

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING  
AGE DISCRIMINATION IN EMPLOYMENT IN THE  
CURRENT ECONOMIC CRISIS

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FRIDAY, JUNE 11, 2010

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The Commission convened in Room 540 at 624  
Ninth Street, Northwest, Washington, D.C. at 9:30  
a.m., Abigail Thernstrom, Vice Chairman, presiding.

PRESENT:

ABIGAIL THERNSTROM, Vice Chairman

TODD F. GAZIANO, Commissioner  
GAIL L. HERIOT, Commissioner  
PETER N. KIRSANOW, Commissioner  
ASHLEY L. TAYLOR, JR., Commissioner  
MICHAEL YAKI, Commissioner  
MARTIN DANNENFELSER, Staff Director

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel, OGC  
MARGARET BUTLER  
CHRISTOPHER BYRNES  
DEMETRIA DEAS

LILLIAN DUNLAP  
PAMELA A. DUNSTON, Chief, ASCD  
LATRICE FOSHEE  
ALFREDA GREENE  
EMMA MONROIG, Solicitor  
LENORE OSTROWSKY  
JOHN RATCLIFFE, Chief, Budget and Finance

EILEEN RUDERT  
KIMBERLY TOLHURST  
VANESSA WILLIAMSON  
AUDREY WRIGHT  
MICHELE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN

ALEC DEULL

TIM FAY

DOMINIQUE LUDVIGSON

JOHN MARTIN

ALISON SCHMAUCH

KIMBERLY SCHULD

PANELISTS PRESENT:

THOMAS NARDONE, Assistant Commissioner for Current  
Employment Analysis at the Bureau of Labor  
Statistics

DIANNA JOHNSTON, Assistant Legal Counsel, EEOC

WALT CONNOLLY, Connolly, Rodgers & Scharman

MICHAEL HARPER, Professor, Boston University  
School of Law

ELIZABETH MILITO, Senior Executive Counsel, National  
Federation of Independent Business

LAURIE McCANN, Senior Attorney, AARP Foundation  
Litigation

CATHY VENTRELL-MONSEES, President of Workplace  
Fairness

AGENDA

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## P R O C E E D I N G S

(9:36 a.m.)

## I. INTRODUCTORY REMARKS

VICE CHAIR THERNSTROM: Good morning, people. We are ready to start. On behalf of the U.S. Commission on Civil Rights, I welcome everyone to this briefing on Age Discrimination and Employment in the Current Economic Crisis. This project will explore whether older workers, as compared with younger counterparts, are less employed than they were in earlier years. It will also examine whether age discrimination and related complaints and lawsuits have increased during the recent economic crisis, and how the Equal Employment Opportunity Commission has addressed such concerns.

The record of this briefing will be open until July 12th, 2010. Public comments may be mailed to the Commission at 624 9th Street, N.W., Room 740, Washington, D.C. The zip code is 20425.

And we are pleased this morning to welcome two panels of experts that will address the topic. Panel One will have government officials dealing with the topic. The participants are Thomas Nardone, Assistant Commissioner for Current Employment Analysis, Bureau of Labor Statistics, and Dianna

1       Johnston, Assistant Legal Counsel, Equal Employment  
2       Opportunity Commission.

3               Thomas Nardone is Assistant Commissioner  
4       for Current Employment Analysis at the U.S. Bureau of  
5       Labor Statistics, BLS. He manages four statistical  
6       programs of the Agency, the Current Population Survey,  
7       Local Area Unemployment Statistics, the Mass Layoff  
8       Survey, and the American Time Use Survey, which  
9       provided much of the basic information available about  
10      national, state, and local labor market issues. The  
11      Current Population Survey, for example, is the source  
12      of the National Unemployment Rate.

13              Dianna Johnston is the Assistant Legal  
14      Counsel for the Division of the Equal Employment  
15      Opportunity Commission that deals with, one, Title VII  
16      of the Civil Rights Act of 1964, which prohibits  
17      discrimination on the basis of race, color, national  
18      origin in programs and activities. That is actually  
19      not the entire list. But, anyway, activities received  
20      federal financial assistance. And, two, the Age  
21      Discrimination Employment Act of 1967, which forbids  
22      employment discrimination against anyone over the age  
23      of 40. Forty is the end of childhood in my view, but  
24      anyway -- and three the Equal Pay Act. That division  
25      provides legal advice and assists the Commissioners in

1 developing agency policy on new and complex employment  
2 discrimination issues under all three statutes.

3 So, let me now ask the panelists to swear,  
4 please swear or affirm that the information you have  
5 provided and will provide is true and accurate to the  
6 best of your knowledge and belief.

7 II. SPEAKERS' PRESENTATIONS

8 (PANELISTS SWORN.)

9 VICE CHAIR THERNSTROM: Well, thank you  
10 for coming. I welcome you on behalf of the  
11 Commission. And I'll call on you in the order in  
12 which you've been given for the record.

13 So, Mr. Nardone, you will speak for seven  
14 minutes.

15 MR. NARDONE: Madam Chair, Members of the  
16 Commission, thank you for the opportunity to  
17 participate in today's briefing. The Bureau of Labor  
18 Statistics collects, analyzes, and disseminates a wide  
19 array of labor market information to support public  
20 and private decision making. As a statistical agency,  
21 we do not formulate or evaluate policy.

22 In my presentation, I will provide an  
23 overview of the characteristics of the United States  
24 labor force age 40 and over, and also discuss the  
25 changes in the labor market situation of that group

1 over the last two years. All the information in my  
2 presentation and the accompanying slides comes from  
3 the Current Population Survey, a monthly sample survey  
4 of 60,000 households.

5 The CPS program is a joint responsibility  
6 of the Bureau of Labor Statistics and the Census  
7 Bureau. The most widely known product from the CPS is  
8 the National Unemployment Rate, which is released at  
9 the beginning of each month. But the basic goal of  
10 the CPS is to classify the civilian non-institutional  
11 population, age 16 and over, into one of three groups.  
12 The employed are all persons with a job or business  
13 during the survey reference week, the week including  
14 the 12th of the month.

15 The unemployed are all persons who are  
16 actively seeking work at some time during the four-  
17 week period ending with the reference week, and who  
18 are currently available to work. The labor force is  
19 the sum of the employed and unemployed, persons who  
20 are neither employed, nor unemployed are referred to  
21 as not in labor force. From these three basic  
22 concepts, we develop a variety of measures to gauge  
23 the labor market situation for the population as a  
24 whole, and for specific worker groups.

25 In 2009 -- can we have the first slide,

1 please. In 2009, there were 82.6 million people age  
2 40 and over in the civilian labor force. This first  
3 chart shows the employment status of those age 40 and  
4 over by gender, race, and ethnicity. As you can see,  
5 men were more likely to be in the labor force than  
6 women, Whites, Asian, and Hispanics were more likely  
7 to be in the labor force than African Americans. Next  
8 slide.

9 The second chart shows a further breakdown  
10 of the 40 plus labor force by age. Those age 40 to 54  
11 make up nearly two-thirds of the group. The share of  
12 the 40 plus labor force that each age group make up  
13 reflects both the size of the group, and the  
14 likelihood that someone of that age would be in the  
15 labor force. As people age, of course, they become  
16 less likely to participate in the labor force.

17 The third chart shows the distribution of  
18 the 40 plus labor force by race and Hispanic origin.  
19 Non-Hispanic Whites make up nearly three-fourths of  
20 the group. The proportions for African Americans and  
21 Hispanics were somewhat smaller than their share of  
22 the overall labor force, reflecting a relatively young  
23 age profile of these groups.

24 In the next chart, the point of view  
25 shifts a bit. Rather than focusing on the composition



1 of the 40 plus labor force, this chart shows the  
2 proportion of the population in different age groups  
3 who were in the labor force. That is their labor  
4 force participation rate. So, for example, in 2009,  
5 83.7 percent of those age 40 to 44 were in the labor  
6 force. In contrast, only 17.2 percent of those age 65  
7 and over were in the labor force.

8 This chart also starts to show the impact  
9 of the recent economic downturn on these groups.  
10 Between 2007 and 2009, labor force participation rates  
11 declined for those age 40 to 44, and 45 to 54. In  
12 contrast, those age 55 to 64, and 65 and over became  
13 somewhat more likely to be labor force participants.  
14 Labor participation rates of those age 55 and over  
15 began trending up in the mid-1990s following several  
16 decades of decline.

17 The next chart provides the unemployment  
18 rates for the different age groups, age 40 and over.  
19 In 2007, the jobless rates for all the ages were  
20 slightly more than 3 percent. By 2009, the rates for  
21 the groups had about doubled. That's about in line  
22 with the increase in the overall National Unemployment  
23 Rate. Within the older labor force, the increase in  
24 jobless rates were somewhat larger for those age 40 to  
25 44, and 45 to 54. Next chart, please.

1 Over this period, not only did  
2 unemployment rates rise, the unemployed were jobless  
3 for longer periods of time. For example, the average  
4 duration of unemployment for persons age 55 to 64 rose  
5 from 21.9 weeks to 29.3 weeks between 2007 and 2009.  
6 I would note that these are estimates, do not indicate  
7 how long it takes someone to find a job; rather, they  
8 indicate how long people who are currently unemployed  
9 have been jobless.

10 The next chart compares labor force  
11 participation rates of the foreign and native born for  
12 those age 45 and over. The foreign born had slightly  
13 higher participation rates than the native born, 58.7  
14 percent versus 55.3 percent. The rates for both the  
15 foreign and native born edged higher over the last two  
16 years.

17 The next chart shows the labor force  
18 participation rate by presence of a disability for  
19 those age 45 and over. Persons with a disability had  
20 dramatically lower participation rates. For example,  
21 among those age 45 to 54, only 35.3 percent of persons  
22 with a disability were in the labor force compared  
23 with 86.4 percent of those without a disability.

24 In addition to the unemployment rate, we  
25 have other measures of labor under-utilization. One

1 is the proportion of workers who are employed part-  
2 time but would prefer a full-time schedule. As shown  
3 in this chart, a share of older workers who are  
4 involuntarily part-time doubled between 2007 and 2009.  
5 Another measure of labor under-utilization relates to  
6 those who are not in the labor force. Most people who  
7 are not in the labor force are not interested in  
8 working; however, some are. They are not counted as  
9 unemployed, because they are not currently looking for  
10 a job. We track those who looked for work in the last  
11 12 months, but who are not currently looking for some  
12 reason. They're called marginally attached to the  
13 labor force. As with the unemployed, and the  
14 involuntary part-time workers, the last two years with  
15 increases in the number of such individuals.

16 Finally, this chart shows the change in  
17 inflation-adjusted median weekly earnings for full-  
18 time workers age 45 and over. Earnings rose for each  
19 of the age subgroups. This may seem odd during the  
20 period where unemployment rose; however, this was also  
21 a period of low inflation, so for those who were  
22 employed, any change in earnings was not eroded by  
23 rising prices.

24 Again, I thank you for the opportunity to  
25 present this overview of the older work force.

1 VICE CHAIR THERNSTROM: Thank you very  
2 much.

3 Ms. Johnston.

4 MS. JOHNSTON: Madam Chairman,  
5 distinguished Members of the Commission, thank you for  
6 having this hearing, and for providing the opportunity  
7 to appear before you.

8 As we've noted, EEOC enforces several  
9 laws, but we'll focus on age discrimination today. My  
10 statement is going to focus on the impact of age  
11 discrimination in the employment of older workers, and  
12 on EEOC's experience in enforcing the ADEA.

13 We know, of course, that older workers are  
14 remaining in the work force longer today than their  
15 predecessors, which is hardly surprising in light of  
16 the fact that life expectancy has increased  
17 significantly, and the current economic climate has  
18 significantly eroded retirement resources.

19 Most of the labor force statistics that  
20 we've seen don't really tell us a lot about  
21 discrimination, but there is one that I think stands  
22 out that's detailed more fully in my written  
23 statement, and that is the fact that workers over 55  
24 remain unemployed far longer than their younger  
25 counterparts, from one to three months longer

1 according to some reports. And that seems quite  
2 possibly, at least partly attributable to  
3 discrimination.

4 EEOC's enforcement data indicates that age  
5 discrimination remains a continuing and growing  
6 problem. Our charging parties come from all walks of  
7 life, they're professors and police officers, medical  
8 orderlies and mechanics, secretaries and sales  
9 representatives. They come to us seeking simply the  
10 opportunity to continue to contribute their expertise  
11 in the workplace, and have had to learn the hard way  
12 that age discrimination can keep them from fulfilling  
13 that desire.

14 Unfortunately, older workers who are  
15 subjected to age discrimination have to pursue their  
16 ADEA rights in a legal landscape that increasingly  
17 minimizes the significance of age discrimination.  
18 Many courts, for example, tend to dismiss as  
19 insignificant stray remarks comments as direct as  
20 "You're too old," and "I need to get me a young man."  
21 Recent Supreme Court decisions have further weakened  
22 the ADEA, and complicated efforts to enforce it. The  
23 decisions make age discrimination more acceptable in  
24 the workplace, and harder to establish in court that  
25 an adverse action was motivated by age. I'm not going

1 to go into the details of those decisions. They're in  
2 my written testimony. And, more importantly, they'll  
3 be discussed by other panelists today.

4 Turning to EEOC charge activity, ADEA  
5 charge receipts have increased by 61 percent since  
6 1998, and more than 60 percent of those complaints  
7 claim discrimination in connection with termination  
8 from employment.

9 Of course, charge data alone provides an  
10 incomplete picture. They measure only allegations of  
11 discrimination received by EEOC. Importantly, many  
12 victims of discrimination don't even file charges.  
13 And of those charges that are filed, not all are  
14 meritorious. Looking at reasonable cause findings  
15 also doesn't provide a complete picture, because many  
16 claims settle out before they reach that stage. A  
17 closer measure of discrimination is probably the  
18 proportion of cases in which the charging party  
19 receives some benefit. We call those merit  
20 resolutions.

21 The proportion of ADEA merit resolutions  
22 has been fairly even over the past five years,  
23 hovering in the vicinity of 19 percent. This suggests  
24 that the increase in charges does reflect some  
25 increase in discrimination. It's difficult to

1 pinpoint the causes of the surge in age discrimination  
2 charges. It's clear, however, that negative  
3 stereotypes about older workers remain deeply  
4 entrenched. The impact of age biases were  
5 illustrated, for example, in a study of people rating  
6 cognitive performance. Researchers reported that  
7 rates perceived many failures to be correlated with  
8 lack of ability when the subject was old, but with  
9 lack of effort when the subject was young.

10 Age biases and stereotypes include  
11 unwarranted assumptions that older workers are harder  
12 to train, less adaptable, less motivated, less  
13 flexible, and less energetic than younger employees.  
14 Although research has shown that many of these  
15 negative age-based stereotypes are not well-founded,  
16 they continue to influence many employment decisions.

17 At a recent EEOC hearing, an expert  
18 testified that research has shown that as a result of  
19 age stereotypes, older persons with the same or  
20 similar attributes received lower ratings in  
21 interviews and performance appraisals than their  
22 younger counterparts; and, thus, of course, have more  
23 trouble finding or keeping a job, or securing a  
24 position. Those stereotypes also come into play in  
25 corporate downsizing situations, when people are being

1 rated in order to cut costs. Any perceptions that  
2 older workers are harder to train, or less flexible,  
3 or less competent are going to become more prominent  
4 in the minds of decision makers. And, as I noted  
5 earlier, age-based stereotypes are likely contributing  
6 to the difficulty unemployed older workers apparently  
7 have finding new employment.

8 The recent spate of case law restricting  
9 the rights of age discrimination plaintiffs coupled  
10 with the rise in age discrimination charges prompted  
11 EEOC to hold a Public Commission meeting that I  
12 referenced earlier. At the meeting, witnesses  
13 testified both about stereotyping, and legal barriers  
14 to enforcement.

15 In connection with the meeting, EEOC, for  
16 example, issued a Technical Assistance Document to  
17 help employees understand their rights and obligations  
18 when they're offered severance pay in exchange for a  
19 waiver of discrimination claims. In the wake of the  
20 meeting, as some witnesses had suggested, the  
21 Commission issued Notices of Proposed Rulemaking  
22 concerning disparate impact and the definition of  
23 Reasonable Factor Other Than Age under the ADEA.  
24 After considering public comments, the EEOC will draft  
25 a final rule.



1                   Consistent with its mission to maximize  
2 voluntary compliance with the law, the Commission also  
3 conducts a significant number of no-cost and fee-based  
4 outreach events each year that address age  
5 discrimination issues. These, too, are set forth in  
6 more detail in my written testimony.

7                   The EEOC will continue to use all means at  
8 its disposal to safeguard equal employment opportunity  
9 for older workers, and to assist employers in  
10 understanding the law's requirements and achieving  
11 voluntary compliance, but legislative action is needed  
12 to restore the law to fulfill the original promise of  
13 the ADEA.

14                  Thank you, again, for inviting me here  
15 today to testify about this very important issue.

### 16                   III. QUESTIONS

17                  VICE CHAIR THERNSTROM: Well, and thank  
18 you for coming, and we are going to open it to the  
19 Commissioners for questions.

20                  Commissioner Kirsanow.

21                  COMMISSIONER KIRSANOW: Thank you to the  
22 witnesses for appearing. Just a couple of questions.

23                  I think, Ms. Johnston, you indicated that  
24 workers over the age of 55 seem to have a longer time  
25 where they're out of the workplace market for a longer

1 time than younger workers. And I'm wondering, and  
2 maybe Mr. Nardone can answer this, to what extent that  
3 may be a function of the fact that, on average, an  
4 older worker, by virtue of having a longer tenure in  
5 the workplace, may have the higher wage, and,  
6 therefore, a different expectation in terms of re-  
7 employment. And that expectation can also affect the  
8 prospective employer as to who he's going to employ.

9 For example, let's say that -- I think  
10 everybody here is now in the protected class. I've  
11 been there for about 16 years now, so I think we're  
12 all particularly sensitive to this, but if I go out  
13 into the workplace, I've got a certain wage. I've got  
14 a certain salary. If a younger associate in my firm  
15 goes out into the workplace, he may not necessarily  
16 have my skill level, but he's got one with which a  
17 prospective employer may be comfortable, but his  
18 salary is significantly lower than mine. To what  
19 extent does that -- I don't know if there's any data  
20 on this, cause an older worker to be unemployed for a  
21 longer period of time?

22 MS. JOHNSTON: I don't know of any  
23 specific data on the issue.

24 VICE CHAIR THERNSTROM: But the point  
25 makes sense. Right?

1 MS. JOHNSTON: But the point is that the  
2 length of time -- it's interesting, the statistics are  
3 that people, I believe it's 16 to 34, tend to be re-  
4 employed in a very few weeks, and I don't remember the  
5 numbers off the top of my head. The group a little  
6 older than that takes longer, and the group over 55  
7 longest. So, yes, it's possible that salary is one of  
8 the factors, but it's also those older workers are, by  
9 definition, presumably more experienced and skilled,  
10 so it's rather surprising that when they're seeking  
11 employment, that they're ending up remaining  
12 unemployed. I mean, they have the same economic  
13 pressures to become re-employed, even at a lower  
14 salary.

15 COMMISSIONER GAZIANO: Not necessarily.  
16 I'll wait until my turn, unless Pete -- but there's  
17 three other factors I was going to ask you about.

18 VICE CHAIR THERNSTROM: Hold on a minute.  
19 I don't think that Commissioner Kirsanow had finished.

20 COMMISSIONER KIRSANOW: I appreciate that.  
21 Just -- we may be on the same page here. I guess, if,  
22 for example, I go out into the workplace, my  
23 expectations or my needs, I think, are going to be of  
24 a different category than of a younger worker. I may  
25 have -- well, my mortgage is pretty much paid for, but

1 an older worker has got certain expectations that  
2 maybe a younger worker may not have. He may, in fact,  
3 and this has nothing do with any stray comments, but  
4 he may, in fact, have less flexibility, intrinsically  
5 less flexibility than a younger worker. But, more  
6 importantly, in today's economic climate, to what  
7 extent is the fact that older workers are more likely  
8 to take advantage of incentive retirement programs, or  
9 incentive exit programs that will pay them to remain  
10 out of work longer, than a younger worker will. To  
11 what extent does that have any bearing, if any, on the  
12 statistics that we see here?

13 MR. NARDONE: Well, I think there could be  
14 a number of factors, and we haven't done any studies  
15 to sort of break those down. It would be out of the  
16 purview of BLS to get into that.

17 It is -- there are a couple of things that  
18 I would mention in terms of the measures of duration  
19 of unemployment. They don't, actually, indicate the  
20 amount of time it takes someone to find a job. It  
21 indicates the amount of time that someone who was  
22 employed has been unemployed. So, one thing that  
23 could happen is, people who are unemployed, their  
24 duration could end either because they find  
25 employment, or they stop looking for work. They leave

1 the labor force. And we have looked at some  
2 information that suggested one of the things that's  
3 gone on recently with young people, and in that case  
4 I'm speaking of people age 16 to 24, became somewhat  
5 more likely to leave the labor force. That may be  
6 that they were making the decision to stop looking for  
7 work, and perhaps go to school because they felt in  
8 the long run that might be an advantage. For those  
9 age 25 to 54, those 55 and over, we saw that their  
10 likelihood of leaving the labor force did not change.  
11 Given the current climate where, basically, there's  
12 virtually no job growth, it is understandable that  
13 they would just continue to stay unemployed for longer  
14 periods.

15 VICE CHAIR THERNSTROM: Commissioner  
16 Gaziano.

17 COMMISSIONER GAZIANO: I'm out of turn,  
18 but since it sort of follows, I just, again, wondered  
19 whether the simple -- are there any studies that you  
20 think are persuasive on the point? And I think  
21 Commissioner Kirsanow started to touch on it. The  
22 older employees, or older workers might not -- might  
23 be less likely to study the newer field, in part, I  
24 think for the reason that you just mentioned, but for  
25 other reasons, as well, because they have less of a

1 future career. Is that -- are there any studies on  
2 that, whether they're less likely to study, or learn  
3 a skill, or an education?

4 MR. NARDONE: I'm not aware of any.

5 COMMISSIONER GAZIANO: Okay.

6 MS. JOHNSTON: There are some studies that  
7 show that employers are less likely to provide  
8 training to older workers. And at least the expert  
9 that testified at our hearing last year thought that  
10 a lot of the assumption that, for example, older  
11 workers are less technologically skilled, or less  
12 willing to learn new tasks are, at least in  
13 significant part, a factor of the employer's assuming  
14 that the older employee isn't going to want to learn  
15 those new things, and not providing the training.

16 COMMISSIONER GAZIANO: I'm not disputing  
17 that discrimination might not be a part of it, but,  
18 particularly, I'm trying to get at what you said, Ms.  
19 Johnston, was your finding that once they are  
20 unemployed, they stay unemployed longer, and then they  
21 don't have an employment relationship. And, by the  
22 way, whether employers are less likely to provide the  
23 training, that sounds like discrimination to me, but  
24 I even want to leave that aside. But another  
25 possibility is, again, I think that Commissioner

1 Kirsanow, they're more likely to be able to rely on  
2 pensions, buy-outs, or other types of their own  
3 retirement savings. Are there any studies on whether  
4 that might be a factor, and whether they're willing to  
5 accept a lower pay?

6 MS. JOHNSTON: I don't know of any study.

7 COMMISSIONER GAZIANO: Or just stay out of  
8 -- you know, at some -- if I could get my older salary  
9 back, I'm willing to work another 10 years. But,  
10 geez, I have these other pensions, so I don't think I  
11 want to go back to work, if I can only earn a third of  
12 what I was. And, finally, I think they -- is there  
13 any study on they're less likely to want to move from  
14 that home that they paid the mortgage off.

15 MS. JOHNSTON: I'm not aware of studies.

16 COMMISSIONER GAZIANO: Okay. And there  
17 might even be -- well, I'll leave it at that. But  
18 there's been, I take it, no studies that tries to --  
19 the only factor I heard from your testimony that you  
20 said suggested to discrimination was that you had an  
21 increase in filings for age discrimination -

22 MS. JOHNSTON: Yes, we had -

23 COMMISSIONER GAZIANO: -- in recent  
24 period. But is it also the case that there's just  
25 more unemployment now during this economic downturn?

1 MS. JOHNSTON: Yes. Although, Mr.  
2 Nardone's testimony, if I understood it correctly, and  
3 I'm not a statistician, but seemed to indicate that  
4 the unemployment was less of a problem for older  
5 workers.

6 COMMISSIONER GAZIANO: It was only  
7 slightly less.

8 MS. JOHNSTON: Yes, it's -

9 COMMISSIONER GAZIANO: But it's more for  
10 every age group. Is that not correct?

11 MR. NARDONE: That's correct.

12 COMMISSIONER GAZIANO: Okay.

13 VICE CHAIR THERNSTROM: Mr. Nardone, I  
14 actually have -

15 COMMISSIONER YAKI: Just -

16 VICE CHAIR THERNSTROM: Oh, I'm sorry.

17 COMMISSIONER YAKI: I think for the Q&A  
18 they need to put their mics back on.

19 VICE CHAIR THERNSTROM: I, actually, have  
20 a question for you, Mr. Nardone. You have a number of  
21 charts. You have 2007 versus 2009, on others you  
22 don't have any time line at all. But I wondered if  
23 you looked across -- if you looked at the last, I  
24 don't know, three decades, two decades, pick your  
25 number, what would we see? I mean, you're just doing



1 the 2007 and 9, it tells us something, but there is  
2 historical data here that should be relevant to the  
3 questions you're asking. This is not the first  
4 recession we've had.

5 MR. NARDONE: No, we -- I focused on the  
6 2007-2009 period because my understanding was that was  
7 the focus of this hearing. And this, certainly, was  
8 -- in many ways, this downturn had the most severe  
9 impact on the labor market over all, and in specific  
10 groups of any going back either to the early 1980s, or  
11 back to the Great Depression, depending on what metric  
12 you're looking at.

13 VICE CHAIR THERNSTROM: Right. But most  
14 significant, I don't know how -- the definition of  
15 significance there.

16 MR. NARDONE: And I think it could depend  
17 -- you could pick your data point, what you want to  
18 look at.

19 VICE CHAIR THERNSTROM: Right.

20 MR. NARDONE: In general, one of the  
21 things we say, which I touched on just very briefly,  
22 for workers age 55 and over, what we saw starting in  
23 the mid-1990s was their participation in the labor  
24 force had started to increase somewhat. And that was  
25 after several decades, which for a variety of reasons,

1 their participation had been trending down. They were  
2 the one group, one age group where participation  
3 continued to go up during the current downturn,  
4 whereas in the -- for younger workers, and for workers  
5 say up to age 45, their participation rates declined  
6 somewhat. So, I'm not really sure how to answer your  
7 question. You do have longer periods of time on this  
8 data.

9 VICE CHAIR THERNSTROM: Right. I mean, I  
10 just find it useful, myself, to look at longer time  
11 periods and get a sense of the historical context of  
12 the current picture.

13 MR. NARDONE: I would agree, and with  
14 those -- for a specific topic, or a specific area you  
15 were interested in, we could provide that information.

16 VICE CHAIR THERNSTROM: Right. And do we  
17 have any sense of public versus private employment,  
18 employment in the public sector versus the private?  
19 Obviously, public sector employment is much more  
20 secure.

21 MR. NARDONE: Just in terms of overall, I  
22 think the decrease -- most of the decrease in  
23 employment has been in the private sector. The areas  
24 that were particularly hard hit during this downturn  
25 were construction and manufacturing, but also many

1 other private sector industries. Some private sector  
2 industries that in previous recessions had done fairly  
3 well, like finance, were also lost -

4 VICE CHAIR THERNSTROM: Hard hit. Yes, I  
5 was going to ask you. And then within the private  
6 sector, which -- you just answered that.

7 Ms. Johnston, as an older worker myself,  
8 you talked about the stereotypes, but those  
9 stereotypes do have some basis in reality. Is that  
10 not correct?

11 MS. JOHNSTON: The -- Professor Campion,  
12 who testified at our hearing last year testified that  
13 -- and some of the studies I've seen have suggested  
14 that to the extent there is any diminution in specific  
15 skills or something, it's made up for by experience  
16 and performance, experience and knowledge, so that  
17 most studies I've seen, job performance over all is as  
18 good, if not better for older workers.

19 VICE CHAIR THERNSTROM: What kind of data  
20 are relied upon in arriving to that conclusion? That  
21 would seem to me hard to quantify.

22 MS. JOHNSTON: There are several studies  
23 that are actually cited in my written materials.  
24 There's a study known as Towers Perrin, Days Inn  
25 Study, and they all come to pretty much that

1 conclusion, that people's notions about flexibility  
2 and so forth are at least greatly exaggerated, because  
3 the job performance overall, older workers, again,  
4 their skill, their loyalty, their stick-to-it-iveness,  
5 tends to make up for any other -

6 COMMISSIONER HERIOT: Doesn't it have to  
7 depend on the job? I mean, I can't imagine that's  
8 true for an NFL player.

9 MS. JOHNSTON: Well, of course, yes. I  
10 mean, I -

11 (Simultaneous speech.)

12 VICE CHAIR THERNSTROM: It's not true for  
13 a pilot, but, you know.

14 MS. JOHNSTON: Right. I mean, there may  
15 be more differences in -- obviously, you would -

16 (Simultaneous speech.)

17 MS. JOHNSTON: Yes, there are physical  
18 skills. I mean, I guess when we're talking about  
19 things like flexibility and willing to learn new  
20 things, we tend to be talking more about desk jobs, or  
21 that sort of thing, probably, than the -- but, as I  
22 say, that's my understanding of -- I'm not doing the  
23 studies myself. I'm just reading them, but that's my  
24 understanding of the studies I've read.

25 VICE CHAIR THERNSTROM: Commissioner

1 Taylor.

2 COMMISSIONER TAYLOR: Yes, I wanted to  
3 pick up on that very point. I had in my notes  
4 stereotypes, studies that refute those stereotypes,  
5 and I wanted to focus on flexibility. And I think in  
6 my own mind, at least, it seemed to be very dependent  
7 upon the job and the industry, but I want to stick  
8 with the office environment right now. And when I  
9 think of flexibility, I think of the ability to  
10 collaborate in a setting that may require you to  
11 partner and team with people that range from 20 to 60,  
12 and the ability of an older worker to do that  
13 effectively. So, I'm wondering, and I'm not going to  
14 expose my bias here by noting my -

15 (Background noise.)

16 COMMISSIONER TAYLOR: -- curious as to  
17 studies that -- Darth Vader sounds like he's joined  
18 us.

19 (Laughter.)

20 COMMISSIONER YAKI: Chair Reynolds may  
21 want to go on mute.

22 COMMISSIONER GAZIANO: It's Melendez, I  
23 think.

24 COMMISSIONER YAKI: Is it? No, it's -- is  
25 it Arlan? I thought Arlan wasn't going to be on.

1                   STAFF DIRECTOR DANNENFELSER: No, no, it's  
2 one of our panelists who's actually called in.

3                   COMMISSIONER YAKI: Oh, okay.

4                   COMMISSIONER TAYLOR: But I'm wondering  
5 are there any studies to refute those, what in my mind  
6 are stereotypes? Is that something that's been  
7 discussed, or how do the experts approach that issue?

8                   MS. JOHNSTON: Again, my understanding is  
9 that of course there are individual variabilities, and  
10 there are people of many ages who display lack of  
11 flexibility, lack of ability to collaborate, and  
12 unwilling to learn new things. But, again, Professor  
13 Campion testified that you get much more variation  
14 within each age group based on individual skills and  
15 so forth, than you do between different age groups.

16                   COMMISSIONER TAYLOR: Do you get the same  
17 variation in age groups, that is, if you have an age  
18 group of a cohort of 55-65, you've got a certain  
19 degree of variation in terms of whether that employee  
20 can be flexible, and you have a similar variation with  
21 a cohort of 25-35, but is it the same? Am I going to  
22 find the same distribution? Am I going to find the  
23 same number of people that are able to operate  
24 effectively within a group setting in that first age  
25 group, as I will in the second? I know there'll be

1 variations, but I'm wondering are they similar if I  
2 move from -

3 MS. JOHNSTON: At that level of  
4 specificity, I don't know.

5 COMMISSIONER TAYLOR: Okay.

6 MS. JOHNSTON: I mean, you know, I'm  
7 reporting our understanding, which in the research  
8 that I've seen suggests, as I say, that stereotypes  
9 about older worker's flexibility, energy level, and so  
10 forth are at least grossly exaggerated in the minds of  
11 decision makers.

12 VICE CHAIR THERNSTROM: And older workers  
13 start, in that statement you just made, what's the age  
14 cutoff?

15 MS. JOHNSTON: Well, I mean, studies do  
16 differ. I think -- I believe Professor Campion was  
17 looking at 55, an older group, but I won't -

18 VICE CHAIR THERNSTROM: Well, there's a  
19 huge difference between 55 and 65 even, in terms -- it  
20 would seem to me.

21 MS. JOHNSTON: Certainly. I mean, let's  
22 back up a little bit with -- I mean, the point of  
23 discrimination laws is not to look at those kinds of  
24 stereotypes when you're making employment decisions,  
25 but to assess people as individuals. And to the

1 extent that there are studies that suggest that those  
2 stereotypes are, as I say, at least exaggerated in  
3 many people's minds, and remain sort of socially  
4 acceptable in this climate, it simply suggests that  
5 employers should be more closely examining those kinds  
6 of decisions, and doing what they can to make sure  
7 that those kinds of stereotypes are not infecting  
8 their decision making.

9 Of course, in corporate downsizing, for  
10 example, employers may want people, depending on the  
11 nature of the downsizing, but they may want people who  
12 can take on new tasks, and so forth. But they should  
13 take steps to try to make sure that they are, in fact,  
14 looking at people who will learn new tasks, and not  
15 assuming that oh, well, he's 60, he won't be able to  
16 do that. Instead of well, how many -- you know, has  
17 he shown willingness previously to take on new tasks,  
18 that sort of thing.

19 VICE CHAIR THERNSTROM: How about -

20 MS. JOHNSTON: That's really -- from our  
21 standpoint, that's -- we're not trying to -- we're not  
22 in the position to nail down all of the science.

23 VICE CHAIR THERNSTROM: Right.

24 MS. JOHNSTON: I'm just reporting that  
25 general principle.



1                   VICE CHAIR THERNSTROM: How about he's 60,  
2 and he's going to take longer to train than a new  
3 person would? But, anyway, Commissioner -

4                   MS. JOHNSTON: Again, the -- most of the  
5 research I've seen suggests that that's not the  
6 problem that people think it is.

7                   VICE CHAIR THERNSTROM: Okay.  
8 Commissioner Yaki.

9                   COMMISSIONER YAKI: Thank you very much.  
10 My question, since you're the fact people, I just want  
11 to get more at the facts here. I know that what the  
12 law does with the facts sometimes may not be what some  
13 of us think should be done, but let me just try and  
14 get some data here.

15                   In the -- in what's happened in 2007-2009,  
16 with the recession that we've had, I was looking at  
17 some of the charts. I guess, I kind of was looking for  
18 the other half for comparison, because I'd really like  
19 to sort of see what are the comparison in terms of  
20 some of those deltas from 2007-2009 with the age  
21 groups of -- my age group, and so forth versus the one  
22 below, and the one below that, in terms of how long  
23 they've been out of the workforce, how many weeks  
24 they've been looking, what the unemployment rate is  
25 for that particular sector versus the unemployment

1 rate for the one just below it.

2 And I'm also interested in sort of a  
3 sector analysis, as well, because at least some of the  
4 perceptions that are out there, and perceptions that  
5 I got, certainly, when I was out on various duties  
6 unrelated to the Commission in 2008, in terms of the  
7 types and numbers of people who were unemployed, say  
8 from the auto industry, from all the ancillary  
9 industries associated with auto or aerospace, in terms  
10 of what they tend to be in terms of age. And, at  
11 least my perception was, and maybe I'm wrong, but my  
12 perception seemed to be that there is a  
13 disproportionate number of people in the older age  
14 groups who are the ones getting laid off the assembly  
15 lines, who are being let go, however you want to call  
16 it. And not even getting to how hard it was for them  
17 to get a job. I'm really interested in the layoff  
18 impacts of this recession, and how it has affected  
19 these age groups, in particular, versus the younger  
20 age groups, in particular, as well. So, if you can --  
21 and if there's any sector information, that would be  
22 helpful, as well.

23 MR. NARDONE: I don't have any information  
24 by sector right here. I do have some information  
25 relating to age that might be useful. So, for

1 example, taking the age group 16-24, in 2007, their  
2 unemployment rate was 11.6 percent, 2009 it had gone  
3 to 17.6 percent. In terms of their labor force  
4 participation rate, the proportion of them that were  
5 working or looking for work, in 2007 it was 61.5  
6 percent, in 2009 it had dropped to 56.9 percent.

7 COMMISSIONER YAKI: Okay.

8 MR. NARDONE: For 25-34 year olds, their  
9 unemployment rate in 2007 was 4.7 percent, 2009 it had  
10 gone to 9.9 percent. Their participation rate went  
11 from 92.2 percent down to 82.7 percent, 35-44, which  
12 is overlapping a little bit with the group that I  
13 showed you there, unemployment rate in 2007 was 3.3  
14 percent, 2009 it was up to 7.9 percent. Their  
15 participation rate fell from 92.3 percent, I'm sorry,  
16 some of those figures were incorrect. I'm terribly  
17 sorry. Let's start again, just for the 16-24 year  
18 olds.

19 COMMISSIONER YAKI: Okay.

20 MR. NARDONE: That's the problem with  
21 having too much data sometimes. Sixteen to 24,  
22 unemployment rate went from 10.5 to 17.6.  
23 Participation rate 59.4 to 56.9.

24 COMMISSIONER YAKI: Okay.

25 MR. NARDONE: For 25-34, unemployment rate

1 4.7 percent up to 9.9. Participation rate 83.3 down  
2 to 82.7. And, finally, the 35-44, the unemployment  
3 rate from 3.4 percent up to 7.9 percent. And the  
4 participation rate from 83.8 down to 83.7.

5 COMMISSIONER YAKI: Thank you.

6 MR. CONNOLLY: This is Walt Connolly in  
7 Detroit. I have some practical suggestions for layoffs  
8 and -

9 COMMISSIONER GAZIANO: No. Could we wait  
10 until he's presented his testimony?

11 VICE CHAIR THERNSTROM: Yes. Mr.  
12 Connolly, as much as I appreciate your coming in at  
13 this point, we need to wait and get your testimony as  
14 part of the second panel.

15 MR. CONNOLLY: Okay, no problem. Whenever  
16 you want me, I'm here.

17 VICE CHAIR THERNSTROM: And we, certainly,  
18 can carry on this fascinating discussion in any way  
19 that people including yourself choose. Commissioner  
20 Heriot.

21 COMMISSIONER HERIOT: Okay. I'd like to  
22 get back to this notion of longer periods of  
23 unemployment for older workers, and the reasons for  
24 that. Ms. Johnston, you mentioned that you thought  
25 that that is indicative, at least in part, of

1 discrimination. And Commissioners Kirsanow and  
2 Gaziano have talked a little bit about other  
3 possibilities. This is actually something that I've  
4 been living in my family for the last year or so. My  
5 older sister was laid off from her job, and she is now  
6 60 years old, and she was making quite a lot of money  
7 when she was laid off. And it's interesting to  
8 compare it to an earlier period in her life. She got  
9 sick when she was in her 20s, and had to leave a job.  
10 And when she was feeling better, she got a job offer,  
11 not where we were living at the time, but in Chicago.  
12 And it was a fairly low-skill job. It was pretty  
13 interesting, and she was gone like a shot to Chicago.  
14 These days she's not as inclined to move around the  
15 country, and I think a lot of people over 40 with  
16 children in school, that might make them somewhat less  
17 flexible as to geography. There's also the fact that  
18 older workers do tend to be more experienced, and more  
19 skilled, and earn more money. There is often an  
20 unwillingness to accept a job that is low-paying.

21 Another issue that I think was touched on  
22 a little bit earlier was less flexibility in getting  
23 more training, because you're going to have a shorter  
24 payoff period. If you're 64 years old and you get  
25 laid off from your job, the answer to your problems is

1 probably not let's go to medical school, or let's go  
2 to law school, and spend a lot of money in getting new  
3 training, because you're not going to have enough time  
4 to pay off that money. And another problem that older  
5 workers disproportionately suffer from that may  
6 account for some of that difference in length of time  
7 of unemployment is they're much more likely to have  
8 the problem of obsolete skills. A younger worker who  
9 obtained their skills recently probably has not chosen  
10 to go into a field that's being phased out; whereas,  
11 it's very common for older workers to have great skill  
12 in some area that just isn't called for as much, you  
13 know, the machinery has changed, or the factory has  
14 closed down. They know how to do something really  
15 well, but nobody is hiring in that area. So, all four  
16 of those areas, I think, could contribute to the  
17 longer period of unemployment. And I'm sure there are  
18 other things, as well.

19 But what I wanted to bring up is - this is  
20 for you, Mr. Nardone - is this something the Bureau of  
21 Labor Statistics could actually look at to shed more  
22 light on this than we've been able to shed so far  
23 today? It seems to me that there are a number of  
24 studies that could be conducted, that you might be in  
25 a position to do, that would shed some light on these

1 four issues. Why is it that older workers are having  
2 this problem? Is this something that can be surveyed,  
3 and would you find that older workers would concede  
4 that they're not willing to take a job that pays less  
5 than X; whereas, a younger worker would say sure, I'm  
6 quite ready to take a job that does that. Or maybe  
7 older workers who are laid off are less likely to  
8 leave the labor force to get schooling. Fewer of them  
9 go back to school for retraining, or you might find  
10 that in areas with a more depressed economy, the older  
11 worker is more likely to stay there, because the kids  
12 are in high school, than the younger worker who's off  
13 to wherever the new place is, where the jobs are  
14 today.

15 MR. NARDONE: I don't think that any of  
16 the surveys that we currently conduct get at all the  
17 different motivations, and possibilities that you  
18 mentioned. And, generally, our focus is on conducting  
19 our surveys, and putting out our data, and helping  
20 people to use it.

21 COMMISSIONER HERIOT: Basic surveys.

22 MR. NARDONE: The basic surveys, and  
23 helping people to use it. There may be studies where  
24 people have attempted to address some of the questions  
25 you raised using data from BLS, or other sources.

1 Unfortunately, I'm not aware of them. I don't have  
2 the knowledge of them. I don't whether they exist, or  
3 not.

4 COMMISSIONER HERIOT: Do you ask questions  
5 in any of your basic studies that would allow you to  
6 get at this?

7 MR. NARDONE: Not at all of the things  
8 that you're looking at, such as motivations, you know,  
9 why didn't you do something? What we're trying to do  
10 in our studies, in the Current Population Survey, is  
11 to establish what people have done. Are they working?  
12 Are they actively looking for work? If not, are they  
13 out of the labor force? We tend not to get into why  
14 are you working, why are you not working.

15 VICE CHAIR THERNSTROM: Commissioner  
16 Gaziano, I wonder if whatever question you have you  
17 could bump it to the next panel. I'm sure it's going  
18 to be -- I would think it would equally relevant.  
19 We've got a clock ticking here, and another whole  
20 panel to come.

21 COMMISSIONER KIRSANOW: Madam Vice Chair,  
22 I do have a question specific to Ms. Johnston.

23 COMMISSIONER GAZIANO: Go ahead. Let him  
24 go first, and then I may. Let me think if I can  
25 rephrase it, but go ahead.



1 VICE CHAIR THERNSTROM: Okay.

2 COMMISSIONER KIRSANOW: We've been asking  
3 a lot of questions that don't, necessarily, go into  
4 what you're here for. And I don't know that you have  
5 this data available, but do you have any sense for  
6 what the median age is for charging parties under the  
7 ADEA, and also the median age for meritorious claims  
8 under ADEA?

9 MS. JOHNSTON: We don't have that data.

10 COMMISSIONER KIRSANOW: Okay.

11 MS. JOHNSTON: It's not broken down that  
12 way.

13 COMMISSIONER KIRSANOW: The reason I ask  
14 is because the protected class begins at age 40, and  
15 I think Vice Chair Thernstrom indicated she thought  
16 that that's about when childhood ends. She wasn't  
17 referring to me because I'm still in kindergarten,  
18 basically.

19 VICE CHAIR THERNSTROM: I was being a bit  
20 facetious.

21 COMMISSIONER KIRSANOW: Well, but I'm  
22 wondering to what extent it is. The ADEA was passed  
23 43 years ago. That's not a long time, but even in  
24 that short period of time life expectancies have  
25 changed; also, the nature of the workforce has

1 changed. My father was a steelworker, back-breaking  
2 work. His work span would be necessarily truncated by  
3 the physical nature of his labor. I think there is  
4 probably more desk-related jobs today than there were  
5 in 1967.

6 I'm wondering if it makes any sense to  
7 revisit whether or not the threshold for the ADEA  
8 should be raised, again, based on what the median  
9 charging party age may be. If the median charging  
10 party age is now 51, then I'm wondering if it may be  
11 raised. But since you don't have that data, second  
12 question.

13 Since Gross, has the EEOC contemplated  
14 issuing guidances related to what a Reasonable Factor  
15 Other Than Age may be? I mean, in other words, has  
16 there been any thought to amending what is currently  
17 out there in the jurisprudence as to what factors  
18 might constitute a Reasonable Factor Other Than Age?

19 MS. JOHNSTON: Well, we have issued a  
20 Notice of Proposed Rulemaking on that, and we've  
21 gotten comments, and we're looking at those comments  
22 now. So, we're in the middle of that process.

23 COMMISSIONER KIRSANOW: Do you have any  
24 sense for what additional factors may have been  
25 proposed? In other words, than those that are

1 currently out there in the jurisprudence.

2 MS. JOHNSTON: Well, there's not a lot out  
3 there in the jurisprudence.

4 COMMISSIONER KIRSANOW: Wage, for example,  
5 you know, the cost of the employee as a Reasonable  
6 Factor Other Than Age.

7 MS. JOHNSTON: Right. I mean, what was  
8 proposed, I mean, this is very much in flux because  
9 we've gotten comments, and now we'll be looking at  
10 those comments, so, I'm not sure what the final rule  
11 will be. But, in general, it was the kinds of things,  
12 given the size and so forth of the employer, what  
13 kinds of things would an employer normally look at in  
14 a similar situation. You know, the kinds of common  
15 sense you would normally see. Again, trying to take  
16 steps to make -- to do what an employer can to  
17 minimize the likelihood that unfounded stereotypes are  
18 playing a role in decision making, providing training,  
19 that sort of thing.

20 COMMISSIONER KIRSANOW: Thank you very  
21 much.

22 VICE CHAIR THERNSTROM: Commissioner  
23 Gaziano, do you think you can -

24 COMMISSIONER GAZIANO: It would have been  
25 better if I had asked the EEOC witness, but I think I

1 can reformulate it, and will pass that on in some  
2 other way. But I will say that I have counted eight  
3 possible biases, other than the four I think we -- so,  
4 maybe we could do some service as the Commission when  
5 we publish to help -- whether it's encouraging BLS to  
6 increase its surveying, or for other scholars to ask  
7 the right kind of questions that might get at one of  
8 these eight or more factors, other than  
9 discrimination.

10 VICE CHAIR THERNSTROM: Good. And I want  
11 to, obviously, thank you very much for coming. This  
12 is a really terrific topic, I think, that the  
13 Commission has chosen. And both of you have been --  
14 provided us with fascinating material. So, I should  
15 now go on, I'm looking at the clock here, which is why  
16 I asked a favor of Commissioner Gaziano, and I should  
17 go on and seat the next panel. But, again, thank you  
18 so much.

19 As was evident from the voice coming  
20 through the phone, Walter Connolly is coming in long  
21 distance, but we assume that will not in any way  
22 diminish his testimony, or his participation, in  
23 general.

24 MR. CONNOLLY: Are you ready for my -

25 VICE CHAIR THERNSTROM: No, not quite.

1 MR. CONNOLLY: Okay.

2 VICE CHAIR THERNSTROM: I need to  
3 introduce people.

4 MR. CONNOLLY: Okay.

5 VICE CHAIR THERNSTROM: And you're going  
6 to have to swear or affirm that you have told the  
7 truth, and nothing but, but let me introduce. And you  
8 are the first, Mr. Connolly, you are the first witness  
9 up. And I'm introducing you first.

10 MR. CONNOLLY: I swear to tell the truth.

11 VICE CHAIR THERNSTROM: Is it the whole  
12 truth?

13 MR. CONNOLLY: Totally.

14 VICE CHAIR THERNSTROM: Good.

15 (Laughter.)

16 VICE CHAIR THERNSTROM: We are just, for  
17 your information, seating other people, so we'll be  
18 with you in a minute.

19 Let me introduce our panelists, Walter B.  
20 Connolly is Senior Partner in the law firm of  
21 Connolly, Rodgers Scharman. Mr. Connolly, Jr. has  
22 been lead defense counsel in 115 -

23 (Background noise.)

24 VICE CHAIR THERNSTROM: Making some  
25 background here, that's what it is. He's been the

1 lead defense counsel on 115 of the largest nationwide  
2 and statewide class actions. He was lead counsel in  
3 the first nationwide class action against Equitable  
4 Life in 1978. He has also defended major age  
5 discrimination class actions for K-Mart, Lockheed  
6 Martin, Detroit Edison, and others. He is the co-  
7 author of five legal books, including "Use of  
8 Statistics in EEO Litigation". His in-house training  
9 and audit programs have been used by many of the  
10 Fortune 100 companies. And, Mr. Connolly, just for  
11 your information, I go through all the bios, and then  
12 we get to your statement.

13 Professor Michael Harper, Professor of  
14 Law, and Barreca -

15 MR. HARPER: Barreca.

16 VICE CHAIR THERNSTROM: Barreca. Thank  
17 you.

18 MR. HARPER: Christopher Barreca.

19 VICE CHAIR THERNSTROM: Barreca Labor  
20 Relations Scholar.

21 MR. HARPER: He was a great man, great  
22 General Counsel at General Electric, great man.

23 VICE CHAIR THERNSTROM: You know, I might  
24 have gotten it right if the script hadn't given me a  
25 cue as to how pronounce it, which completely threw me

1 off. But, anyway, Barreca Labor Relations Scholar at  
2 the Boston University School of Law. Professor Harper  
3 teaches labor law, employment discrimination law, and  
4 employment law. Professor Harper is the author of  
5 many Law Review articles, and book chapters on labor  
6 and employment law topics, including age  
7 discrimination and employment. He has co-authored  
8 several major case books. Professor Harper is now  
9 serving as a reporter for the American Law Institute's  
10 Restatement of Employment Law.

11 Elizabeth Milito -

12 MS. MILITO: Milito.

13 VICE CHAIR THERNSTROM: Milito, thank you.

14 Serves as Senior Executive Counsel with the National  
15 Federation of Independent Business, Small Business  
16 Legal Center. She frequently counsels small  
17 businesses facing employment discrimination charges,  
18 wage and hour claims, wrongful termination lawsuits,  
19 safety and health citations, union avoidance, and  
20 other issues of Human Resources law. Previously, she  
21 served with the U.S. Department of Veterans Affairs,  
22 where she defended VA hospitals in Maryland, the  
23 District of Columbia, and West Virginia in employment  
24 and labor lawsuits, and was responsible for training  
25 and counseling managers on fair employment and HR

1 practices.

2 Laurie McCann, Esquire it says here.

3 Laurie McCann is Senior Staff Attorney with the AARP  
4 Foundation Litigation. Her principal responsibilities  
5 include litigation, and amicus curiae participation  
6 for AARP on a broad range of age discrimination and  
7 employee benefit issues. Previously, she worked for  
8 the Select Committee on Aging of the U.S. House of  
9 Representatives. Ms. McCann received a Master's in  
10 Gerontology, with an emphasis on employment and public  
11 policy from the Andrus Gerontology Center at the  
12 University of Southern California.

13 And last but not least, and help me  
14 pronounce your name.

15 MS. VENTRELL-MONSEES: Ventrell-Monsees.

16 VICE CHAIR THERNSTROM: Cathy Ventrell-  
17 Monsees is the current President of Workplace  
18 Fairness, a non-profit dedicated to educating workers  
19 about their employment rights. She is the co-author  
20 of "Age Discrimination Litigation." She has litigated  
21 several ADEA class action, and numerous cases in the  
22 U.S. Supreme Court, and Federal Circuit Court. She  
23 also teaches employment discrimination law at the  
24 Washington College of Law at American University. She  
25 was a member of the Board of Directors of the National



1 Employment Lawyers Association from 1996 to 2008,  
2 where she served as its Vice President of Public  
3 Policy, and as Chair of the Age Discrimination  
4 Committee.

5 (Panelists sworn.)

6 VICE CHAIR THERNSTROM: I welcome you on  
7 behalf of the Commission. I'll be calling on you as  
8 I did with the last panel in the order you have been  
9 given for the record. So, Mr. Connolly will speak for  
10 up to seven minutes, and we are looking forward to  
11 your testimony.

12 MR. CONNOLLY: Thank you very much. This  
13 is Walter Connolly, and if anybody has any questions  
14 you can call me on my phone in Detroit, Michigan.

15 VICE CHAIR THERNSTROM: Wait a minute.  
16 We're going to be able to ask you questions here.  
17 We've got a -

18 MR. CONNOLLY: That, too.

19 I have a fairly simplistic theory to  
20 discrimination cases, and that is that good employers  
21 win and bad employers lose. And what I have are some  
22 practical suggestions on how to become a good employer  
23 both to the eyes of a judge or a jury, or the public,  
24 in general, as well as your employees.

25 What I have found historically is that

1 statistically I have found in virtually every case  
2 that I've defended adverse impact in a layoff that  
3 hits in around the age of 57. And one of the things  
4 that I strongly urge and recommend for employers is  
5 that they come up with an in-house study on what the  
6 best business judgment is on why they're going to do  
7 certain things in terms of reorganizations, including  
8 demotion programs, or layoff programs. But the  
9 concept should be not that we're going to save --  
10 engage in cost-savings or increase profits, but we  
11 are cutting jobs to save jobs. And what has not been  
12 said previously is that an employee takes early  
13 retirement at the age of 57, and takes a program where  
14 he or she has a pension, they're not going to lose  
15 money on that pension until approximately the age of  
16 77.

17 Another thing that people fail to  
18 recognize is that when one imposes a concept of making  
19 decisions on the basis of seniority, it has a  
20 significant adverse impact on women and minorities.  
21 And if you are in certain states, like the State of  
22 Michigan, discrimination on the basis of age doesn't  
23 start at age 60, it starts when you start work. And  
24 one of the little known factors in the world is that  
25 the average age of hires nationally is 35 years of

1 age. And one of the things that we encourage, and  
2 everybody understands what the Supreme Court has said,  
3 and other courts, there's a Bar Journal article in the  
4 summer of 1981, or summer of '82 in the Stanford Law  
5 Journal that differentiates statistics in age cases  
6 from statistics in race and sex cases. And the  
7 factors are most dissimilar. Statistics do not create  
8 discrimination. They create evidence that can be  
9 rebutted. Plaintiffs have the obligation to prove  
10 pretext. That is their burden.

11 One of the things that I'm amused by in  
12 some of the layoff cases I've seen in the past is that  
13 companies will advertise for jobs similar to the ones  
14 they are laying people off at. And one of the things  
15 I recommend strongly is to cease advertising.

16 I also strongly recommend that companies  
17 go to a voluntary program first before they go to an  
18 involuntary program with significant protections to  
19 the interest of the employees, that they are given  
20 written guidelines on the voluntary program, that all  
21 supervisors and managers are trained in equal  
22 employment opportunity, and how to have a voluntary  
23 program, that they have a hiring freeze that is  
24 implemented the day that the thought of a layoff  
25 becomes a gleam in the eye of the Chairman of the

1 Board. And I would have a hiring freeze that  
2 continues for at least six months to a year after the  
3 layoff program goes into effect.

4 To the extent that one is going to have  
5 hiring after a layoff program, preferential hiring  
6 should be given to people that were laid off, but that  
7 they have an obligation to apply for the jobs that are  
8 advertised, and they are told when they are laid off,  
9 whether it's an involuntary or voluntary program,  
10 where on the internet they can find those jobs,  
11 because we know that somebody is going to be arguing  
12 that you hired younger people in the year after the  
13 layoff. And if people didn't apply that were laid off,  
14 that is their burden, not other people's burdens.

15 The company should have an EEO auditing  
16 committee, as well as an Appellate Procedure for all  
17 individuals who believe that they are subject to an  
18 involuntary or voluntary layoff program. And I  
19 recommend that employers have an ombudsperson assigned  
20 to be able to make the arguments on appeal up the  
21 chain of command for someone who believes that he or  
22 she has been adversely affected by the layoff program.

23 One of the things that I have recommended  
24 in the past, and it has worked surprisingly well, is  
25 that you have an appeal up the chain of command, and

1 someone can take the case of their termination to  
2 arbitration paid for by the company.

3 VICE CHAIR THERNSTROM: Mr. Connolly, I  
4 hate to interrupt you here, but we did have a seven-  
5 minute time window for each panelists, otherwise we --  
6 we've got a lot of panelists here.

7 MR. CONNOLLY: Okay. I'm sorry. Let me  
8 leave with this. If various job functions are going  
9 to be excluded, or departments are going to be  
10 excluded in a voluntary program, that should be  
11 spelled out in writing.

12 One of the problems I've seen historically  
13 in the past are that personnel files have documents  
14 that have age and seniority-related issues, including  
15 the document a supervisor has to fill out to make a  
16 recommendation for termination. Those documents  
17 should not have that information.

18 VICE CHAIR THERNSTROM: I really do need  
19 to cut you off here.

20 MR. CONNOLLY: I have more to say, but  
21 I'll just conclude by saying good employers win, bad  
22 employers lose. Go to a voluntary program that is  
23 truly voluntary, and not coerced, before going to an  
24 involuntary program. Create EEO oversight committees,  
25 and appellate programs.

1 VICE CHAIR THERNSTROM: Thank you very  
2 much. And I'm sorry to have to cut you off, but we do  
3 have -

4 MR. CONNOLLY: No problem.

5 VICE CHAIR THERNSTROM: We do have four  
6 other panelists. Professor Harper, you are next.

7 MR. HARPER: Okay.

8 VICE CHAIR THERNSTROM: Seven minutes.

9 MR. HARPER: Okay. Well, I want to thank  
10 you all for inviting me. I feel very honored to be  
11 here. And I want to begin my remarks by making an  
12 assertion, and that is, the assertion is that age  
13 discrimination is a much, much more pervasive  
14 occurrence in this society than sex, or race, or  
15 national origin discrimination today. And I base that  
16 assertion not on primarily on the studies that I've  
17 read, or not primarily on all the cases I've read  
18 where there are many more ageist comments, smoking gun  
19 evidence, than there is sexist, or racist comments in  
20 the cases I've read. I base it not on the fact that  
21 in academia where I come from, there is no appointment  
22 that is ever made, no appointments committee meeting  
23 that has ever met considering someone who is 55, or  
24 60, or 65 years old where age is not an implicit, if  
25 not explicit consideration in that appointment. And

1 I bet Chair Thernstrom would agree with that, but she  
2 can disagree later.

3 VICE CHAIR THERNSTROM: Vice Chair, by the  
4 way.

5 MR. HARPER: Yes, Vice Chair. Okay.

6 I don't base it on the fact that I know in  
7 my profession of law, most large law firms have a  
8 mandatory retirement age, even though there is no age  
9 limitation now. The statute has been amended to  
10 eliminate all age limitations. And they say the  
11 partners are not employees, and therefore not covered  
12 by the ADEA. I don't think that's tenable after the  
13 Supreme Court's decision in the Clackamas case, upheld  
14 the EEOC guidelines. In most big law firms, these  
15 partners are employees. Don't base it on any of that  
16 really, primarily.

17 I base it on the fact that it is  
18 economically rational for employers, good employers,  
19 good in the sense they're just trying to make a  
20 profit, which is a good thing in our economy. Good  
21 employers, and most employers are good employers, it's  
22 economically rational for them to discriminate.  
23 It's not economically rational on the basis of age,  
24 not on the basis of sex or race. I think that's  
25 primarily an agency problem to the extent it exists.

1 The employers would be better off if its agents were  
2 not sexist or racist, and the employer tries to get  
3 rid of that. But in the case of age, it can be  
4 economically rational. It can be economically  
5 rational because something what economists call  
6 statistical discrimination. I'm not an economist, I'm  
7 not a social scientist, don't ask me about -- but I do  
8 understand statistical discrimination. That is, that  
9 you look at -- you can look at overlapping bell-shaped  
10 curves, and it is true as individuals, many older  
11 workers, at 65, you all may work for 15 years  
12 productively, or a 60-year old might work for 20  
13 years. It's possible, and some do. But if an  
14 employer is hiring, and is going to do some training,  
15 and is going to put someone in a path where how much  
16 they get back is going to depend upon how long they  
17 work, and how they long continue in that career, it's  
18 rationale for the employer to say I want to hire  
19 someone younger, who is going to pay back in  
20 productivity on the average longer. So, they use age  
21 as a proxy.

22 Now, that may be efficient for the  
23 employer, but if you have those overlapping bell-  
24 shaped curves, and use age as a proxy because you have  
25 to, because you can't predict the future, who's going



1 to be where on the curve, then you're going to exclude  
2 all the older workers, and bring in the younger  
3 workers. That may be rational, efficient for the  
4 employer, good employer would do it, but the problem  
5 is, it excludes all the older workers, and it creates,  
6 I believe, not only in fairness to the older workers  
7 as individuals, which as Ms. Johnston said, is one of  
8 the goals of anti-discrimination law, but also,  
9 potentially, under-employment, and unemployment in  
10 society for older workers. And that's a bad thing as  
11 baby boomers age, as we are concerned about Social  
12 Security. It's going to be a problem for us, not as  
13 big as in Europe, but depending upon the degree of  
14 immigration, but it is an issue. So, I think that the  
15 age discrimination is more pervasive, and it is more  
16 resilient than other forms of discrimination. And for  
17 that very reason, we need not weaker remedies, and not  
18 more difficult methodologies of proof, as we now have  
19 under ADEA, but we need at least equal methodologies  
20 of proof and remedies.

21 Under the ADEA, which was attached to the  
22 Fair Labor Standards Act, the remedies do not include,  
23 as they do after the 1991 Act for Title VII,  
24 compensatory and punitive damages. There is  
25 liquidated damages, which is double back-pay, but it's

1 in the nature of punitive damages. It's difficult to  
2 establish that. That needs to be changed as Congress,  
3 House of Representatives passed the Paycheck Fairness  
4 Act for the Equal Pay Act to change that, which is  
5 also aligned with the Fair Labor Standards Act.

6 Also, should be changed is the class  
7 actions. I would like to hear what other folks  
8 experience have been with class actions, but under age  
9 discrimination you can only have what are called opt-  
10 in class actions. You can't have true Rule 23, which  
11 is Federal Rules of Civil Procedure Opt-Out Class  
12 Actions, which you can have under Title VII. It's  
13 much less effective. There are ways around it, if  
14 there's a state law, and the Circuit allows it, Third  
15 Circuit doesn't, sort of complicated. I won't get  
16 into that. But as I say in my paper, that needs to be  
17 changed to align the remedies, I believe, of the ADEA  
18 with Title VII.

19 The proof methodologies need to be  
20 aligned. The Gross decision, which I think other  
21 people have talked about, is indeed a gross decision,  
22 a gross example of judicial activism, and legislation  
23 from the bench by the current Supreme Court ignoring  
24 their own precedents, and the direction of Congress,  
25 that needs to be overturned. There is no

1 justification for saying it is more difficult to prove  
2 age discrimination. If there should be defenses to  
3 age discrimination, fine. Increase the BFOQ. It's  
4 possible to give defenses to age discrimination, other  
5 explanations in the individual case, but it shouldn't  
6 be more difficult to prove that which is more likely  
7 to be rational, and, therefore, resilient.

8 I think also Smith v. City of Jackson  
9 should be -- the other decision in disparate impact  
10 should be overturned. That decision I think was  
11 correct, given the fact that there is a Reasonable  
12 Factor Other Than Age defense in the statute, which is  
13 not in Title VII. But I think that needs to be  
14 amended, because you have to give the plaintiff an  
15 opportunity to show a less restrictive alternative.

16 VICE CHAIR THERNSTROM: Let me warn you  
17 that you're over the seven minutes.

18 MR. HARPER: Oh, I am? Okay.

19 VICE CHAIR THERNSTROM: Yes.

20 MR. HARPER: All right. So, those are my  
21 four -- I actually have two other recommendations, one  
22 of which might appeal to the more conservative members  
23 of the panel, and that is to allow a probationary  
24 period of one year to encourage the hiring of older  
25 workers, so that the employer would not be subject to

1 the age discrimination. For a year, there would be a  
2 probationary period of one-year, which I think would  
3 encourage the employment of older workers, because the  
4 employer gets to know the person, and see they might  
5 be on one end of that bell-shaped curve.

6 Okay. I'm over time. I hope to answer  
7 questions later. Thank you.

8 VICE CHAIR THERNSTROM: I'm sure there  
9 will be many questions. And thank you for that very  
10 interesting testimony. Ms. Milito.

11 MS. MILITO: Thank you very much for  
12 inviting me to participate in this very important  
13 briefing.

14 The National Federation of Independent  
15 Business is the nation's leading advocacy organization  
16 representing small and independent businesses. NFIB's  
17 national membership spans the spectrum of business  
18 operations ranging from sole proprietorships, to firms  
19 with hundreds of employees. While there is no  
20 standard definition of a small business, the typical  
21 NFIB member employs just 10 employees, and reports  
22 gross sales of about \$500,000 per year. NFIB  
23 membership is a reflection of American small business,  
24 and I am here today on their behalf to share small  
25 business perspective.

1           Today's small business owners who  
2           according to the Small Business Administration employ  
3           just over half of all private sector employees,  
4           contend with anti-discrimination laws, family medical  
5           and other protected leave laws, wage hour laws,  
6           privacy laws, and workplace safety laws. They often  
7           struggle to decipher the mysteries of overlapping, and  
8           sometimes even conflicting federal, state, and local  
9           employment laws. The problem is compounded by the  
10          fact that very few small businesses employ a  
11          professional human resources employee.

12           Today I will discuss how recent Supreme  
13          Court rulings interpreting the ADEA have affected  
14          small businesses. I will also provide some insights  
15          into how small businesses make employment decisions,  
16          and highlight some of the differences between how  
17          small business owners, and large corporations make  
18          these decisions.

19           The ADEA, as you all know, makes it  
20          unlawful for an employer to "fail, or refuse to hire,  
21          or to discharge any individual or otherwise  
22          discrimination against any individual because of the  
23          individual's age." The ADEA further provides, very  
24          importantly, that "it shall not be unlawful for an  
25          employer to take any action otherwise prohibited where

1 the differentiation is based on Reasonable Factors  
2 Other Than Age."

3 The first of the two recent Supreme Court  
4 cases that I'd like to discuss involving the ADEA is  
5 Meacham v. Knoll's Atomic Power Laboratory. This case  
6 determined which party bears the burden of proving the  
7 reasonableness of an employment practice based on a  
8 factor other than age. The Supreme Court held that  
9 the burden is on employers to prove that their  
10 practices are reasonable, not on employees to prove  
11 that a practice is unreasonable.

12 The question of who bears the burden of  
13 demonstrating that an employment practice is  
14 reasonable or unreasonable has implications for small  
15 business owners that large corporations would not,  
16 necessarily, face. Small business owners are far less  
17 likely, as I noted before, to employ a professional HR  
18 executive, and much less likely to have legal advice.  
19 For example, a survey of small business owners found  
20 that only two out of every five small businesses  
21 consulted an attorney for advice within the last 12  
22 months. And of those who did speak with an attorney,  
23 only 12 percent asked the attorney about an employment  
24 matter. As a result, small business owners often do  
25 not document employment decisions, or retain the

1 evidence that they need that might help them survive  
2 a legal challenge.

3 And the more recent of the two Supreme  
4 Court decisions I'd like to discuss, Gross v. FBL  
5 Financial Services, the court held that an employee  
6 has the burden of proving that age discrimination was  
7 a but-for clause of an adverse employment action. It  
8 is not enough that age be merely one factor among many  
9 that led to an adverse employment action. This makes  
10 age discrimination cases different than other suits  
11 brought under Title VII.

12 In a Title VII claim, an employee must  
13 demonstrate only that a prohibited factor contributed  
14 to an adverse employment action. However, it makes  
15 sense to treat age discrimination cases differently  
16 than discrimination based on another protected  
17 category, such as sex, or race, because there are  
18 often legitimate employment factors that correlate  
19 with age, but would not, necessarily, correlate with  
20 one of the other protected categories, like sex or  
21 race.

22 Ordinary aging and career advancement  
23 patterns tend to result in older workers as a group  
24 holding higher level, better paid, and longer  
25 established positions of employment than younger

1 counterparts. Because of these natural correlations,  
2 many business decisions and practices, even though  
3 age-neutral and intent tend to impact older workers  
4 differently than younger ones. Take, for example, a  
5 hypothetical small business that manufactures sporting  
6 equipment. The business employs roughly 25 people,  
7 most of whom are entry level, and lower paid workers  
8 who operate machinery, make finished products, take  
9 orders, and handle shipping. They also employ two  
10 skilled professionals, both of whom are over age 40.  
11 One is an engineer, the other is an accountant. In  
12 order to continue making payroll for the rest of the  
13 year, the owner needs to cut labor costs by 10  
14 percent. Because demand for his product is still  
15 strong, cuts in labor will result in either reduced  
16 production, or will be work that the owner, himself,  
17 is going to have to take over.

18 The owner decides he will make the  
19 decision based on three criteria, total cost of  
20 compensation, necessity for maintaining output, and  
21 necessity for maintaining quality of product. The  
22 engineer, the accountant, and the most highly paid  
23 member of the production staff become the three  
24 targeted positions, because they're the most highly  
25 compensated positions.



1           The engineer is an important part of the  
2 testing and quality control process, and the owner is  
3 concerned that he would not be able to perform those  
4 job duties himself. The member of the production  
5 staff is the most highly paid, because he's also the  
6 most productive worker. Cutting him would adversely  
7 affect output. However, the owner has kept the  
8 company books before when he started the company, and  
9 he thinks he can hold the accounting job for a few  
10 months until, hopefully, the economy turns around.  
11 Therefore, he makes the decision to terminate the  
12 accountant, and eliminate the position.

13           Nothing about that decision took the  
14 accountant's age into consideration. However, this  
15 decision resulted in a 50 percent reduction in the  
16 company's over 40 workforce. If the accountant filed  
17 an age discrimination complaint, an investigation  
18 would reveal that all of the employees over 40 were  
19 considered for termination. The owner could soon find  
20 himself having to defend an age discrimination  
21 lawsuit, despite the fact that his employees' ages  
22 were never a factor in his decision.

23           Small business owners rarely make the  
24 difficult decisions that surround downsizing lightly.  
25 Small businesses studies show are more likely than

1 large corporations to keep employees on the payroll  
2 even during tough times. An employee is not just a  
3 revenue source, he is a member of the owner's extended  
4 family. Small businesses tend to hire conservatively,  
5 and they run lean, mean operations. This makes the  
6 typical small business employee much more valuable to  
7 a business owner than a corporate employee is to the  
8 average shareholder.

9 Small business owners are entitled to the  
10 benefit of doubt that their facially neutral  
11 employment actions are reasonable. Allowing age  
12 discrimination cases to move forward based on  
13 speculative evidence that age is a factor in an  
14 employer's decision exposes employers to countless  
15 allegations of meritless discrimination claims.  
16 Instead of spending resources on growing their  
17 businesses, and creating new jobs, employers will be  
18 forced to spend time and money defending legitimate  
19 employment decisions.

20 Thank you very much.

21 VICE CHAIR THERNSTROM: You get a prize.

22 (Laughter.)

23 VICE CHAIR THERNSTROM: It is seven  
24 minutes to the dot. Ms. McCann.

25 MS. McCANN: Good morning, and thank you

1 for the opportunity to speak to you this morning on  
2 behalf of AARP regarding age discrimination employment  
3 in the context of this country's current economic  
4 crisis.

5 As the recent surge in age discrimination  
6 charges filed with the EEOC demonstrates, the current  
7 economic crisis combined with the aging demographics  
8 in the workforce has created the perfect storm for age  
9 discrimination. In fact, in a very short passage of  
10 time, news coverage concerning older workers has gone  
11 from stories about how smart employers should take  
12 steps to recruit and to retain their older workers, to  
13 a recent story I read in the Business Press that  
14 warned companies not to become storehouses of  
15 embittered older employees, who are only working to  
16 rebuild their shattered 401(k)s, and were putting in  
17 only the minimum effort to keep their jobs.

18 Approximately three and a half years ago,  
19 AARP held a celebration and a symposium to celebrate  
20 the 40th anniversary of the enactment of the Age  
21 Discrimination and Employment Act. During its 40 plus  
22 years, the ADEA has made tremendous strides in  
23 eliminating the most blatant forms of age  
24 discrimination. For example, mandatory retirement has  
25 been eliminated for the vast majority of Americans,

1 and job ads which were once prevalent announcing  
2 maximum hiring ages for positions are a distant  
3 memory. However, despite these achievements, age  
4 discrimination continues to pervade the workforce, and  
5 impede the achievement of equality in the workplace.

6 For example, the job ad may no longer say  
7 people over 40 or 45 need not apply; however, that  
8 doesn't mean those individual's resumes will be  
9 ignored, because the hiring supervisor merely assumes  
10 that the person will not accept the salary for which -  
11 - that is posted, and that they're well aware of the  
12 salary, and yet have chosen to apply for the job, or  
13 assumes they will only work a few years, and then  
14 retire.

15 As I studied for my Master's in  
16 Gerontology, I learned that individual differences in  
17 aging far outweighed the similarities. As an  
18 employment discrimination lawyer, I learned that that  
19 fact was the fundamental premise behind the ADEA and  
20 other civil rights statutes, that everyone has the  
21 right to be judged as an individual, and not based on  
22 assumptions, and stereotypes about what we think  
23 someone of their age wants to do, or will do.

24 Why has the ADEA fallen short of its goal  
25 of eliminating arbitrary age discrimination? One

1 reason, which my colleague, Cathy Ventrell-Monsees,  
2 will discuss is our society's perplexing willingness  
3 to tolerate age discrimination. But this willingness  
4 to tolerate age discrimination is not held only by the  
5 public, it is shared, reinforced, and exacerbated by  
6 the courts, particularly the U.S. Supreme Court.

7 One of the most telling examples of age  
8 discrimination being relegated to lesser status by the  
9 courts is the treatment of age-related comments, which  
10 Ms. Johnston touched upon. Courts repeatedly discount  
11 or ignore blatant age discriminatory comments. In  
12 *Reeves v. Sanderson Plumbing Products*, Roger Reeves  
13 was told by his supervisor just a few months before he  
14 was fired that he was so old that he must have come  
15 over on the Mayflower. Then just two months prior to  
16 his termination, he was told that he was too damned  
17 old to do the job, and yet the U.S. Court of Appeals  
18 for the 5th Circuit ruled that those comments were not  
19 relevant evidence of age discrimination, because they  
20 were not made in the direct context of his  
21 termination, in other words, moments before he was  
22 terminated.

23 I think the most blatant comment I've  
24 heard that has been sanctioned by courts came out of  
25 the U.S. Court of Appeals for the 4th Circuit, where

1 a Vice President was justifying why when they  
2 conducted a reduction in force older workers were  
3 over-represented in those that were let go. He said  
4 that -- the Vice President said, "Well, there comes a  
5 time when older workers must make way for younger  
6 workers." That's why they were over-represented.

7 The 4th Circuit, and I quote, said "That  
8 that reflected no more than a fact of life, and is  
9 merely a truism that carries with it no disparaging  
10 undertones." And although the 5th Circuit reversed --  
11 although the Supreme Court reversed the 5th Circuit's  
12 horrible decision in Mr. Reeves' case, the court has  
13 certainly been no friend to the rights of older  
14 workers to be free from age discrimination in the  
15 workplace. Instead, the Supreme Court has repeatedly  
16 interpreted the ADEA to provide inferior protection  
17 for older workers, and has imposed greater burdens on  
18 older workers seeking to prove age discrimination.

19 Specifically, in 1993, in the case of  
20 Hazen Paper Company v. Biggins, the court suggested  
21 that the ADEA's reach was limited to discrimination  
22 based on inaccurate and stigmatizing stereotypes about  
23 older workers. In other words, that that was the only  
24 type of discrimination that you could challenge. This  
25 limitation has been used to sanction laying off

1 individuals who are eligible for retirement, because  
2 after all, the fact that you're eligible for  
3 retirement benefits, and could probably bear the brunt  
4 of a layoff better than a younger worker, is not an  
5 inaccurate or stigmatizing stereotype, although that's  
6 not very consoling to the 55-year old with kids in  
7 college. And for refusing to hire individuals  
8 eligible for early retirement benefits because they  
9 might leave soon, anyway. Again, not an inaccurate  
10 and stigmatizing stereotype.

11 In 2000, in the case of *Kimel v. Florida*  
12 *Board of Regents*, the court ruled that the 11th  
13 Amendment protected state governments from being sued  
14 for monetary damages by older state employees who have  
15 been discriminated against based on age. In *Smith v.*  
16 *City of Jackson*, the court ruled that the scope of  
17 disparate impact liability under ADEA is far more  
18 narrow than under Title VII. In 2008, in *Kentucky*  
19 *Retirement System v. EEOC*, the court stated that the  
20 clear and strong protections of the Older Workers  
21 Benefit Protection Act, which prohibit age  
22 discrimination in benefits, were beside the point, and  
23 that a disability retirement plan that blatantly  
24 discriminated based on age was perfectly okay. And  
25 most recently, just last year in *Gross v. FBL*

1 Financial Services, the court imposed a far more  
2 stringent causation standard on age discrimination  
3 victims than faced by other victims of discrimination.

4 This relegation of age discrimination to  
5 second-class civil rights status is unwarranted, and  
6 must stop. AARP applauds the Commission for holding  
7 this briefing this morning, and is hopeful that it  
8 signals that it is time for the Administration,  
9 Congress, and society at-large to act with greater  
10 resolve to stop this tragic waste and loss of talent,  
11 energy, and wisdom. Thank you.

12 VICE CHAIR THERNSTROM: You get the second  
13 star of the morning. Please go ahead, Ms. Ventrell-  
14 Monsees.

15 MS. VENTRELL-MONSEES: Thank you. I've  
16 studied age discrimination practices in law for 25  
17 years, and given the questioning this morning, I'm  
18 going to depart from my written presentation, and I  
19 would like to focus on ageist stereotyping because  
20 that seems to be a real concern here. But first I  
21 must reiterate that the purpose -- one of the purposes  
22 of the ADEA, like Title VII, and other Civil Rights  
23 law, is that Congress has said employers must not make  
24 decisions based on group generalizations. An employer  
25 must make an individual assessment of that particular



1 person's abilities, not based on their race, or sex,  
2 or age, national origin, or religion. That's the  
3 premise from which we operate.

4 This morning, I've heard several ageist  
5 stereotypes, older workers are less mobile, they're  
6 more costly and not likely to accept lower wages, they  
7 are less flexible, they're not likely to learn new  
8 skills, and they're not likely to have current skills,  
9 all stereotypes. Some may be true. That is the  
10 nature of stereotyping. It is human nature to  
11 stereotype. What it means is that we make judgments  
12 based on our human experiences. That's all perfectly  
13 fine. It's how we operate. It's how we function on  
14 a day-to-day basis. But when the laws come into play,  
15 it requires decision makers to pause and think am I  
16 assessing this individual based on his or her ability,  
17 or based on previous experiences and assumptions that  
18 I have that may not be true for this person.

19 Stereotypes can be true for an entire  
20 group. Example, women live longer than men. It is  
21 unlawful for an employer to charge women higher  
22 insurance rates because women live longer than men.  
23 That is a violation of Title VII. And I ask you every  
24 time you think of what seems an innocuous comment  
25 about aging and ageism, those are ageist stereotypes.

1 Compare them to sexist or racist stereotypes.

2 The problem is that age has always  
3 historically been viewed as different. It's less  
4 serious, it's less harmful, it's not based on malice  
5 or intolerance. Granted, it's based on stereotyping.  
6 But look at discrimination here in the 21st century,  
7 if you look at race discrimination and sex  
8 discrimination, guess what, for the most part, they  
9 are based on stereotyping, unfounded stereotypes. The  
10 same is true of age discrimination.

11 One of the other stereotypes that I heard  
12 this morning was about the investment in training. An  
13 older worker is not likely to be around much longer at  
14 this point in his or her career, so an employer  
15 shouldn't invest in the training. Guess what, all of  
16 the research refutes that stereotype. I direct you to  
17 the written testimony of Professor Michael Campion,  
18 who spoke last summer at the EEOC's hearing in July  
19 2009. His written testimony is replete with the  
20 research and scientific data that refutes all of these  
21 ageist stereotypes. Again, the law requires you to  
22 look at the individual. For some individual, the  
23 stereotype may be true, for others it may not. Okay?

24 If you compare an example, an ageist  
25 stereotype, an older worker who, pick an age, 55, 65,

1 whatever it might be, they might be retiring soon.  
2 They might be leaving the workforce soon. All right?  
3 I can say, why is it lawful for an employer to say I'm  
4 not going to give that person a promotion because I  
5 assume they're going to retire soon? Why would that  
6 be lawful? Compare that to sexism. None of us would  
7 question that it must be unlawful if an employer said  
8 here's a woman who's likely to have a child. Why would  
9 I give her that promotion that's going to require more  
10 hours every week, if she's not going to be around?  
11 Clearly, that's sexism.

12 And what I have to reiterate over and over  
13 is, take the ageist stereotypes and compare them to  
14 the stereotypes that are at play for racism and  
15 sexism. Society and Title VII condemn reliance on  
16 racist and sexist stereotypes. Do you see any of that  
17 condemnation in the ageism area? No. Why? Well,  
18 that's the \$64 million question, I guess. Is age  
19 really different? Is it less serious? Well, ask an  
20 older worker who has been fired, ask an older woman if  
21 she was fired because of age discrimination. Is the  
22 sting any less severe because it was based on age and  
23 not sex, if it was based on sex and not age. Ask the  
24 older worker who loses his job, now has no income.  
25 The economic trauma he suffers and his family suffers

1 is the same whether he lost his job because he's too  
2 old, or because he was African American, the same  
3 consequences.

4 So, I urge you to take a more detailed and  
5 in-depth look at the problem of who is this older  
6 worker in the 21st century. It's not the same person  
7 who was the concern of Congress when they passed the  
8 law in the 1960s. It's not the middle-aged white male  
9 who worked for General Electric for 35 or 40 years.  
10 That's not what the older worker looks like today. It  
11 could be someone who was downsized, went back to  
12 school, has an entirely new career that they start in  
13 their 50s, and maybe at the lower end of the wage  
14 totem pole. Okay? It may be someone in their 50s or  
15 60 who has children in grammar school. Typically, we  
16 would think of someone in that age group with kids in  
17 college. Thinking about retirement? No way. So, all  
18 of these perceptions, assumptions, and stereotypes  
19 that we hold, we have to re-examine. And that's what  
20 I urge all of us to continue to do.

21 Age should not be treated differently.  
22 Older workers deserve the exact same protections, the  
23 rights, and remedies that all other workers have. I  
24 agree with Professor Harper, the ADEA is inadequate.  
25 It needs to be strengthened in the procedures, the

1 methods of proof, the class action requirements, the  
2 entire statute. Older workers deserve equal  
3 treatment, and equal protection. We should stand for  
4 that, and we should adhere to it. Thank you.

5 VICE CHAIR THERNSTROM: Wonderful, another  
6 perfect witness. Very appreciated, so I am now  
7 opening it up to questions from Commissioners.  
8 Commissioner Kirsanow, I believe, his hand went up  
9 first.

10 COMMISSIONER KIRSANOW: Actually, I think  
11 Commissioner -

12 VICE CHAIR THERNSTROM: Oh, well, sort it  
13 out between you.

14 COMMISSIONER KIRSANOW: Go ahead.

15 COMMISSIONER GAZIANO: I thought I had a  
16 round left over from the last -

17 VICE CHAIR THERNSTROM: You have a round  
18 left over, and we will not allow you to be neglected.  
19 If you feel you should be first -

20 COMMISSIONER YAKI: I'm often neglected.

21 COMMISSIONER HERIOT: I think my hand did  
22 go up first.

23 VICE CHAIR THERNSTROM: It doesn't --

24 Commissioner Gaziano, I promise you will have plenty  
25 of time.

1                   COMMISSIONER HERIOT: We could arm  
2 wrestle.

3                   COMMISSIONER GAZIANO: Do I get an extra  
4 round?

5                   MR. CONNOLLY: May I ask a question?

6                   VICE CHAIR THERNSTROM: Of course you may  
7 ask a question. Let's ask Mr. Connolly.

8                   MR. CONNOLLY: The one question I have, or  
9 two questions I have is, every case I've gotten,  
10 plaintiffs have aggregated statistics, including cases  
11 on a nationwide basis, where individual decisions were  
12 made in a facility in California, and combined with a  
13 facility in Chicago, and combined with someplace else.  
14 Every smart decision maker knows that you should look  
15 at the effective recommenders of the decisions, not  
16 aggregate globally. Secondly -

17                   VICE CHAIR THERNSTROM: Well, wait a  
18 minute, you're making a speech, rather than asking a  
19 question. We've got a lot of Commissioners with their  
20 hands raised.

21                   MR. CONNOLLY: The question is, do you  
22 think effective recommenders ought to be the people  
23 that are analyzed, or aggregated statistics company-  
24 wide, nationwide? And the second question is, does  
25 anybody have evidence that older employees that are

1 laid off attend outplacement services on a continuing  
2 and regular basis, as do younger people?

3 VICE CHAIR THERNSTROM: All right. Let us  
4 hold those questions, because we've got a lot -- but  
5 please keep them in mind, panelists, and maybe you can  
6 incorporate the answers to those questions in  
7 responses to Commissioners.

8 I believe we were starting with  
9 Commissioner Heriot.

10 COMMISSIONER HERIOT: I just wanted to  
11 comment, and just ask a question on Ms. Ventrell-  
12 Monsees' position, because I don't know if we're  
13 communicating properly here. The previous panel, we  
14 were talking about an aggregate statistic, and trying  
15 to explain an aggregate statistic. Why is it that the  
16 unemployment period for older workers tends to be  
17 higher than for younger workers? And to say -

18 COMMISSIONER GAZIANO: The period of  
19 unemployment is longer.

20 COMMISSIONER HERIOT: The period is  
21 longer. That's not stereotyping contrary to the ADEA.  
22 I mean, you were saying here the law requires you to  
23 look at the individual. Actually, the law doesn't  
24 require me to look at the individual, the law requires  
25 the employer in making a decision to look at the

1 particular applicant's characteristics, and not age.  
2 But when trying to explain why that period of  
3 unemployment is longer for older workers, when we say  
4 older workers may be less willing to move, that's not  
5 a violation of the ADEA. My sister is not going to  
6 move to Denver. She's in Houston now. If there's a  
7 job in Denver, she's not going to move. And  
8 stereotypes are simply generalizations, many of which  
9 are simply true. Many older workers would be happy to  
10 move to Moscow for a job, and if the ADEA is in effect  
11 in Russia, then we'd want the employers not to  
12 consider age in hiring, but they don't have to go and  
13 reach out to my sister in Houston, if she's not going  
14 to move to Moscow, or to Denver, or wherever.

15 With regard to training, employers are not  
16 supposed to take age into consideration in offering  
17 training. That's our law. However, the employee, or  
18 the potential employee certainly can do it. In fact,  
19 someone did suggest to my sister why don't you go back  
20 to college and get your degree. Well, by the time she  
21 got her degree she'd be 65, and she'd like to retire  
22 at 65. She wouldn't be able to earn back that money.  
23 She's not violating the law. She's not engaging in a  
24 stereotype. She's making a decision for Jane Hollman,  
25 and she has different considerations.



1           Same with each of the reasons we were  
2 talking about in the last panel. It's not engaging in  
3 the kind of invidious stereotyping, we're simply  
4 trying to determine why that aggregate statistic is  
5 what it is.

6           MS. VENTRELL-MONSEES: And I think it's  
7 important to distinguish between the statistical  
8 focus, and the individual focus. So, on the  
9 statistical focus, there are many factors that lead to  
10 the unemployment of older workers, as well as -

11           COMMISSIONER HERIOT: Nobody is disputing  
12 that. The employer has to take into consideration the  
13 individual.

14           MS. VENTRELL-MONSEES: Okay. On the  
15 statistical side, self-selection across factors can  
16 cause the unemployment numbers to be higher for women,  
17 for older workers, for minorities. For every  
18 particular category, if you were to look at  
19 unemployment data, you could say that self-selection,  
20 motivation, lack of skills, lack of training, and  
21 discrimination all play a role as factors in  
22 concluding what that number, the unemployment number  
23 is. All right?

24           My focus on the individual side is, yes,  
25 self-selection plays a role, but when the employer

1 assumes that -

2 COMMISSIONER HERIOT: Nobody is going to  
3 dispute that.

4 MS. VENTRELL-MONSEES: Okay. Well, it's  
5 my role as an advocate for older workers to constantly  
6 remind us that there are those who dispute that, is  
7 the problem. There are those who not only believe the  
8 stereotype, believe it to be true, and then act upon  
9 it. And that is the problem that we have, because to  
10 say that it's okay for an employer to fire older  
11 workers that happen to be making the most money, the  
12 problem is there if you consider age and cost, that  
13 would be unlawful. If the employer ignores age and  
14 considers only cost, or only some other non-  
15 discriminatory legitimate reason, that is not  
16 unlawful.

17 VICE CHAIR THERNSTROM: Can I let  
18 Commissioner Gaziano go first?

19 COMMISSIONER GAZIANO: Let me ask the  
20 questions I was going to ask the last panel, and then  
21 I'll ask the -- I want to ask -

22 VICE CHAIR THERNSTROM: But you only get  
23 seven minutes, too.

24 COMMISSIONER GAZIANO: No. I get an extra  
25 round, I'm arguing. Anyway, the first question is, I

1 don't know if this is true, but assuming the Military  
2 Officer Training School says we do not accept, we have  
3 to invest so much money, we do not accept candidates  
4 for the Officer Training School who are older than X,  
5 I'll make up 30, but if you have a better -- is that --  
6 -- this is the pure legal question for you two. Is  
7 that, in fact, illegal, maybe the military has an  
8 exemption, but is that --

9 MR. HARPER: It does, yes.

10 COMMISSIONER GAZIANO: It does. Okay.  
11 So, that is okay for the military, but that kind of  
12 determination would be illegal if a private employer--

13 MR. HARPER: I think there is very little  
14 doubt that it is illegal. The employer's best defense  
15 there would be bona fide occupational qualification.

16 COMMISSIONER GAZIANO: Right.

17 MR. HARPER: And there is a safety  
18 consideration. There is -- the Supreme Court's  
19 decision in the Criswell case, which the underlying  
20 law -- I mean, the law there, if it is safety that  
21 we're projecting into the future, that they can make  
22 a generalization, but not for future -- how long  
23 they're going to be working.

24 COMMISSIONER GAZIANO: Okay. Well, I  
25 appreciate -- by the way, your recommendation is

1 interesting. I don't know that I'd accept it, but the  
2 BFOQ maybe should be relaxed.

3 MR. HARPER: No, no, no, I didn't say the  
4 BFOQ. I don't -- oh, perhaps it could be. I don't  
5 know.

6 COMMISSIONER GAZIANO: Okay.

7 MR. HARPER: I mean, if there are -

8 COMMISSIONER GAZIANO: The other would be  
9 related. Let's say -- I also think for Command,  
10 Higher Command, Colonel, General, Captain, Admiral,  
11 they select their potential candidates in the midpoint  
12 of their career. They invest maybe a year of war  
13 college study. Again, I don't think that they do it  
14 if someone is at a certain age and they think close to  
15 retirement. And you cannot generally become a General  
16 unless you go through this process. I take it that  
17 that is somehow exempted for the military, but that  
18 kind of consideration would be illegal if there was a  
19 similar management training program at a big  
20 corporation.

21 MR. HARPER: Yes, it is, although, I would  
22 think that it's rational for an employer to do that.  
23 I mean, I understand why the employers do that, and I  
24 don't think they're bad, or malignant, nefarious for  
25 doing that. I think it's a rational thing. I consider

1 it sort of rational, not irrational, but it is  
2 illegal, and I think it should be illegal, even though  
3 it's rational, and even though I understand it  
4 economically.

5 COMMISSIONER GAZIANO: So, if someone  
6 looks like they are one year away from likely  
7 retirement, but the management training program is a  
8 five-year program, and the company only gets benefits  
9 10 years later, you're saying that should still be  
10 illegal. They must include -

11 MR. HARPER: Well, I doubt if someone  
12 wants to go into that any more than Commissioner  
13 Heriot's sister wants to go back to college. I don't  
14 think someone wants to go into that program, if  
15 they're going to retire.

16 COMMISSIONER GAZIANO: The individual says  
17 I'm not sure when I'm going to retire, but the company  
18 knows statistically that they're likely to retire -

19 MR. HARPER: Statistically, right. They  
20 know that statistically, but this is an individual  
21 who, gee, I have a lot of colleagues my age, and I'm  
22 older than I look, I hope. So that they want to -

23 VICE CHAIR THERNSTROM: We all have that  
24 illusion.

25 (Simultaneous speech.)

1 MS. McCANN: I think there are lawful ways  
2 to accommodate that concern, the concern that we're  
3 going to invest all this management training into you,  
4 and you're going to retire soon, anyway. And a couple  
5 of ways to do it is during the interview process for  
6 the management training program, you can ask a person  
7 where do you see yourself in five years? That's  
8 perfectly lawful. I mean, the Age Discrimination  
9 Employment Act doesn't say you cannot have legitimate  
10 business concerns that you investigate.

11 VICE CHAIR THERNSTROM: Wait a minute.  
12 And the person is going to say well, five years I'll  
13 be here, but seven years -- no, the person isn't going  
14 to answer that way.

15 MS. McCANN: You just assume they're going  
16 to lie. I mean, I can bet if they're in a position --

17 VICE CHAIR THERNSTROM: If they're  
18 rational.

19 (Laughter.)

20 MS. McCANN: They're in the position that  
21 they're being considered, they're obviously a trusted  
22 employee, and I think that, hopefully, they would be  
23 honest. I'm not saying -- so, that's one way, is you  
24 -- and the same thing with someone being interviewed  
25 for a job, and you can ask them, are you truly

1 interested in this salary? The law says that it's  
2 okay to ask these questions, as long as you ask them  
3 to everybody, so if you ask your 60-year old sister  
4 would you be willing to relocate to Moscow, and she  
5 says no, then the 30-year old comes in and you say  
6 would you be willing to relocate to Moscow? They may  
7 not be willing to either. The question is legitimate.

8 COMMISSIONER HERIOT: Career counselors  
9 actually coach interviewees to lie in these  
10 circumstances.

11 VICE CHAIR THERNSTROM: Exactly.

12 COMMISSIONER HERIOT: I've seen it happen,  
13 where the career counselor says when they ask you  
14 this, make sure you say I'm going to be here with you  
15 in five years.

16 MS. McCANN: The other way to deal with it  
17 is that, for example, at AARP we have some programs  
18 where it's a very favorable program, but you're  
19 expected to stay. So, if you say if you're accepted  
20 into this management promotion -- management training  
21 program, we expect a commitment of at least five  
22 years, 10 years you can set it, but you're not  
23 assuming without asking, without exploring that the  
24 person 50 and over is not a good candidate for that.

25 COMMISSIONER HERIOT: Can I just interject

1 one quick question here that's relevant to that? What  
2 do you think about the idea of penalties for people  
3 who end up finking out, you know, a 60-year old gets  
4 training.

5 MS. McCANN: It can be done.

6 COMMISSIONER HERIOT: It takes three  
7 years. You put in the contract, and if you fink out  
8 too early -

9 (Simultaneous speech.)

10 COMMISSIONER HERIOT: We're going to dock  
11 you 40 grand.

12 VICE CHAIR THERNSTROM: But wait a minute.

13 COMMISSIONER KIRSANOW: The problem is  
14 most states prohibit that. Most states -

15 MR. CONNOLLY: May I interject a comment  
16 about transfer to Moscow issue. I've had cases  
17 involving corporate reorganization and layoffs where  
18 people were transferred from one department to  
19 another, or from one facility to another, and I  
20 strongly recommend to companies that if you're going  
21 to have a transfer program, that the employee should  
22 self-initiate the request for the transfer.

23 I had a case where two extremely qualified  
24 people sued, but they did not request a transfer to  
25 another department, and put the burden on the employee



1 to make that request. And I still haven't heard the  
2 answer to why aggregate statistics are remotely  
3 relevant to age discrimination cases, when really the  
4 effective recommender is the person making the  
5 decision.

6 VICE CHAIR THERNSTROM: Commissioner -

7 COMMISSIONER KIRSANOW: I was next.

8 VICE CHAIR THERNSTROM: Oh, I'm terribly  
9 sorry. Commissioner Kirsanow.

10 COMMISSIONER KIRSANOW: I'm just trying to  
11 think of what question I want to ask.

12 MR. HARPER: Most.

13 COMMISSIONER KIRSANOW: Most. Right.

14 VICE CHAIR THERNSTROM: Another sign of  
15 age.

16 COMMISSIONER KIRSANOW: Let me improve the  
17 question I asked the previous panel, and that is  
18 whether or not there's any thought among these panel  
19 members as to whether or not the threshold for the  
20 protected class should be adjusted?

21 MR. HARPER: It should be adjusted up.

22 COMMISSIONER KIRSANOW: Up, down,  
23 whatever.

24 MR. HARPER: Yes. I'll let the other  
25 panelists answer the policy. I just will point out

1 that in Europe, under the EU Directive, age is now  
2 being included in their laws, and it's going both  
3 ways. It's symmetrical. It's both discrimination  
4 against the young, and discrimination against the old.  
5 And the Supreme Court held here that there's some  
6 ambiguity in the statute. The Supreme Court held  
7 here, I think correctly, that this particular statute  
8 is asymmetrical, and only proscribes discrimination  
9 against the older, in part because it's 40 and above  
10 that's the protected class, which it sends a strong  
11 signal which influence the court. But whether it  
12 should -- what your question is, should it be moved  
13 up, so that only people like 50 and older would get  
14 the advantage. Is that your -

15 COMMISSIONER KIRSANOW: Yes, because I'm  
16 interested in terms of there's not been any  
17 explication of whether the data shows that the median  
18 charging party age is say 50 or 51. That's been -- my  
19 experience is, charges that I see are mainly in the 55  
20 and up category.

21 MR. HARPER: Right.

22 COMMISSIONER KIRSANOW: But the threshold  
23 begins at 40, and I'm wondering whether or not it  
24 makes sense to move that upwards, maybe to winnow out  
25 some, and I don't know this, I'm just positing this,

1 those claims that may be less than meritorious.  
2 You've got individuals who are 41 years old, or 42  
3 years old that may bring a charge based on simply  
4 perception that they've been discriminated against on  
5 the basis of age. Again, going to stereotype, there  
6 are stereotypes that work the other way. In other  
7 words, someone, an employer, a decision maker may make  
8 a rational decision in terms of a layoff, and someone  
9 who's in the protected class may perceive it as on the  
10 basis of age because well, my gosh, you said something  
11 like I was going to be retained based on my  
12 anticipated future benefit. Ah-hah, that is  
13 indicative, that's indirect evidence of age. So, I'm  
14 wondering whether or not it makes sense to adjust it,  
15 and what sense, 45, 50, or something like that.

16 MS. McCANN: It's certainly possible. I  
17 will say, piggybacking on Professor Harper, that,  
18 actually, there are numerous state laws right here in  
19 the United States -

20 MR. HARPER: That's right.

21 MS. McCANN: -- that protect against age  
22 discrimination at any age, because you can be  
23 stereotyped because you're a younger worker, too.  
24 There was a classic New Jersey case where a very  
25 qualified employee was hired to be a Vice President of

1 the bank, apparently, presented himself in a very  
2 mature way. Then when they found out he was in his  
3 20s, the bank was embarrassed that they had hired a  
4 20-something year old as a Vice President, and they  
5 fired him, and he prevailed under New Jersey law.

6 MR. HARPER: Yes, that's right.

7 MS. McCANN: I think that it's worth  
8 looking at whether or not the age should be raised.  
9 I referenced in my comment, when the ADEA was enacted,  
10 I think they were like more than half the job  
11 advertisements had age cutoffs as low as 30 and 35.

12 MS. VENTRELL-MONSEES: Thirty-two, 35.

13 MS. McCANN: I will say that in certain  
14 industries, age discrimination affects people at  
15 younger ages. Again, back to the stereotypes, and  
16 those stereotypes are more likely to be at play, so  
17 anywhere where youth is valued over age, such as  
18 advertising, on-air media. You often see new anchors  
19 discriminated against in their 40s, so you would be  
20 making a policy decision to increase it, but there is  
21 legitimate age discrimination that occurs at younger  
22 ages.

23 COMMISSIONER KIRSANOW: Let me ask another  
24 question with respect to the policy issue. I've heard  
25 from several of you, and I don't, necessarily,

1 disagree, but I want to explore this, that age should  
2 be treated the same as other Title VII protected  
3 classes, but with one or two exceptions, say religion,  
4 that's the only one I can think of. The difference  
5 between age and the other protected classes is, the  
6 other protected classes are immutable.

7 VICE CHAIR THERNSTROM: Pete, can I just  
8 interrupt you. Somebody's got their cell phone near  
9 the microphone. It's making that kind of -

10 COMMISSIONER KIRSANOW: The other  
11 protected classes are immutable. For example, all of  
12 us here barring some unfortunate circumstance will  
13 become part of the protected class. However, not all  
14 of us here would, necessarily, become Black, or Asian,  
15 or something else. I'm going to get older, but I'm  
16 not going to get any blacker.

17 (Laughter.)

18 COMMISSIONER KIRSANOW: So, the point -

19 (Off mic comment.)

20 COMMISSIONER KIRSANOW: I think Professor  
21 Harper said, and I think this is true based on my  
22 experience, that age discrimination is among the types  
23 of discrimination out there, more pervasive and  
24 resilient. I'm not so sure that is the most invidious  
25 or has the type of historical parallel let's say race

1 discrimination has, or other types of discrimination.  
2 None of us at this point want to engage in any kind of  
3 philosophical discussion about that, but the  
4 immutability of a protected class I think does augur  
5 toward the types of proof that may be required by a  
6 trier of fact, or a court in a particular case.

7 Example, Professor Harper probably knows,  
8 and all of us know that the court seems to struggle  
9 mightily with the standards of proof for immutable  
10 characteristics. You know, you've got -- look at  
11 Price Waterhouse, the McDonnell Douglas test, for  
12 example, may not, necessarily, lend itself perfectly  
13 to an age discrimination case, and you've got also  
14 other considerations, all these things where the court  
15 is trying to figure out okay, what is the appropriate  
16 standard of proof. But with respect to an age case,  
17 going to your point about stray comments, I don't  
18 disagree with respect -- a stray comment may be  
19 indicative of age. I'd say it's indirect indication  
20 of age, but very often what you find is a decision  
21 maker may say oh, you're so old that you came over on  
22 the Mayflower. In the scores of age cases I've  
23 handled, 90 times out of 100 that decision maker that  
24 made that comment is older than the guy he's  
25 directing, or as old as the guy he's directing the

1 comment toward; whereas, what you won't see is a -

2 MR. CONNOLLY: Does anybody disagree -

3 COMMISSIONER KIRSANOW: Sir. Mr.

4 Connolly-

5 MR. CONNOLLY: -- that if we lay people

6 off -

7 COMMISSIONER KIRSANOW: Mr. Connolly.

8 MR. CONNOLLY: -- on the basis of

9 favoring -

10 (Simultaneous speech.)

11 VICE CHAIR THERNSTROM: Nobody is

12 interrupting people here.

13 MR. CONNOLLY: I didn't realize I was

14 interrupting. I'm sorry.

15 VICE CHAIR THERNSTROM: You were

16 interrupting Commissioner Kirsanow.

17 MR. CONNOLLY: I can't hear as well.

18 COMMISSIONER KIRSANOW: I'm not

19 suggesting, necessarily, that that's an appropriate

20 comment to make, but in the race cases I've seen, you

21 will have, say, let's just take an example, a white

22 decision maker who calls somebody, exact case I've

23 had, an old coon. Is that -- or saying you're M-F-N.

24 Okay? Maybe because I belong to that protected class,

25 although I don't consider myself -

1 (Interference.)

2 COMMISSIONER KIRSANOW: But maybe because  
3 I belong to that protected class, I find that more  
4 disturbing to me than somebody calling me an old fart,  
5 although I qualify for that, too.

6 (Laughter.)

7 COMMISSIONER KIRSANOW: So, the fact of  
8 the matter is, there are degrees of invidiousness that  
9 I think we are just papering over here. I'm not  
10 saying it's okay, and I don't think any of us are  
11 saying that age discrimination is appropriate. We  
12 think we consider it on an individual basis, but in  
13 terms of the standards of proof that are accorded in  
14 a given case, there are reasons why age is different  
15 from some of the other classes. I'd like to hear your  
16 comments with respect to that.

17 MS. McCANN: All right. Cathy Ventrell-  
18 Monsees and I are going to both address you, and I'm  
19 going to start with the immutability.

20 It's a very legitimate point. And, in  
21 fact, it's one that the U.S. Supreme Court has used to  
22 rule that age is not a suspect class, but is only  
23 entitled to Rational Basis Review and Equal Protection  
24 claims. So, it is something that the court is aware  
25 of, and has taken note of.



1 I think the answer is that once you enter  
2 the protected class -- I think it's immutable, but in  
3 a different way. Once you become an older worker, you  
4 can't say God, this sucks. I am not getting any  
5 interviews. Back when I was 30, I got in the door.  
6 I'm going back and being a 30-year old. You can't do  
7 that once you are in the protected class, so it's not  
8 immutable like race and gender, but in many ways it  
9 is. There's no going back once you get there.

10 VICE CHAIR THERNSTROM: You can't exit  
11 from the class.

12 MS. McCANN: Exactly.

13 MS. VENTRELL-MONSEES: No, you cannot.  
14 And I wanted to address the question about, or the  
15 consideration of how invidious discrimination is  
16 against other classes, and then compare to age, and  
17 that's a historical perspective, and no one disputes  
18 that. From our perspective, when Congress decided to  
19 use the exact same language prohibiting age  
20 discrimination as it did in Title VII, from a legal  
21 perspective, that entails, should entail the same  
22 standards of proof. Congress didn't use weaker  
23 language, didn't impose greater burdens on older  
24 workers in the language that it chose. It certainly  
25 could have, and so from a policy perspective, and a

1 litigator's perspective, when we look at those words  
2 that are identical, and the prohibitions of the Age  
3 Act, and in Title VII to say that there should be no  
4 difference in how an older worker proves age  
5 discrimination, than compared to how a woman proves  
6 sex discrimination. And, indeed, the courts in many  
7 areas use the same theories, same proof theories, some  
8 of the same defenses, some of the same inferences,  
9 like a same actor inference.

10 For example, when an older worker is hired  
11 and then fired within a few years by the same  
12 supervisor, many of the courts have created an  
13 inference that says well, how can that be age  
14 discrimination? It didn't just appear in a few years.  
15 The supervisor was unbiased enough to hire this older  
16 worker, so that must have continued. There is no bias  
17 that grew suddenly when he or she fired the older  
18 worker. That theory has also been applied in race and  
19 sex discrimination cases, so it has -- it should go  
20 both ways.

21 When Congress makes the policy decision to  
22 apply the same standards, we, as advocates, would say  
23 the courts should apply the same standards. And the  
24 fact that there may have been less historical  
25 discrimination against older workers, and the fact

1 that the discrimination, historically, was different,  
2 it's not invidious. Okay? But we can take the same  
3 comparison of the history of race discrimination  
4 compared to sex discrimination.

5 Remember that gender, sex was only added  
6 as a prohibited factor in Title VII at the last moment  
7 to try to scuttle Title VII. Okay? Title VII of the  
8 Civil Rights Act was focused on race discrimination.  
9 The southern Democrats thought that they could damage  
10 the bill by adding gender. It didn't turn out that  
11 way. Now, today, in the 21st century, we don't look  
12 at sex discrimination cases and say well, the history  
13 is different, so should we apply a different standard?  
14 Now, in constitutional law there are clearly different  
15 standards, but we're dealing with statutes written by  
16 Congress, and interpreted by the courts with very  
17 confusing results that, as Laurie had said, in the  
18 Supreme Court cases impose greater burdens of proof on  
19 older workers, that for many of us are inexplicable  
20 given what Congress did.

21 COMMISSIONER KIRSANOW: Well, let me  
22 suggest an explanation. I don't know that this is  
23 one. And I'm not -- I know the Gross case, and the  
24 explanation there, and that's another debate as to  
25 whether or not the 1991 amendments had application to

1 Title VII, not ADEA.

2 MR. HARPER: That's not -

3 COMMISSIONER KIRSANOW: But going -

4 MR. HARPER: Go ahead.

5 COMMISSIONER KIRSANOW: But going to Ms.  
6 Milito's point, there are -- in terms of policy, and  
7 standards of proof, you have got a smaller employer  
8 who, for the reasons that Ms. Milito posited, has to  
9 terminate someone who is in a protected class. If the  
10 standard of proof is one that is a strict McDonnell  
11 Douglas balancing test, in order to make a prima facie  
12 case, Ms. Milito's company is going to be hit with the  
13 costs of defense, which are prohibitive. And the  
14 policy inquiry is whether or not we have -- we want to  
15 protect those individuals who may be the subject of  
16 discrimination, but by the same token, we have to  
17 understand that it is a business, and we make a  
18 legitimate business case, but because the standards of  
19 proof are such, virtually everybody can bring, or make  
20 out a prima facie case causing Ms. Milito's client to  
21 incur significant damages, which then, the law of  
22 unintended consequences results in employers being  
23 skittish about hiring overall, but specifically hiring  
24 anybody in a particular protected class. Those are  
25 the real world implications.

1           They're not being bad guys. They're not  
2 being bad guys, they're really not. Their mom and pop  
3 guys going like, geez, how do I maintain my business?  
4 Because, remember, it's the same kind of consideration  
5 that the Fair Labor Standards Act was promulgated for;  
6 that is, you've got smaller businesses who are  
7 permitted to hire people outside the statute, meaning  
8 family members, so they can survive.

9           ADEA is promulgated under the Fair Labor  
10 Standards Act, also, I think with the same type of  
11 mind set. We have to understand, businesses need to  
12 survive, or older workers, younger workers, any  
13 workers are not going to have a job.

14           MR. HARPER: But what -- in all due  
15 respect, what Ms. Milito's example, her hypothetical  
16 could have equally been used for race, or sex. It  
17 could have had two -- the two people that were being  
18 considered for layoff both could have been a member of  
19 the same race. They both could have been white. You  
20 know, Title VII is symmetrical. Everybody is in the  
21 protected class. It's unlike ADEA, but they both  
22 could have been women, or they both could have been  
23 African American, and she could have made the same  
24 point. I think you were suggesting that. So, I think  
25 that once the decision is made by Congress to

1       proscribe something, and the -- we can debate which  
2       classes should be covered, but the decision was made  
3       to cover age because of the stereotyping found in the  
4       Wirtz report. And I think it was a good decision, and  
5       because of the impact, potential impact on the  
6       economy. But once that decision is made, why should  
7       the proof methodologies be different?

8                 Now, there may be different defenses. I  
9       propose because of things in my statement, things  
10      special about age, perhaps there ought to even be this  
11      probationary period, so encourage employers who are  
12      worried about being sued to hire someone, find out if  
13      they are a good worker. Maybe you make those kinds of  
14      adjustments, but once you decide to prescribe  
15      intentional discrimination, let's say on the basis of  
16      age, just like race and sex, I don't see any of your  
17      arguments being relevant to the proof methodology.

18                COMMISSIONER GAZIANO: I'll raise one  
19      later, but the other Commissioners have -

20                VICE CHAIR THERNSTROM: Yes, I really need  
21      to go to some other Commissioners.

22                COMMISSIONER TAYLOR: I'm listening to  
23      this debate, and I'm wondering about the disconnect  
24      between the language Congress uses in the statute, and  
25      the way the public perceives this issue, and the way

1 the courts treat the issue. So, I'm trying to get my  
2 mind around that, and there's been a lot of discussion  
3 about it. And it brought to mind a real world  
4 example.

5 We have a current opening in our Supreme  
6 Court, and the last time I checked, folks who may have  
7 graduated from one of the finest institutions in  
8 America, the Ivy League law schools, which seems to be  
9 a requirement these days. Right?

10 MR. HARPER: Harvard or Yale.

11 COMMISSIONER TAYLOR: Who sit on a Court  
12 of Appeals with a pristine ready record, and no paper  
13 trail. Give me the perfect candidate, but if they're  
14 over 55, they need not apply. And that seems to be  
15 widely known in this town. And I'm not going to pick  
16 on the current Administration, but I don't see any hue  
17 and cry from the folks who advocate for a policy  
18 change on that issue, and it seems to me -

19 COMMISSIONER GAZIANO: And in the Supreme  
20 Court they all live to 92.

21 COMMISSIONER TAYLOR: I mean, it seems to  
22 me that -

23 VICE CHAIR THERNSTROM: That's rational  
24 discrimination.

25 COMMISSIONER TAYLOR: Right. I mean, I

1 see a disconnect between what's going on in the public  
2 discussion, and what the language of the statute  
3 reads. And I don't know, I'm just wondering, how do  
4 we explain this disconnect that I see, where it seems  
5 perfectly plausible for folks in any White House,  
6 that's my perception. I've never worked in the White  
7 House, I don't know what's going in this White House,  
8 but it seems like they're having that type of open  
9 discussion, and no one has a problem with it. So, I'm  
10 struggling a bit with what's going on. Is that a bona  
11 fide qualification for the job? Is that what that is,  
12 a bona fide defense? Well, of course, you don't have  
13 to go through the nomination process for another two  
14 decades. Everybody knows that. Is that a bona fide  
15 defense?

16 MR. HARPER: When Dwight Eisenhower picked  
17 William Brennan for the Supreme Court in the '50s, he  
18 said to his Attorney General, we need an Irish  
19 Catholic from the Northeast. And, of course, that was  
20 before the '64 Civil Rights Act, so things have  
21 changed, but they're stayed the same in some ways.

22 COMMISSIONER TAYLOR: I'm just -- it's  
23 really an open question. I don't see -- it seems, to  
24 me, to be reflection of reality -

25 COMMISSIONER GAZIANO: Excuses. The



1 President says this job is really so important, it's  
2 worth discriminating on the basis of age.

3 COMMISSIONER TAYLOR: Well, that -- is  
4 that a bona fide -

5 COMMISSIONER GAZIANO: Even though there's  
6 something in the water that keeps them fit, and smart  
7 longer than average. This is so important, we've got  
8 to go by the actuarial tables.

9 MS. VENTRELL-MONSEES: How about  
10 discrimination based on sex? If he really wants a  
11 woman, he's going to pick a woman, and not a man.

12 VICE CHAIR THERNSTROM: Yes.

13 MS. VENTRELL-MONSEES: Okay?

14 COMMISSIONER GAZIANO: I don't like that,  
15 either. I don't like that either.

16 MS. VENTRELL-MONSEES: I don't say that I  
17 like it, either. I'm not -

18 VICE CHAIR THERNSTROM: These are  
19 political appointments.

20 MS. VENTRELL-MONSEES: Right.

21 COMMISSIONER TAYLOR: Wait a minute.

22 MS. VENTRELL-MONSEES: But I understand  
23 your disconnect, because look at -- our society is  
24 full of disconnects. We are very confused because we  
25 may -- whether you walk the walk, and talk the talk,

1 we're inconsistent in application of some of the  
2 principles that Congress may espouse, but then we  
3 build in exceptions. Okay? We have BFOQs. Right?  
4 We have them for, in Title VII all but race. There's  
5 a BFOQ for age to recognize some balancing, where  
6 gender may be relevant to a particular job, where age  
7 may be relevant to a particular safety job.

8 COMMISSIONER TAYLOR: I guess I'm -- my  
9 last comment. I'm troubled when those BFOQs tend to  
10 be applied in a political context, when Congress did  
11 not apply 1983 to itself, and very quickly applied it  
12 to the private sector. And in this context, that  
13 we're willing to accept that discussion about an  
14 Appellate Court judge with the right record need not  
15 apply if they are over 65. We accept that political  
16 context, but those BFOQs are so much limited on how  
17 they scrutinize for private employees. To me, that  
18 dis -- I am not one to allow a government to have that  
19 wide a berth in terms of its exceptions. If we're  
20 going to pass laws, and have true policies -

21 MR. HARPER: The Age Discrimination Act  
22 applies to federal government, and it applies to state  
23 government, but this is -- please, the Supreme Court  
24 is a -- this is a political -- you know why they -

25 COMMISSIONER TAYLOR: I know why, but -

1 MR. HARPER: Bush and Obama both want --  
2 and every President, because things are polarized  
3 politically. You know the reason -

4 COMMISSIONER TAYLOR: I know. And I would  
5 argue, though, that if you're a small employer to say  
6 well, it's different there because it's political is  
7 a balm that does not address the wound. It just  
8 doesn't -- to me, that doesn't make sense, and I want  
9 to put it on the table and say if we're going to have  
10 these exceptions, let's have some broader exceptions,  
11 and not exclude small businesses. I just -- I don't  
12 want our conversation to so easily allow for the  
13 political class to get a pass.

14 MS. McCANN: Well, there are many -- I  
15 mean, even in private industry -

16 COMMISSIONER YAKI: Stop. This is  
17 Commissioner Yaki. Let me just say this. Sorry for  
18 interrupting you, but I've been very patient  
19 throughout this entire discussion. I mean,  
20 Commissioner Taylor, please. If you really want to  
21 start going down that pathway, then we can start  
22 talking about the application of Title VII to  
23 political appointees by prior administrations in terms  
24 of their composition, makeup, and what have you, in  
25 terms of diversification to America, but we don't,

1 because we understand that the pool is very limited,  
2 that the types of things we're talking about are very  
3 limited. It is part of the political versus what is  
4 process. And whether you think it's hypocrisy for the  
5 political process to say well, we're only going to  
6 apply this, or I'm going to appoint my friends, and  
7 their friends, and their proteges to the Office of  
8 Legal Counsel, or the AG's office, or whatever it is,  
9 and they all happen to be of one ilk versus another.  
10 I mean, we can do that, but that's a debate that we  
11 settle every four years politically through an  
12 election, because people then get to -- we elect  
13 people because we know they're probably going to make  
14 those kinds of choices.

15 That's very different than someone who is  
16 in an economically different position to a private  
17 employer who does not have that same kind of election  
18 process. He cannot say to the boss of that company  
19 well, you know, in four years you're going to be gone.  
20 Someone else is going to -- that doesn't scour, that  
21 doesn't take. It has no application.

22 My question, though -

23 COMMISSIONER TAYLOR: I want to respond to  
24 that -

25 COMMISSIONER YAKI: Okay.

1                   COMMISSIONER TAYLOR: -- before -- if I  
2 may, Madam Chair. I appreciate that political  
3 perspective, but that's, as the Professor just pointed  
4 out, inconsistent with the law. The law applies  
5 equally.

6                   COMMISSIONER YAKI: No, the law -

7                                 (Simultaneous speech.)

8                   COMMISSIONER YAKI: -- federal, civil  
9 service. It does not, I would submit, apply to the  
10 Supreme Court.

11                   MS. McCANN: Or any political appointee.

12                   COMMISSIONER YAKI: Or choosing the  
13 Assistant Secretary of Agriculture -

14                   COMMISSIONER GAZIANO: But it has the same  
15 corrosive effect, if not more.

16                   COMMISSIONER YAKI: Well, then I would  
17 submit that that corrosive effect began long before,  
18 and the idea that somehow there's any corrosive effect  
19 because of this Administration is garbage, because --

20                   COMMISSIONER TAYLOR: It's not about a  
21 single administration.

22                   COMMISSIONER YAKI: I mean, but -

23                   VICE CHAIR THERNSTROM: Wait a minute.  
24 Every -- I mean, political appointments, calculations  
25 are made about racial balance, gender balance,

1       whatever, all the time.

2                   COMMISSIONER TAYLOR: I'm not denying the  
3       reality. I'm just -

4                   VICE CHAIR THERNSTROM: There's nothing  
5       wrong with that.

6                   COMMISSIONER TAYLOR: I'm just pointing  
7       out -

8                   COMMISSIONER YAKI: I think there is.

9                   COMMISSIONER TAYLOR: I'm not denying  
10      reality. I'm just pointing out that it's -- I don't  
11      see how that's a valid response to the small business  
12      owner who -

13                               (Simultaneous speech.)

14                   COMMISSIONER YAKI: I think the  
15      fundamental difference is that every four years, or  
16      two years, you can tell that person -- you can decide  
17      that someone else is going to make those decisions  
18      that you, apparently, have some issues with; whereas,  
19      an employee, whereas, my cousin, or your child, or  
20      someone's mother when they're going into Corporation  
21      X, Y, or Business X, Y, or Z, doesn't have that same  
22      kind of ability. There is no franchise. There is --

23                               (Simultaneous speech.)

24                   COMMISSIONER TAYLOR: Not that I have a  
25      problem with, because, actually, my position supports

1 equal application of law. My position supports  
2 applying these standards across the board. Your  
3 position supports exempting the political -

4 COMMISSIONER YAKI: My position is simply  
5 to say, to use the -- to try and create some kind of  
6 -- the reason why, quite frankly, Commissioner, that  
7 I object to what you're saying is because I think it  
8 is a false analogy. I think that it's simply used for  
9 political purposes, and not because of any particular  
10 adherence to an overall -- now you and I may differ on  
11 that, but that's the way I perceive it, because,  
12 usually, the way these arguments get couched then is,  
13 then it becomes a question of well, then, let's simply  
14 start using these new principles to tank this other  
15 thing politically, because that's exactly what  
16 happens. It becomes a political argument, a political  
17 discussion. Well, those are solved politically, which  
18 is a different context than we're talking about for  
19 private employment, the private sector, for private  
20 employees.

21 So, you and I may differ about that. I  
22 simply say, now, you may have perfectly -- you may be  
23 the exception to the rule, Commissioner.

24 COMMISSIONER TAYLOR: Thank you.

25 COMMISSIONER YAKI: You may the person who

1 actually believes that this is a principle that  
2 everyone should -- I simply see it, perhaps I'm just  
3 jaded from 20 years of being in politics, that  
4 frequently whenever these things comes up, it's simply  
5 brought up and used as a mechanism to divide and  
6 further antagonize an electorate, and diminish their  
7 confidence in government by simply trying to create  
8 inconsistencies, where, really, the consistency is  
9 simply that of every four years that whoever is  
10 criticizing changes sides. And the people who win  
11 every four years, or two years, aren't the ones who  
12 criticize, it's the ones who are on the outside. And  
13 that's just American democracy. That's just the way  
14 the -

15 MS. McCANN: But the anomaly that you're  
16 pointing out here -

17 VICE CHAIR THERNSTROM: Wait a minute.  
18 One person at a time.

19 MR. CONNOLLY: I'm going to have to  
20 adjourn.

21 COMMISSIONER HERIOT: No, you don't  
22 adjourn, you leave.

23 COMMISSIONER YAKI: But I actually have a  
24 question before -- my question was Professor Harper's  
25 statement, he ended prematurely. And there were other



1 recommendations that he was talking about that he did  
2 not get to talk about. And I was just going to ask  
3 him -- well, at least there was one you hurriedly went  
4 through, but you said there was another one that -

5 MR. HARPER: There is another one. All  
6 right.

7 COMMISSIONER YAKI: That's all I was going  
8 to ask.

9 MR. HARPER: Well, this is, actually, a  
10 suggestion in response to one of Commissioner  
11 Kirsanow's question of the first panel. Your question  
12 was, perhaps the longer unemployment, greater  
13 unemployment of older workers is explained, in part,  
14 by the fact that their wages have gone up, and they  
15 have the expectations of getting a higher wage. And  
16 it's more difficult for them to do that in a new job;  
17 whereas, the younger worker has a lower -- you gave  
18 the example, your sister, as well. And that question  
19 reflects the reality of the labor market, where  
20 people's wages do go up with the career, hopefully, at  
21 least if they have longer run careers, and they have  
22 some success. And employers have internal labor  
23 markets, labor economists have shown, that reflect  
24 this, to keep people happy. There are all sorts of  
25 reasons why an employer wants to do that, even

1 sometimes increasing wages after the marginal -- more  
2 than the marginal productivity of the older  
3 experienced worker goes up.

4 But then, particularly in an economic  
5 downturn, an employer says gee, you know, I want to  
6 get rid of some of those older workers whose wages  
7 have gone up more than their marginal productivity,  
8 because that's a more efficient thing for us to do,  
9 and, normally, they don't do that, because they want  
10 to encourage the older -- the younger workers to stick  
11 around and keep working hard, but in an economic  
12 downturn, they become opportunistic. So, there are  
13 reasons why that's the case.

14 My proposal is that -- I think the Supreme  
15 Court was correct in Hazen Paper under the current  
16 statute. I disagree with the criticism of Hazen  
17 Paper, but I think the statute should be somewhat  
18 modified so that if the employee is willing to take a  
19 lower wage, if they're willing -- let's use her  
20 hypothetical. Okay? The hypothetical that two --  
21 let's say they're two accountants, and the employer  
22 says well, I'm going to get rid of the more expensive  
23 accountant, who has more experience and seniority,  
24 because they're at a higher wage. I think that's a  
25 cost justification, and that's justified. That's not

1 based on age, that's based on salary, or seniority.  
2 However, I think that if that higher wage is based on  
3 the employer's pushing that up with seniority, the --  
4 it would -- I think it makes sense, policy sense, to  
5 say that the employer should give the employee the  
6 opportunity to work at the lower wage. So, it  
7 shouldn't be able to use its own internal labor market  
8 increase as an excuse not to employ. Some employees  
9 won't. And you're right, some employees won't work at  
10 the lower wage, but I don't think that the higher wage  
11 should be an excuse to not give the employee the  
12 opportunity.

13 COMMISSIONER KIRSANOW: All right. One  
14 observation, and one question. Again, this goes to --  
15 if you look at some of the other discrimination  
16 statutes, you've got the Americans With Disabilities  
17 Act, for example, where you've got to engage in the  
18 interactive, okay, what other jobs - can you perform  
19 this job with or without a reasonable accommodation?  
20 What you could ask a worker who has a higher salary,  
21 who also happens to be within the protected class is,  
22 will you accept this lower wage, without it being,  
23 necessarily, indicative of an attempt to  
24 discrimination, that we have an interactive process.  
25 You've given the opportunity to somebody to retain

1 their job.

2 Second is, question for the entire panel,  
3 just I'm wondering. In terms of -- first of all, I  
4 don't know that there are that many BFOQs, but in  
5 terms of some other standards, would any of you think  
6 that a different, or a modified standard, would apply  
7 in RIF, in Reduction In Force cases, as opposed to a  
8 disparate individual single employee disparate  
9 treatment case?

10 MS. VENTRELL-MONSEES: A different  
11 standard for ADEA than for Title VII?

12 COMMISSIONER KIRSANOW: A different  
13 standard within ADEA. For example, if someone is  
14 discharged pursuant to a reduction in force, broad-  
15 based companywide reduction in force, should there be  
16 a higher standard of proof, or lower standard of proof  
17 than in a single employee termination, which is a  
18 disparate treatment case? And let me tell you why I  
19 ask that question.

20 In a reduction in force, qualified  
21 employees will, necessarily, be let go. Okay? So, it  
22 seems to me, and I don't know if this is the  
23 appropriate balance, that possibly having a more  
24 elevated standard of proof, or possibly an additional  
25 standard to make out a prima facie case, such as

1 showing replacement, as opposed to reassignment. If  
2 you have a disparate treatment of a single employee,  
3 I think you have the McDonnell Douglas standard that  
4 could apply, or graft on any other iteration, all the  
5 other cases. Any thoughts with respect to that?

6 MS. VENTRELL-MONSEES: There already is --  
7 I mean, the McDonnell Douglas burden of proof, a prima  
8 facie case has been adapted to provide for in RIF  
9 situations, and that would apply to Title VII, race,  
10 sex claims, as well as ADEA, age claims. So, the  
11 courts have accommodated the recognition that  
12 employees across the board, good employees will lose  
13 their jobs in a RIF. They may be in a protected  
14 category, so you need more than just being, basically,  
15 in your ordinary McDonnell Douglas individual  
16 disparate treatment case. In a RIF, it's modified to  
17 recognize that a RIF is different.

18 COMMISSIONER KIRSANOW: And would that  
19 modification include a replacement requirement? In  
20 other words, a showing that that employee has been  
21 replaced by someone outside the protected class, or is  
22 substantially younger?

23 MS. VENTRELL-MONSEES: Well, here's the --  
24 the standard needs to be flexible, and the courts get  
25 into traps when the standard is not flexible, because

1 the facts of a particular RIF may differ. There may  
2 be no replacements. Jobs can be assumed by -

3 COMMISSIONER KIRSANOW: Reassigned.

4 MS. VENTRELL-MONSEES: Reassigned and  
5 assumed by a number of employees. Positions may  
6 entirely disappear, new positions may be created. So,  
7 you have to examine the entire RIF process, the  
8 decision making process, the evaluation process, was  
9 it applied fairly? Was it applied in a non-  
10 discriminatory way, to determine how the -- to play  
11 out that standard, and it will differ from RIF to RIF.  
12 And when the courts do it right, when they acknowledge  
13 that the McDonnell Douglas element should be flexible  
14 to adapt to the particular facts presented in the  
15 case, then it works. It makes sense, because what  
16 you're trying to do is based on all of the factors  
17 that are occurring in that RIF process, was there  
18 discrimination at play? Did race, age, sex, whatever  
19 it is, did it play a role, and did it have a  
20 determinative influence on the employer's decision to  
21 select that particular individual for the RIF, or was  
22 there something else, like whether it's sexist  
23 stereotyping, ageist stereotyping, less potential,  
24 less adaptability, whatever the employer may have been  
25 considering, the principle would always be did the

1 employer ignore age, ignore sex, race, whatever it  
2 might be, even in the RIF.

3 MS. MILITO: And I'll just say, too,  
4 because with any layoff, every employee, as has been  
5 pointed out, falls in probably multiple protected  
6 categories. So, I mean, when I'm counseling  
7 employers, it's -- and this is something I think Mr.  
8 Connolly pointed out in his written submission, too,  
9 I counsel employers to focus on the position. You're  
10 not focusing on the employee. It's not, "we're going  
11 to eliminate Bart's job." It's: "are we going to  
12 eliminate somebody on the assembly line, or somebody  
13 in the front office?" You're looking at positions,  
14 and that's why flexibility is very important for  
15 employers.

16 COMMISSIONER GAZIANO: Can I claim my  
17 round for this panel? I only asked questions from the  
18 last -

19 VICE CHAIR THERNSTROM: Hold on a minute.  
20 I have not asked any questions, and I would like to  
21 address one question. And we do have to soon wrap up,  
22 but is that one question to Commissioner Taylor. You  
23 cannot be serious that -

24 (Laughter.)

25 VICE CHAIR THERNSTROM: -- you think a new

1 administration coming in and putting together a  
2 cabinet, or thinking about Supreme Court appointments,  
3 whenever they arise, but let's just start with the  
4 cabinet, that it's illegitimate to think wait a minute  
5 we can't have all white males, we can't have all  
6 women, we can't have whatever, that we've got to  
7 create a political profile that serves us politically  
8 well. And with respect to Supreme Court appointments,  
9 when the buzz started about who was going to, in fact,  
10 become the nominee, one of the points I kept making  
11 about Merrick Garland, no, he is not going to appoint  
12 another white male who is a Jew. Okay. We're now  
13 going to have nothing but Jews and Catholics, but the  
14 -- Elena Kagan is not male.

15 Now, of course there are political  
16 calculations that go into the creating of a profile  
17 for an administration, and there would be screaming  
18 bloody murder if, indeed, you had a cabinet that  
19 wasn't in balance certainly by gender, race, and  
20 ethnicity.

21 COMMISSIONER TAYLOR: I can acknowledge  
22 all the political realities, and I can acknowledge  
23 exactly every point you have made. I can also say to  
24 Commissioner Yaki that I don't raise this issue for  
25 purposes of bludgeoning any particular administration,



1       whatsoever. I raise it, though, for this reason, not  
2       as an attack on the political analysis, but as a  
3       defense of the small business owner to say why is a  
4       small business owner not as valuable, for that person  
5       who started a business, or for a company that is  
6       trying to grow its business. I think that person, or  
7       that company has values and principles that need  
8       protection as much as any political class or process,  
9       so it's a defense of an entity, not an attack on the  
10      political analysis.

11               VICE CHAIR THERNSTROM: Well, and I would  
12      add to that, building on something Professor Harper  
13      said about age in universities, frankly, I think it is  
14      ridiculous that universities cannot say to very  
15      elderly people who are not functioning very well as  
16      academics any more, you know -

17               MR. HARPER: Right. Well, see, what  
18      happened was, tenure and not having a limit on age, or  
19      intention, and for a while, there was a phasing out of  
20      the -- for universities of not having any limit on the  
21      -- but that's a different debate.

22               VICE CHAIR THERNSTROM: Right.

23               MR. HARPER: But I understand your point.

24               VICE CHAIR THERNSTROM: Yes. I mean -

25               COMMISSIONER GAZIANO: Can I make -

1 VICE CHAIR THERNSTROM: Sure.

2 COMMISSIONER GAZIANO: This will mostly be  
3 a comment. This was going to be my -- but it may  
4 engender -- on the Gross decision, and some of the  
5 other comments that I think were brilliantly raised by  
6 Commissioner Kirsanow, first of all, I want to just  
7 reject Professor Harper's, although, I thought it was  
8 very clever. Let me -- well, I've really enjoyed all  
9 of your testimony. I'm sorry I can't ask more  
10 questions, but I have to reject your clever attempt at  
11 characterizing the Gross opinion as activist, because  
12 you think the decision was not expressly presented in  
13 the question presented. The standard the Supreme  
14 Court uses is whether it was -- whether issue it  
15 decides is fairly presented within the question. I  
16 think it is, but I'll just leave it at that.

17 MR. HARPER: I would like to respond to  
18 that, but go ahead.

19 COMMISSIONER GAZIANO: Okay. But let me  
20 get out the whole question. I also know that you  
21 disagree with the court's technical analysis. I will  
22 let the court speak for itself, whether the '91  
23 amendments should have applied to -- I think they know  
24 that better, and I'll let them -- but I want to now  
25 get back several interesting discussions, particularly

1 between Ms. Milito, and you, and Commissioner Kirsanow  
2 on why you think it's illogical to have any different  
3 standards. And here I will suggest that the Supreme  
4 Court and Congress, the Supreme Court and Congress are  
5 considered with the relationship between likely Type  
6 1 and Type 2 errors, Type 1 error being that the  
7 person discriminated against doesn't get a recovery,  
8 Type 2 errors, the person gets a recovery where  
9 there's no discrimination in the case of -- this is  
10 implicit in a lot of the Supreme Court's opinion. In  
11 the case of race discrimination, the Supreme Court  
12 said there's two reasons to apply strict scrutiny, one  
13 of which is not just because it's immutable.  
14 Certainly, that is a factor, and that's in all their  
15 decisions, but it is -- there is no difference, or  
16 almost always no difference between the races, and,  
17 therefore, there can be almost no good reason to  
18 discriminate, so we need a strict standard to flesh it  
19 out, as compared to gender discrimination. There  
20 aren't many, but there are a few differences between  
21 men and women, so we'll have an intermediate scrutiny.

22 The other reason that relates to  
23 immutability, but is different, is with regard to  
24 race, it could be the decision maker, not only is it  
25 immutable, but it's an other, it's different than you;

1       whereas, a fact in gender, even us guys, we almost all  
2       have sisters, mothers, daughters, wives, partners who  
3       we love, so it is less likely in some sense that we  
4       would want them -- with regard to age, no matter  
5       whether it's reversible, or not, once we are in it, we  
6       all know we will be in -- we either are in it, or will  
7       be in it, so for all of those reasons, a policy maker  
8       might decide that the Type 2 error risk is really much  
9       greater, and we really do not need a burden of proof  
10      like strict scrutiny, or intermediary scrutiny to  
11      flesh out the likely impermissible motives. We think  
12      it's a much closer question as ex ante, so we don't  
13      want to tilt the table. What do you think about that?

14               MR. HARPER: All right. I really want to  
15      respond. Your argument is about equal protection  
16      analysis, and the level -

17                       (Simultaneous speech.)

18               MR. HARPER: No, no, no. Let me -- this  
19      is very important, this distinction between equal  
20      protection and Title VII and the ADEA. Equal  
21      protection analysis starts after the determination  
22      that one of the -- this characteristic, whether it's  
23      race, or sex, whatever, age is taken into account, and  
24      then the scrutiny is whether that was taken into  
25      account for a malignant purpose. Okay? That's what

1 we're scrutinizing.

2           Whereas, under Title VII, or the ADEA,  
3 there -- it doesn't make any difference whether it's  
4 animus or malignancy. The issue under McDonnell  
5 Douglas, the issue is, was race, sex, age, whatever,  
6 taken -- was that taken into account? That's the  
7 issue. So, it's a very different issue.

8           You said some very interesting things  
9 about equal protection analysis, and it's a big  
10 discussion. And a lot of it I agreed with, what you  
11 said about equal protection. I don't think that it is  
12 applicable in the -

13           COMMISSIONER GAZIANO: Aren't there  
14 similar or -

15           MR. HARPER: No, they are not the same.

16           COMMISSIONER GAZIANO: -- analogous  
17 reasons why Congress might want to tinker with the  
18 type of evidentiary, or other reason?

19           MR. HARPER: I see the argument, and it  
20 could be made to Congress. I don't agree with it, but  
21 I think it definitely -- there's some weight to it,  
22 and it could be made to Congress. However, when you  
23 have statutes that have the exact same words, it seems  
24 to me that a court, and this is a question of what a  
25 court should do, and what Congress should do, but a

1 court ought to interpret those words in the same way.  
2 And that brings me back to Gross, and the reason I say  
3 that that is a very activist judicial opinion is not  
4 because they didn't follow the 1991 Act. I think that  
5 there were very good reasons for them not to follow  
6 the 1991 Act. It's because they didn't choose --  
7 because they moved away from the choice between the  
8 '91 Act on the one hand, and their prior precedent,  
9 Price Waterhouse, under the same language on the  
10 other, and they went over here. Congress amends Price  
11 Waterhouse in one direction, and rather than going in  
12 that direction, it was fine for them, because they  
13 didn't amend ADEA to go with the '91 Act, but rather  
14 than going in that direction, the court goes totally  
15 in the other direction.

16 It was argued, Price Waterhouse and the  
17 '91 Act, they said neither. We're going with the  
18 dissents in Price Waterhouse, because now we have the  
19 votes. That's what I object to, because it is a  
20 judicial restraint, judicial conservatism is being  
21 confined by precedent, or by signals from the  
22 political branch. That's what I object to.

23 MS. MILITO: Please, please, please.

24 MR. HARPER: I'm sorry that I -

25 VICE CHAIR THERNSTROM: I'm very, very

1       sorry. I am really going to cut off discussion, but  
2       have it outside.

3                               (Laughter.)

4               COMMISSIONER YAKI: That's two falls out  
5       of three.

6               VICE CHAIR THERNSTROM: I got my arm  
7       twisted here by the Staff Director.

8               COMMISSIONER KIRSANOW: The Staff Director  
9       is twisting your arm? We can overrule him, can't we?  
10       We're Commissioners.

11                              (Laughter.)

12              VICE CHAIR THERNSTROM: Now, wait a  
13       minute.

14              MR. HARPER: We've having fun here.

15              VICE CHAIR THERNSTROM: We spent a lot of  
16       time, and we can continue this discussion.

17              COMMISSIONER KIRSANOW: I would just urge  
18       everyone to get their comments in. July 12th is when  
19       it's -

20              VICE CHAIR THERNSTROM: Yes.

21              COMMISSIONER KIRSANOW: Because our  
22       reports will go places, maybe even to the EEOC, and I  
23       am interested in your comments with respect to the  
24       kind of -- having a discussion with respect to taking  
25       a reduction in pay, because I think, unfortunately, in

1 our discrimination laws, it's an adversarial process  
2 that's been set up, with maybe the exception of the  
3 ADA. I like the interactive process, maybe give a  
4 safe harbor to employers who engage in that process  
5 without there being a presumption that they're engaged  
6 in invidious age discrimination.

7 VICE CHAIR THERNSTROM: I mean, there's no  
8 reason why subsequent questions from Commissioners  
9 cannot be submitted to these panelists. Right?

10 STAFF DIRECTOR DANNENFELSER: I believe  
11 they can do that, yes.

12 VICE CHAIR THERNSTROM: Right. So, this  
13 has been great. Thank you so much, both panels were  
14 great. We're having a 15-minute break.

15 STAFF DIRECTOR DANNENFELSER: Ten.

16 VICE CHAIR THERNSTROM: Ten?

17 STAFF DIRECTOR DANNENFELSER: All right,  
18 12:30, come back at 12:30.

19 (Whereupon, the proceedings went off the  
20 record at 12:20 p.m.)  
21  
22  
23  
24  
25



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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Age Discrimination Briefing

Before: US Commission on Civil Rights

Date: 06-11-10

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

*Neal R Gross*

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Court Reporter

**NEAL R. GROSS**

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