SORRY, YOU ARE TOO CLOSE TO RETIREMENT FOR THIS PROMOTION: ANALYZING PROXIMITY TO RETIREMENT AS A BASIS FOR AGE DISCRIMINATION CLAIMS

ABSTRACT

Each day, thousands of Baby Boomers leave the workforce. Once the largest generation in the nation's history, the Boomers have now reached retirement age and find themselves being replaced by younger workers—a generational shift creating the potential for various age discrimination issues. The Iowa Supreme Court recently highlighted one of these issues in Mormann v. Iowa Workforce Development. Mormann *raised this issue: May an employer deny a promotion because the employee is approaching retirement? Ultimately, the court left this question unanswered, adjudicating the case on statute of limitations grounds. This Note aims to answer that question by examining the Age Discrimination in Employment Act and the case law interpreting it.*

Two competing principals make the answer to this question particularly elusive. First, federal age discrimination laws generally prohibit an employer from taking adverse action against an employee based on age. But second, employers may consider a worker's long-term potential when taking adverse employment actions. Proximity to retirement relates to both age and long-term potential.

When is an employment action based on age, and when is it based on long-term potential? There is no clear-cut answer. This Note, however, proposes four factors that courts should consider to determine whether an employment decision based on a worker's proximity to retirement constitutes age discrimination.

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I. INTRODUCTION

While you are qualified for this promotion, we are going to give it to a

different candidate because you are too close to retirement. This is what Marlon Mormann claimed happened to him.[1] An Iowa administrative law judge, Mormann applied for a promotion to deputy workers' compensation commissioner in 2014, but the state instead hired a younger, less experienced worker for the position.[2] Months later, a piece of evidence surfaced, which Mormann believed established a claim for age discrimination.[3] In a deposition for an unrelated case, then Iowa Workforce Development (IWD) Director Teresa Wahlert stated that she opposed Mormann's promotion because Mormann had stated "during his interview that he thought he was going to retire," and that it thus may be inappropriate to invest in training Mormann for the new position considering his potential departure.[4] Relying on this statement, Mormann sued for age discrimination.[5] Mormann argued the IWD violated the Age Discrimination in Employment Act (ADEA) by denying his promotion based on his proximity to retirement.[6] The merits of this argument, however, were never tested.[7]

In 2018, the Iowa Supreme Court ruled in favor of the IWD on narrow statute of limitations grounds.[8] The court noted Mormann's case presented a question about age discrimination claims but expressly declined to answer it, stating: "We take no position on if and when statements related to potential retirement may be considered evidence of age discrimination."[9]

Mormann's case, if not barred by the statute of limitations, would have presented this question: Does an employer commit age discrimination by taking adverse action against an employee based on the employee's proximity to retirement?[10] Courts are split on this issue.[11] Some have found that age and retirement proximity are effectively inseparable and that neither is a legitimate reason to fire, demote, or deny a promotion to an employee.[12] Other courts,

1. Mormann v. Iowa Workforce Dev., 913 N.W.2d 554, 558–59 (Iowa 2018).
2. *Id.* at 557–58.
3. *See id.* at 558.
4. *Id.*
5. *Id.*
6. *See id.* at 559; *see also* 29 U.S.C. § 623 (2018).
7. *Mormann*, 913 N.W.2d at 576 n.5.
8. *Id.* at 578.
9. *Id.* at 576 n.5.
10. *See id.*
11. *See id.*
12. *See, e.g.*, Hilde v. City of Eveleth, 777 F.3d 998, 1008 (8th Cir. 2015); Hawley v. Dresser Indus., Inc., 958 F.2d 720, 724 (6th Cir. 1992); Schaffner v. Hispanic Hous. Dev. Corp., 76 F. Supp. 2d 881, 883 (N.D. Ill. 1999); Martin v. Gen. Elec. Co., 891 F. Supp. 1052, 1058 (E.D. Pa. 1995); Ware v. Howard Univ., Inc., 816 F. Supp. 737, 745 (D.D.C. 1993).

meanwhile, have indicated employers may consider an employee's long-term potential, such as retirement proximity, when considering who to hire, fire, demote, or promote.[13]

This discrepancy creates several problems. First, it could lead to inconsistent application of the ADEA. As the Iowa Supreme Court noted in its opinion, the case law addressing the question posed by Mormann's claim points in opposite directions.[14] Second, the current case law could paralyze employers, preventing them from making legitimate employment decisions based on an employee's long-term potential out of fear of committing age discrimination.[15] Imagine a lawyer considering two paralegals for a promotion. They are similar in skill and experience, though one is older and has expressed plans to continue working for only a year or two more. Is the lawyer barred from considering the two employees' long-term potential and the older employee's express retirement plans when deciding who to promote? Additionally, the lack of consensus on this issue leaves an opening for employers to discriminate based on age while evading punishment. Consider a business conducting layoffs in response to budget cuts. Suppose the business laid off older, more experienced, and higher-paid employees and kept younger, cheaper workers. Could the business defeat an age discrimination claim by arguing that it cut the employees most likely to retire soon and that the layoffs thus were a legitimate business decision based not on age but on long-term potential? These hypotheticals highlight the conflict between two competing principals: First, under the ADEA an employer may not use age as the basis of an adverse employment decision,[16] but second, employers may consider the long-term potential of employees when making employment decisions.[17] This poses the question: Are employment decisions based on proximity to retirement more closely related to age or long-term potential? This Note aims to answer this question by providing a framework to analyze these age discrimination claims.

II. DEMOGRAPHIC AND TECHNICAL FORCES INCREASE THE NEED FOR CLARITY IN AGE DISCRIMINATION LAWS

Refining age discrimination law is of growing importance as the population ages and older employees face mounting hurdles to remain in the workforce. A

13. *See, e.g.*, Scott v. Potter, 182 F. App'x 521, 526 (6th Cir. 2006); Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000); Furr v. Seagate Tech., Inc., 82 F.3d 980, 987–88 (10th Cir. 1996); Young v. Hobart W. Grp., 897 A.2d 1063, 1065–66 (N.J. Super. Ct. App. Div. 2005).

14. *Mormann*, 913 N.W.2d at 576 n.5.

15. *See Hawley*, 958 F.2d at 724.

16. 29 U.S.C. §§ 621, 623 (2018).

17. *Id.*

recent study from ProPublica and the Urban Institute found more than half of workers over 50 are being pushed out of long-time jobs before they decide to retire.[18] Some 28 percent of workers faced a damaging layoff between 50 and the end of their working careers.[19] Another 15 percent of workers over 50 left stable jobs after reporting their pay, hours, location, or work conditions deteriorated.[20] The post-war generation is retiring in record numbers, with an estimated 10,000 Baby Boomers retiring every day, a demographic shift that prompts the need to clarify the law related to age discrimination claims and proximity to retirement.[21] Employees approaching retirement age and their employers deserve to know their rights and responsibilities in this regard.

III. BACKGROUND

A. *Congress Sought to Prevent Workplace Discrimination Based on Age When It Enacted the ADEA*

Age discrimination claims are governed by the ADEA and Title VII of the Civil Rights Act of 1964.[22] The ADEA requires employers to "evaluate [older] employees . . . on their merits and not their age."[23] Congress passed the ADEA amid growing concern that older workers were being expelled from the labor market.[24] Congress stated several reasons for the law: arbitrary age limits were becoming commonplace; long-term unemployment and its resulting ills (namely, the deterioration in skill, morale, and employability) were disproportionately harming older workers; and age discrimination was burdening commerce.[25] In short, Congress passed the ADEA due to "concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."[26]

18. *See* Peter Gosselin, *If You're over 50, Chances Are the Decision to Leave a Job Won't Be Yours*, PROPUBLICA (Dec. 28, 2018), https://www.propublica.org/article/older-workers-united-states-pushed-out-of-work-forced-retirement [https://perma.cc/FT9X-6QZV] (noting a study of 20,000 nationally representative workers between the age of 50 and the end of their working careers found roughly 56 percent were laid off at least once or left a job under conditions that indicate they were pushed out rather than leaving on their own terms).

19. *Id.*

20. *Id.*

21. *See id.*; Joel Landau, *Health-Care Dilemma: 10,000 Boomers Retiring Each Day*, CNBC (Oct. 3, 2017), https://www.cnbc.com/2017/10/03/health-care-dilemma-10000-boomers-retiring-each-day.html [https://perma.cc/T4GC-XPW5].

22. 29 U.S.C. § 621 (2018); 42 U.S.C. §§ 2000e–2000e-17 (2018).

23. Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993) (quoting W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 422 (1985)).

24. 29 U.S.C. § 621.

25. *Id.*

26. *Hazen Paper*, 507 U.S. at 610 (citing EEOC v. Wyoming, 460 U.S. 226, 228 (1983)).

Under the ADEA, an employer may not fire, lay off, demote, or take other adverse employment actions against an employee based on the belief that the employee's productivity and competence will decline with age—doing so would be "the very essence of age discrimination."[27] The ADEA applies to state and local governments through the Commerce Clause.[28]

B. *Elements Needed to Establish an Age Discrimination Claim*

To establish a prima facie case of age discrimination, a plaintiff must prove four elements: (1) the plaintiff was part of a protected class (at least 40 years old); (2) the plaintiff was qualified for the applied-for job (in cases of promotion or hiring) or the job the plaintiff was holding (in cases of termination, demotion, or layoff); (3) the plaintiff was rejected (i.e. fired, laid off, demoted, not hired, or denied promotion) despite being qualified; and (4) the job was filled by a younger applicant.[29]

Once a prima facie case of age discrimination is established, courts apply the burden-shifting test from *McDonnell Douglas Corp. v. Green*.[30] Under this test, the defendant may rebut the claim by offering a nondiscriminatory reason for the adverse employment action.[31] Then, the plaintiff may rebut the defendant's purported reason by showing the defendant's nondiscriminatory reason is mere pretext.[32] In effect, the *McDonnell Douglas* test places the burden on the defendant to show a legitimate reason for taking an adverse action against an older employee and then shifts the burden to the employee to show the employer's reason is pretext meant to conceal a discriminatory reason.[33]

The ADEA does not authorize mixed-motive claims.[34] Specifically, the U.S. Supreme Court has held that to sustain a claim for age discrimination under the ADEA, age must be the "but for" cause of the employer's adverse action against the employee.[35] That is, the adverse employment action would not have occurred had the employer not considered age.[36]

27. *Id.*
28. *EEOC*, 460 U.S. at 243.
29. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
30. *Id.*
31. *Id.*
32. *See id.* at 804.
33. *See id.* at 807.
34. Gross v. FBL Fin. Servs., 588 F.3d 614, 620 (8th Cir. 2009).
35. *Id.*
36. *Id.*

Courts have identified several defenses against age discrimination claims.[37] They include the following: age as a bona fide occupational qualification, a reliance on the terms of a bona fide seniority plan, a personnel action for good cause, and an employment action based on reasonable factors other than age.[38] Most relevant to this Note is the defense of reasonable factors other than age (RFOA). By invoking a RFOA defense, a defendant–employer claims it took an adverse action against the employee not because of age but because of some other legitimate factor, such as the employee's performance.[39] In the context of a RFOA defense, the question presented by Mormann's claim is this: Is an employee's proximity to retirement a RFOA upon which an employer may base an adverse employment action? More simply stated, may an employer fire, demote, or decline to promote an employee merely because the employee is approaching retirement?

Courts have provided no bright-line answer to this question. This Note, however, aims to provide a framework for courts to analyze age discrimination claims that hinge on the plaintiff's proximity to retirement. As this Note discusses below, courts should consider several factors when determining whether proximity to retirement is a reasonable factor other than age. These factors include whether the employee expressed retirement intentions, whether the employer considered the long-term potential of all employees affected, the presence or absence of other instances of age discrimination, and the employer's need for long-term worker retention.[40]

C. *Courts Have Identified Several RFOAs upon Which Employers May Base Employment Decisions*

A RFOA is an affirmative defense in which the defendant−employer bears the burdens of production and persuasion.[41] Courts have identified various factors for employment decisions that constitute a RFOA.[42] Some of them include the

37. Zachary L. Karmen, Annotation, *Disparate Impact Claims Under Age Discrimination Act of 1967, §§ 2 et seq., 29 U.S.C.A. §§ 621 et seq.*, 186 A.L.R. Fed. 1, §§ 12–14 (2018).

38. *Id.*

39. *Id.* § 14.

40. *See infra* Part V.

41. 29 U.S.C. § 623(f)(1) (2018); Fulghum v. Embarq Corp., 938 F. Supp. 2d 1090, 1131 (D. Kan. 2013), *aff'd in part*, *rev'd in part*, 778 F.3d 1147 (10th Cir. 2015).

42. *See* Karmen, *supra* note 37, § 3.

following: physical fitness;[43] unacceptable job performance and inability to improve;[44] an evaluation process to retain the employees best able to perform the job;[45] job-performance evaluations;[46] and sales performance.[47] Still unclear, however, is whether an employee's proximity to retirement constitutes a RFOA. The Supreme Court has not addressed this question, and circuit courts have indicated varying levels of tolerance for employment decisions based on a worker's proximity to retirement.[48]

IV. COURTS ARE SPLIT ON WHETHER PROXIMITY TO RETIREMENT CONSTITUTES A RFOA

While the Supreme Court has not directly addressed whether proximity to retirement is a RFOA for an adverse employment action, it has provided some insight.[49] In *Hazen Paper Co. v. Biggins*, a paper goods manufacturer fired a 62-year-old employee weeks before he achieved 10 years of service with the company, at which point his pension would have vested.[50] The employee alleged the employer fired him to prevent his pension rights from vesting.[51] The Court distilled the issue to this: "[D]oes an employer's interference with the vesting of pension benefits violate the ADEA?"[52] In short, the answer is no.[53] The Court held the employer's action may have violated benefits laws, such as the Employment Retirement Income Security Act (ERISA), but it does not provide grounds for an

43. Annotation, *Construction and Application of Age Discrimination in Employment Act of 1967, 29 U.S.C.A. § 621 et seq.*, 24 A.L.R. Fed. 808, § 1(c) (1975).

44. Randlett v. Owens-Illinois, Inc., 419 F. Supp. 103, 105 (N.D. Tex. 1976).

45. Duncan v. El Paso Prods. Co., No. MO-85-CA-162, 1985 WL 15451, at *1 (W.D. Tex. Nov. 27, 1985).

46. Stringfellow v. Monsanto Co., 320 F. Supp. 1175, 1180–81 (W.D. Ark. 1970).

47. Schwager v. Sun Oil Co., 591 F.2d 58, 61–62 (10th Cir. 1979) (eliminating the employee with the lowest sales performance).

48. *Compare* Hilde v. City of Eveleth, 777 F.3d 998, 1008 (8th Cir. 2015), Hawley v. Dresser Indus., Inc., 958 F.2d 720, 724 (6th Cir. 1992), Schaffner v. Hispanic Hous. Dev. Corp., 76 F. Supp. 2d 881, 883 (N.D. Ill. 1999), Martin v. Gen. Elec. Co., 891 F. Supp. 1052, 1058 (E.D. Pa. 1995), *and* Ware v. Howard Univ., Inc., 816 F. Supp. 737, 745 (D.D.C. 1993), *with* Scott v. Potter, 182 F. App'x 521, 526 (6th Cir. 2006), Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000), *and* Furr v. Seagate Tech., Inc., 82 F.3d 980, 987–88 (10th Cir. 1996).

49. *See generally* Hazen Paper Co. v. Biggins, 507 U.S. 604, 612–13 (1993).

50. *Id.* at 607.

51. *Id.* at 606.

52. *Id.* at 608.

53. *See id.* at 611.

age discrimination claim.[54] This is because age and years of service are "analytically distinct."[55] Furthermore, the Court held that when an employer's decision is wholly motivated by factors other than age, the employee has no claim for age discrimination, "even if the motivating factor is correlated with age."[56] If the Court had stopped there, the analysis for using proximity to retirement as grounds for an age discrimination claim would be easy. That is, the holding in *Hazen Paper* would lead to the inference that proximity to retirement, while generally correlated with age, is analytically distinct from age, and thus, an employer may base an employment decision on proximity to retirement without violating the ADEA.[57] The Court, however, did not stop there. The Court held an employer would be liable for age discrimination if it used an age-correlated

factor to hide a discriminatory purpose.[58] Specifically, the Court stated, "Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent . . . but in the sense that the employer may suppose a correlation between the two factors and act accordingly."[59] For example, if an employer believes older workers are less productive and seeks to cast off older workers by laying off those eligible for pension, then the employer would be committing age discrimination under the ADEA because pension eligibility would merely be a mechanism used to differentiate the workers based on age.[60]

Applied to the question presented by Mormann's case, *Hazen Paper* leads to the conclusion that an employer may not use proximity to retirement as a stand-in for age or as a pretext to mask a discriminatory purpose.[61] That is, an employer may not take an adverse action against an employee based on the assumption that the employee is too old for the job merely because the employee is approaching retirement[62] nor may an employer target older workers by taking adverse action

54. *Id.* at 612–13.
55. *Id.* at 611.
56. *Id.*
57. *See id.*
58. *Id.* at 613; Toni J. Querry, Note, *A Rose by Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After* Hazen Paper Co. v. Biggins, 81 CORNELL L. REV. 530, 554–55 (1993).
59. *Hazen Paper*, 507 U.S. at 613.
60. *See* Querry, *supra* note 58, at 554.
61. *See Hazen Paper*, 507 U.S. at 613.
62. *See id.*

against those nearing retirement while hiding behind the guise that the action was based not on age but on proximity to retirement.[63]

Ultimately, what does *Hazen Paper* tell us about using proximity to retirement as a RFOA? First, if an employer's reason for taking an adverse action against an employee is analytically distinct from age, even if correlated with age, it is presumed to be legitimate.[64] But second, if the employer's age-correlated reason for the employment action is merely pretext used to mask a discriminatory purpose, it is illegitimate.[65] This begs the question: Is proximity to retirement merely a proxy for age? Or is it analytically distinct from—albeit generally correlated with—age? Other courts have provided insight on answering this question.

A. *The Eighth and Sixth Circuits Have Found Employment Actions Based on Proximity to Retirement May Give Rise to Age Discrimination Claims Under the ADEA*

1. *Eighth Circuit*

Several courts, including the Eighth and Sixth Circuits, have found actions based on an employee's proximity to retirement provide grounds for an age discrimination claim under the ADEA.[66] In *Hilde v. City of Eveleth*, the Eighth Circuit held a police lieutenant established evidence of age discrimination sufficient to overcome a motion for summary judgement by showing the defendant−city declined to promote him to police chief because his age made him eligible for retirement.[67] Under department policy, employees were eligible for retirement when they reached 50 and had 3 years of service.[68] The lieutenant was 51 and had worked for the department for 29 years.[69] He had been ranked as the most qualified for the job, but the hiring commissioners, deviating from their own protocol, deliberately reduced his qualification scores to make the two candidates

63. *See id.*

64. *Id.* at 611.

65. *Id.* at 613.

66. *See, e.g.*, Hilde v. City of Eveleth, 777 F.3d 998, 1008 (8th Cir. 2015); Hawley v. Dresser Indus., Inc., 958 F.2d 720, 724 (6th Cir. 1992); Schaffner v. Hispanic Hous. Dev. Corp., 76 F. Supp. 2d 881, 883 (N.D. Ill. 1999); Martin v. Gen. Elec. Co., 891 F. Supp. 1052, 1058 (E.D. Pa. 1995); Ware v. Howard Univ., Inc., 816 F. Supp. 737, 745 (D.D.C. 1993).

67. *Hilde*, 777 F.3d at 1008.

68. *Id.* at 1002.

69. *Id.* at 1001.

appear similarly qualified.[70] The outgoing police chief and a hiring commissioner acknowledged the lieutenant's retirement eligibility may have been a factor in the decision.[71] The commission did not deny it considered the lieutenant's retirement eligibility when making its decision.[72] Instead, the city argued that retirement eligibility was evidence of the employee's lack of commitment to his job and that this lack of commitment was a legitimate concern.[73] Simply put, the city argued retirement eligibility was a RFOA.[74] The Eighth Circuit disagreed.[75] The lieutenant overcame the city's motion for summary judgement by bringing into question whether the city used the lieutenant's retirement eligibility as a proxy for age.[76]

The Eighth Circuit held the type of stereotyping prohibited by the ADEA—namely that "older employees are likely to be less committed to a job because they can retire at any time"—was a factor in the city's decision.[77] Furthermore, the court held, "Using retirement eligibility to presuppose lowered productivity or dedication would not 'represent an accurate judgement about the employee' unless *evidence other than age* indicates that the employee would, in fact, retire."[78] That is, an employer may not assume an employee is less dedicated to the job merely because the employee is eligible for retirement; basing an employment action upon such an assumption would be an ADEA violation under the Eighth Circuit's analysis.[79]

The Eighth Circuit distinguished *Hilde* from the Supreme Court's ruling in *Hazen Paper*.[80] Specifically, the court noted pension eligibility based on years of service, as in *Hazen Paper*, was distinct from age because a younger employee may work for an employer for an entire career, while an older employee may have been recently hired.[81] Retirement eligibility in *Hilde*, on the other hand, could not "be divorced from age" because it was dependent on the employee reaching 50.[82]

70. *Id.* at 1007.
71. *Id.* at 1003.
72. *Id.* at 1005.
73. *Id.*
74. *See id.*
75. *Id.* at 1008.
76. *See id.* at 1005.
77. *Id.* at 1006.
78. *Id.* (emphasis added) (citations omitted).
79. *See id.*
80. *See id.*
81. *Id.*
82. *Id.*

Accordingly, factors such as pension vesting and retirement eligibility are proxies for age when they cannot be divorced from age and are not the function of some other factor, such as years of service.[83]

2. *Sixth Circuit*

The Sixth Circuit, meanwhile, has indicated proximity to retirement may be a proxy for age.[84] In *Hawley v. Dresser Industries, Inc.*, a manufacturing company faced with economic difficulties cut 12 executive positions but found new positions for 11 of the executives.[85] The plaintiff, a 62-year-old vice president, was the only executive not retained.[86] The plaintiff's boss testified, "[H]e thought that plaintiff was so close to retirement that he would not mind being terminated."[87] The Sixth Circuit reversed a judgement notwithstanding the verdict in favor of the defendant−employer, holding that based on the boss's "belief that plaintiff was ready to retire, the jury could have inferred that plaintiff's termination . . . was not based on his lack of skills but on the fact that he was close to retirement age."[88] The court, however, affirmed the district court's grant of a new trial to the defendants, stating the "evidence is especially weak that age was a 'significant' factor" and the "overwhelming weight of the evidence was that age played no part" in the executive's termination.[89]

The dissent in *Hawley* offered a different analysis, arguing a statement about an employee's age is not inherently probative of intent to discriminate and that a single reference to an employee's retirement, without more, is not enough to establish an age discrimination claim under the ADEA.[90]

3. *Several U.S. District Courts Agree Proximity to Retirement May Function as a Proxy for Age and Is Thus an Illegitimate Basis for Employment Decisions*

U.S. district courts have also identified instances where a negative employment action based on an employee's proximity to retirement may constitute age discrimination.[91] In *Ware v. Howard University, Inc.*, the U.S. District Court

83. *See id.*
84. *See* Hawley v. Dresser Indus., Inc., 958 F.2d 720, 724 (6th Cir. 1992).
85. *Id.* at 722.
86. *Id.*
87. *Id.* at 723.
88. *Id.* at 724.
89. *Id.* at 725.
90. *Id.* at 729–30 (Contie, J., dissenting).
91. *See, e.g.*, Schaffner v. Hispanic Hous. Dev. Corp., 76 F. Supp. 2d 881, 883 (N.D. Ill. 1999); Martin v. Gen. Elec. Co., 891 F. Supp. 1052, 1058 (E.D. Pa. 1995); Ware v. Howard Univ., Inc., 816 F. Supp. 737, 745 (D.D.C. 1993).

for the District of Columbia held the college committed age discrimination when it declined to promote (and later demoted) a 60-year-old personnel director and instead promoted a younger, less qualified employee.[92] The personnel director's boss told him he was not considered for the promotion "because he was too close to retirement."[93] In the bench trial, the court did not consider this statement in a vacuum but rather based its findings on the totality of the circumstances, which showed pervasive age discrimination at the college.[94] Employees in their early 60s were not seriously considered for promotions, the employee handbook stated (contrary to law) employees could be compelled to retire at age 70, and the school essentially made 65 a mandatory retirement age.[95] The record does not indicate the plaintiff ever told his boss he intended to retire in the near future; rather, it appears the defendant−employer assumed the plaintiff's retirement plans based on his age.[96] On these facts, the court ruled the university committed age discrimination when it declined to promote and later demoted the plaintiff.[97]

The U.S. District Court for the Northern District of Illinois, in *Schaffner v. Hispanic Housing Development Corp.*, held a reasonable jury could find a case of age discrimination when the defendant−employer downgraded the plaintiff−employee's performance reviews because she was approaching retirement and when the employer derogatorily stated the employee "was too old for her job."[98] Regarding the employee's proximity to retirement, the employer specifically stated the plaintiff "was getting close to retirement and they didn't want to spend time and energy on her."[99] The employer's statement about the employee being too close to retirement is highly probative of the issue examined in this Note, but the employer's additional statement about the employee being "too old for her job" muddies the issue.[100] This is because the latter statement alone would provide grounds for an age discrimination claim.[101] Considering both statements ("too old for the job" and "getting close to retirement"), the court ruled the plaintiff had established enough evidence of age discrimination to overcome a motion for summary judgement.[102]

92. *Ware*, 816 F. Supp. at 754.
93. *Id.* at 746.
94. *Id.* at 740, 745–46.
95. *Id.* at 746.
96. *Id.* at 745–46.
97. *Id.* at 754.
98. Schaffner v. Hispanic Hous. Dev. Corp., 76 F. Supp. 2d 881, 882 (N.D. Ill. 1999).
99. *Id.*
100. *See id.*
101. *See id.*
102. *Id.* at 883.

The U.S. District Court for the Eastern District of Pennsylvania, in *Martin v. General Electric Co.*, denied a defendant−employer's motion for summary judgement, holding a reasonable jury could find a case of age discrimination when a manager considering which employees to lay off told a subordinate to "investigate if anyone on plaintiff's list was close to retirement and might opt to retire if given a layoff notice."[103] If the evidence stopped here, the holding in *Martin* would speak directly to the issues considered in this Note. However, the defendant−employer made several other comments about age that could, by themselves, provide evidence to establish an age discrimination claim.[104] Specifically, when discussing an employee being considered for a layoff, the manager stated: "[F]ine, age is a requirement. That's how we get rid of him. That's how we get down to the names we need."[105] Additionally, the manager stated, about the plaintiff's 25-years-of-service lunch, "[W]e don't have that anymore because all that does, that just honors old people."[106] Like in *Schaffner*, these comments muddied the water; the court did not determine whether the employer's comments about proximity to retirement alone would provide grounds for an age discrimination claim because other age-related comments helped show discrimination.[107]

B. *The Sixth, Seventh, and Tenth Circuits Have Found Employment Actions Based on Proximity to Retirement May be a RFOA and Thus Do Not Give Rise to Age Discrimination Claims Under the ADEA*

Several courts, including the Seventh and Tenth Circuits, have indicated proximity to retirement may be a legitimate reason to take an adverse action against an employee.[108] Writing for the Seventh Circuit in *Thorn v. Sundstrand Aerospace Corp.*, Judge Richard Posner held employers may consider the long-term potential of their employees when deciding who to lay off in a reduction-in-force (RIF) action.[109] Specifically, Posner wrote:

> It would be a foolish RIF that retained an employee who was likely to quit anyway in a few months while [eliminating] one likely to perform well for the

103. Martin v. Gen. Elec. Co., 891 F. Supp. 1052, 1058 (E.D. Pa. 1995).

104. *See id.*

105. *Id.*

106. *Id.*

107. *See id.*; *Schaffner*, 76 F. Supp. 2d at 882.

108. *See, e.g.*, Scott v. Potter, 182 F. App'x 521, 526 (6th Cir. 2006); Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000); Furr v. Seagate Tech., Inc., 82 F.3d 980, 987 (10th Cir. 1996); Young v. Hobart W. Grp., 897 A.2d 1063, 1065–66 (N.J. Super. Ct. App. Div. 2005).

109. *Thorn*, 207 F.3d at 389.

> company over a period of years. High turnover of skilled workers can be very harmful to a company. The worker who leaves may take with him trade secrets valuable to a competitor or the benefits of specialized training that the employer had given him, at some expense, in the hope of recouping the expense in the worker's superior productivity now to be enjoyed by another employer.[110]

Posner also highlighted a distinction between age and long-term potential, noting younger workers may, in fact, offer lower long-term potential by being more apt to hop from job to job.[111] "Since younger employees tend to be more mobile than older ones, there is no basis for an inference that employers interested in the long-term potential of an employee prefer young to old."[112] Posner's opinion underscored a subtle distinction between long-term potential and proximity to retirement: the former is not necessarily related to age, while the latter almost always is.[113]

Similarly, the Tenth Circuit has held an employee's future potential is a RFOA for making an adverse employment decision.[114] In *Furr v. Seagate Technology, Inc.*, a computer-hard-disk-drive manufacturer sought to reduce its workforce and conducted layoffs based on a list of factors including "potential."[115] A jury found for the plaintiff−employees, but the Tenth Circuit overturned the verdict, holding the following:

> Future job potential is certainly something that a company might legitimately want to consider in its RIF decision. Indeed, Congress has recognized potential as a legitimate factor distinct from age; Congress enacted the ADEA to combat "the setting of arbitrary age limits regardless of *potential* for job performance."[116]

The Sixth Circuit, meanwhile, has held, "'[R]etire' and 'age' are not synonyms."[117] In *Scott v. Porter*, which involved a dispute between a disgruntled mail handler and his supervisor, the Sixth Circuit concluded the supervisor's statement, "[w]hy don't you retire and make everybody happy," did not constitute direct evidence of age discrimination.[118] The court reasoned the statement was

110. *Id.*
111. *See id.*
112. *Id.*
113. *See id.*
114. Furr v. Seagate Tech., Inc., 82 F.3d 980, 987 (10th Cir. 1996).
115. *See id.* at 986.
116. *Id.* at 987.
117. Scott v. Potter, 182 F. App'x 521, 526 (6th Cir. 2006).
118. *Id.* at 526–27.

analogous to stating "why don't you quit and make everybody happy," which clearly would not present a claim for age discrimination.[119]

1. *Some State Courts Have Similarly Found Proximity to Retirement to Be a RFOA*

Some state courts have also held employers may consider the long-term potential of their workers when making employment decisions.[120] For example, in *Young v. Hobart West Group*, a New Jersey staffing company terminated a manager in an effort to reduce costs amid shrinking business.[121] The manager sued for age and gender discrimination, alleging she was terminated because the employer believed she was not in it "for the long haul" because she planned to retire to Montana in the future.[122] Citing *Thorn*, the New Jersey Superior Court concluded employers are allowed to consider the long-term potential of their employees when making employment decisions and that long-term potential is not inherently a proxy for age because younger employees are often more mobile and thus more likely to leave for other jobs.[123]

C. *Inquiring About Retirement Plans Is Distinct from Basing an Employment Decision on an Employee's Retirement Plans or Presumed Proximity to Retirement*

In a related, albeit distinct issue, several U.S. circuit courts have held an employer does not commit age discrimination under the ADEA merely by inquiring about an employee's retirement plans.[124] The Eighth Circuit, in *Cox v. Dubuque Bank & Trust*, held neither federal nor Iowa law prohibits an employer from asking employees about their retirement plans.[125] The Eleventh Circuit, in *Roberts v. Design & Manufacturing Services, Inc.*, held an employer's inquiries—even frequent ones—into when an employee is going to retire is not direct evidence of age discrimination.[126] The Sixth Circuit, in *Woythal v. Tex-Tenn Corp.*, was

119. *See id.* at 526.

120. *See, e.g.*, Young v. Hobart W. Grp., 897 A.2d 1063, 1065–66 (N.J. Super. Ct. App. Div. 2005).

121. *Id.* at 1067.

122. *See id.* at 1070–71.

123. *See id.* at 1071.

124. *See, e.g.*, Roberts v. Design & Mfg. Servs., Inc., 167 F. App'x 82, 84–85 (11th Cir. 2006); Cox v. Dubuque Bank & Tr. Co., 163 F.3d 492, 498 (8th Cir. 1998); Woythal v. Tex-Tenn Corp., 112 F.3d 243, 247 (6th Cir. 1997).

125. *Cox*, 163 F.3d at 497.

126. *Roberts*, 167 F. App'x at 84–85 ("Only the most blatant remarks, whose intent could be nothing other than to discriminate . . . constitute direct evidence of discrimination." (quoting Carter v. Miami, 870 F.2d 578, 582 (11th Cir. 1989)).

presented with evidence that the employer repeatedly asked the employee what he wanted to do at the company and what his retirement plans were, to the point that the employee "believed he was being pressured to retire;" the court found this did not constitute age discrimination.[127]

V. ANALYSIS

Case law addressing age discrimination claims based on proximity to retirement points to several conclusions. First, employers may consider an employee's long-term potential when hiring, firing, promoting, or taking other employment actions.[128] That is to say, an employee's long-term potential is a RFOA upon which an employer may base an employment decision.[129] This is logical. Employers have legitimate reasons to seek, retain, and elevate workers with the greatest long-term potential because hiring or promoting an employee involves significant up-front costs such as screening, interviewing, and training, and an employer may recover these costs only if the employee remains in the position for a certain period of time.[130] Additionally, by building relationships and gaining institutional knowledge, an employee may become more valuable the longer the employee remains in the position.[131] Furthermore, employers should be able to consider an employee's long-term potential when making employment decisions because long-term potential and age, while sometimes correlated, are distinct factors.[132] For example, younger employees often are more mobile and

127. *Woythal*, 112 F.3d at 247.

128. *See* Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000); *Young*, 897 A.2d at 1071.

129. *See, e.g.*, *Thorn*, 207 F.3d at 389 ("High turnover of skilled workers can be very harmful to a company."); Furr v. Seagate Tech., Inc., 82 F.3d 980, 987 (10th Cir. 1996) ("Future job potential is certainly something that a company might legitimately want to consider in its RIF decision."); *Young*, 897 A.2d at 1071 ("Employers are entitled to consider the long-term potential of employees when making business decisions.").

130. *See* SOC'Y FOR HUMAN RES. MGMT., 2016 HUMAN CAPITAL BENCHMARKING REPORT 16 (2016), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2016-Human-Capital-Report.pdf [https://perma.cc/GU4S-RPHD] (finding the average cost of hiring an employee is $4,129).

131. Dr. Andrew M. Peña, *Institutional Knowledge: When Employees Leave, What Do We Lose?*, HIGHER ED JOBS (Nov. 18, 2013), https://www.higheredjobs.com/articles/articleDisplay.cfm?ID=468 [https://perma.cc/7W9Z-BNVF].

132. Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993) ("Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'"); *see Thorn*, 207 F.3d at 389 ("Since younger employees tend to be more mobile than older ones, there is no basis for an inference that employers interested in the long-term potential

may be more likely to job-hop, change careers, or return to school than older, more stable workers, and thus, an inquiry about an employee's likelihood to remain with the employer (i.e. the employee's long-term potential) is not necessarily a function of the employee's age and may, in fact, be inversely related to the employee's age.[133] Because an employee's long-term potential is a legitimate business interest of an employer and because long-term potential is distinct from age, an employer should be able to consider a worker's long-term potential when making employment decisions without violating the ADEA.[134]

The second conclusion to draw from the case law on this subject is that an employer may not base an employment decision on an employee's proximity to retirement if the employer is using proximity to retirement as a proxy for age.[135] That is, proximity to retirement is not a RFOA when it is merely a stand-in for age.[136] In *Hazen Paper*, the Supreme Court addressed this point, drawing a link between age and pension status.[137] Specifically, the Court held an employer may not assume a correlation between age and pension status and act accordingly.[138] Doing so would be treating pension status as a proxy for age and would violate the ADEA.[139] That same rationale can be applied to an employee's proximity to retirement. Like pension status, proximity to retirement is closely related to age. Accordingly, if an employer assumes a correlation between an employee's retirement plans and the employee's age, then the employer would be treating retirement as a proxy for age, and employment decisions based on such an assumption would violate the ADEA.[140]

Thus, when an employer considers an employee's proximity to retirement in order to determine the employee's long-term potential, proximity to retirement is

of an employee prefer young to old."); *Furr*, 82 F.3d at 987 ("Simply because there may be a correlation between age and potential does not mean that potential cannot be used as a selection criteria."); *Young*, 897 A.2d at 1071 (citing *Thorn* and reasoning that long-term potential is not an automatic proxy for age because younger and more mobile employees may be more likely to job-hop and would thus offer their employer less long-term potential than older, more stable workers).

133. *See Thorn*, 207 F.3d at 389.

134. *See Hazen Paper*, 507 U.S. at 611.

135. *See id.* at 612–13 ("We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination.").

136. *See id.*

137. *Id.* at 613 ("Pension status may be a proxy for age . . . in the sense that the employer may suppose a correlation between the two factors and act accordingly.").

138. *Id.*

139. *Id.*

140. *See id.* at 612–13.

a legitimate basis for an employment decision.[141] But when an employer uses proximity to retirement as a proxy for age, then proximity to retirement is merely pretext to mask age discrimination and violates the ADEA.[142]

This begs the question: How do courts determine the difference? When proximity to retirement is the basis for an employment decision, how do courts determine if the employer was (legitimately) considering long-term potential or (illegitimately) using retirement proximity as a proxy for age? Answering this question is challenging because it requires a journey inside the mind of the employer. Specifically, the fact-finder must determine whether the motive of the employer was legitimate or a pretextual reason used to hide discrimination.[143] Such a determination is particularly challenging because "an employer rarely waves a red flag announcing his or her discriminatory intent."[144] But this challenge is not new. The current *McDonnell Douglas* burden-shifting test requires an examination of the employer's mind; once the plaintiff establishes a prima facie case of age discrimination and the employer has rebutted the claim with a nondiscriminatory reason for the employment action, the employee may attempt to prove the employer's stated reason is mere pretext used to mask a discriminatory purpose.[145] Whether the employer's stated reason is legitimate or mere pretext is a question about the employer's thinking; it requires an examination of the employer's motivation.[146]

A. *Factors for Determining Whether Consideration of an Employee's Proximity to Retirement Violates the ADEA*

This Note aims to provide several factors a court may consider when determining whether an employer's consideration of an employee's proximity to retirement is a legitimate inquiry into the employee's long-term potential or is mere pretext to mask age discrimination. At least four factors are relevant: (1) whether the employee voluntarily divulged the retirement plans; (2) other instances of age discrimination in the workplace; (3) the employer's need for workers with long-term potential; and (4) whether the long-term potential of all affected employees was considered.

141. *See id.* at 611.
142. *See id.* at 612–13.
143. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
144. Querry, *supra* note 58, at 554–55.
145. *McDonnell Douglas*, 411 U.S. at 802.
146. *See id.*

1. *Factor 1: Whether the Employee Voluntarily Divulged the Retirement Plans*

Courts should consider whether the employee expressly stated the intention to retire at a certain time or whether the employer merely assumed the employee was approaching retirement based on the employee's age. When an employer assumes an employee is approaching retirement based on the employee's age, the employer is using retirement proximity as a proxy for age and is thus basing its employment decision on age, a clear violation of the ADEA.[147] That is, an employer should only be allowed to base an employment decision on an employee's proximity to retirement when the employer has received some express information indicating the employee's retirement plans.[148] For example, if an employee tells the boss the employee intends to retire in one year, the boss should be able to consider that information (subject to limitations from other factors proposed in this Note) in deciding whether to promote the soon-to-retire employee.

One downside to this factor is it would incentivize employees to refrain from discussing their retirement plans with their superiors. This could harm employers by hindering succession planning and the training of replacement workers. This problem, however, is relatively minimal considering employees are already incentivized to keep retirement plans carefully guarded. Specifically, employees may refrain from disclosing retirement plans because of any number of reasons, such as this information is personal, committing to a retirement date long before it arrives can limit an employee's options, or a stigma exists that retiring workers have checked out or are less committed to their jobs.

In short, if employees state their intentions to retire, employers should not be barred from considering that information when determining which employees offer the greatest long-term potential. But if the employee does not offer up retirement plans, the employer should not be allowed to assume the employee is nearing retirement based on the employee's age.

2. *Factor 2: Other Instances of Age Discrimination in the Workplace*

Courts should consider other instances or evidence of age discrimination or ageism in the workplace committed by the defendant−employer. For example, in *Ware*, the college was found to have violated the ADEA when it told a 60-year-

147. *See Hazen Paper*, 507 U.S. at 611 (holding pension status is a proxy for age when the employer supposes a correlation between the two factors and acts accordingly).

148. *See* Young v. Hobart W. Grp., 897 A.2d 1063, 1071 (N.J. Super. Ct. App. Div. 2005).

old personnel director he "was too close to retirement" for a promotion.[149] The U.S. District Court for the District of Columbia did not consider this statement in a vacuum but instead considered the totality of the circumstances, including several other actions by the school showing a pattern of ageism.[150] Courts should follow this precedent. When considering whether an employer made a legitimate employment decision based on an employee's long-term potential or used proximity to retirement as a proxy for age in violation of the ADEA, courts should consider evidence of other acts of age discrimination by the employer. Because making such a determination requires an examination of the employer's thought process and because evidence of a party's inner thoughts and motivations are difficult to access, evidence of prior acts would be particularly useful to the court.[151]

3. *Factor 3: The Employer's Need for Workers with Long-Term Potential*

If an employer claims it considered an employee's proximity to retirement as a means to gauge the employee's long-term potential in a particular job, then the court should consider whether long-term potential was a relevant factor for the particular job, position, or assignment. In most instances, it seems the answer would be yes; long-term potential is relevant.[152] Generally, employers desire workers who will remain for a long term because maintaining a steady workforce can reduce training and replacement costs.[153] But there are conceivable scenarios where long-term potential is irrelevant. Consider an employer seeking to promote a worker to a temporary position that offers extra pay. If the assignment lasts six months, it would be irrelevant that one employee vying for the assignment plans to retire in two years. In that case, a young employee and the employee approaching retirement would have the same potential to fulfill the assignment. In the cases of these short-term assignments, employers should not be able to base a selection on an employee's proximity to retirement.

4. *Factor 4: Whether the Employer Considered the Long-Term Potential of All Employees Implicated in the Employment Decision*

Lastly, if an employer takes an adverse action against an employee because

149. Ware v. Howard Univ., Inc., 816 F. Supp. 737, 745–46 (D.D.C. 1993).

150. *Id.* (noting pervasive age discrimination including the facts that employees in their early 60s were not seriously considered for promotions, the employee handbook stated (contrary to law) employees could be compelled to retire at age 70, and the school essentially made 65 a mandatory retirement age).

151. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

152. *See* Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000).

153. *See* SOC'Y FOR HUMAN RES. MGMT., *supra* note 130, at 16.

the employee is nearing retirement and thus offers low long-term potential, then the employer should also have to consider the long-term potential of other employees potentially affected by the action. To do otherwise would indicate the employer focused on age, rather than potential, when making the decision. Consider an employer choosing between two workers for a promotion, one old and one young. If the boss inquires about the older worker's retirement plans, the employer should also ask the younger worker how long the worker intends to remain with the company. By asking the former but not the latter, the boss would be making an assumption about an older worker, while giving a younger worker the benefit of the doubt. The ADEA was enacted to outlaw these assumptions, specifically that older workers were less valuable in the workplace merely because of their age.[154] Stated differently, to conclude an older worker, based on proximity to retirement, has lower long-term potential than a younger worker, without considering the probability the younger worker will quit, be fired, or otherwise leave the job, would be to make an assumption about the older employee that the ADEA does not permit.[155]

VI. CONCLUSION

A statute of limitations issue in Mormann's case spared the Iowa Supreme Court from the task of determining whether an employer violated the ADEA by declining to promote an employee based on proximity to retirement.[156] While the court left the question unanswered, the factors proposed in this Note can be applied to Mormann's case to determine if he would be able to sustain a claim for age discrimination under the ADEA.

A. *Express Retirement Intentions*

Mormann expressly raised the issue of his impending retirement.[157] In his interviews for the promotion, he allegedly stated he "thought he was going to retire."[158] Thus, if the IWD considered Mormann's proximity to retirement when making the promotion decision, it was doing so not based on an age-based assumption but on Mormann's own statement about his potential retirement.[159]

154. *See* 29 U.S.C. § 621 (2018).
155. *See id.*
156. Mormann v. Iowa Workforce Dev., 913 N.W.2d 554, 578 (Iowa 2018).
157. *Id.* at 558.
158. *Id.*
159. *See id.*

B. *Other Instances of Age Discrimination in the Workplace*

The record in Mormann's case does not include references to other instances of age discrimination within the IWD.[160] Whether there actually were no other instances of potential age discrimination within the agency or whether Mormann simply was not aware of these instances, we do not know. But if courts applied the factors proposed in this Note, plaintiffs bringing ADEA claims would have increased incentive to uncover past acts of potential age discrimination to bolster their claims.

C. *The Employer's Need for Workers with Long-Term Potential*

The director of the IWD stated she was worried about investing time and resources to train Mormann for the new position if he was going to retire soon.[161] The desire to conserve resources by training employees who will remain long-term is rational. This shows the IWD had a legitimate reason for considering the long-term potential of the employees vying for the promotion.

The conclusion would be different if the job was only a temporary position. In that case, the long-term potential of the employees seeking the job would be largely irrelevant. But here, Mormann was seeking a permanent position as a deputy compensation commissioner,[162] and thus, it was legitimate for the IWD to consider his long-term potential when evaluating him for the position.[163]

D. *Whether the Employer Considered the Long-Term Potential of All Employees Implicated in the Employment Decision*

There appeared to be no evidence that the IWD inquired about or evaluated the long-term potential of the employee who was ultimately chosen for the promotion, including whether the employee planned to remain with the agency long-term.[164] But this issue was not raised, so it is possible the IWD did, in fact, make such an evaluation. If the factors proposed in this Note are adopted, defendants in similar ADEA cases would have incentive to provide evidence showing they considered the long-term potential of all people vying for a job or promotion.

160. *See generally id.*
161. *Id.*
162. *Id.* at 557.
163. *See* Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000).
164. *Cf. Mormann*, 913 N.W.2d at 557–58.

E. *Under These Factors, Mormann Likely Would Have Lost His Claim*

Considering the factors proposed in this Note, the result likely would have been the same for Mormann. Because Mormann expressly stated his retirement plans, because the IWD had a legitimate reason to consider the long-term potential of the person it promoted, because Mormann did not present evidence showing a history of age discrimination by the IWD, and because the IWD may have (if the issue had been raised) been able to show it considered the long-term potential of all employees vying for the promotion, the IWD would likely be able to show Mormann's proximity to retirement was a RFOA upon which to base its decision to deny his promotion.

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* B.A., Kansas State University, 2010; J.D. Candidate, Drake University Law School, 2020. Prior to entering law school, the Author worked as a newspaper reporter in Kansas, Oregon, and Iowa. I dedicate this Note to my wife, Annah Backstrom Aschbrenner, a supportive partner, an exceptional journalist, and an all-around good person. While I was futzing over these paragraphs, she was busy working to keep us fed and housed. Without her love and support, this new career path would not have been possible.