education, was at the heart of what Title VII of the Civil Rights Act of 1964 prohibited. Title VII simply extended the constitutional prohibition from public employment, which the Constitution covered of its own force, to private employment. Public employers were already forbidden from discriminating on the basis of race or national origin; Title VII imposed the same prohibitions on

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[Journal of Legal Studies, vol. XXIV (June 1995)]
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private employers. The Age Discrimination in Employment Act (ADEA)\(^2\) was the first enduring departure from the constitutional model of employment discrimination law. Unlike the prohibitions in Title VII, including those against discrimination based on religion and gender,\(^3\) the ADEA plainly went beyond any constitutional claim. There has never been any form of heightened judicial review of government classifications on the basis of age.\(^4\)

In prohibiting discrimination on the basis of age, the ADEA also moved employment discrimination law further from the nearly absolute constitutional and statutory prohibitions against racial discrimination. These prohibitions allow an exception mainly for affirmative action,\(^5\) and the other prohibitions in Title VII are subject to an important exception only for bona fide occupational qualifications,\(^6\) but the ADEA is subject to a broad array of exceptions.\(^7\) These raise the question whether the ADEA should be interpreted and applied like the nearly absolute prohibitions against racial discrimination in the Constitution and Title VII.

Cases under the ADEA also anticipated developments under Title VII in two respects: first, plaintiffs under the ADEA have always had a right to jury trial;\(^8\) and second, most plaintiffs have advanced far enough in their jobs to make a claim for discriminatory discharge worthwhile.\(^9\) Plaintiffs who allege claims of age discrimination have much to gain and little to fear from jury trial.\(^10\) And indeed, the crucial decision in most claims under the ADEA is on the question whether the plaintiff has sub-

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\(^3\) The Supreme Court recognized a constitutional prohibition against sexual discrimination a few years after enactment of Title VII. See Reed v. Reed, 404 U.S. 71 (1971).


\(^7\) See text around notes 26–39 infra.


\(^9\) See Tables 1 and 2.

\(^10\) See text around notes 55–58 infra.
### TABLE 1

**Characteristics of Plaintiffs**

<table>
<thead>
<tr>
<th></th>
<th><strong>NON-ADEA CASES</strong></th>
<th></th>
<th><strong>ALL ADEA CASES</strong></th>
<th></th>
<th><strong>ADEA-ONLY CASES</strong></th>
<th></th>
<th><strong>ADEA-PLUS CASES</strong></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>Number</td>
<td>%</td>
<td>Number</td>
<td>%</td>
<td>Number</td>
<td>%</td>
<td>Number</td>
</tr>
<tr>
<td>Plaintiffs who were:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Management and professional</td>
<td>30</td>
<td>244</td>
<td>64</td>
<td>73</td>
<td>68</td>
<td>57</td>
<td>52</td>
<td>16</td>
</tr>
<tr>
<td>Technical, sales, other support</td>
<td>26</td>
<td>211</td>
<td>25</td>
<td>29</td>
<td>21</td>
<td>18</td>
<td>36</td>
<td>11</td>
</tr>
<tr>
<td>Service</td>
<td>15</td>
<td>126</td>
<td>7</td>
<td>8</td>
<td>6</td>
<td>5</td>
<td>10</td>
<td>3</td>
</tr>
<tr>
<td>Operator and fabricator</td>
<td>22</td>
<td>177</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Precision production</td>
<td>7</td>
<td>59</td>
<td>3</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>White males</td>
<td>5</td>
<td>38</td>
<td>57</td>
<td>26</td>
<td>74</td>
<td>20</td>
<td>32</td>
<td>6</td>
</tr>
<tr>
<td>Average age</td>
<td>39</td>
<td>373</td>
<td>55</td>
<td>115</td>
<td>55</td>
<td>87</td>
<td>52</td>
<td>28</td>
</tr>
<tr>
<td>Average job tenure (in years)</td>
<td>5.3</td>
<td>652</td>
<td>15.1</td>
<td>103</td>
<td>15.5</td>
<td>82</td>
<td>13.6</td>
<td>21</td>
</tr>
<tr>
<td>Average annual salary (Consumer Price Index for urban consumers, 1982–84 = $1.00)</td>
<td>$18,323</td>
<td>166</td>
<td>$35,528</td>
<td>21</td>
<td>$33,327</td>
<td>15</td>
<td>$41,030</td>
<td>6</td>
</tr>
<tr>
<td>Total number of cases</td>
<td>981</td>
<td></td>
<td>128</td>
<td></td>
<td>94</td>
<td></td>
<td>34</td>
<td></td>
</tr>
</tbody>
</table>

**Source.**—American Bar Foundation Employment Discrimination Litigation Survey. For conversion to constant dollars, see the Statistical Abstract of the United States (1994), table 746.

**Note.**—Percentages are calculated based on the number of cases in which a characteristic (such as race) was reported, not necessarily on the total number of cases.
<table>
<thead>
<tr>
<th></th>
<th>NON-ADEA CASES</th>
<th>ALL ADEA CASES</th>
<th>ADEA-ONLY CASES</th>
<th>ADEA-PLUS CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>Number</td>
<td>%</td>
<td>Number</td>
</tr>
<tr>
<td>Lag between violation and filing (in quarters)</td>
<td>9.0</td>
<td>844</td>
<td>5.6</td>
<td>123</td>
</tr>
<tr>
<td>Claims included discrimination in:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hiring</td>
<td>23.1</td>
<td>227</td>
<td>8.6</td>
<td>11</td>
</tr>
<tr>
<td>Firing</td>
<td>62.2</td>
<td>610</td>
<td>85.9</td>
<td>110</td>
</tr>
<tr>
<td>Pay</td>
<td>24.5</td>
<td>240</td>
<td>3.1</td>
<td>4</td>
</tr>
<tr>
<td>Demotion or promotion</td>
<td>39.0</td>
<td>383</td>
<td>20.3</td>
<td>26</td>
</tr>
<tr>
<td>Conditions of employment</td>
<td>44.8</td>
<td>439</td>
<td>12.5</td>
<td>16</td>
</tr>
<tr>
<td>Alleged violation was discrete</td>
<td>42.1</td>
<td>392</td>
<td>74.6</td>
<td>94</td>
</tr>
<tr>
<td>Plaintiff sought:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reinstatement, hiring, or promo-</td>
<td>49.1</td>
<td>457</td>
<td>62.3</td>
<td>76</td>
</tr>
<tr>
<td>tion</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Back pay</td>
<td>75.5</td>
<td>703</td>
<td>70.5</td>
<td>86</td>
</tr>
<tr>
<td>Punitive damages</td>
<td>55.9</td>
<td>520</td>
<td>71.3</td>
<td>87</td>
</tr>
<tr>
<td>Liquidated damages</td>
<td>.4</td>
<td>4</td>
<td>13.1</td>
<td>16</td>
</tr>
<tr>
<td>Pension or other benefits</td>
<td>9.9</td>
<td>92</td>
<td>33.6</td>
<td>41</td>
</tr>
<tr>
<td>Total number of cases</td>
<td>981</td>
<td>128</td>
<td>94</td>
<td></td>
</tr>
</tbody>
</table>

Source.—American Bar Foundation Employment Discrimination Litigation Survey.

Note.—Percentages are calculated based on the number of cases in which a characteristic (such as the discrete or continuous nature of the violation) was reported, not necessarily on the total number of cases.
mitted sufficient evidence to get the case before the jury. Likewise, it was supporters of Title VII, not opponents, who obtained a right to jury trial in the recently enacted Civil Rights Act of 1991. In the years immediately after enactment of Title VII, by contrast, it was opponents of Title VII who sought to create a right to jury trial for claims under that statute, in the hope, presumably, that southern juries would not be sympathetic to claims of racial discrimination. A second contrast with litigation in the years immediately after enactment of Title VII is that most claims of employment discrimination are now claims of discriminatory discharge. Litigation under the ADEA, which concerns such claims almost exclusively, exemplifies this trend in its most extreme form.

This article examines the empirical evidence of the departures from the constitutional model of racial discrimination. Section I is a brief survey of the substantive and procedural differences between the ADEA and Title VII. Section II reports the results of an empirical study of employment discrimination cases in seven cities around the nation. Section III examines the similarity between patterns of litigation under the ADEA and litigation of state law claims of wrongful discharge.

1. Changing Prohibitions and Procedures

Both the substantive and the procedural provisions of the ADEA are unique. It established the first federal prohibition against discrimination on the basis of age but also subjected this prohibition to an unprecedented number of exceptions. The coverage provisions of the statute compounded the effect of these substantive provisions. With several exceptions, the ADEA covers all employees at or above the age of 40,


15 The Age Discrimination Act, 42 U.S.C. § 6101 et seq. (1988), which prohibits age discrimination by recipients of federal funds, was enacted only in 1975.
regardless of race or sex.\textsuperscript{16} Although Title VII nominally has equally broad coverage, it was intended mainly to protect racial minorities, women, and other traditional victims of discrimination;\textsuperscript{17} claims of reverse discrimination by white males are the exception under Title VII, not the rule. What the reported cases reveal, and what the empirical evidence confirms, is that white males have been the principal beneficiaries of the ADEA.\textsuperscript{18} Whatever the justification for protecting white males age 40 or over, it cannot be that they have been excluded from political and economic power. The justification for the ADEA must therefore be based on entirely different grounds. These turn out to have a surprising resemblance to the justification for recognizing claims for wrongful discharge.

In addition to extending the principle against discrimination beyond its traditional justification, the ADEA also created distinctive procedures for enforcement.\textsuperscript{19} Essentially, the statute combined the procedures under the Equal Pay Act,\textsuperscript{20} which themselves were taken from the Fair Labor Standards Act,\textsuperscript{21} with the procedures under Title VII.\textsuperscript{22} The net result was a procedural hybrid that allowed for the right to jury trial and for liquidated damages—procedures that were not available under Title VII as originally enacted. Although jury trials and damages have long been available for claims of racial discrimination under section 1981,\textsuperscript{23} it was only recently, in the Civil Rights Act of 1991,\textsuperscript{24} that similar procedures were made available to claims under Title VII. Because most claims under the ADEA concern discharges from employment, the provisions for compensatory and punitive damages further reinforce the similarity to claims for wrongful discharge.

A. Substantive Prohibitions and Exceptions

The basic prohibition in the ADEA simply paraphrases the corresponding prohibition in Title VII, substituting "age" for "race, color, religion,
sex, or national origin."25 This prohibition is then subject to a wide variety of exceptions. In addition to a bona fide occupational qualification for age, modeled on that for sex under Title VII,26 the ADEA contains a general exception for "reasonable factors other than age"27 and a number of special exceptions for high-level employees28 and certain aspects of fringe benefit and retirement plans.29

The multitude of exceptions under the ADEA has not figured in most of the litigation under the statute. As the empirical evidence makes clear, ADEA cases usually concern a discharge from employment, or less frequently, denial of promotion or refusal to hire.30 These cases are decided under the same structure of proof as claims of racial or sexual discrimination under Title VII.31 Indeed, one exception under the ADEA, for employment decisions based on "reasonable factors other than age,"32 simply codifies the most common defense to claims of intentional discrimination under Title VII, a "legitimate, nondiscriminatory reason for the employee's rejection."33

The exceptions to the ADEA of greatest practical significance concern the ways in which age can be taken into account in retirement, pension, disability benefits, and medical insurance plans.34 These exceptions routinely affect millions of employees and only rarely give rise to litigation. Faced with the related and highly technical requirements of the Employment Retirement Income Security Act,35 employers have hired specialists to adapt their fringe benefit plans to the requirements of the ADEA as

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27 Id. This provision resembles the exception to the Equal Pay Act for differentials in pay "based on any other factor other than sex." See 29 U.S.C. § 206(d)(1)(iv) (1988).
30 See Table 2.
well. The most controversial of these exceptions has been for retirement and insurance plans, which has twice been given a fairly broad interpretation by the Supreme Court and twice amended by Congress to further narrow its scope.

What is notable about these exceptions is not how detailed they are, or how rarely they are subject to litigation, but the fact that they exist at all. Pension, and medical and life insurance plans must take account of age, if only because life expectancy and health decrease as age increases. The most recent federal legislation on this subject explicitly acknowledges this defense to considering age in fringe benefit plans. Yet a similar correlation between sex and life expectancy was found inadequate to support consideration of sex in pension plans under Title VII. The exceptions to the ADEA do not prove the rule, but the opposite: how limited the rule really is.

The prohibition against age discrimination is likely to remain narrower than the prohibitions against race and sex discrimination so long as age is a more acceptable basis for decisions in public and economic life. For the young, age serves as a restriction on such common activities as voting, driving, and employment; and for the old, it figures in the eligibility for and cost of a variety of insurance and social welfare programs. As the Supreme Court said in Massachusetts Board of Retirement v. Mur-
the case rejecting age as a suspect classification under the Equal Protection Clause: "But even old age does not define a 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span." In constitutional law, there is no need to protect the old from the rest of the population, most of whom will live to the same age. So, too, in employment, there is no evidence that older workers on the whole are worse off than younger workers, although the earnings of unskilled workers do tend to decrease before retirement.

Nor can discrimination against older workers be condemned as an inefficient form of statistical discrimination. According to the statistical theory of discrimination, personal characteristics such as race are used to select employees for the job. Although these generalizations may be accurate in the short run—perhaps because of the effects of past discrimination—they create inefficiencies over the long run by discouraging members of racial minorities from developing the qualifications and applying for jobs from which they are excluded. A statistical theory of age discrimination would have to establish that the balance of efficiency lies with prohibiting generalizations on the basis of age. This conclusion is implausible for several reasons: first, everyone's physical and mental abilities decline at some point with age, more steeply for some individuals than others and more steeply in some jobs than others; second, the countervailing benefits of age, such as experience and judgment, do not invariably outweigh the loss of these abilities; third, the period over which older workers can gain and utilize new skills necessarily is shorter than for younger workers; and fourth, more accurate methods of evaluation, such as individualized testing, may cost enough to outweigh the gain in accuracy that they achieve. Some employers in some circumstances might find generalizations on the basis of age to be efficient; others might not. There is no reason to believe that efficiency, even over the long run, dictates a single solution to this problem for all employers and all jobs.

42 Murgia, supra note 4, at 307, 313–14 (per curiam).

43 Even before the enactment of the ADEA, the earnings of most workers increased until the then-standard retirement age of 65. See Herbert S. Parnes, Avril V. Adams, Paul Andrisani, Andrew I. Kohen, & Gilbert Nestal, The Pre-retirement Years 21 (Manpower Research and Development Monograph No. 15, U.S. Dep't of Labor, Manpower Administration 1975) (longitudinal data reflect steady increase in the average annual incomes of preretirement-age men, although cross-sectional data do not, probably because of lower levels of education of older cohorts).

Instead of being based on a constitutional theory of discrete and insular groups, or the economic theory of statistical discrimination, the ADEA is more plausibly based on the life cycle theory of earnings. Although the coverage of the ADEA extends to all employees at or over the age of 40, the justification for the statute is limited to specific abuses of individual employees. Under the life cycle theory of earnings, an employee's compensation at first exceeds his productivity because the employee receives on-the-job training from the employer. 45 Although an employee’s compensation gradually increases with seniority and with promotions, productivity increases even faster. At some point, the employee’s productivity exceeds his compensation, so that the employer profits from the training that it has given to the employee. As the employee grows old, however, his productivity again sinks below his compensation. According to the life cycle theory of earnings, the employer’s profits during the middle period should compensate it for its losses in the earlier and later periods. Although there are dangers of opportunism by both the employer and employee throughout the relationship, the life cycle earnings theory tends to emphasize opportunism by the employer in the later period. During that period, the employer can do better for itself simply by terminating the employee. The employee, on the other hand, having developed skills specific to his job and to his existing employer, will have difficulty finding an equally attractive job with another employer.

The life cycle theory of earnings supports arguments for protecting employees from dismissal without good cause late in their careers. These arguments figured in the debates over the ADEA and led to its enactment, although not as prominently as the subsequent litigation over discharges would lead one to expect. 46 Whether or not they are compelling as a matter of overall efficiency, or as a matter of fairness to individual employees, these arguments differ dramatically from the arguments for remedying long-standing discrimination against racial minorities and women or for the inefficiency of statistical discrimination against older workers. Indeed, they presuppose one form of explicit discrimination against older workers: mandatory retirement when the surplus value conferred on the employer during the employee’s productive middle period has been exhausted. With this qualification, these arguments are simply versions of the arguments for allowing claims for wrongful discharge, restricted to

employees within the coverage of the ADEA. For this structural reason, we would expect claims under the ADEA to closely resemble claims under the developing law of wrongful discharge.

B. Procedures for Enforcement

The procedures under the ADEA further enhance the similarity to the law of wrongful discharge. Although the ADEA adopted some of the requirements for exhaustion of state and federal administrative remedies from Title VII, it reduced their significance considerably. The most important procedures under the ADEA are those adopted from the Equal Pay Act, and in particular, those which provide for the right to jury trial and for the award of liquidated damages. These procedures allow plaintiffs to bring their claims before a jury composed mainly of employees like themselves or their spouses and to seek a limited form of punitive damages. Likewise, the restrictions on class actions under the ADEA, requiring each plaintiff to opt affirmatively into any private action on her behalf, have restricted litigation under the statute almost entirely to individual actions, departing from the model of “across-the-board” class actions prominent in the first decade of litigation under Title VII. With the diminished requirements for exhaustion of administrative remedies, these procedures ensure that claims for age discrimination are litigated in much the same way as claims for wrongful discharge.

The requirements for exhaustion of administrative remedies under the ADEA, although superficially similar to those under Title VII, are both easier to satisfy and less significant. Like Title VII, the ADEA requires plaintiffs to file charges of discrimination with suitable state or local agencies and with the Equal Employment Opportunity Commission (EEOC). Unlike the procedures under Title VII, however, both sets of administrative remedies can be exhausted at the same time; they can even be exhausted after an action has been commenced; and they delay the action

47 For a version of this argument, see Paul C. Weiler, Governing the Workplace: The Future of Labor and Employment Law 63–67 (1990).
48 Compare 29 U.S.C. § 626(c)(2), (b) (1988) (ADEA) with 29 U.S.C. § 216(b) (1988) (Equal Pay Act). The right to jury trial was first implied from the provisions in the ADEA modeled on or referring to the FLSA. See Pons, supra note 8, at 575, 580-85.
for only 60 days, instead of at least 180 days under Title VII.\textsuperscript{52} Not only are plaintiffs allowed to get to court faster,\textsuperscript{53} they are less encumbered than plaintiffs under Title VII by a complex, multitiered system of state and federal enforcement. By jumping quickly through only a few procedural hoops, they can get to court almost as easily as a plaintiff with an ordinary common-law claim.

The right to jury trial gave plaintiffs under the ADEA an even more important advantage, only recently conferred on plaintiffs under Title VII. Plaintiffs who alleged racial discrimination under section 1981 have always been entitled to a jury trial,\textsuperscript{54} but they faced more difficulties in obtaining a sympathetic jury than plaintiffs under the ADEA. Plaintiffs who allege racial discrimination are usually from minority groups. Unless they sue in a federal district consisting predominantly of a central city, such as Washington, D.C., members of their own group are not likely to make up most of the jury. Plaintiffs under the ADEA are typically white, or so the empirical evidence strongly suggests.\textsuperscript{55} It is correspondingly easier for them to obtain a jury largely of the same race and age and from the same economic class. A representative jury is more likely to be composed of employees or their dependents than it is of employers and managers.

For this reason, defendants in ADEA cases have sought strenuously to avoid jury trials, usually by motions for summary judgment, or if those fail, motions for directed verdict or judgment notwithstanding the verdict.\textsuperscript{56} These motions might, of course, be explained on other grounds: motions for summary judgment by the defendant's interest in bringing the litigation to a quick conclusion, or at least obtaining a preview of the plaintiff's case, and motions for directed verdict and judgment notwithstanding the verdict by the defendant's desire to exhaust all means of


\textsuperscript{53} Plaintiffs also used to have a longer statute of limitations in which to go to court: 2 years, or in the case of willful violations, 3 years (29 U.S.C. §§ 626(e)(1), 255(a) (1988)). Delays by the EEOC, however, in processing charges under the ADEA prevented plaintiffs from complying with the statute of limitations. Congress initially responded to this problem by extending the limitation period to accommodate claims that would otherwise have been barred. See Pub. L. No. 100-283, 102 Stat. 78 (1988), as amended by Pub. L. No. 101-504, 104 Stat. 1298 (1990). More recently, the Civil Rights Act of 1991 replaced the old limitation period under the ADEA with the 90-day limitation period from Title VII, which begins to run only on receipt of a right-to-sue letter after the EEOC has completed its proceedings (29 U.S.C. § 626(e) (Supp. IV 1992)).

\textsuperscript{54} Johnson v. Express, supra note 23.

\textsuperscript{55} See Table 1.

\textsuperscript{56} Lanctot, supra note 11.
avoiding an unfavorable judgment. Plaintiffs might also seek jury trials because of the increasing proportion of conservative federal judges appointed during the 1980s. The little empirical evidence that there is suggests that juries are no more favorable to plaintiffs on the issue of liability than judges, although they might make larger awards of damages once they find liability. Even if the sympathies of juries are suspended somewhere between professional lore and empirical confirmation, what cannot be doubted is that the right to jury trial under the ADEA strengthens the resemblance to claims of wrongful discharge. Whatever the actual behavior of juries, it is not likely to differ systematically between the two kinds of cases.

The remedies available under the ADEA are more limited than those for a claim of wrongful discharge, but they are in some respects more certain. A successful plaintiff under the ADEA is entitled to back pay (including lost fringe benefits), reinstatement, and attorney’s fees. If the jury finds that the defendant’s violation was “willful,” in the sense that it was committed in “reckless disregard” of the Act, the plaintiff is also entitled to an award of liquidated damages equal to the amount of back pay. If the plaintiff is not reinstated, she may also receive an award of front pay. The award of back pay and liquidated damages, and in some circuits, the award of front pay, are made by the jury. Reinstatement and attorney’s fees are awarded by the judge. This package of remedies does not include nonpecuniary damages, such as those for emotional distress, or unlimited punitive damages, as are available for tort claims for wrongful discharge. However, it is somewhat more generous than the remedies for simple contract claims for wrongful discharge, which do not include any form of nonpecuniary damages or punitive damages, or an award of attorney’s fees.


58 Harry Kalven, Jr., The Dignity of the Civil Jury, 50 Va. L. Rev. 1055, 1065–67 (1964); Eglit, supra note 33, at 205 n.238. A more recent study has found still fewer systematic differences in the outcomes and the amount of awards in cases tried to a judge and to a jury (Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1137–38, 1140–41 (1992)). Nevertheless, the data also showed that plaintiffs prevailed in civil rights cases on employment twice as frequently before juries as they did before judges. See Clermont & Eisenberg, supra, at 1175.


61 There is a conflict among the circuits on whether awards of front pay should be made by the judge or jury. Comment, The Role of the Jury and the Court in Assessing Front Pay Awards under the Age Discrimination in Employment Act, 58 U. Chi. L. Rev. 1475 (1991).

Paradoxically, the similarities between claims under the ADEA and claims for wrongful discharge have led courts to emphasize their differences. As many opinions have reiterated, the plaintiff’s burden under the ADEA is not just to prove that the employer’s offered reason for discharging the plaintiff was insufficient; the plaintiff must prove that it was a pretext for considering age.63 The fact that courts insist on this distinction suggests that it is one that is easily blurred in practice. Discrediting the reason offered by the defendant often gives rise to an inference of age discrimination, but, as the cases strain to make clear, it is not identical to proving it.64 The similarities between these claims cannot be further refined at the level of legal doctrine. Instead, it is necessary to look at the actual patterns of litigation under the ADEA.

II. EMPIRICAL EVIDENCE

Litigation under the ADEA exemplifies trends that are apparent in other claims of employment discrimination. The decline in class actions under Title VII, for instance, has minimized the significance of the ADEA’s restriction of class actions to opt-in classes. So, too, the increase in claims of discriminatory discharge, to about 86 percent of charges filed with the EEOC, has made all of employment discrimination law look more like the law of wrongful discharge.65 What is distinctive about litigation under the ADEA is how far it carries forward this trend.

There are two sources of data about cases filed under the ADEA: statistics published by the EEOC about the large volume of charges of employment discrimination and about the very much smaller number of actions filed by the EEOC itself;66 and the American Bar Foundation (ABF) Survey on employment discrimination claims in seven cities across the nation.67 These sources of data have complementary strengths. The

63 Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981); Villanueva v. Wellesley College, 930 F.2d 124 (1st Cir. 1991); Lancotot, supra note 11.
64 St. Mary’s Honor Center v. Hicks, 113 S. Ct. 2742, 2748–49 (1993).
65 Donohue & Siegelman, supra note 14, at 1015–16.
67 The data set is described in more detail in Donohue & Siegelman, supra note 14, at 985 n.3.

[The American Bar Foundation Employment Discrimination Litigation Survey, Computer File (1990) (on file with the authors) contains the results of a detailed study of some 1250 employment discrimination cases in 7 cities (Atlanta, Chicago, Dallas, New Orleans, New York, Philadelphia, and San Francisco). Over the period from 1972 to 1987, just under 20% of all federal employment discrimination cases were filed in these seven cities. Although the cities were not selected randomly, the sample of cases chosen was randomly drawn from all cases filed in these cities between 1972 and 1987. We believe that the sample of cities contains enough internal variation to make it useful, albeit imperfect, proxy for the U.S. caseload as a whole.
data from the EEOC provide information on virtually the entire universe of administrative charges of discrimination, but almost none at all about private litigation. The ABF survey fills this gap with a useful sample of about 20 percent of employment discrimination cases from 1972 to 1987. Other sources of data, such as the reports of the Administrative Office of the U.S. Courts, do not disaggregate employment discrimination claims from all civil rights actions. Another study, by Michael Schuster and Christopher S. Miller, examines published opinions in ADEA cases, but without correcting for the selection of these cases from the universe of all cases that are filed. The data from the EEOC and from the ABF together yield consistent conclusions about the number and character of claims under the ADEA.

The annual reports of the EEOC cover all charges filed with the EEOC itself and with state and local agencies that enforce similar laws against employment discrimination. These reports reveal that, in quantitative terms, charges of age discrimination have not dominated the caseload of these agencies. During the fiscal years 1984–88, the last 5-year period that largely overlaps with the ABF survey, charges of age discrimination filed with state agencies grew from 15.8 percent in 1984 to 18.0 percent in 1986 and then remained steady at 18.3 percent and 18.2 percent in 1987 and 1988. Over the same period, charges of age discrimination filed with the EEOC grew from 22.7 percent to 25.3 percent.

The apparent value of these claims is more remarkable than their number. The EEOC brought claims under the ADEA in this 5-year period in nearly the same proportion as charges under that statute. Over the entire period, 24.7 percent of the actions it brought were under the ADEA. A slightly different statistic, for cases closed during this period, reveals that 23 percent of cases were brought under the ADEA. By contrast, 51.0 percent of the monetary benefits secured through litigation by the EEOC were collected in ADEA cases. Thus, the average recovery for each

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68 Schuster & Miller, supra note 14.
70 These percentages include both charges filed only under the ADEA and charges filed under the ADEA and Title VII. See Tables 3 and 4.
71 Id. This percentage does not include mixed actions, brought under more than one statute, which are not broken down by the EEOC into those with an ADEA claim and those without. If all the mixed actions are counted as ADEA cases, the percentage rises to 30.2 percent. These percentages are also calculated without including any subpoena enforcement actions, in either the numerator or the denominator.
72 See Table 5. Aggregating the numbers for each year, approximately 24.5 percent of the cases the EEOC resolved through litigation during the 5-year period were brought under the ADEA, while the monetary benefits secured through litigation under the ADEA totaled 51.0 percent of all monetary benefits received through litigation.
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<tr>
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<td>Number</td>
<td>%</td>
<td>Number</td>
<td>%</td>
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</tr>
<tr>
<td>Non-ADEA cases</td>
<td>39,345</td>
<td>84.2</td>
<td>43,691</td>
<td>83.1</td>
<td>41,539</td>
</tr>
<tr>
<td>All ADEA cases</td>
<td>7,385</td>
<td>15.8</td>
<td>8,885</td>
<td>16.9</td>
<td>9,106</td>
</tr>
<tr>
<td>ADEA-only cases</td>
<td>5,871</td>
<td>12.6</td>
<td>7,045</td>
<td>13.4</td>
<td>6,947</td>
</tr>
<tr>
<td>ADEA-plus cases</td>
<td>1,514</td>
<td>3.2</td>
<td>1,840</td>
<td>3.5</td>
<td>2,159</td>
</tr>
<tr>
<td>Total</td>
<td>46,730</td>
<td>100.0</td>
<td>52,576</td>
<td>100.0</td>
<td>50,645</td>
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### TABLE 4

**Charges Filed with the Equal Employment Opportunity Commission (EEOC)**

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<tr>
<td>Non-ADEA cases</td>
<td>53,360</td>
<td>77.3</td>
<td>55,218</td>
<td>76.7</td>
<td>51,379</td>
<td>74.7</td>
<td>46,953</td>
<td>75.6</td>
<td>43,971</td>
<td>74.7</td>
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<tr>
<td>All ADEA cases</td>
<td>15,614</td>
<td>22.7</td>
<td>16,784</td>
<td>23.3</td>
<td>17,443</td>
<td>25.3</td>
<td>15,121</td>
<td>24.4</td>
<td>14,882</td>
<td>25.3</td>
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<td>ADEA-only cases</td>
<td>12,489</td>
<td>18.1</td>
<td>13,601</td>
<td>18.9</td>
<td>13,854</td>
<td>20.1</td>
<td>11,627</td>
<td>18.7</td>
<td>11,454</td>
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<td>ADEA-plus cases</td>
<td>3,125</td>
<td>4.6</td>
<td>3,183</td>
<td>4.4</td>
<td>3,589</td>
<td>5.2</td>
<td>3,494</td>
<td>5.6</td>
<td>3,428</td>
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<td>Total</td>
<td>68,874</td>
<td>6.6</td>
<td>72,002</td>
<td>6.6</td>
<td>68,822</td>
<td>6.6</td>
<td>62,074</td>
<td>6.6</td>
<td>58,853</td>
<td>6.6</td>
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<tr>
<td>Cases resolved:</td>
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<tr>
<td>Non-ADEA</td>
<td>186</td>
<td>79.5</td>
<td>159</td>
<td>81.5</td>
<td>155</td>
<td>77.9</td>
<td>224</td>
<td>72.3</td>
<td>322</td>
<td>79.1</td>
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<tr>
<td>ADEA</td>
<td>48</td>
<td>20.5</td>
<td>36</td>
<td>18.5</td>
<td>44</td>
<td>22.1</td>
<td>86</td>
<td>27.7</td>
<td>85</td>
<td>20.9</td>
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<tr>
<td>Total</td>
<td>234</td>
<td>100</td>
<td>195</td>
<td>100</td>
<td>199</td>
<td>100</td>
<td>310</td>
<td>100</td>
<td>407</td>
<td>100</td>
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Money recovered in all cases (in thousands; Consumer Price Index for urban consumers, 1982-84 = $1.00):

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<td>Number</td>
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<td>Number</td>
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</tr>
<tr>
<td>Non-ADEA</td>
<td>$14,984</td>
<td>38.7</td>
<td>$25,596</td>
<td>71.0</td>
<td>$33,950</td>
<td>68.6</td>
<td>$8,588</td>
<td>21.0</td>
<td>$20,021</td>
<td>47.4</td>
</tr>
<tr>
<td>ADEA</td>
<td>$23,739</td>
<td>61.3</td>
<td>$10,442</td>
<td>29.0</td>
<td>$15,520</td>
<td>31.4</td>
<td>$32,232</td>
<td>79.0</td>
<td>$22,177</td>
<td>52.6</td>
</tr>
<tr>
<td>Total</td>
<td>$38,723</td>
<td></td>
<td>$36,038</td>
<td></td>
<td>$46,470</td>
<td></td>
<td>$40,820</td>
<td></td>
<td>$42,198</td>
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</tr>
</tbody>
</table>

ADEA action brought by the EEOC (regardless of the number of private parties who benefited from the action) was two-and-one-half times the average recovery in each Title VII case and over four times the average recovery in each case under the Equal Pay Act.

Because claims brought by the EEOC are usually thought to be more meritorious than claims by private litigants,\(^{73}\) the figures on back pay awards may overstate the value of ADEA claims relative to other claims. They are based on a very small proportion of the charges, less than .7 percent, filed with the EEOC during the same period. Nevertheless, the EEOC does not bring ADEA claims in disproportion to their number among initial charges of discrimination. Nor is it likely to have any special expertise or incentive to bring only the most valuable ADEA claims, since it received authority to enforce the statute only in 1979,\(^{74}\) after it had enforced the prohibitions against race, national origin, and sex discrimination in Title VII for over a decade.

The inferences about the greater value of ADEA claims are borne out by the more detailed data from the ABF Survey. It contains information about the character of plaintiffs under the ADEA, the nature of their claims, and the damages they receive. The survey covered over 1,100 cases, of which 128 involved claims under the ADEA. Like most civil cases, only a small proportion of cases in the sample reached trial. A total of 179 cases were tried, and only 24 cases with a claim under the ADEA. Accordingly, the inferences from the data about the nature of the plaintiffs and their claims are stronger than the inferences about the outcome of trials.

By every measure, plaintiffs in ADEA cases are better off than plaintiffs in other employment discrimination cases. As Table 1 reveals, they are much more likely to be managerial and professional employees (64 percent of the plaintiffs whose job was identified in the sample) than other plaintiffs (30 percent of plaintiffs). They are, of course, likely to be older than other plaintiffs and to have a longer tenure on the job (over 15 years for ADEA plaintiffs and a little more than 5 years for other plaintiffs). It is therefore not surprising to find that the average salary of ADEA plaintiffs is almost twice the average salary of other plaintiffs. (This figure nevertheless must be used with some caution because it is based on the small subsample of tried cases and because both averages conceal wide variations among plaintiffs.)


Among ADEA cases alone, 73 percent bring claims only under the ADEA. The remaining 27 percent, who also bring claims under other statutes, are more likely to be minorities or women. Only 19 percent of the plaintiffs in these cases were identified as white males. For all ADEA cases in which the race and sex of the plaintiff were identified, 57 percent were white males. (By contrast, only 5 percent of plaintiffs who did not bring ADEA claims were identified as white males.) The 57 percent figure, however, is likely to understate the proportion of white males, since sex or race went unstated in over half of the ADEA cases, and this is most likely to occur in cases brought by white males. It is also plausible to assume that only relatively few women and minorities are likely to allege age discrimination alone and that only a few white men are likely to allege national origin discrimination or reverse discrimination. We can safely infer that a majority, and perhaps a large majority, of ADEA plaintiffs are white males. Apart from this difference in racial and sexual composition, however, there are no large differences among the occupational status, age, job tenure, and salary between these two groups of ADEA plaintiffs.

The claims that are brought by ADEA plaintiffs differ both in substance and in procedure from the claims brought by other plaintiffs. These differences are most striking in the cases brought only under the ADEA. For almost all of the entries in Table 2, the figures for “ADEA-Plus Cases” fall between those for “Non-ADEA Cases” and “ADEA-Only Cases.” (For some of these entries, however, the number of “ADEA-Plus Cases” is so small that the difference between them and “ADEA-Only Cases” is not statistically significant.) Plaintiffs who bring ADEA claims alone are more likely than other plaintiffs to bring claims of discrimination in firing. They did so in 89 percent of the cases, whereas non-ADEA plaintiffs did so in 62 percent of cases. They are therefore less likely to bring claims of discrimination in hiring, pay, demotion or promotion, or conditions of employment. Corresponding to this difference in disputed employment decisions is a difference in the discrete or continuous nature of the alleged violation. Claims under the ADEA are more likely to concern particularized violations rather than systematic practices. Plaintiffs who bring only ADEA claims are also more likely to seek reinstatement and pension or other benefits, but again, these differences are smaller for plaintiffs who bring ADEA claims with other claims, as Table 2 reveals.

Other differences in the claims brought by ADEA plaintiffs result from

73 For a similar inference, see Schuster & Miller, supra note 14, at 68–69.
the different procedures and remedies available under the statute. As noted earlier, ADEA plaintiffs can get to court more quickly than plaintiffs under Title VII, a difference borne out by the shorter time between violation and filing for ADEA cases in Table 2. Plaintiffs under the ADEA can also seek liquidated or punitive damages, which were until recently only available to other plaintiffs who filed claims under section 1981 or the Equal Pay Act, but not under Title VII. The entries in Table 2 reveal more frequent requests for both kinds of relief under the ADEA than under other statutes.

The differences in outcomes between ADEA cases and other cases are even more dramatic than the differences between plaintiffs. Again, these differences are most striking for cases concerned only with claims under the ADEA. The most astonishing difference, in monetary recoveries, however, is the least well documented. Plaintiffs who bring claims only under the ADEA and whose recovery is reported in court records receive over seven times as much as plaintiffs who do not bring ADEA claims, over $83,600 as compared to $11,500. As Table 6 states, this comparison is based on a sample of only 10 cases brought only under the ADEA, and although the difference between recoveries in these cases and in cases under other statutes is statistically significant, the variance for both figures is very large. Both figures are heavily influenced by a few large recoveries that greatly exceed the average. Nevertheless, the difference between the two figures is consistent with the recoveries obtained by the EEOC in cases brought under the ADEA. The general question raised by Table 6 is whether the large recoveries reported in a small fraction of ADEA cases yield any inference about the large proportion of cases that are settled.

These recoveries are consistent with the higher status, longer job tenure, and higher salaries of ADEA plaintiffs in the much larger sample of all cases that are brought. Higher status and longer job tenure should be correlated with higher salary, as they are in the figures in Table 1. Under the life cycle theory of earnings, salary should increase with tenure on the job, as employees advance within a firm’s internal system of seniority and promotions. The salaries of ADEA plaintiffs are almost twice as high as the salaries of plaintiffs in other cases. Because back pay is the principal component of monetary awards in employment discrimination cases, salaries in all cases should be correlated with recoveries, not just in the few cases in which recoveries are reported.

For more subtle reasons, status and job tenure should also affect the

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76 See text around notes 51–53 supra.
<table>
<thead>
<tr>
<th>TABLE 6: OUTCOME OF CASES</th>
<th>NON-ADEA CASES</th>
<th>ADEA-ONLY CASES</th>
<th>ADEA-PLUS CASES</th>
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</thead>
<tbody>
<tr>
<td>Settlement</td>
<td>46.5%</td>
<td>47.0%</td>
<td>57.9%</td>
</tr>
<tr>
<td>Plaintiff dropped the case</td>
<td>445</td>
<td>451</td>
<td>57.4</td>
</tr>
<tr>
<td>Defendant won</td>
<td>13.9%</td>
<td>13.4%</td>
<td>21.7</td>
</tr>
<tr>
<td>Plaintiff won</td>
<td>55.9%</td>
<td>55.8%</td>
<td>63.4</td>
</tr>
<tr>
<td>Sum of judgment</td>
<td>26.3%</td>
<td>25.8%</td>
<td>37.3</td>
</tr>
<tr>
<td>On summary judgment</td>
<td>5.6%</td>
<td>4.3%</td>
<td>10.0</td>
</tr>
<tr>
<td>On other pretrial motion</td>
<td>6.6%</td>
<td>6.0%</td>
<td>9.1</td>
</tr>
<tr>
<td>On trial disposition</td>
<td>12.5%</td>
<td>12.4%</td>
<td>18.3</td>
</tr>
<tr>
<td>Total number of cases</td>
<td>958</td>
<td>126</td>
<td>93</td>
</tr>
<tr>
<td>Average recovery of plaintiffs (Consumer price index adjusted for inflation)</td>
<td>$11,517</td>
<td>$87,785</td>
<td>$35,174</td>
</tr>
<tr>
<td>Average attorney's fees recovered</td>
<td>$22,311</td>
<td>$29,500</td>
<td>$53,174</td>
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</tbody>
</table>


Note: Numbers may not add up to 100 due to rounding.
rate and amount of settlements. Cases under the ADEA, whether or not they include other claims of discrimination, are settled more frequently than other cases, 58 percent of the time, as opposed to 47 percent. This figure suggests that settlements are easier to reach in ADEA cases, either because the parties are more likely to agree on the outcome of litigation or on an appropriate settlement. Because of the plaintiff's longer tenure on the job, both parties are more likely to have extensive information about the plaintiff's performance and the defendant's employment practices. The higher status of ADEA plaintiffs is also likely to increase their knowledge of the defendant's employment practices. For similar reasons, the plaintiff is likely to have vested pension rights or the right to severance pay which can be used by the defendant to increase its settlement offer. This inference is supported to some extent by the increased frequency of requests for pension and other benefits by ADEA plaintiffs, set forth in Table 2, and the greater average age of ADEA plaintiffs, to be found in Table 1.

Despite the higher settlement rate for ADEA cases, defendants still prevail much more frequently than plaintiffs in litigated cases, although they prevail less frequently on ADEA claims than on other claims. In cases brought only under the ADEA, defendants prevail 25.8 percent of the time, and plaintiffs 8.7 percent of the time. (Most of the remaining cases are settled.) Even if we confine the statistics only to decisions at trial, defendants prevail 15.0 percent of the time, or almost twice as often as plaintiffs. According to the well-known theory of George Priest and Benjamin Klein, we should expect cases that are seriously litigated to be decided equally often for the plaintiff and for the defendant. 77 An important exception to this principle is for actions in which the stakes are not evenly balanced, when, for instance, the defendant has more to lose than the plaintiff has to win. Evidently, this is true of ADEA claims.

But if so, the stakes are even more unbalanced on other claims. In non-ADEA cases, defendants prevail 47.0 percent of the time, and plaintiffs only 22 percent, with most of the remaining cases settled. Again, if we confine the comparison to cases at trial, defendants prevail 14.0 percent of the time, for a six-to-one differential. (In cases that combine ADEA claims and other claims, defendants won 6.1 percent of the cases that were tried, but plaintiffs did not win at all, partially no doubt because of the small sample of such cases.) In non-ADEA cases, the stakes seem to be even more lopsided for the defendant than in pure ADEA cases. What accounts for these lopsided stakes?

An obvious imbalance in the stakes results from fee-shifting statutes. These have been interpreted in employment discrimination cases to require a losing defendant almost always to pay the attorney’s fees of a prevailing plaintiff. A losing plaintiff, however, hardly ever has to pay the fees of a prevailing defendant. This explanation has some force if we consider only the plaintiff’s incentives to go to trial, although it is doubtful that it accounts for all of the six-to-one ratio of victories in favor of defendants. The limited data on attorney’s fees suggest that it is, at most, double the average monetary recovery in a non-ADEA case. Such large attorney’s fees, if they are representative of the many cases in which fees are not reported, probably reflect the value of reinstatement or fringe benefits, which can be used to justify a larger award of attorney’s fees. Indeed, under existing law, attorney’s fees could not consistently be a large multiple of the total recovery and still be reasonable. If so, they cannot explain the large differential in favor of the defendant at trial.

The most plausible remaining explanation for the imbalance in stakes is that the defendant needs to maintain managerial control over its own employment practices, particularly against threats of litigation by other employees. On this explanation, an employer who loses one case may face many similar cases in the future. One disgruntled employee who prevails will encourage others to challenge the employer’s personnel decisions. The defendant therefore faces the risk that a loss in one case will result in a cascade of cases. The employer may also have other interests in prevailing which are more or less closely related to preserving managerial control: preventing the plaintiff from obtaining reinstatement and returning as a discontented worker, preserving the benefits from the partic-

79 Farrar v. Hobby, 113 S. Ct. 566, 574 (1992); Hensley v. Eckerhart, 461 U.S. 424, 436 (1983); Charles Silver, Incoherence and Irrationality in the Law of Attorneys’ Fees, 12 Rev. Lit. 301, 323 (1993) (“To my knowledge, no study has found that enhanced or unenhanced lodestar fee awards systematically or even frequently exceed customary contingent percentage fees.”). In an exceptional case, in which the degree of success cannot easily be reduced to money damages, the award of attorney’s fees may far exceed the damages awarded to the plaintiff (City of Riverside v. Rivera, 477 U.S. 561, 585–86 (1986) (opinion of Powell, J.)).
80 However, one-way shifting of attorney’s fees might explain some of the reduced differential in favor of the defendant in cases tried only under the ADEA. In the two cases in which attorney’s fees are reported, the awarded fees are about half the average monetary award in all ADEA cases. If these figures could be generalized, the small size of awarded fees relative to the plaintiff’s average recovery would dampen the effect from one-way shifting of attorney’s fees, which in turn would explain some of the greater success that ADEA plaintiffs have as compared to other plaintiffs. This speculation, however, rests on a very small sample of only two cases.
ular employment practice in dispute, or protecting its general reputation as a nondiscriminatory employer. Each of these explanations is plausible; none of them is excluded by the evidence.

These explanations are also consistent with the defendants' lower rate of success in cases tried only under the ADEA. Under the Priest-Klein theory, we can infer from the defendant's lower rate of success that the stakes are less imbalanced in pure ADEA cases than in other cases and mixed cases. This suggestion is supported by the higher recoveries reported by plaintiffs in such cases. Although a higher recovery for the plaintiff also means greater exposure for the defendant, it will also disproportionately increase the plaintiff's stakes relative to the defendant's if the plaintiff is risk averse.\textsuperscript{51} Since the plaintiff's job is usually his principal financial asset, we should expect plaintiffs to be risk averse in most cases alleging discriminatory discharge. A plaintiff with higher status, longer job tenure, and a higher salary is also likely to receive a higher settlement offer, which includes severance pay or pension benefits. Accordingly, we should expect ADEA plaintiffs to settle more of their cases, as they do. We should also expect ADEA plaintiffs to be more risk averse about rejecting settlement offers and going to trial; if settlement offers are more generous, risk averse plaintiffs have more to lose by going to trial. This effect is likely to be particularly pronounced for plaintiffs who are near the age of retirement. Severance and retirement benefits for ADEA plaintiffs, with an average age of 55, are more likely to approximate reinstatement than for plaintiffs under other statutes, with an average age of 39.

Moreover, many of the defendant's costs in settling an ADEA case are attributable to sources other than the plaintiff's recovery, in particular, costs to its managerial control over personnel decisions. These costs will not be confined only to ADEA cases, but to employment decisions that can be challenged on other grounds and so are independent of the high recoveries under the ADEA. The defendant's costs of losing are more or less constant across all employment discrimination cases, but the plaintiff's stakes increase in ADEA cases, enough to reduce the defendant's rate of success from six to one to less than two to one.

This explanation, although inevitably speculative, is consistent with the evidence for cases brought only under the ADEA, but not for mixed cases brought under the ADEA and other statutes. When these cases are litigated, plaintiffs appear to have a much lower rate of success and to obtain lower recoveries than in pure ADEA cases. Yet plaintiffs in these

\textsuperscript{51} Priest & Klein, supra note 77, at 27–28.
cases have higher average salaries and only slightly lower job tenure than the plaintiffs who sue only under the ADEA. The outcome in mixed cases resembles the outcome in pure ADEA cases only in the similar rate of settlement. The remaining differences might be dismissed as not statistically significant because of the small number of mixed cases in which outcomes are reported. It is possible, however, that mixed cases are weaker because the plaintiff has not been able to identify what was wrong with the employer’s adverse decision. By alleging so much, they might admit that they know too little. Alternatively, it might be that the judge or jury is less sympathetic to these plaintiffs because they are, as we have seen, predominantly women or minorities. Whatever the explanation, the relatively unfavorable results in these cases do not detract from, and may reinforce, the distinction between claims brought only under the ADEA and claims under other employment discrimination statutes.

From the evidence we have, claims under the ADEA are worth more than other claims: the plaintiff has a greater chance of settling, probably for a larger amount of money, and if the case is litigated, the plaintiff has a greater chance of winning and winning a larger amount of money. The plaintiff is also more likely to be a white male, more likely to have a high status occupation with a higher salary, and more likely to have raised a claim of discriminatory discharge. These similarities to general claims for wrongful discharge and their implications are taken up in the next section of the article.

III. A Comparison with Claims of Wrongful Discharge

The resemblance between claims under the ADEA and claims for wrongful discharge is borne out by the only major empirical study of wrongful discharge cases, conducted by the Rand Corporation in a survey of 120 cases tried in Los Angeles Superior Court in 1986 and 1987. This study predated a leading decision of the California Supreme Court, Foley v. Interactive Data Corp., which restricted defendants’ liability for wrongful discharge. For this reason, and because it is limited to a city with a reputation for generous verdicts, it probably overstates the amount that plaintiffs actually recovered. It is less likely to distort the characteristics of plaintiffs, which bear a striking resemblance to the characteristics of ADEA plaintiffs.

The plaintiffs in the Rand Study were overwhelmingly white, 89.3 per-

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cent, and predominantly male, 68.6 percent. These figures are similar to the percentage of white males among plaintiffs who sued only under the ADEA, 74 percent. The plaintiffs in the Rand Study were also similar in occupation; 53.4 percent were executives or middle managers, while 68 percent of the plaintiffs in pure ADEA cases were in the broader category of managers or professionals. The job tenure of wrongful discharge plaintiffs, however, was lower; only 23.1 percent had served with the employer for over 15 years, while the average for plaintiffs under the ADEA was over 15 years. Despite the effect of job tenure on salary, the average salary of the two groups remained similar: $36,254 for wrongful discharge plaintiffs and $33,327 for plaintiffs who sued only under the ADEA. And as we have seen, 89.4 percent of these claims concerned discriminatory discharge.

Despite the similarity in plaintiffs and claims, the recoveries reported in the Rand Study are larger than the recoveries under the ADEA, perhaps because awards in California are especially generous. The Rand Study is particularly valuable in its detailed analysis of verdicts and amounts actually paid to plaintiffs and their attorneys, but because the study was confined almost entirely to cases tried to a jury, it contains no information about dismissals. It does indicate that 95 percent of wrongful discharge cases were settled for an average of $30,000 for all cases filed. Plaintiffs in the Rand Study prevailed in 67.5 percent of the cases, for a two-to-one ratio of victories in their favor, just the opposite of the ratio in cases involving only the ADEA. These verdicts, however, were set aside or reduced in posttrial proceedings so that plaintiffs were slightly less likely to prevail than defendants and very likely to have the jury verdict reduced. Further proceedings in the trial court and on appeal and further settlement negotiations reduced the average award to the plaintiff by more than half, from an average jury verdict for the plaintiff of $646,900 to a final average payment of $307,600.

The success rate reported in the Rand Study is probably not as stable as the success rate under the ADEA. Uncertainty about the evolving law of wrongful discharge affected the success rate of plaintiffs in the years before 1986, and the restrictive decision in *Foley v. Interactive Data*

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84 Rand Study, *supra* note 82, at 20–21. The Rand data apparently are reported in nominal dollars for the period 1980–86 (*id.* at 19). This is closely comparable to the dollar figures reported in the tables in this article, which are in constant dollars for the Consumer Price Index for urban consumers (CPI-U) averaged over the period 1982–84.

85 *Id.* at 47–48.

86 *Id.* at 26, 33–37, 40.

87 *Id.* at 15–16.
Corp. undoubtedly reduced it thereafter.\textsuperscript{88} By contrast, individual claims under the ADEA were governed by the structure of proof under \textit{McDonnell Douglas Corp. v. Green}\textsuperscript{89} over the entire period covered by the ABF data, 1972–87.\textsuperscript{90} Developments under the ADEA, although significant, have not been of nearly the same magnitude as the changes that caused many states to depart from the common-law doctrine of employment at will.\textsuperscript{91} Most states have recognized claims for wrongful discharge in one of its various forms, although as the law in California illustrates, the nature of the claim and the extent of the defendant’s liability often take some time to be clarified.

Other doctrinal differences between the law of wrongful discharge and the ADEA also account for the larger recoveries reported in the Rand Study. A plaintiff who has prevailed on a claim of wrongful discharge is not ordinarily entitled to an award of attorney’s fees, so that his net recovery is usually reduced by the amount of his attorney’s contingent fee. All of the plaintiffs’ attorneys were compensated by contingent fees, with almost two-thirds charging a fee of at least 40 percent of the recovery.\textsuperscript{92} Contingent fees reduced the prevailing plaintiff’s average net payment to $188,520.\textsuperscript{93} Of this amount, 39.9 percent was attributable to punitive damages, which were awarded in about half of the cases in which plaintiffs obtained verdicts in their favor.\textsuperscript{94} I do not have figures for the amount of liquidated damages awarded in ADEA cases, but the total amount of damages in ADEA cases is likely to be lower, since recovery is limited to back pay and an equal amount of liquidated damages. In a tort claim for wrongful discharge, which was generally available in California during the years covered by the Rand Study, the plaintiff could recover nonpecuniary damages for emotional distress and an unlimited amount of punitive damages.\textsuperscript{95} The authors of the Rand Study also caution that the figures on average awards, just like those in the ABF data,


\textsuperscript{89} McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

\textsuperscript{90} See Player, supra note 31.

\textsuperscript{91} Weiler, supra note 47, ch. 2.

\textsuperscript{92} Rand Study, supra note 82, at 38.

\textsuperscript{93} \textit{Id.} at 40. This average counts only cases in which the plaintiff obtained a jury verdict in his favor.

\textsuperscript{94} \textit{Id.} at 25–26.

\textsuperscript{95} See note 88 supra.
are heavily influenced by a small number of very large awards. They conclude that the median payment for all plaintiffs, whether or not they obtained a jury verdict in their favor, was only $30,000, which amounted to a severance payment of 6 months’ salary.

The magnitude of the recoveries reported in the Rand Study might be exaggerated, but the existence of a significant difference from employment discrimination cases is not. Plaintiffs who get to a jury on claims of wrongful discharge are more likely to recover, and more likely to recover larger judgments, than plaintiffs who get equally far with claims of employment discrimination, including claims under the ADEA. The recoveries reported in the Rand Study extend a pattern found in the ABF data: larger recoveries by plaintiffs are correlated with a higher success rate at trial. This correlation lends some support to my inference from the Priest-Klein theory that increasing the plaintiff’s recovery evens out the stakes between plaintiffs and defendants. It also places claims under the ADEA midway between other claims of employment discrimination and claims of wrongful discharge. Although the figures from the Rand Study and from the ABF data are difficult to compare precisely, they yield the following pattern: in non-ADEA cases, plaintiffs win about one-seventh of the trials and winning plaintiffs recover an average of $11,500; in cases only under the ADEA, they win about one-third of the trials and recover an average of $83,600; and in wrongful discharge cases, they win two-thirds of the cases and ultimately obtain a net average recovery of $188,500.

With the passage of the Civil Rights Act of 1991, other employment discrimination claims should come to resemble ADEA claims more closely, but only to a degree. The act extended the right to jury trial and the right to compensatory and punitive damages to all claims of intentional discrimination. These were formerly available only for claims of racial discrimination under section 1981 and, as liquidated damages, under the ADEA. Under the new act, damages are limited according to the size of the employer, but these limits roughly and imperfectly approximate the limits on liquidated damages under the ADEA. What the act

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97 Id. at 39.
99 The limits under the new act range from $50,000 to $300,000 depending on the size of the employer. The limits apply to future pecuniary losses, nonpecuniary losses, and punitive damages (Pub. L. No. 102-166, § 102, 105 Stat. 1071 (1991), 42 U.S.C. § 1981a(b)(3) (Supp. IV 1992)). By way of comparison, the ADEA allows an award of liquidated damages in an amount equal to an award of back pay for willful violations (29 U.S.C. §§ 626(b), 216(b) (1988)).
cannot change are the characteristics of plaintiffs who bring different kinds of discrimination claims and how sympathetic a jury is likely to be toward them. The few data available on claims under section 1981 suggest that the effective limits on damages do not arise solely from legal doctrine. Plaintiffs on these claims recover money judgments in almost the same percentage of filed cases as plaintiffs under Title VII. From a broader sample of all constitutional tort cases, it appears that plaintiffs under section 1981 recover more than plaintiffs under Title VII, but less than half of what plaintiffs recover under the ADEA alone.

Claims under the ADEA bear a far stronger resemblance to wrongful discharge claims than other claims of employment discrimination precisely because they are not claims on behalf of a discrete and insular group in our society. Like wrongful discharge claims, they are usually brought by white males, and they can usually be avoided only by employers who establish general safeguards against unjust dismissal. The institutional reform stimulated by the ADEA, apart from changes in retirement and benefits policies, is indistinguishable from the reform caused by the law of wrongful discharge. In the latter, a major issue is how far such claims should go beyond the express or implied terms of the employment contract, and a fundamental issue in both fields is how far the judge or jury should second-guess the employer's reasons for discharging the plaintiff.

IV. Conclusion

The ADEA may be characteristic of trends in the law of employment discrimination, but only if those trends are eroding the distinctive characteristics of the field. The ADEA is part of a growing list of negative prohibitions, telling employers what they may not consider in hiring and firing employees. Someday this list might have the same effect as an affirmative command, telling them what they must consider, not just what they must exclude from consideration. As prohibitions against discrimination multiply to reach additional grounds, they have the same cumulative effect as an affirmative obligation only to discharge for good cause. They

102 See Murgia, supra note 4, at 307, 313–14 (per curiam).
103 Weiler, supra note 47, at 25–26, 70–78.
104 Lantot, supra note 11, at 64–67; Player, supra note 31, at 656; Eglit, supra note 33, at 168, 226.
also lose their moral force as absolute prohibitions when they are subject to multiple exceptions, as in the ADEA. Protection against wrongful discharge may—or may not—be justifiable, but if it is, it is on grounds only distantly related to the original aims and purposes of employment discrimination law.

Today, 25 years after enactment of the ADEA, and soon after the passage of the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991, it is difficult to imagine that the increasing scope of employment discrimination law can be reversed. Yet the customary justification for this body of law can no longer be applied, if it ever could, to all of the prohibitions against different forms of discrimination. The ADEA, in particular, cannot be justified in terms of opening opportunities to a historically disfavored group. Those 40 years old or older are not politically powerless and do not, as a group, suffer from economic disadvantages. On the contrary, those who sue under the ADEA tend to be white males who are relatively well off in status, positions, and pay. It is therefore necessary to turn to other justifications for the ADEA. These have yet to be supplied, and if they are not, both the breadth of and the need for the ADEA must be reexamined.