

**ADEA AND THE HOSTILE WORK  
ENVIRONMENT CLAIM: ARE THE CIRCUIT  
COURTS DRAGGING THEIR FEET AT THE  
EXPENSE OF THE HARASSED OLDER  
WORKER?**

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*Congress enacted the Age Discrimination in Employment Act (ADEA) in 1967 in order to eliminate age discrimination in employment. In its purpose and statutory language, the ADEA mirrors Title VII, its predecessor in fighting discrimination in the workplace. The methods of proof initially available under Title VII and the ADEA shared the requirement that the plaintiff present evidence of an adverse employment action with economic implications. However, in recognizing that the effects of discrimination are not always outwardly apparent, courts adopted a "hostile work environment" claim under Title VII. Unlike the other established claims under Title VII, this method of proof allows for a viable claim of discrimination even though a tangible, adverse employment action is not readily apparent. While the hostile work environment claim has been widely accepted under Title VII, the circuit courts have been hesitant to fully analyze the issue and adopt this claim under the ADEA.*

*Ms. Gembala advocates the universal adoption among the courts of the hostile work environment claim under the ADEA, as it has been accepted under Title VII. Ms. Gembala supports her position through an analysis of the purpose of the ADEA, the policies that it promotes, and the similarities between the ADEA and Title VII.*

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## I. The Incomplete Protection of the ADEA

The Age Discrimination in Employment Act (ADEA)<sup>1</sup> was enacted in 1967 in response to congressional findings that older workers: (1) were at a disadvantage in terms of retaining and finding new employment; (2) were negatively impacted by many employer practices, including the setting of arbitrary age limits; (3) had higher incidents of unemployment as compared to the rest of the population; and (4) placed a burden on commerce as a result of discrimination imposed on them by employers.<sup>2</sup> Thus, the ADEA's purpose was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment."<sup>3</sup>

Although thirty years have passed, the ADEA still remains a necessary statute due to both the growth rate of the elderly population and the persisting stereotypical view regarding the abilities of the elderly in the workplace.<sup>4</sup> America's elderly are the fastest growing segment of the population with their numbers having reached 33.2 million in 1994.<sup>5</sup> During the twentieth century, the number of people aged sixty-five and older has multiplied eleven times.<sup>6</sup> In contrast, the number of people under sixty-five has undergone a growth rate of only three times their original number.<sup>7</sup> This growth spurt among the elderly shows no sign of stopping. The U.S. Census Bureau projects that the elderly population will reach eighty million by the year 2050, more than double the population today.<sup>8</sup> This growth can largely be attributed to the entry of the "Baby Boom" generation into the elder category.<sup>9</sup>

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1. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1994).

2. *See id.* § 621(a).

3. *See id.* § 621(b).

4. *See generally* S. REP. NO. 105-36(I), at 77 (1997) (In the REPORT ON THE DEVELOPMENTS IN AGING: 1996-VOLUME I, the Special Committee on Aging found that age discrimination continued to pose a serious threat to the welfare of the older population in the workforce).

5. *See* Economics & Statistics Admin., U.S. Dep't of Commerce, *Sixty-Five Plus in the United States* (last updated 1995) <<http://www.census.gov/socdemo/www/agebrief.html>>.

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

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With the growth of the elderly population, the incidence of age-based discrimination in the workplace continues to be a problem.<sup>10</sup> In fact, the 1996 Developments of Aging Report issued by the Senate's Special Committee on Aging found that:

Older workers continue to face numerous obstacles to employment, including negative stereotypes about aging and productivity; job demands and schedule constraints that are incompatible with the skills and needs of older workers; and management policies that make it difficult to remain in the labor force, such as corporate downsizing brought on by recession.<sup>11</sup>

The Senate committee largely attributes this continuing discrimination to the pervasive opinion that, with advancement in years, one's abilities decline, resulting in lower efficiency and effectiveness as an employee.<sup>12</sup> As a result of this prevailing view, older workers still rely heavily on the ADEA to provide a remedy for discrimination in the workplace.<sup>13</sup>

Despite the fact that the ADEA's protection continues to play an important role in ensuring older workers' rights in the workplace, the ADEA's current construction falls short of delivering its promise of prohibiting "arbitrary age discrimination in employment."<sup>14</sup> Under the ADEA's generally accepted causes of action, the employee must be subjected to some type of tangible, adverse employment practice with accompanying economic implications in order to have a valid claim.<sup>15</sup> This requirement limits ADEA claims to the areas of hiring, firing, and promotion, while ignoring intangible, noneconomic discriminatory practices that result in older workers feeling "inconvenience, unfairness, and humiliation" because of their age.<sup>16</sup> This limitation on ADEA claims leaves older workers without recourse if they experience pervasive harassment at the workplace.<sup>17</sup>

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10. See S. REP. NO. 105-36(I), at 77 (1997).

11. *Id.*

12. See *id.*; see also H.R. REP. NO. 99-756, at 6 (1986) (This belief has been largely disproven with studies showing that older workers can be just as productive in the workplace as their younger co-workers. In addition, these same studies indicate that, in many areas, workers actually improve in terms of performance as they grow older. As a result, these studies have concluded that age serves as a poor proxy for job performance.).

13. See S. REP. NO. 105-36(I), at 78 (1997).

14. 29 U.S.C. § 621(b) (1994).

15. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971); see also Julie Vigil, Comment, *Expanding the Hostile Environment Theory to Cover Age Discrimination: How Far Is Too Far?*, 23 PEPP. L. REV. 565, 568 (1996).

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

17. See *id.*

An example might prove helpful in illustrating the harassed older worker's dilemma:

Barbara works at a bank where she is the only teller over fifty. One of the tellers' responsibilities is lifting boxes containing financial statements. Barbara's co-workers always leave her the heaviest and most unwieldy boxes in an effort to force her to retire. In addition, her co-workers often tell jokes and insult Barbara regarding her age, poor health, and medical problems. This incessant badgering is not inflicted on any other co-worker and interferes with Barbara's ability to carry out her job duties effectively. In an effort to put such treatment to an end, Barbara complains to her supervisor. The supervisor tells her not to be so sensitive and offers a few age-related jokes of his own. As a result, Barbara feels desperate about the situation, but is powerless to effect change because the job provides her only source of income and she fears that she will be unable to find a replacement job if she does quit.<sup>18</sup>

Under some courts' construction of the ADEA, Barbara's fate looks bleak. Barbara cannot produce an adverse employment action necessary to establish a disparate treatment claim. She has not been demoted or fired; from an economic standpoint, her situation has not changed. Moreover, although the facts surrounding Barbara's plight suggest that she could establish an age-based hostile work environment claim, it is unclear whether such a claim is cognizable in most circuits. If, however, the hostile work environment doctrine was accepted under the ADEA, Barbara could bring forth a claim without fear that it would be barred due to the absence of an adverse economic impact.<sup>19</sup>

Since 1986, the hostile work environment claim has been accepted by the Supreme Court as a valid claim under Title VII of the Civil Rights Act of 1964.<sup>20</sup> Under Title VII, a violation is found when "the workplace is permeated with 'discriminatory intimidation, ridicule and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working

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18. See generally *EEOC Says Age Harassment in Workplace Should Be Addressed the Same as Title VII Violations*, 41 Daily Lab. Rep. (BNA) A-1 (Mar. 4, 1987) [hereinafter *Age Harassment*].

19. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (Title VII case concerning hostile work environment based on sex); *Rogers*, 454 F.2d 234 (Title VII case concerning hostile work environment based on national origin).

20. See *Meritor*, 477 U.S. 57; see also Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994) (prohibits employer from discriminating "against any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin").

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environment.”<sup>21</sup> Thus, Title VII allows employees who are harassed due to their “race, color, religion, sex or national origin”<sup>22</sup> to bring forth a Title VII claim although they have not been fired or constructively discharged.<sup>23</sup> This doctrine has recently experienced further expansion with the Supreme Court’s acceptance of the same-sex harassment claim.<sup>24</sup> Thus, the hostile work environment claim has flourished within the confines of Title VII.

Despite Title VII’s expansion, courts have been slow to accept the hostile work environment claim under the ADEA. Instead, the majority of those circuit courts that have faced the issue have chosen not to resolve the issue of whether the hostile work environment claim is viable under the ADEA. The circuit courts’ avoidance is problematic because it will not only lead to confusion and inconsistency among the lower courts within the indecisive circuits, but also to confusion among harassed older workers in positions similar to Barbara’s.

This note explores whether the ADEA should follow Title VII’s lead and adopt the hostile work environment claim as constructed under Title VII. Specifically, part II of the note will examine the ADEA’s accepted methods of proof; the ADEA’s dependence on Title VII’s construction for its purpose, origin, and development; and the development of the hostile work environment claim under Title VII. Part III of the note will analyze the EEOC’s and the courts’ treatment of the hostile work environment claim as applied to the ADEA. Part IV will rely on this background and analysis to show that the hostile work environment should be embraced by all circuits due to the ADEA’s purpose, its similarities to Title VII, and its societal benefits.

## II. Title VII—The Role Model for the ADEA?

### A. ADEA Methods of Proof

The ADEA states in 29 U.S.C. § 623(a)(1) that “it shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with

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21. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 65, 67).

22. 42 U.S.C. § 2000e-2(m).

23. See Vigil, *supra* note 15, at 595 (citing *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522 (1991)).

24. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."<sup>25</sup> In showing a violation of this provision, a plaintiff may either present evidence of disparate treatment or of disparate impact.<sup>26</sup>

Disparate treatment requires that the plaintiff prove that the defendant was largely motivated by the plaintiff's age when making the adverse employment decision or action.<sup>27</sup> In other words, disparate treatment focuses on the defendant's intent.<sup>28</sup> The courts accept more than one method of proving the employer's intent to discriminate; namely, the direct method, the mixed-motive method, and the indirect method.<sup>29</sup>

Under both the direct method and the mixed-motive method, the plaintiff produces direct evidence that clearly demonstrates the employer's discriminatory intent.<sup>30</sup> Once the evidence establishes that discrimination exists, the burden shifts to the employer to prove by a preponderance of the evidence that the same decision would have been reached regardless of the discriminatory motive.<sup>31</sup> In contrast, the indirect method, better known as the *McDonnell Douglas* burden shifting method, relies on circumstantial evidence to create an inference of discrimination.<sup>32</sup> To establish an inference, or prima facie case, the plaintiff must prove the following: (1) she was a member of the protected class under the ADEA; that is, she was over forty;<sup>33</sup> (2) she was doing her job in a manner that met her employer's legitimate expectations; (3) she suffered from an adverse employment action; and (4) younger employees who were similarly situated in the workplace were treated more favorably.<sup>34</sup>

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25. 29 U.S.C. § 623(a)(1).

26. See Barbara Lindemann & Paul Grossman, *Employment Discrimination Law*, 1996 A.B.A. SEC. LAB. & EMPLOYMENT LAW 585.

27. See Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1127 (1993).

28. See *id.*

29. See Lindemann & Grossman, *supra* note 26, at 586, 596.

30. See *Sosky v. Int'l Mill Serv., Inc.*, No. CIV.A.94-2833, 1996 WL 32139, at \*4 (E.D. Pa. Jan. 25, 1996) (citing *Armbrusster v. Unisys Corp.*, 32 F.3d 768, 778 (3d Cir. 1994)); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989).

31. See Lindemann & Grossman, *supra* note 26, at 596.

32. See *Sosky*, 1996 WL 32139, at \*5 (citing *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

33. See 29 U.S.C. § 631(b).

34. See *O'Connor v. Consolidated Coin Caterers Group*, 517 U.S. 308 (1996) (Supreme Court, without analysis, assumed that the McDonnell Douglas analysis

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In establishing an adverse employment action, or the third prong of the prima facie case, the plaintiff may show that she was constructively discharged.<sup>35</sup> Thus, if a plaintiff can show that the employer created such an intolerable working environment that a reasonable person would have resigned, an adverse employment action is found despite the fact that the employer did not take the action.<sup>36</sup> Once the plaintiff has satisfied the four elements, the burden shifts to the defendant, who may rebut the inference of age discrimination by articulating a legitimate, nondiscriminatory reason for the adverse employment action.<sup>37</sup> If the defendant does this successfully, the plaintiff may still prevail if she proves by a preponderance of the evidence that the employer's "legitimate" reason was actually a pretext for discrimination.<sup>38</sup>

In contrast to the disparate treatment claim, the second type of claim, disparate impact, involves a facially neutral employment policy that places a disproportionately adverse impact on older workers.<sup>39</sup> The plaintiff must prove that there was some meaningful disparity between the percentage of older workers over forty who suffered an adverse employment practice on the basis of the so-called neutral policy at issue and the percentage of the total selection pool.<sup>40</sup> Although most courts have accepted the disparate impact claim under the ADEA, it has recently been called into question by the Supreme Court in *Hazen Paper Co. v. Biggens*.<sup>41</sup>

In summary, the ADEA provides two main claims for establishing a violation of § 623(a)(1): disparate treatment and disparate impact.<sup>42</sup> With these claims, courts allow plaintiffs to

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was applicable); cf. *McDonnell Douglas Corp.*, 411 U.S. 792, 802.

35. See Ira M. Saxe, *Constructive Discharge Under the ADEA: An Argument for the Intent Standard*, 55 FORDHAM L. REV. 963, 963-64 (1987).

36. See *id.* There is disagreement among the courts as to whether constructive discharge can be established where the employer did not intend to create the intolerable conditions. See Maureen S. Binetti et al., *The Employment-at-will Doctrine: Have Its Exceptions Swallowed the Rule?*, 600 PRAC. LAW INST. 441, 567 (1999).

37. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

38. See *id.*

39. See *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1109 (1991).

40. See Eglit, *supra* note 27, at 1127-28.

41. See HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW § 7.2, at 356 (1997).

42. See Lindemann & Grossman, *supra* note 26.

prevail even when direct evidence of discrimination is not available.<sup>43</sup> These accepted methods, however, share the requirement that the plaintiff suffer a tangible, adverse employment action which has economic implications.<sup>44</sup> Such actions include getting fired, being refused a promotion or a raise, or getting demoted with an accompanying decrease in salary. Thus, the accepted methods of proof fall short of providing relief to plaintiffs who experience intangible, noneconomic adverse employment practices, such as age harassment.<sup>45</sup>

#### **B. The ADEA's Reliance on Title VII for Both Its Purpose and Statutory Construction**

In fully understanding how the ADEA protects older workers from discrimination in the workplace, it is important to understand its relationship with Title VII. The courts have long recognized the ADEA's reliance on Title VII in both its creation and development.<sup>46</sup> In *Lorillard v. Pons*,<sup>47</sup> the Supreme Court stated that "[t]here are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions."<sup>48</sup>

The most obvious evidence of the ADEA's formative dependence on Title VII is illustrated in the nearly identical language of the two statutes regarding employers' prohibited conduct.<sup>49</sup> As the

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43. See *Sischo-Nownejad*, 934 F.2d at 1109.

44. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1972); see also *Vigil*, *supra* note 15, at 568.

45. See *Rogers*, 454 F.2d at 238.

46. See *Eglit*, *supra* note 27, at 1097 ("This judicially-fashioned nexus has been premised on the perception of ADEA courts that decisions construing Title VII, the older and thus senior partner in this relationship, constitute particularly persuasive analogical guides, by virtue of the statutes' shared aims and like terms.") (citing *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 450 U.S. 1205 (1983); *Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981); *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981)).

47. 434 U.S. 575 (1978).

48. *Id.* at 584.

49. Section 703 of Title VII, 42 U.S.C. § 2000e-2(a) (1994), states that:

It shall be an unlawful employment practice for an employer-  
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or



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Supreme Court noted, “the prohibitions of the ADEA were derived *in haec verba* from Title VII.”<sup>50</sup> Another indication of the ADEA’s reliance on Title VII lies in the fact that the ADEA mirrors Title VII’s requirement that the plaintiff initially seek relief from state antidiscrimination agencies before filing a complaint under the federal provision.<sup>51</sup> In addition, the ADEA contains similar language to Title VII in prohibiting retaliatory discharge by the employer in response to the plaintiff’s discrimination suit.<sup>52</sup>

Beyond these textual similarities, courts have adopted Title VII’s *McDonnell Douglas* burden shifting model as a method of proof under ADEA disparate treatment claims.<sup>53</sup> They have also followed Title VII’s lead regarding both the determination of events that trigger the ADEA’s statute of limitations provisions for filing a claim with the EEOC and the interpretation of the ADEA’s bona fide occupational qualification defense.<sup>54</sup> Finally, in an instance of role swapping, Title VII has adopted the ADEA’s determination that arbitration clauses are valid and effectively bar suit.<sup>55</sup>

Congress, with the passage of the Civil Rights Act of 1991, stated its support of the courts’ practice of using Title VII as an interpretive tool to develop the ADEA.<sup>56</sup> In the House of Representative’s Report on the Civil Rights Act of 1991, the House recognized that “[a]

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(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Section 4(a) of the ADEA, 29 U.S.C. § 623(a) (1994), provides as follows:

It shall be unlawful for an employer-

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

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

50. *Lorrillard*, 434 U.S. at 584.

51. *See Eglit*, *supra* note 27, at 1100.

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.* at 1101 (citing *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991)).

56. *See H.R. REP. NO. 102-40*, pt. 2, at 4 (1991).

number of other laws banning discrimination, including . . . the Age Discrimination in Employment Act . . . , are modeled after, and have been interpreted in a manner consistent with, Title VII.”<sup>57</sup> Based on this conclusion, Congress determined that the ADEA and other employment discrimination laws should be interpreted in a manner consistent with Title VII, as amended by the Civil Rights Act of 1991.<sup>58</sup>

In furtherance of this determination, Congress passed a conforming section in the Civil Rights Act of 1991 (section 17) which, first, made the Act’s changes to Title VII’s statute of limitations applicable to the ADEA and, second, changed some of the ADEA’s statute of limitations provisions so that they mirrored Title VII’s construction.<sup>59</sup> Again, the reasoning behind this section was that “the courts have routinely looked to Title VII precedent in interpreting corresponding provisions of the ADEA.”<sup>60</sup> Thus, section 17 of the Civil Rights Act further illustrates Congress’s acknowledgment and support of the courts’ use of Title VII to develop the ADEA.<sup>61</sup>

Both the courts and the legislature acknowledge Title VII’s impact on the ADEA’s creation and development. As the ADEA is further refined, it is evident that Title VII will continue to be instrumental in providing interpretive guidance.

### C. The Creation of the Hostile Work Environment Claim Under Title VII

As stated earlier, the ADEA and Title VII part ways in the area of the hostile work environment claim. Whereas all courts have acknowledged that Title VII protects against discrimination in the form of a hostile work environment, they have yet to do so under the ADEA. The difference between the hostile work environment claim and the other claims available under the ADEA is that the hostile

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57. *Id.*

58. *See id.*

59. *See id.* at 40.

60. *Id.* With regard to section 17’s first modification, Congress feared that, in the absence of section 17, courts would continue to rely on Title VII precedents in interpreting the ADEA statute of limitations provision and essentially overlook the statutory changes made to Title VII through the 1991 act. *See id.* With regard to section 17’s second modification, Congress acknowledged that much confusion would be eliminated through the ADEA’s amendment which would effectively change the ADEA’s statute of limitations provision so that it reflected both Title VII’s imposition of a single time limit (versus a dual) and the requirement that, prior to the institution of a claim, the EEOC issue a right to sue. *See id.* at 40-41.

61. *See id.*

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work environment claim does not center on the employers' *actions* taken as a result of the employee's protected status; rather, it centers on the quality of the *environment* to which the employer subjects the employee with protected status.<sup>62</sup> Thus, unlike the other claims, the hostile work environment claim does not require an adverse employment practice of an economic nature.<sup>63</sup>

The Fifth Circuit case of *Rogers v. EEOC*<sup>64</sup> was the first case to acknowledge a hostile work environment claim.<sup>65</sup> A divided panel found that an EEOC demand for information from the employer should have been enforced based on a Title VII claim of discrimination based on national origin.<sup>66</sup> The plaintiff, an employee at an optometrist office, alleged that, through the segregation of patients within the office, she was discriminated against based on her Hispanic background.<sup>67</sup>

In the first of three separate opinions, Judge Goldberg set the background for the modern-day hostile work environment claim.<sup>68</sup> In finding that the segregative practices of the employer violated Title VII, he "fundamentally" disagreed with the employer's argument that, even if it was assumed that the office did have a segregative policy which so offended the plaintiff as to make her uncomfortable, no unlawful employment practice occurred under Title VII.<sup>69</sup> Central to his rejection was his finding that § 703(a)(1) of Title VII, which prohibited an employer from "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin,"<sup>70</sup> should be afforded broad interpretation to "effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic

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62. See ERNEST C. HADLEY, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW & PRACTICE, ch. XI, E. (1998).

63. See *id.*

64. 454 F.2d 234 (5th Cir. 1971).

65. See *id.*

66. See *id.*

67. See *id.* at 236. From the face of the complaint, the court found that it was unclear whether the plaintiff, herself, was able to service all the patients or was restricted to serving only patients who were of the same Hispanic background. See *id.* at 237.

68. See *id.* at 237-39.

69. See *id.* at 237-38.

70. 42 U.S.C. § 2000e-2(a)(1).

discrimination.”<sup>71</sup> This broad interpretation, he stated, was consistent with the constant change in the workplace where the seemingly innocent practices of the present may become unjust, discriminatory practices in the future due to the complexities and subtleties involved in the workplace.<sup>72</sup> Thus, Judge Goldberg concluded that “employees’ psychological as well as economic fringes are statutorily entitled to protection from employer abuse” and that Title VII prohibits “the practice of creating a working environment heavily charged with ethnic or racial discrimination.”<sup>73</sup> In finding that Title VII afforded protection to employees exposed to a hostile work environment, Judge Goldberg did, however, place limitations on what could constitute such an environment by stating that “mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee” would not be sufficient to prove a violation of Title VII.<sup>74</sup>

Although the two other judges on the panel did not join in Judge Goldberg’s finding of a cause of action,<sup>75</sup> his opinion has been relied upon in further developing the hostile work environment claim.<sup>76</sup> Thus, this theory of discrimination has been applied to find discrimination based on race, religion, national origin, and sex, and in Title IX cases.<sup>77</sup>

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

72. *See id.*

73. *Id.* (“One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.”)

74. *Id.*

75. *See id.* at 241, 243. (Godbold, J., concurring); *see also id.* at 243 (Roney, J., dissenting). (Judge Godbold concurred with Judge Goldberg’s opinion, but only to the extent that the employer was restricting the plaintiff’s performance of services to those patients who were segregated based on ethnicity. In a dissenting opinion, Judge Roney essentially agreed with Judge Godbold’s assessment, but found that the plaintiff’s complaint could in no way be construed as restricting the plaintiff’s services based on clientele.)

76. *See HADLEY*, *supra* note 62, at ch. XI, E.

77. *See Vigil*, *supra* note 15, at 579-80 (citing *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977) (race discrimination case); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (sexual harassment case); *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (sexual harassment case); *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) (national origin discrimination case); *Gray v. Greyhound Lines, E.*, 545 F.2d 169 (D.C. Cir. 1976) (race discrimination case); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1563 (N.D. Cal. 1993) (Title IX case); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) (religious discrimination case)).

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*Meritor Savings Bank, FSB v. Vinson* marked the Supreme Court's formal adoption of the hostile work environment theory as a valid claim under Title VII.<sup>78</sup> The plaintiff in *Meritor* alleged that, while she was a teller at the bank, her manager forced her to engage in sexual relations with him over the course of her employment.<sup>79</sup> She further alleged that she withstood her manager's sexual advances, which included fondling her in front of the other employees and exposing himself to her at the workplace, because she feared she would be fired if she did not comply with his wishes.<sup>80</sup> Upon being terminated for abusing sick leave, the plaintiff filed a Title VII claim for sexual harassment under 42 U.S.C. § 2000e-2(a)(1).<sup>81</sup>

The opinion, written by Chief Justice Rehnquist, centered on the type of sexual harassment charges allowed under Title VII.<sup>82</sup> The bank argued that in order to have an actionable claim of harassment, the plaintiff needed to demonstrate harm which concerned a "tangible loss" of "an economic character," not just the "purely psychological aspects of the workplace environment."<sup>83</sup> In other words, the bank contended that Title VII allowed only sexual harassment claims that involved harassment conditioning concrete employment benefits on sexual favors.<sup>84</sup> Therefore, it argued, a hostile work environment claim was not actionable under Title VII because it focused on psychological costs incurred at the workplace, rather than economic costs.<sup>85</sup>

In both rejecting the bank's argument and embracing the theory of hostile work environment based on sex, the Court first focused on the language of Title VII, noting that the "phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women.'"<sup>86</sup> From this, and the fact that the bank was unable to point to language in Title VII that supported its argument that Title VII only protected employees from harassment that had economic consequences, the Court reasoned that the plaintiff's hostile work environment claim fit

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78. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

79. See *id.* at 60.

80. See *id.* at 60-61.

81. See *id.* at 60.

82. See generally *id.*

83. *Id.*

84. See *id.* (i.e., quid pro quo sexual harassment).

85. See *id.*

86. *Id.*

within congressional intent.<sup>87</sup> The Court then pointed towards the EEOC's acceptance of the hostile work environment claim in its Guidelines on Sexual Harassment.<sup>88</sup> Noting that the guidelines were not necessarily controlling, but did constitute a body of knowledge to which courts may look for guidance, the Court concluded that the EEOC's view that employees had "the right to work in an environment free from discriminatory intimidation, ridicule, and insult" was correct based upon the substantial body of supporting judicial decisions and EEOC precedent.<sup>89</sup> In particular, the Court found the EEOC's reliance on *Rogers* was especially persuasive.<sup>90</sup> In addition, the Court pointed out that hostile work environment claims had been recognized as applied to racial discrimination, religious discrimination, and national origin discrimination.<sup>91</sup> Thus, the Court recognized the hostile work environment theory as a cognizable claim under Title VII.<sup>92</sup> It did, however, place limitations on the claim similar to the limits imposed in *Rogers*; namely, that to have a viable claim the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"<sup>93</sup>

In accepting the claim, the Court did not resolve all issues regarding the hostile work environment theory. For instance, the Court did not decide which legal standard was appropriate for determining whether a hostile work environment existed.<sup>94</sup> Nor did it define the level of psychological injury required in order to have a cognizable claim.<sup>95</sup> Lastly, it refrained from deciding the extent of employer liability.<sup>96</sup> It did, nevertheless, indicate in dicta that agency principles should apply when employees in supervisory roles create a hostile work atmosphere for employees who are protected under Title VII.<sup>97</sup>

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87. *See id.*

88. *See id.* at 65.

89. *Id.*

90. *See id.* at 66.

91. *See id.*

92. *See id.*

93. *Id.* at 67 (alteration in original)(quoting *Henson*, 682 F.2d at 904).

94. *See Lindemann & Grossman, supra* note 26, at 781, 800.

95. *See id.*

96. *See Meritor*, 477 U.S. 57.

97. *See id.* at 72.

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The first two of the above issues were resolved in the Supreme Court case of *Harris v. Forklift Systems, Inc.*<sup>98</sup> In this case, the plaintiff brought forth a Title VII claim alleging that the employer violated Title VII by subjecting her to an abusive working environment due to her gender.<sup>99</sup> Specifically, the plaintiff alleged that the company's president made her the target of numerous sexual innuendoes and derogatory comments regarding her gender.<sup>100</sup> These derogatory comments included referring to her as a "dumb ass woman" and stating, "you're a woman, what do you know" and "we need a man as the rental manager."<sup>101</sup> In addition, the plaintiff claimed the president had suggested that he and the plaintiff go to a hotel to negotiate her raise.<sup>102</sup> Lastly, the plaintiff alleged that the president had asked the plaintiff and other female employees to retrieve coins out of his front pockets and to pick objects up off the ground so that he could watch them bend over.<sup>103</sup>

The lower court found that the president's conduct did not constitute a hostile work environment under Title VII.<sup>104</sup> Although the court decided that the plaintiff did find the president's conduct offensive, it concluded that the plaintiff's psychological well-being was not harmed.<sup>105</sup> Moreover, it stated that a reasonable woman would agree with the plaintiff in finding the conduct offensive, but because the harassment was not severe enough to harm the reasonable woman psychologically, the reasonable woman's work performance would not be affected.<sup>106</sup> This requirement of psychological injury under a hostile work environment was in keeping with the judicial precedent of the Sixth Circuit up until that time.<sup>107</sup>

In reviewing the lower court's finding, a unanimous Supreme Court relied heavily on *Meritor* and reaffirmed its holding.<sup>108</sup> First, the Court held that, in order for a plaintiff to prevail on a hostile work

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98. 510 U.S. 17 (1993).

99. *See id.* at 19.

100. *See id.*

101. *Id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.* at 21.

environment claim under Title VII, the plaintiff must prove that the environment was hostile both objectively and subjectively.<sup>109</sup> In other words, both a “reasonable person” and the victim must find the conduct “severe or pervasive enough” to create an abusive work environment.<sup>110</sup> Second, the Supreme Court rejected the lower court’s requirement that the plaintiff suffer psychological injury as a result of the harassment holding that “Title VII comes into play before the harassing conduct leads to a nervous breakdown.”<sup>111</sup> It reasoned that, regardless of whether the hostile work environment resulted in psychological injury to the employee, the environment “can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”<sup>112</sup> The Court also stated that the facts of *Meritor*, which was an especially egregious example of harassment, did not set forth the minimum amount of harassment needed to make a viable hostile work environment claim.<sup>113</sup> Finally, the Court held that, in order to determine whether a working environment is both objectively and subjectively hostile, courts must look at the totality of the circumstances.<sup>114</sup> The Court took into account the frequency and severity of the harassing actions and whether the harassment unreasonably interfered with the employee’s work performance.<sup>115</sup> The Court also considered whether the actions merely involved the use of offensive language or whether the actions were physically threatening or humiliating.<sup>116</sup>

From these judicial determinations, the current legal standard of a hostile work environment was established. Thus, in order to have a successful claim, the plaintiff must prove that, based on the totality of the circumstances, the environment was both objectively and subjectively hostile so as to interfere with the plaintiff’s ability to perform effectively at the workplace.<sup>117</sup>

Based on *Rogers*, *Meritor*, and *Harris*, the hostile work environment claim has become a viable claim under Title VII.

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109. *See id.* at 21-22.

110. *Id.*

111. *Id.* at 22.

112. *Id.*

113. *See id.*

114. *See id.*

115. *See id.* at 23.

116. *See id.*

117. *See id.*



Although there is no text in Title VII that directly supports the claim, the broad meaning of “terms, conditions, or privileges of employment”<sup>118</sup> has led the courts to conclude that an environment fraught with hostility based on an employee’s race, color, religion, sex, or national origin violates Title VII, regardless of whether such an environment has an economic impact.<sup>119</sup>

### **III. The ADEA Hostile Work Environment Claim: Enthusiasm from the EEOC, Confusion Among the Courts**

Having examined the existing claims under the ADEA, the ADEA’s relationship with and reliance on Title VII, and the development of the hostile work environment claim under Title VII, the background is set to analyze the current relationship between the ADEA and the hostile work environment claim. This analysis will be accomplished by examining the EEOC’s treatment of the issue, and by investigating the case law involving hostile work environment issues under the ADEA.

#### **A. The EEOC and the Hostile Work Environment Claim Under the ADEA**

The EEOC, the administrative agency charged with administering the ADEA and other employment discrimination statutes,<sup>120</sup> supports the validity of the hostile work environment claim under the ADEA.<sup>121</sup> As early as 1987, the EEOC made a policy statement supplementing its compliance manual that stated that age harassment claims were cognizable under the ADEA and should be accepted and investigated by agency personnel in a manner similar to

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118. 42 U.S.C. § 2000e-2(a)(1) (1994).

119. See *Vigil*, *supra* note 15, at 579-80 (citing *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977) (race discrimination case); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (sexual harassment case); *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (sexual harassment case); *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) (national origin discrimination case); *Gray v. Greyhound Lines, E.*, 545 F.2d 169 (D.C. Cir. 1976) (race discrimination case); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1563 (N.D. Cal. 1993) (Title IX case); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) (religious discrimination case)).

120. See S. REP. NO. 105-36, pt. 1, at 78 (1997).

121. See *Age Harassment*, *supra* note 18, at A-1.

harassment claims filed under Title VII.<sup>122</sup> Central to the EEOC's recognition of the age harassment claim was that the language used in Title VII and the ADEA was virtually identical.<sup>123</sup>

After the issuance of this policy statement, the EEOC published two sets of guidelines on harassment based on classifications other than age: EEOC Guidelines on Discrimination Because of Sex<sup>124</sup> and EEOC Guidelines on Discrimination Because of National Origin.<sup>125</sup> In October of 1993, the EEOC issued proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability.<sup>126</sup> In issuing these proposed guidelines, the EEOC reasoned that it had already held that harassment violated Title VII, the ADEA, and the Americans with Disabilities Act in past administrative hearings.<sup>127</sup> In addition, it noted "that it would be useful to have consolidated guidelines that set forth the standards for determining whether conduct in the workplace constitutes illegal harassment under the various antidiscrimination statutes."<sup>128</sup> Thus, the proposed guidelines were meant to "consolidate, clarify and explicate the Commission's position on a number of issues relating to harassment."<sup>129</sup>

Within the proposed guidelines, the EEOC attempted the following for all protected classifications: (1) define harassment and give examples of behavior that constituted harassment, including the creation of a hostile work environment,<sup>130</sup> (2) provide the legal

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122. *See id.*

123. *See id.*; *see also* 42 U.S.C. § 2000e-2(a)(1); *cf.* 29 U.S.C. § 623(a)(1).

124. 29 C.F.R. § 1604 (1998).

125. *Id.* § 1606.8.

126. 58 Fed. Reg. 51,266 (1993).

127. *See id.* at 51,267.

128. *Id.*

129. *Id.* at 51,266.

130. *See id.* at 51,269; Proposed Guidelines § 1609.1(b) states:

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

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

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

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

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

(i) Epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts, that relate to race, color, religion, gender, national

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standard for finding a hostile work environment based on the totality of the circumstances,<sup>131</sup> (3) place an affirmative duty on the employer to maintain an environment free of harassment,<sup>132</sup> and (4) establish the grounds for employer liability based on agency principles.<sup>133</sup> In creating these proposed guidelines, the EEOC relied heavily on and tried to remain consistent with judicial precedent, including *Rogers* and *Meritor*.<sup>134</sup>

Despite consistency with the common law, the EEOC withdrew the proposed guidelines on October 11, 1994.<sup>135</sup> This withdrawal stemmed from criticism by members of Congress, the American Civil Liberties Union, and religious groups who feared that the guidelines would infringe on employees' First Amendment rights to exercise religion freely in the workplace.<sup>136</sup> In spite of the withdrawal of the

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

*Id.* (footnote omitted).

131. *See id.* at 51,268-69 (Proposed Guidelines § 1609.1(c) and (d)). Proposed § 1609.1(c) states:

The standard for determining whether verbal or physical conduct . . . is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive. The "reasonable person" standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability (footnote omitted). It is not necessary to make an additional showing of psychological harm.

*Id.*

132. *See id.* at 51,269 (1993) (Proposed Guidelines § 1609.1(d)).

133. *See id.* (Proposed Guidelines § 1609.2).

134. *See id.* at 51,267. Although *Harris* had not been decided yet, the proposed guidelines were consistent with the opinion in that they stated that the reasonable person standard was applicable, psychological injury was not required in order to have a viable claim, and the merits of the claim would be based on the totality of the circumstances. *See id.*; *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). The guidelines did, however, conflict with *Harris* in the following manner. First, the guidelines only required the work environment to be objectively hostile, omitting the subjective requirement. *See* 58 Fed. Reg. 51,269 (1993) (Proposed Guidelines § 1609.1). Therefore, the guidelines did not require the plaintiff to prove that he found the work environment abusive or hostile. Second, when defining the "reasonable person" within the objective standard, the guidelines accounted for the plaintiff's race, color, religion, gender, national origin, age, or disability. *See id.*

135. *See* 12/22/94 EMPLOYMENT REL. TODAY 455 (1994).

136. *See* Dean J. Schaner & Melissa M. Erlemeier, 6/1/95 EMPLOYEE REL. L.J. (1995); *see also HADLEY*, *supra* note 62, at ch. XI, E, 4. In fact, Congress voted to

guidelines, the EEOC's acceptance of the hostile work environment claim under the ADEA remains intact.<sup>137</sup> The EEOC continues to recognize the claim as viable and treats it in a manner consistent with the standard set forth under Title VII case law.<sup>138</sup>

#### **B. Case Law and the Hostile Work Environment Claim Under the ADEA**

Many federal appellate courts have had the opportunity to determine the cognizability of the hostile work environment claim under the ADEA. When faced with this opportunity, however, the majority have declined to resolve the issue. Rather, they have either (1) relied on the fact that the parties have not raised the issue, or (2) examined the facts of the specific claim at hand and determined that, even if the hostile work environment claim was recognized, the claim would fail. Thus, they have rationalized, it was not necessary to resolve whether the claim was viable. Although the courts' treatment is the model of judicial efficiency, it may be so to the detriment of the lower courts and harassed older workers.

The Sixth, Second, and Ninth Circuits stand apart from the majority of the courts that have addressed the issue. The Sixth Circuit has unquestionably accepted the hostile work environment claim as valid under the ADEA.<sup>139</sup> Although not as clear, the Second and Ninth Circuits also appear to have recognized the claim.<sup>140</sup> Under such recognition, older workers can confidently bring forth the claim without fear that the absence of an adverse employment act might result in the claim's dismissal. Likewise, the lower courts can analyze the claim without fear of reversal.

The following section will address those appellate court decisions that have accepted the hostile work environment claim

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strike religion from the guidelines in its entirety. *See id.* In response to this criticism, the EEOC published a notice of withdrawal in the Federal Register stating that the guidelines were withdrawn because they did not adequately "consolidate, clarify, and explicate existing law pertaining to harassment on these bases." 12/22/94 EMPLOYMENT REL. TODAY 455 (1994).

137. *See* HADLEY, *supra* note 62, at ch. XI, E, 4; *see, e.g.* Von Zimmer v. Department of Army, 01821300, 1116/C3 (1983).

138. *See* HADLEY, *supra* note 62, at ch. XI, E, 4.

139. *See, e.g.*, Crawford v. Medina Gen. Hosp., 96 F.3d 830 (6th Cir. 1996).

140. *See* Hatter v. New York Hous. Auth., No. 97-9351, 1998 WL 743733 (2d Cir. Oct. 22, 1998); Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104 (9th Cir. 1991).

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under the ADEA, then it will discuss those appellate court decisions that have refused to address the issue.

1.    **RECOGNITION OF THE HOSTILE WORK ENVIRONMENT CLAIM—  
SIXTH, SECOND, AND NINTH CIRCUITS**

a.    *The Sixth Circuit*    The 1996 Sixth Circuit opinion, *Crawford v. Medina General Hospital*,<sup>141</sup> has had the largest impact with regard to the ADEA and the hostile work environment claim, largely due to its lengthy analysis of the issue. The plaintiff, who was in her late fifties and still employed in a hospital's billing department at the time she filed the claim, alleged that Medina had violated the ADEA by creating a hostile work environment.<sup>142</sup> She specifically pointed towards comments made by her supervisor, including, "I don't think women over 55 should be working" and "[o]ld people should be seen and not heard."<sup>143</sup> She also alleged that co-workers consistently made derogatory, age-related comments in reference to the older workers and excluded the older workers from social activities within the office.<sup>144</sup> Finally, she claimed that the office was divided into two sections—one for older workers and one for younger workers.<sup>145</sup>

In declaring itself the first circuit court to actually apply the hostile work environment claim in an ADEA context,<sup>146</sup> the court highlighted the similarities between Title VII and the ADEA. It concluded that "[t]he broad application of the hostile-environment doctrine in the Title VII context; the general similarity of purpose shared by Title VII and the ADEA; and the fact that the Title VII rationale for the doctrine is of equal force in the ADEA context, all counsel [acceptance of the claim]."<sup>147</sup> The court stated that it found "it a relatively uncontroversial proposition that such a theory is viable under the ADEA."<sup>148</sup> The court then went on to define the criteria of a prima facie claim as follows: (1) the employee must be at least forty

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141.    See *Crawford*, 96 F.3d at 830.

142.    See *id.* at 832.

143.    *Id.*

144.    See *id.*

145.    See *id.* at 833.

146.    See *id.* at 834 (citing *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1109 (9th Cir. 1991); *Young v. Will County Dep't of Pub. Aid*, 882 F.2d 290, 294 (7th Cir. 1989)).

147.    *Crawford*, 96 F.3d at 834.

148.    *Id.*

years old;<sup>149</sup> (2) the employee must have been subjected to harassment on the basis of age;<sup>150</sup> (3) the harassment must have “had the effect of unreasonably interfering with the employee’s work performance and creating an objectively intimidating, hostile, or offensive work environment;”<sup>151</sup> and (4) employer liability must exist.<sup>152</sup> The court further defined the prima facie case with regard to the third prong by embracing the elements of a Title VII hostile work environment claim as established by *Meritor Savings Bank v. Vinson*<sup>153</sup> and *Harris v. Forklift Systems, Inc.*<sup>154</sup> Namely, it noted that, to be considered a hostile work environment, the discrimination must be both objectively and subjectively severe or pervasive.<sup>155</sup> In addition, it reiterated the Title VII finding that the plaintiff need not prove psychological injury in order to have a viable claim under the theory.<sup>156</sup> Thus, the court modeled the prima facie case in a manner consistent with Title VII’s hostile work environment claim.<sup>157</sup>

In applying the prima facie model, the court found that the plaintiff did not offer adequate proof to fulfill the second and third prongs.<sup>158</sup> The court agreed that the supervisor made two age-related comments, but found nothing else in the record that showed the harassment was based on anything other than “a simple clash of personalities.”<sup>159</sup> In addition, the court found that exclusion from social activities did not constitute harassment as social activities were not a term, condition, or privilege of employment.<sup>160</sup> Lastly, the court concluded that the plaintiff failed to offer any evidence demonstrating that the hostile environment interfered with her work performance.<sup>161</sup> Thus, the court concluded that, although the hostile work environment claim was viable under the ADEA, the plaintiff did not allege the necessary facts in support of her claim.<sup>162</sup>

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149. *See id.*

150. *See id.*

151. *Id.* at 835.

152. *See id.*

153. 477 U.S. 57 (1986).

154. 510 U.S. 17 (1993).

155. *See Crawford*, 96 F.3d at 835.

156. *See id.*

157. *See generally id.*

158. *See id.* at 836.

159. *Id.*

160. *See id.*

161. *See id.*

162. *See id.*

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Interestingly, although the Sixth Circuit threw open its doors to hostile work environment claims under the ADEA, courts sitting in the circuit have yet to rule in a plaintiff's favor. In *Peacock v. Northwestern National Insurance Group*,<sup>163</sup> the Sixth Circuit affirmed the lower court's granting of the defendant's motion for summary judgment, finding that the plaintiff had not proved (1) that he was subject to age harassment and (2) that such harassment unreasonably interfered with the plaintiff's work performance.<sup>164</sup> Similarly, in *Vannoy v. Ocsea Local 11*,<sup>165</sup> the district court granted the defendant's motion for summary judgment, finding that the plaintiff did not present sufficient evidence to establish an objectively hostile environment.<sup>166</sup>

*b. The Second Circuit* The Second Circuit's acceptance of the hostile work environment claim in the 1998 case of *Hatter v. New York City Housing Authority*<sup>167</sup> is not as clear as the acceptance in *Crawford*. Unlike *Crawford*, the court did not treat the question of whether the claim was cognizable under the ADEA as a case of first impression. Rather, it seemed to assume that the claim existed under the ADEA by determining that the district court's summary judgment for the defendant was proper because of plaintiff's failure to allege compensable damages.<sup>168</sup> In a very brief opinion, the Second Circuit neither analyzed the facts nor discussed the implications of allowing the ADEA hostile work environment claim.<sup>169</sup>

*c. The Ninth Circuit* Like *Hatter*, the Ninth Circuit's acceptance of the hostile work environment claim in the 1991 case of *Sischo-Nownejad v. Merced Community College District*<sup>170</sup> was not based on

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163. No. 94-4318, 1998 U.S. App. Lexis 18265 (6th Cir. Aug. 3, 1998).

164. See *id.* at \*2 (finding that supervisor's comments of "perhaps you are too old to change" and "old fart," as well as his attitude toward plaintiff's use of a hearing aid, appeared innocuous and not severe and pervasive enough to establish a hostile work environment).

165. 36 F. Supp. 2d 1018 (S.D. Ohio 1999).

166. See *id.* at 1025 (holding that two isolated comments regarding retirement and the reassignment, relocation, and lack of resources as a result of corporate reorganization did not constitute harassment).

167. No. 97-9351, 1998 WL 743733 (2d Cir. Oct. 22, 1998).

168. See *id.* at \*1.

169. See generally *id.*

170. 934 F.2d 1104 (9th Cir. 1991).

lengthy analysis. Instead, the court mentioned the viability of the claim in an offhand manner.<sup>171</sup> Though the fact pattern seemed to naturally lend itself to a hostile work environment claim,<sup>172</sup> the Title VII and ADEA claims were based solely on the theory of disparate treatment.<sup>173</sup> In dicta, however, the court stated that a plaintiff could show violations of both Title VII and the ADEA by proving disparate treatment, disparate impact, or a hostile work environment.<sup>174</sup> Therefore, the court seemed to accept the hostile work environment claim under the ADEA with little fanfare.<sup>175</sup>

Due to the cursory analysis in *Hatter* and *Sischo-Nownejad*, one may question whether the Second and Ninth Circuits have actually accepted the hostile work environment claim. Nevertheless, *Sischo-Nownejad* has been relied on by the district courts in the Ninth Circuit to allow ADEA hostile work environment claims.<sup>176</sup> This reliance, however, is not dispositive since district courts within the Seventh Circuit relied on a similarly cursory treatment in the 1989 case of *Young v. Will County Department of Public Aid*<sup>177</sup> only to find out ten years later in *Halloway v. Milwaukee County*<sup>178</sup> that the Seventh Circuit Court of Appeals did not view its nonchalant treatment of the claim as an acceptance.<sup>179</sup> Nonetheless, until the Second and Ninth Circuits state otherwise, they appear to accept the hostile work environment claim under the ADEA.

Thus, with differing degrees of analysis, the Sixth, Second, and Ninth Circuits have recognized the hostile work environment claim under the ADEA. Oddly enough, despite the earlier holding of the Ninth Circuit, the Sixth Circuit is perceived as the first circuit to officially recognize the hostile work environment claim.<sup>180</sup> The

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171. *See id.* at 1108.

172. *See id.* at 1107-08. The plaintiff, a faculty member of a community college, was denied the opportunity to choose the courses she would teach and was not approached regarding supplies needed. Similarly situated co-workers received these privileges. In addition, the division chairperson referred to the plaintiff, who was in her mid-fifties, as "an old war-horse," while the president of the college and dean of personnel urged the plaintiff to retire.

173. *See id.* at 1109.

174. *See id.* at 1108.

175. *See id.*

176. *See Smith v. Kmart*, No. CS-95-248-RHW, 1996 WL 780490, at \*8 (E.D. Wash. Dec. 18, 1996).

177. 882 F.2d 290 (7th Cir. 1989).

178. No. 98-1429, 1999 WL 382693, at \*5 (7th Cir. June 11, 1999).

179. *See id.* at \*6.

180. *See, e.g., EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244,



recognition of the claim by these three circuits has allowed the district courts sitting within their jurisdiction to try ADEA claims despite the fact that the plaintiff is unable to prove an adverse economic impact.<sup>181</sup>

**2. THE UNCERTAIN FATE OF THE HOSTILE WORK ENVIRONMENT—  
A REFUSAL TO REACH THE ISSUE BY THE ELEVENTH, FOURTH,  
TENTH, AND SEVENTH CIRCUITS**

Despite the Sixth Circuit's finding that recognition of the hostile work environment claim under the ADEA is a "relatively uncontroversial proposition,"<sup>182</sup> the majority of circuits faced with the issue have been hesitant to embrace the claim. Instead, the Eleventh, Fourth, Tenth, and Seventh Circuits have determined that they need not resolve the issue of whether the hostile work environment claim is cognizable because either (1) the parties have not raised the issue or (2) the facts in their specific cases do not reach the level necessary to form a hostile work environment. Therefore, these circuits have not only failed to provide any guidance, but have generated confusion among the lower courts and among harassed older workers themselves.

*a. The Eleventh Circuit* The Eleventh Circuit, in the 1997 case of *EEOC v. Massey Yardley Chrysler Plymouth*,<sup>183</sup> was the first circuit to refuse to decide whether the hostile work environment claim was viable under the ADEA. The case, which occurred after the Sixth Circuit decision in *Crawford*,<sup>184</sup> involved a plaintiff alleging that her employer had subjected her to a hostile work environment and had constructively discharged her based upon her age.<sup>185</sup> The plaintiff, a title clerk at a car dealership, claimed that both her immediate supervisor and the general manager made demeaning, age-related comments to her on a daily basis which affected her work performance and physical condition.<sup>186</sup> Eventually, she felt compelled

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1249 n.7 (11th Cir. 1997); *Burns v. AAF-McQuay, Inc.*, 980 F. Supp. 175, 179 (W.D. Va. 1997).

181. See, e.g., *Vannoy v. Oscea Local 11*, 36 F. Supp. 2d 1018 (S.D. Ohio 1999); *Smith v. Kmart*, No. CS-95-248-RHW, 1996 WL 780490, at \*8 (E.D. Wash. Dec.18, 1996).

182. *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834 (6th Cir. 1996).

183. 117 F.3d 1244 (11th Cir. 1997).

184. See *Crawford*, 96 F.3d at 835.

185. See *Massey Yardley*, 117 F.3d at 1246.

186. See *id.* at 1246-47.

to leave the dealership and take a lesser paying job after a two-year job search.<sup>187</sup>

The plaintiff entered into evidence age-related comments such as remarks that her hair was turning gray; that she was getting a “fat ass;” that she had “saggy, baggy boobs” and should wear a bra; that she should wear “old lady” dresses with knee highs and a bra; inquiries as to whether she had experienced any hot flashes that day; and whether Alzheimer’s disease was setting in.<sup>188</sup> As a result of such treatment, the plaintiff often cried, broke out in hives, suffered from depression, became nauseous, and generally dreaded going to work.<sup>189</sup> In a jury trial, the lower court found that the plaintiff had been subjected to a hostile work environment based on age and had been constructively discharged.<sup>190</sup>

On appeal, the Eleventh Circuit noted that, because neither party questioned the validity of the hostile work environment claim under the ADEA, it would not actually decide the issue.<sup>191</sup> In doing so, the court also stated that only the Sixth Circuit had accepted the claim.<sup>192</sup> Thus, the court did not consider *Sischo-Nownejad*.<sup>193</sup> Nor did it analyze the relationship between Title VII and the ADEA. The court did, however, reject the defendant’s motion for judgment as a matter of law and found that the jury’s determination that a hostile work environment existed should stand.<sup>194</sup> Ironically, despite the Eleventh Circuit’s refusal to reach the issue of whether the ADEA claim existed, *Massey Yardley* is one of the few judicial decisions holding that the facts supported a hostile work environment claim based on age. It does not, however, offer guidance to lower courts and potential plaintiffs as to whether the claim, in and of itself, is valid. Thus, when a defendant argues that the hostile work environment claim is not cognizable, a lower court sitting within the Eleventh Circuit will have to make the decision without guidance from the circuit.

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187. *See id.* at 1248.

188. *See id.* at 1247.

189. *See id.*

190. *See id.* at 1246.

191. *See id.* at 1249 n.7.

192. *See id.*

193. *See Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104 (9th Cir. 1991).

194. *See Massey Yardley*, 117 F.3d at 1249.

*b. The Fourth Circuit* Only one circuit, the Fourth Circuit, has had the opportunity to review a district court's denial of a hostile work environment claim under the ADEA. The appellate opinion of *Burns v. AAF-McQuay, Inc.*<sup>195</sup> was issued in early 1999, but had quite a long procedural history prior to its issuance.<sup>196</sup> The claim was originally filed in July of 1994 in the Western District of Virginia by a sixty-five-year-old plaintiff who charged her employer with violating the ADEA under the disparate treatment theory.<sup>197</sup> The plaintiff alleged that her employer discriminated against her on the basis of age by demoting her from her position as secretary to the position of switchboard operator.<sup>198</sup> Because of this, she claimed that she was eventually forced to resign and was, thus, constructively discharged.<sup>199</sup>

In an effort to establish that age-based animus motivated these employment decisions, the plaintiff also offered proof of derogatory age-based comments by the plaintiff's managerial supervisors. These comments included statements such as "we're going to have to get rid of the old broad downstairs," references to her as "dead wood," as well as multiple, direct inquiries as to when the plaintiff was planning to retire.<sup>200</sup> In granting the defendant's motion for summary judgment, the court refused to consider plaintiff's resignation as constituting constructive discharge because it found the resignation to be voluntary rather than the product of the defendant's efforts.<sup>201</sup> In reference to the demotion, the court found that, although the plaintiff met the prima facie case of disparate treatment including the production of an adverse employment action, she failed to show that the legitimate reasons offered by the defendant to justify the demotion were pretextual.<sup>202</sup> On appeal, the Fourth Circuit affirmed the lower court's finding that there was no adverse employment decision in the form of constructive discharge,<sup>203</sup> but reversed and remanded the case

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195. 166 F.3d 292 (4th Cir. 1999).

196. *See id.* at 292-94.

197. *See id.* at 292.

198. *See id.*

199. *See id.*

200. *Burns v. AAF-McQuay, Inc.*, No. 94-00049H, 1995 WL 605909 at \*2 (W.D. Va. Oct. 6, 1995).

201. *See id.* at \*3-4.

202. *See id.* at \*9-11.

203. *See Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 734 (4th Cir. 1996).

on the basis that a question of material fact existed as to whether the defendant's proffered reasons for the demotion were pretextual.<sup>204</sup>

The appellate court's decision to remand the case occurred at approximately the same time as the Sixth Circuit determined that the hostile work environment claim was viable under the ADEA in *Crawford v. Medina General Hospital*.<sup>205</sup> Because of *Crawford*, the plaintiff on remand filed a motion in district court for leave to amend the complaint to include the hostile work environment claim.<sup>206</sup> The court for the Western District of Virginia denied the plaintiff's motion finding that the amendment would be futile because the Fourth Circuit did not recognize the claim under the ADEA.<sup>207</sup> In reaching the decision, the district court noted:

To be sure, the Sixth Circuit is the only federal circuit to have recognized a hostile environment claim in the ADEA context. While the authority of a sister circuit is persuasive, this court must nonetheless look first to the law of its circuit for guidance and precedential value. In doing so, the court finds no case decided by this circuit which follows the rationale of *Crawford*.<sup>208</sup>

Thus, the court concluded that it could only recognize the claim if the Fourth Circuit affirmatively acknowledged it.<sup>209</sup>

On appeal, the Fourth Circuit addressed the issue of whether the district court abused its discretion in denying plaintiff's motion for leave to amend her complaint to include the hostile work environment claim under the ADEA.<sup>210</sup> In affirming the district court's decision to deny plaintiff's motion, the circuit court agreed

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204. *See id.*

205. 96 F.3d 830, 834 (6th Cir. 1996).

206. *See Burns v. AAF-McQuay, Inc.*, 980 F. Supp. 175, 176 (W.D. Va. 1997).

207. *See id.* at 180.

208. *Id.* at 179.

209. Interestingly enough, after the court issued the above decision, the court later granted the defendant's second motion for summary judgment. *See Burns v. AAF-McQuay, Inc.*, No. Civ. A. 94-9948-H, 1997 WL 820958, at \*1 (W.D. Va. Dec. 23, 1997). The defendant argued that, as a matter of law, the plaintiff had no claim based on the idea that, even assuming that the employer demoted the plaintiff due to her age, she suffered no economic loss and, thus, had no adverse economic impact. *See id.* In agreeing with the defendant, the court pointed out that the plaintiff's transfer to switchboard operator did not result in a lower salary, lower benefits package, or lower employment "rank." *See id.* at \*3. The court stated that neither pecuniary nor equitable relief was available because she neither suffered economic harm nor left her job involuntarily. *See id.* at \*3-4 n.3. Without the opportunity of such relief, the court reasoned that the plaintiff's claim was moot. *See id.* at \*4. Thus, the plaintiff was left no recourse regarding her demotion due to its lack of economic impact.

210. *See Burns v. AAF-McQuay, Inc.*, 166 F.3d 292, 293-94 (4th Cir. 1999).

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that the amendment of plaintiff's complaint would be futile, but "for reasons somewhat different than those of the district court."<sup>211</sup> Instead, the Fourth Circuit found that, even assuming that the hostile work environment claim existed under the ADEA, plaintiff failed to establish that the hostility in the working environment was so severe or pervasive that it would be considered objectively hostile.<sup>212</sup> Thus, the Fourth Circuit held: "we need not reach the question of whether this court would recognize a hostile environment claim under the ADEA given an adequate allegation of facts."<sup>213</sup>

As with the Eleventh Circuit, the Fourth Circuit's refusal to reach the issue of whether the hostile work environment claim is viable is likely to cause confusion among lower courts and potential plaintiffs within the circuit. Moreover, the lower courts in the Fourth Circuit may be even more hesitant than those in the Eleventh Circuit to hear a claim based on a hostile work environment due to the Fourth Circuit's failure to address the Western District of Virginia's position that the Fourth Circuit does not recognize such a claim.

*c. The Tenth Circuit* Like the Fourth Circuit, the Tenth Circuit in *Holmes v. Regents of the University of Colorado*<sup>214</sup> decided that it did not need to reach the issue of whether the hostile work environment claim was viable under the ADEA because the facts of the case were insufficient to establish the claim.<sup>215</sup> The plaintiff, a sixty-four-year-old African American associate professor at the University of Colorado, sued the university under the disparate treatment and hostile work environment theories under both Title VII and the ADEA.<sup>216</sup> In support of her age claim, the plaintiff presented evidence that she overheard a conversation regarding her possible retirement and that, in her presence, a colleague made self-deprecating comments about his own age.<sup>217</sup> The plaintiff appealed to the Tenth Circuit when the district court granted the defendant's motion for summary judgment based on its finding that the allegedly

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211. *Id.* at 294.

212. *See id.*

213. *Id.* at 295.

214. No. 98-1172, 1999 WL 285826 (10th Cir. May 7, 1999).

215. *See id.* at \*8.

216. *See id.* at \*1.

217. *See id.*

discriminatory conduct did not reach the level necessary for a claim of race or age discrimination.<sup>218</sup>

On appeal, the Tenth Circuit noted that:

Courts have long recognized that hostile environment claims are actionable under title VII [sic] based on race, but the issue of whether a plaintiff may proceed utilizing a hostile environment theory under the ADEA remains unsettled. Although this circuit has not expressly recognized a cause of action for hostile work environment under the ADEA, it has considered a case where the plaintiff raised the issue. For purposes of this case, we assume without deciding Dr. Holmes may advance a hostile work environment claim under the ADEA.<sup>219</sup>

The case referred to in the above quote was *McKnight v. Kimberly Clark Corp.*,<sup>220</sup> where the court discussed the plaintiff's assertions of a hostile work environment in the context of establishing pretext under a disparate treatment theory.<sup>221</sup> Although the Tenth Circuit did mention the hostile work environment claim in *McKnight*, it did not discuss the viability of the claim itself.<sup>222</sup> In *Holmes*, however, the court clearly stated that it was deciding not to decide.<sup>223</sup> Thus, the court found that the evidence presented by the plaintiff did not raise a question of material fact and affirmed the district court's grant of summary judgment.

Although the Tenth Circuit's treatment regarding the viability of the hostile work environment claim is similar to that of the Fourth Circuit, the backdrop of the decision is quite different. Instead of refusing to decide the issue while reviewing a district court's rejection of the claim, the Tenth Circuit has refused to decide the issue where a prior Tenth Circuit opinion, *McKnight*, suggests that the Tenth Circuit is amenable to the claim. Of course, *McKnight* is not dispositive, but it may encourage the lower courts of the Tenth Circuit to accept the claim.

*d. The Seventh Circuit* The Seventh Circuit initially appeared to be the first circuit to openly accept the claim of a hostile work environment under the ADEA. In 1989, the court issued the opinion

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218. *See id.*

219. *Id.* at \*19 n.6 (citations omitted).

220. 149 F.3d 1125 (10th Cir. 1998).

221. *See id.* at 1129.

222. *See generally id.*

223. *See Holmes v. Regents of the Univ. of Colorado*, No. 98-1172, 1999 WL 285826, at 7 n.6 (10th Cir. May 7, 1999).

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of *Young v. Will County Department of Public Aid*,<sup>224</sup> where it affirmed the district court's summary judgment for the defendant.<sup>225</sup> The plaintiff, who was forty-seven and employed by the county, originally brought forth an ADEA claim under the disparate impact and hostile work environment theories.<sup>226</sup> She contended that her supervisor discriminated against her because of her age through negative performance evaluations, lower-than-average raises, and generally hostile behavior.<sup>227</sup> Examples of the allegedly hostile behavior included failure to supply plaintiff with the necessary employee manuals, refusal of plaintiff's request for co-worker assistance upon return from sick leave, and oral reprimands of plaintiff in the presence of other co-workers.<sup>228</sup>

In considering the plaintiff's hostile work environment claim, the court relied on *Meritor Savings Bank, FSB v. Vinson*,<sup>229</sup> which was decided three years earlier.<sup>230</sup> Noting that "hostile work environment claims in the context of age discrimination are rare,"<sup>231</sup> the court determined that the plaintiff failed to meet the elements of a hostile work environment claim in that: (1) she failed to prove that she was subject to the alleged hostile incidents because of her age, and (2) the hostile incidents alleged were not severe or pervasive enough to meet the level of harassment required.<sup>232</sup> With little analysis, the court affirmed the lower court's decision while appearing to openly acknowledge the validity of the ADEA hostile work environment claim.<sup>233</sup> As a result of *Young*, district courts within the Seventh Circuit accepted hostile work environment claims based on age harassment.<sup>234</sup>

Recently, the Seventh Circuit has again addressed the viability of the hostile work environment claim and, as a result, has sent a mixed

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224. 882 F.2d 290 (7th Cir. 1989).

225. *See id.*

226. *See id.*

227. *See id.* at 291-92.

228. *See id.*

229. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

230. *See Young*, 882 F.2d at 294 (Harris v. Forklift Sys., Inc. had not yet been decided).

231. *See id.*

232. *See id.*

233. *See id.*

234. *See e.g.*, *Chua v. St. Paul Fed. Bank for Sav.*, No. 95 C 2463, 1996 WL 312079 (N.D. Ill. June 7, 1996); *Eggleston v. South Bend Community Sch. Corp.*, 858 F. Supp. 841 (N.D. Ind. 1994).

message to the lower courts who had been relying on *Young*. In the 1999 opinion of *Halloway v. Milwaukee County*,<sup>235</sup> the Seventh Circuit affirmed a grant of summary judgment for the defendant based upon claims of disparate treatment and hostile work environment under the ADEA.<sup>236</sup> In an effort to establish a hostile work environment, the plaintiff, an eighty-two-year-old judicial court commissioner, submitted evidence that his supervisors repeatedly requested that he retire, rotated him into a floater position, and challenged his rulings.<sup>237</sup> Inconsistent with its earlier opinion in *Young*, the court wrote the following:

We note initially that this court has not had the occasion to determine whether a hostile work environment claim may be recognized under the ADEA. Our colleagues in the Sixth Circuit have decided that such claims are cognizable under the ADEA. Because we believe that the evidence in this case would not support such a claim, we need not decide . . . whether such claims are cognizable.<sup>238</sup>

Thus, the Seventh Circuit avoided the previously decided question of whether the claim was cognizable. In finding that the evidence, including the defendant's repeated attempts to compel the plaintiff to retire, did not constitute age-based discrimination, the court found that the plaintiff failed to show that the environment was objectively hostile.<sup>239</sup>

Although *Halloway* can be best characterized as a decision not to decide, some lower courts within the Seventh Circuit may construe the Seventh Circuit's failure to mention *Young* as a retreat from its initial acceptance of the hostile work environment claim under the ADEA. As a result, many lower courts may be hesitant to allow a harassed older worker to bring forth an ADEA claim absent an adverse economic impact.

Despite the Sixth Circuit's position that the acceptance of the hostile work environment claim is uncontroversial, the Eleventh, Fourth, Tenth, and Seventh Circuits' decisions avoiding the issue may suggest otherwise. As a result, lower courts are left to forge their own paths amid confusing signals sent by their circuits.<sup>240</sup> In addition,

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235. No. 98-1429, 1999 WL 382693 (7th Cir. June 11, 1999).

236. *See id.* at \*1.

237. *See id.* at \*6.

238. *Id.*

239. *See id.*

240. A few district courts have accepted the hostile work environment claim despite the silence of their circuit courts. *See generally* *Tumulo v. Triangle Pac.*



harassed older workers must make the weighty choice of either filing a suit absent an adverse economic impact or creating their own adverse impact by resigning and establishing constructive discharge.

#### **IV. Ending the Silence Through the Recognition of the Hostile Work Environment Claim Under the ADEA**

The circuit courts should break their silence and address the issue of whether the hostile work environment claim is valid under the ADEA. In doing so, they should accept the claim and embrace the prima facie case set forth in *Crawford*. Such acceptance is necessary so that the ADEA can fully effectuate its purpose.

Like Title VII, the ADEA was created to prohibit arbitrary discrimination.<sup>241</sup> This purpose, however, is not fully realized without the acceptance of the hostile work environment claim. Specifically, if a harassed older employee can only rely on the traditional methods of disparate treatment or disparate impact to prove age discrimination, her claim will fail unless she can demonstrate that an additional term, condition, or privilege<sup>242</sup> of an economic nature has also been affected. If such an economic, adverse employment action does not exist, the employee is caught between the proverbial rock and a hard place. In such a situation, she has two possible choices: (1) she can continue to work for her employer and tolerate the discriminatory environment; or (2) she can create her own economic adverse employment action by resigning, entering the ranks of the unemployed, and bringing forth an ADEA disparate treatment claim based on constructive discharge. Neither of these choices, however, deliver the full protection of the ADEA because they force the older worker to either withstand discrimination in the workplace or suffer economic hardship in order to seek remedial action.

In addition to the ADEA's purpose, the similarities between the ADEA and Title VII call for the acceptance of the hostile work environment claim under the ADEA. As noted earlier, both the courts

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Corp., 46 F. Supp. 2d 410 (E.D. Pa. 1999); *Valdivia v. University of Kansas Med. Ctr.*, 24 F. Supp. 2d 1177 (D. Kan. 1998) (assuming that before *Holmes* was decided the ADEA hostile work environment claim was viable in the Tenth Circuit under the reasoning in *Crawford*); *Jackson v. R.I. Williams & Assoc.*, No. 98-1741, 1998 WL 316090 (E.D. Pa. June 8, 1998); *McKeown v. Dartmouth Bookstore, Inc.*, 975 F. Supp. 403 (D.N.H. 1997).

241. See *Lorillard v. Pons*, 434 U.S. 575, 577 (1978).

242. See 29 U.S.C. § 623(a)(1) (1994).

and the EEOC have heavily relied on Title VII to develop and interpret the ADEA's statutory protections.<sup>243</sup> Congress has shown approval of this reliance in passing the Civil Rights Act of 1991.<sup>244</sup> Moreover, Title VII and the ADEA share the same prohibitory clause.<sup>245</sup> In fact, the Supreme Court relied on the shared language prohibiting discrimination based on "terms, conditions, and privileges" to determine that the hostile work environment was a valid claim under Title VII.<sup>246</sup> It reasoned that the phrase "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment,'"<sup>247</sup> including a hostile work environment. This position, however, is irreconcilable with the fact that, although the ADEA contains the same language, many courts are hesitant to accept a hostile work environment claim under the ADEA.

It is important to note that *Crawford's* prima facie case of a hostile work environment claim under the ADEA remains consistent with Title VII. Namely, the ADEA mirrors both *Harris* and *Meritor* in requiring a plaintiff to establish the following in order to establish a prima facie case: (1) the employee is at least forty years old; (2) the employee was subjected to harassment on the basis of age; (3) the harassment was both objectively and subjectively severe or pervasive enough to have the effect of unreasonably interfering with the plaintiff's work performance so as to create a hostile work environment; and (4) employer liability exists.<sup>248</sup>

Although one may argue that those who suffer from age discrimination do not need the same level of protection as those who suffer from discrimination based on race, color, gender, national origin, or religion, this argument fails because, in passing the ADEA, Congress clearly stated that the ADEA shared the same purpose as Title VII — to prohibit arbitrary discrimination.<sup>249</sup> Moreover, though one may argue that it is hard to imagine age harassment so egregious as to reach the level of severe or pervasive, one only needs to look to the Eleventh Circuit opinion of *Massey Yardley*<sup>250</sup> to find such

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243. See *supra* notes 54-55 and accompanying text.

244. See *supra* notes 56-61 and accompanying text.

245. See *supra* note 49 and accompanying text.

246. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

247. *Id.* (quoting *Los Angeles Dep't. of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13).

248. See *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834-35 (6th Cir. 1996).

249. See 29 U.S.C. § 621(b) (1994); see also *Crawford*, 96 F.3d at 834.

250. *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244 (11th

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harassment. The circuit court, though failing to address the issue of whether the hostile work environment claim is cognizable under the ADEA, upheld the jury's verdict finding a hostile work environment.<sup>251</sup> In making such a determination, the court considered evidence that both the plaintiff's immediate supervisor and general manager made insulting, age-related comments on a daily basis, resulting in the interference with the plaintiff's ability to perform her duties.<sup>252</sup> Such comments concerned her gray hair, "fat ass," "saggy, baggy boobs," and the possibility that the plaintiff had experienced hot flashes and suffered from Alzheimer's.<sup>253</sup>

Although not every case will be as egregious as *Massey Yardley*, many will still warrant the protection of the ADEA. Such claims will include facts where the employees are barraged with repeated "suggestions" that they retire. Employer proddings to retire should not be ignored in evaluating a hostile work environment claim. In *Halloway*, the Seventh Circuit held that pressure to retire was not necessarily related to age. As a result, the court did not consider this type of pressure when it determined that the plaintiff did not establish a prima facie case for the hostile work environment claim.<sup>254</sup> Such a ruling ignores the fact that employees today, unless independently wealthy, will almost always retire due to age. Thus, an employer will only really exert pressure to retire on older employees. These pressures are likely to interfere with the employee's work and negatively impact the employee's work environment. To ignore such evidence would bar many harassed employees from establishing a prima facie case and would render adoption of the hostile work environment claim meaningless.

In addition to achieving the ADEA's purpose and reaching statutory consistency with Title VII, the acceptance of the hostile work environment claim under the ADEA would provide societal benefits. As stated earlier, without the hostile work environment claim, an older employee will either withstand the harassment for fear of finding no other employment, or the employee will feel compelled to resign from the job in order to escape the unbearable conditions of the

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Cir. 1997).

251. *See id.* at 1249.

252. *See id.*

253. *See id.* at 1247 n.2.

254. *See Halloway v. Milwaukee County*, No. 98-1429, 1999 WL 382693, at \*4, \*6 (7th Cir. June 11, 1999).

workplace. Although the employee's unemployed status would allow for an ADEA claim relying on the adverse action of constructive discharge, it would have negative consequences both on the individual employee and on society as a whole.

As a result of leaving the workplace due to a hostile work environment, the older worker will suffer economic, physical, and psychological harm.<sup>255</sup> For example, once unemployed, older workers have a significantly longer duration of unemployment than most other groups.<sup>256</sup> This longer duration can be attributed to employers' persistent perceptions that older workers are not as productive as their younger counterparts.<sup>257</sup> In addition to the economic hardships that result, this "[p]rolonged unemployment can often have mental and physical consequences. Psychologists report that discouraged workers can suffer from serious psychological stress, including hopelessness, depression, and frustration."<sup>258</sup> According to Dr. Robert Butler, the first leader of the National Institute of Aging, continued employment has the opposite effect in that it adds structure to older workers lives and allows them to live longer and healthier.<sup>259</sup>

In addition to individualized harm, the absence of the ADEA hostile work environment claim causes far-reaching societal harm. Unemployment of older workers burdens society as a whole because the unemployed may need to rely on public assistance programs in order to survive.<sup>260</sup> With their longer duration of unemployment, older workers are more likely to exhaust available unemployment insurance benefits and suffer economic hardships.<sup>261</sup> In addition, they will no longer be contributing to their retirement pension and will have to rely on it sooner than expected. Unemployment will also force older employees to rely on federal medical programs, such as

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255. See S. REP. NO. 105-36(I), at 78 (1997).

256. See *id.*

257. See *id.* These perceptions are faulty as studies have shown that older workers can bring experience and knowledge to the workplace. The 1988 study by the Commonwealth Fund, "Americans Over 55 at Work," determined that older workers "are both productive and cost-effective, and that hiring them makes good business sense." *Id.* The 1989 study conducted by the American Association of Retired People indicates that, despite the prevailing view that older workers are less productive, more employers are recognizing them as showing high levels of "productivity, attendance, commitment to quality, and work performance." *Id.*

258. *Id.*

259. Robert J. Samuelson, *Getting Serious: Medicare Reform*, NEWSWEEK, Sept.18, 1995, at 40, 44.

260. See *id.* at 41.

261. See *id.*

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the overextended Medicare system, in lieu of employee benefit plans.<sup>262</sup> Lastly, the truly distressed older employees may need to rely on public welfare programs.

The circuit courts must face the issue and accept the ADEA hostile work environment claim in order to end confusion among harassed older workers and the lower courts. Although in most situations avoidance is the model of judicial efficiency, and therefore desired, it is harmful within the context of the ADEA and the hostile work environment claim. Through widespread acceptance, the lower courts will be able to hear hostile work environment claims without fear that their decisions will be overturned. Additionally, older workers will be secure in the knowledge that they can remain employed while bringing forth the claim. Until such widespread acceptance occurs, lower courts should forge ahead despite their circuits' self-imposed silence by accepting hostile work environment claims by harassed older workers.

## V. Conclusion

The hostile work environment claim should be recognized as a valid claim under the ADEA. This is not only consistent with the ADEA's purpose, the ADEA's relationship with Title VII, and the position of the EEOC and various courts, but it is also consistent from a policy perspective regarding the welfare of both the older worker and society as a whole.

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262. *See id.* Social Security and Medicare “now constitute a third of federal spending, and by the time the baby boom hits 65 in 2011, they will be unaffordable in their present form.” *Id.* at 40, 41.