U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING
AGE DISCRIMINATION IN EMPLOYMENT IN THE
CURRENT ECONOMIC CRISIS

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FRIDAY, JUNE 11, 2010
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The Commission convened in Room 540 at 624 Ninth Street, Northwest, Washington, D.C. at 9:30 a.m., Abigail Thernstrom, Vice Chairman, presiding.

PRESENT:
ABIGAIL THERNSTROM, Vice Chairman

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

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

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

EILEEN RUDERT
KIMBERLY TOLHURST
VANESSA WILLIAMSON
AUDREY WRIGHT
MICHELE YORKMAN
COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN
ALEC DEULL
TIM FAY
DOMINIQUE LUDVIGSON
JOHN MARTIN
ALISON SCHMAUCH
KIMBERLY SCHULD

PANELISTS PRESENT:

THOMAS NARDONE, Assistant Commissioner for Current Employment Analysis at the Bureau of Labor Statistics
DIANNA JOHNSTON, Assistant Legal Counsel, EEOC
WALT CONNOLLY, Connolly, Rodgers & Scharman
MICHAEL HARPER, Professor, Boston University School of Law
ELIZABETH MILITO, Senior Executive Counsel, National Federation of Independent Business
LAURIE McCANN, Senior Attorney, AARP Foundation Litigation

CATHY VENTRELL-MONSEES, President of Workplace Fairness
AGENDA

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I. INTRODUCTORY REMARKS

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

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

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

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

Dianna Johnston is the Assistant Legal Counsel for the Division of the Equal Employment Opportunity Commission that deals with, one, Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, national origin in programs and activities. That is actually not the entire list. But, anyway, activities received federal financial assistance. And, two, the Age Discrimination Employment Act of 1967, which forbids employment discrimination against anyone over the age of 40. Forty is the end of childhood in my view, but anyway -- and three the Equal Pay Act. That division provides legal advice and assists the Commissioners in
developing agency policy on new and complex employment
discrimination issues under all three statutes.

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

II. SPEAKERS' PRESENTATIONS

(PANELISTS SWORN.)

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

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

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

In my presentation, I will provide an
overview of the characteristics of the United States
labor force age 40 and over, and also discuss the
changes in the labor market situation of that group
over the last two years. All the information in my presentation and the accompanying slides comes from the Current Population Survey, a monthly sample survey of 60,000 households.

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

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

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

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

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

In the next chart, the point of view shifts a bit. Rather than focusing on the composition
of the 40 plus labor force, this chart shows the
proportion of the population in different age groups
who were in the labor force. That is their labor
force participation rate. So, for example, in 2009,
83.7 percent of those age 40 to 44 were in the labor
force. In contrast, only 17.2 percent of those age 65
and over were in the labor force.

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

The next chart provides the unemployment
rates for the different age groups, age 40 and over.
In 2007, the jobless rates for all the ages were
slightly more than 3 percent. By 2009, the rates for
the groups had about doubled. That's about in line
with the increase in the overall National Unemployment
Rate. Within the older labor force, the increase in
jobless rates were somewhat larger for those age 40 to
44, and 45 to 54. Next chart, please.
Over this period, not only did unemployment rates rise, the unemployed were jobless for longer periods of time. For example, the average duration of unemployment for persons age 55 to 64 rose from 21.9 weeks to 29.3 weeks between 2007 and 2009. I would note that these are estimates, do not indicate how long it takes someone to find a job; rather, they indicate how long people who are currently unemployed have been jobless.

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

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

In addition to the unemployment rate, we have other measures of labor under-utilization. One
is the proportion of workers who are employed part-time but would prefer a full-time schedule. As shown in this chart, a share of older workers who are involuntarily part-time doubled between 2007 and 2009. Another measure of labor under-utilization relates to those who are not in the labor force. Most people who are not in the labor force are not interested in working; however, some are. They are not counted as unemployed, because they are not currently looking for a job. We track those who looked for work in the last 12 months, but who are not currently looking for some reason. They're called marginally attached to the labor force. As with the unemployed, and the involuntary part-time workers, the last two years with increases in the number of such individuals.

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

Again, I thank you for the opportunity to present this overview of the older work force.
VICE CHAIR THERNSTROM: Thank you very much.

Ms. Johnston.

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

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

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

Most of the labor force statistics that we've seen don't really tell us a lot about discrimination, but there is one that I think stands out that's detailed more fully in my written statement, and that is the fact that workers over 55 remain unemployed far longer than their younger counterparts, from one to three months longer.
according to some reports. And that seems quite possibly, at least partly attributable to discrimination.

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

Unfortunately, older workers who are subjected to age discrimination have to pursue their ADEA rights in a legal landscape that increasingly minimizes the significance of age discrimination. Many courts, for example, tend to dismiss as insignificant stray remarks comments as direct as "You're too old," and "I need to get me a young man." Recent Supreme Court decisions have further weakened the ADEA, and complicated efforts to enforce it. The decisions make age discrimination more acceptable in the workplace, and harder to establish in court that an adverse action was motivated by age. I'm not going
to go into the details of those decisions. They're in
my written testimony. And, more importantly, they'll
be discussed by other panelists today.

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

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

The proportion of ADEA merit resolutions
has been fairly even over the past five years,
hovering in the vicinity of 19 percent. This suggests
that the increase in charges does reflect some
increase in discrimination. It's difficult to
pinpoint the causes of the surge in age discrimination charges. It's clear, however, that negative stereotypes about older workers remain deeply entrenched. The impact of age biases were illustrated, for example, in a study of people rating cognitive performance. Researchers reported that rates perceived many failures to be correlated with lack of ability when the subject was old, but with lack of effort when the subject was young.

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

At a recent EEOC hearing, an expert testified that research has shown that as a result of age stereotypes, older persons with the same or similar attributes received lower ratings in interviews and performance appraisals than their younger counterparts; and, thus, of course, have more trouble finding or keeping a job, or securing a position. Those stereotypes also come into play in corporate downsizing situations, when people are being
rated in order to cut costs. Any perceptions that older workers are harder to train, or less flexible, or less competent are going to become more prominent in the minds of decision makers. And, as I noted earlier, age-based stereotypes are likely contributing to the difficulty unemployed older workers apparently have finding new employment.

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

In connection with the meeting, EEOC, for example, issued a Technical Assistance Document to help employees understand their rights and obligations when they're offered severance pay in exchange for a waiver of discrimination claims. In the wake of the meeting, as some witnesses had suggested, the Commission issued Notices of Proposed Rulemaking concerning disparate impact and the definition of Reasonable Factor Other Than Age under the ADEA. After considering public comments, the EEOC will draft a final rule.
Consistent with its mission to maximize voluntary compliance with the law, the Commission also conducts a significant number of no-cost and fee-based outreach events each year that address age discrimination issues. These, too, are set forth in more detail in my written testimony.

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

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

III. QUESTIONS

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

Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Thank you to the witnesses for appearing. Just a couple of questions. I think, Ms. Johnston, you indicated that workers over the age of 55 seem to have a longer time where they're out of the workplace market for a longer
time than younger workers. And I'm wondering, and
maybe Mr. Nardone can answer this, to what extent that
may be a function of the fact that, on average, an
older worker, by virtue of having a longer tenure in
the workplace, may have the higher wage, and,
therefore, a different expectation in terms of re-
employment. And that expectation can also affect the
prospective employer as to who he's going to employ.

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

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

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

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

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

COMMISSIONER KIRSANOW: I appreciate that. Just -- we may be on the same page here. I guess, if, for example, I go out into the workplace, my expectations or my needs, I think, are going to be of a different category than of a younger worker. I may have -- well, my mortgage is pretty much paid for, but
an older worker has got certain expectations that
maybe a younger worker may not have. He may, in fact,
and this has nothing do with any stray comments, but
he may, in fact, have less flexibility, intrinsically
less flexibility than a younger worker. But, more
importantly, in today's economic climate, to what
extent is the fact that older workers are more likely
to take advantage of incentive retirement programs, or
incentive exit programs that will pay them to remain
out of work longer, than a younger worker will. To
what extent does that have any bearing, if any, on the
statistics that we see here?

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

It is -- there are a couple of things that
I would mention in terms of the measures of duration
of unemployment. They don't, actually, indicate the
amount of time it takes someone to find a job. It
indicates the amount of time that someone who was
employed has been unemployed. So, one thing that
could happen is, people who are unemployed, their
duration could end either because they find
employment, or they stop looking for work. They leave
the labor force. And we have looked at some
information that suggested one of the things that's
gone on recently with young people, and in that case
I'm speaking of people age 16 to 24, became somewhat
more likely to leave the labor force. That may be
that they were making the decision to stop looking for
work, and perhaps go to school because they felt in
the long run that might be an advantage. For those
age 25 to 54, those 55 and over, we saw that their
likelihood of leaving the labor force did not change.
Given the current climate where, basically, there's
virtually no job growth, it is understandable that
they would just continue to stay unemployed for longer
periods.

VICE CHAIR THERNSTROM: Commissioner
Gaziano.

COMMISSIONER GAZIANO: I'm out of turn,
but since it sort of follows, I just, again, wondered
whether the simple -- are there any studies that you
think are persuasive on the point? And I think
Commissioner Kirsanow started to touch on it. The
older employees, or older workers might not -- might
be less likely to study the newer field, in part, I
think for the reason that you just mentioned, but for
other reasons, as well, because they have less of a
future career. Is that -- are there any studies on
that, whether they're less likely to study, or learn
a skill, or an education?

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

COMMISSIONER GAZIANO: Okay.

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

COMMISSIONER GAZIANO: I'm not disputing
that discrimination might not be a part of it, but,
particularly, I'm trying to get at what you said, Ms.
Johnston, was your finding that once they are
unemployed, they stay unemployed longer, and then they
don't have an employment relationship. And, by the
way, whether employers are less likely to provide the
training, that sounds like discrimination to me, but
I even want to leave that aside. But another
possibility is, again, I think that Commissioner
Kirsanow, they're more likely to be able to rely on pensions, buy-outs, or other types of their own retirement savings. Are there any studies on whether that might be a factor, and whether they're willing to accept a lower pay?

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

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

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

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

MS. JOHNSTON: Yes, we had -

COMMISSIONER GAZIANO: -- in recent period. But is it also the case that there's just more unemployment now during this economic downturn?
MS. JOHNSTON: Yes. Although, Mr. Nardone's testimony, if I understood it correctly, and I'm not a statistician, but seemed to indicate that the unemployment was less of a problem for older workers.

COMMISSIONER GAZIANO: It was only slightly less.

MS. JOHNSTON: Yes, it's -

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

MR. NARDONE: That's correct.

COMMISSIONER GAZIANO: Okay.

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

COMMISSIONER YAKI: Just -

VICE CHAIR THERNSTROM: Oh, I'm sorry.

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

VICE CHAIR THERNSTROM: I, actually, have a question for you, Mr. Nardone. You have a number of charts. You have 2007 versus 2009, on others you don't have any time line at all. But I wondered if you looked across -- if you looked at the last, I don't know, three decades, two decades, pick your number, what would we see? I mean, you're just doing
the 2007 and 9, it tells us something, but there is
historical data here that should be relevant to the
questions you're asking. This is not the first
recession we've had.

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

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

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

VICE CHAIR THERNSTROM: Right.

MR. NARDONE: In general, one of the
things we say, which I touched on just very briefly, for
workers age 55 and over, what we saw starting in
the mid-1990s was their participation in the labor
force had started to increase somewhat. And that was
after several decades, which for a variety of reasons,
their participation had been trending down. They were
the one group, one age group where participation
continued to go up during the current downturn,
whereas in the -- for younger workers, and for workers
say up to age 45, their participation rates declined
somewhat. So, I'm not really sure how to answer your
question. You do have longer periods of time on this
data.

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

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

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

MR. NARDONE: Just in terms of overall, I
think the decrease -- most of the decrease in
employment has been in the private sector. The areas
that were particularly hard hit during this downturn
were construction and manufacturing, but also many
other private sector industries. Some private sector industries that in previous recessions had done fairly well, like finance, were also lost -

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

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

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

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

MS. JOHNSTON: There are several studies that are actually cited in my written materials. There's a study known as Towers Perrin, Days Inn Study, and they all come to pretty much that
conclusion, that people's notions about flexibility and so forth are at least greatly exaggerated, because the job performance overall, older workers, again, their skill, their loyalty, their stick-to-it-iveness, tends to make up for any other -

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

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

(Simultaneous speech.)

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

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

(Simultaneous speech.)

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

VICE CHAIR THERNSTROM: Commissioner
Taylor.

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

(Background noise.)

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

(Laughter.)

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

COMMISSIONER GAZIANO: It's Melendez, I think.

COMMISSIONER YAKI: Is it? No, it's -- is it Arlan? I thought Arlan wasn't going to be on.
STAFF DIRECTOR DANNENFELSER: No, no, it's one of our panelists who's actually called in.

COMMISSIONER YAKI: Oh, okay.

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

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

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

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

COMMISSIONER TAYLOR: Okay.

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

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

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

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

MS. JOHNSTON: Certainly. I mean, let's back up a little bit with -- I mean, the point of discrimination laws is not to look at those kinds of stereotypes when you're making employment decisions, but to assess people as individuals. And to the
extent that there are studies that suggest that those stereotypes are, as I say, at least exaggerated in many people's minds, and remain sort of socially acceptable in this climate, it simply suggests that employers should be more closely examining those kinds of decisions, and doing what they can to make sure that those kinds of stereotypes are not infecting their decision making.

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

VICE CHAIR THERNSTROM: How about -

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

VICE CHAIR THERNSTROM: Right.

MS. JOHNSTON: I'm just reporting that general principle.
VICE CHAIR THERNSTROM: How about he's 60, and he's going to take longer to train than a new person would? But, anyway, Commissioner -

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

VICE CHAIR THERNSTROM: Okay.

Commissioner Yaki.

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

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

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

MR. NARDONE: I don't have any information by sector right here. I do have some information relating to age that might be useful. So, for
example, taking the age group 16-24, in 2007, their unemployment rate was 11.6 percent, 2009 it had gone to 17.6 percent. In terms of their labor force participation rate, the proportion of them that were working or looking for work, in 2007 it was 61.5 percent, in 2009 it had dropped to 56.9 percent.

COMMISSIONER YAKI: Okay.

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

COMMISSIONER YAKI: Okay.

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

COMMISSIONER YAKI: Okay.

MR. NARDONE: For 25-34, unemployment rate
4.7 percent up to 9.9. Participation rate 83.3 down
to 82.7. And, finally, the 35-44, the unemployment
rate from 3.4 percent up to 7.9 percent. And the
participation rate from 83.8 down to 83.7.

COMMISSIONER YAKI: Thank you.

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

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

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

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

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

COMMISSIONER HERIOT: Okay. I'd like to
get back to this notion of longer periods of
unemployment for older workers, and the reasons for
that. Ms. Johnston, you mentioned that you thought
that that is indicative, at least in part, of
discrimination. And Commissioners Kirsanow and Gaziano have talked a little bit about other possibilities. This is actually something that I've been living in my family for the last year or so. My older sister was laid off from her job, and she is now 60 years old, and she was making quite a lot of money when she was laid off. And it's interesting to compare it to an earlier period in her life. She got sick when she was in her 20s, and had to leave a job. And when she was feeling better, she got a job offer, not where we were living at the time, but in Chicago. And it was a fairly low-skill job. It was pretty interesting, and she was gone like a shot to Chicago. These days she's not as inclined to move around the country, and I think a lot of people over 40 with children in school, that might make them somewhat less flexible as to geography. There's also the fact that older workers do tend to be more experienced, and more skilled, and earn more money. There is often an unwillingness to accept a job that is low-paying.

Another issue that I think was touched on a little bit earlier was less flexibility in getting more training, because you're going to have a shorter payoff period. If you're 64 years old and you get laid off from your job, the answer to your problems is
probably not let's go to medical school, or let's go
to law school, and spend a lot of money in getting new
training, because you're not going to have enough time
to pay off that money. And another problem that older
workers disproportionately suffer from that may
account for some of that difference in length of time
of unemployment is they're much more likely to have
the problem of obsolete skills. A younger worker who
obtained their skills recently probably has not chosen
to go into a field that's being phased out; whereas,
it's very common for older workers to have great skill
in some area that just isn't called for as much, you
know, the machinery has changed, or the factory has
closed down. They know how to do something really
well, but nobody is hiring in that area. So, all four
of those areas, I think, could contribute to the
longer period of unemployment. And I'm sure there are
other things, as well.

But what I wanted to bring up is - this is
for you, Mr. Nardone - is this something the Bureau of
Labor Statistics could actually look at to shed more
light on this than we've been able to shed so far
today? It seems to me that there are a number of
studies that could be conducted, that you might be in
a position to do, that would shed some light on these
four issues. Why is it that older workers are having
this problem? Is this something that can be surveyed,
and would you find that older workers would concede
that they're not willing to take a job that pays less
than X; whereas, a younger worker would say sure, I'm
quite ready to take a job that does that. Or maybe
older workers who are laid off are less likely to
leave the labor force to get schooling. Fewer of them
go back to school for retraining, or you might find
that in areas with a more depressed economy, the older
worker is more likely to stay there, because the kids
are in high school, than the younger worker who's off
to wherever the new place is, where the jobs are
today.

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

COMMISSIONER HERIOT: Basic surveys.

MR. NARDONE: The basic surveys, and
helping people to use it. There may be studies where
people have attempted to address some of the questions
you raised using data from BLS, or other sources.
Unfortunately, I'm not aware of them. I don't have the knowledge of them. I don't whether they exist, or not.

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

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

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

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

COMMISSIONER GAZIANO: Go ahead. Let him go first, and then I may. Let me think if I can rephrase it, but go ahead.
VICE CHAIR THERNSTROM: Okay.

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

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

COMMISSIONER KIRSANOW: Okay.

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

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

VICE CHAIR THERNSTROM: I was being a bit facetious.

COMMISSIONER KIRSANOW: Well, but I'm wondering to what extent it is. The ADEA was passed 43 years ago. That's not a long time, but even in that short period of time life expectancies have changed; also, the nature of the workforce has
changed. My father was a steelworker, back-breaking work. His work span would be necessarily truncated by the physical nature of his labor. I think there is probably more desk-related jobs today than there were in 1967.

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

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

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

COMMISSIONER KIRSANOW: Do you have any sense for what additional factors may have been proposed? In other words, than those that are
currently out there in the jurisprudence.

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

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

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

COMMISSIONER KIRSANOW: Thank you very much.

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

COMMISSIONER GAZIANO: It would have been better if I had asked the EEOC witness, but I think I
can reformulate it, and will pass that on in some other way. But I will say that I have counted eight possible biases, other than the four I think we -- so, maybe we could do some service as the Commission when we publish to help -- whether it's encouraging BLS to increase its surveying, or for other scholars to ask the right kind of questions that might get at one of these eight or more factors, other than discrimination.

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

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

MR. CONNOLLY: Are you ready for my -

VICE CHAIR THERNSTROM: No, not quite.
MR. CONNOLLY: Okay.

VICE CHAIR THERNSTROM: I need to introduce people.

MR. CONNOLLY: Okay.

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

MR. CONNOLLY: I swear to tell the truth.

VICE CHAIR THERNSTROM: Is it the whole truth?

MR. CONNOLLY: Totally.

VICE CHAIR THERNSTROM: Good.

(Laughter.)

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

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

(Background noise.)

VICE CHAIR THERNSTROM: Making some background here, that's what it is. He's been the
lead defense counsel on 115 of the largest nationwide and statewide class actions. He was lead counsel in the first nationwide class action against Equitable Life in 1978. He has also defended major age discrimination class actions for K-Mart, Lockheed Martin, Detroit Edison, and others. He is the co-author of five legal books, including "Use of Statistics in EEO Litigation". His in-house training and audit programs have been used by many of the Fortune 100 companies. And, Mr. Connolly, just for your information, I go through all the bios, and then we get to your statement.

Professor Michael Harper, Professor of Law, and Barreca -

MR. HARPER: Barreca.

VICE CHAIR THERNSTROM: Barreca. Thank you.

MR. HARPER: Christopher Barreca.

VICE CHAIR THERNSTROM: Barreca Labor Relations Scholar.

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

VICE CHAIR THERNSTROM: You know, I might have gotten it right if the script hadn't given me a cue as to how pronounce it, which completely threw me
off. But, anyway, Barreca Labor Relations Scholar at the Boston University School of Law. Professor Harper teaches labor law, employment discrimination law, and employment law. Professor Harper is the author of many Law Review articles, and book chapters on labor and employment law topics, including age discrimination and employment. He has co-authored several major case books. Professor Harper is now serving as a reporter for the American Law Institute's Restatement of Employment Law.

Elizabeth Milito -

MS. MILITO: Milito.

VICE CHAIR THERNSTROM: Milito, thank you.

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

Laurie McCann, Esquire it says here.

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

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

MS. VENTRELL-MONSEES: Ventrell-Monsees.

VICE CHAIR THERNSTROM: Cathy Ventrell-Monsees is the current President of Workplace Fairness, a non-profit dedicated to educating workers about their employment rights. She is the co-author of "Age Discrimination Litigation." She has litigated several ADEA class action, and numerous cases in the U.S. Supreme Court, and Federal Circuit Court. She also teaches employment discrimination law at the Washington College of Law at American University. She was a member of the Board of Directors of the National
Employment Lawyers Association from 1996 to 2008, where she served as its Vice President of Public Policy, and as Chair of the Age Discrimination Committee.

(Panelists sworn.)

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

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

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

MR. CONNOLLY: That, too.

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

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

Another thing that people fail to recognize is that when one imposes a concept of making decisions on the basis of seniority, it has a significant adverse impact on women and minorities. And if you are in certain states, like the State of Michigan, discrimination on the basis of age doesn't start at age 60, it starts when you start work. And one of the little known factors in the world is that the average age of hires nationally is 35 years of
age. And one of the things that we encourage, and
everybody understands what the Supreme Court has said,
and other courts, there's a Bar Journal article in the
summer of 1981, or summer of `82 in the Stanford Law
Journal that differentiates statistics in age cases
from statistics in race and sex cases. And the
factors are most dissimilar. Statistics do not create
discrimination. They create evidence that can be
rebutted. Plaintiffs have the obligation to prove
pretext. That is their burden.

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

I also strongly recommend that companies
go to a voluntary program first before they go to an
involuntary program with significant protections to
the interest of the employees, that they are given
written guidelines on the voluntary program, that all
supervisors and managers are trained in equal
employment opportunity, and how to have a voluntary
program, that they have a hiring freeze that is
implemented the day that the thought of a layoff
becomes a gleam in the eye of the Chairman of the
Board. And I would have a hiring freeze that continues for at least six months to a year after the layoff program goes into effect.

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

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

One of the things that I have recommended in the past, and it has worked surprisingly well, is that you have an appeal up the chain of command, and
someone can take the case of their termination to arbitration paid for by the company.

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

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

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

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

MR. CONNOLLY: I have more to say, but I'll just conclude by saying good employers win, bad employers lose. Go to a voluntary program that is truly voluntary, and not coerced, before going to an involuntary program. Create EEO oversight committees, and appellate programs.
VICE CHAIR THERNSTROM: Thank you very much. And I'm sorry to have to cut you off, but we do have -

MR. CONNOLLY: No problem.

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

MR. HARPER: Okay.

VICE CHAIR THERNSTROM: Seven minutes.

MR. HARPER: Okay. Well, I want to thank you all for inviting me. I feel very honored to be here. And I want to begin my remarks by making an assertion, and that is, the assertion is that age discrimination is a much, much more pervasive occurrence in this society than sex, or race, or national origin discrimination today. And I base that assertion not on primarily on the studies that I've read, or not primarily on all the cases I've read where there are many more ageist comments, smoking gun evidence, than there is sexist, or racist comments in the cases I've read. I base it not on the fact that in academia where I come from, there is no appointment that is ever made, no appointments committee meeting that has ever met considering someone who is 55, or 60, or 65 years old where age is not an implicit, if not explicit consideration in that appointment. And
I bet Chair Thernstrom would agree with that, but she can disagree later.

VICE CHAIR THERNSTROM: Vice Chair, by the way.

MR. HARPER: Yes, Vice Chair. Okay.

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

I base it on the fact that it is economically rational for employers, good employers, good in the sense they're just trying to make a profit, which is a good thing in our economy. Good employers, and most employers are good employers, it's economically rational for them to discrimination. It's not economically rational on the basis of age, not on the basis of sex or race. I think that's primarily an agency problem to the extent it exists.
The employers would be better off if its agents were not sexist or racist, and the employer tries to get rid of that. But in the case of age, it can be economically rational. It can be economically rational because something what economists call statistical discrimination. I'm not an economist, I'm not a social scientist, don't ask me about -- but I do understand statistical discrimination. That is, that you look at -- you can look at overlapping bell-shaped curves, and it is true as individuals, many older workers, at 65, you all may work for 15 years productively, or a 60-year old might work for 20 years. It's possible, and some do. But if an employer is hiring, and is going to do some training, and is going to put someone in a path where how much they get back is going to depend upon how long they work, and how they long continue in that career, it's rationale for the employer to say I want to hire someone younger, who is going to pay back in productivity on the average longer. So, they use age as a proxy.

Now, that may be efficient for the employer, but if you have those overlapping bell-shaped curves, and use age as a proxy because you have to, because you can't predict the future, who's going
to be where on the curve, then you're going to exclude all the older workers, and bring in the younger workers. That may be rational, efficient for the employer, good employer would do it, but the problem is, it excludes all the older workers, and it creates, I believe, not only in fairness to the older workers as individuals, which as Ms. Johnston said, is one of the goals of anti-discrimination law, but also, potentially, under-employment, and unemployment in society for older workers. And that's a bad thing as baby boomers age, as we are concerned about Social Security. It's going to be a problem for us, not as big as in Europe, but depending upon the degree of immigration, but it is an issue. So, I think that the age discrimination is more pervasive, and it is more resilient than other forms of discrimination. And for that very reason, we need not weaker remedies, and not more difficult methodologies of proof, as we now have under ADEA, but we need at least equal methodologies of proof and remedies.

Under the ADEA, which was attached to the Fair Labor Standards Act, the remedies do not include, as they do after the 1991 Act for Title VII, compensatory and punitive damages. There is liquidated damages, which is double back-pay, but it's
in the nature of punitive damages. It's difficult to establish that. That needs to be changed as Congress, House of Representatives passed the Paycheck Fairness Act for the Equal Pay Act to change that, which is also aligned with the Fair Labor Standards Act.

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

The proof methodologies need to be aligned. The Gross decision, which I think other people have talked about, is indeed a gross decision, a gross example of judicial activism, and legislation from the bench by the current Supreme Court ignoring their own precedents, and the direction of Congress, that needs to be overturned. There is no
justification for saying it is more difficult to prove age discrimination. If there should be defenses to age discrimination, fine. Increase the BFOQ. It's possible to give defenses to age discrimination, other explanations in the individual case, but it shouldn't be more difficult to prove that which is more likely to be rational, and, therefore, resilient.

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

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

MR. HARPER: Oh, I am? Okay.

VICE CHAIR THERNSTROM: Yes.

MR. HARPER: All right. So, those are my four -- I actually have two other recommendations, one of which might appeal to the more conservative members of the panel, and that is to allow a probationary period of one year to encourage the hiring of older workers, so that the employer would not be subject to
the age discrimination. For a year, there would be a
probationary period of one-year, which I think would
courage the employment of older workers, because the
employer gets to know the person, and see they might
be on one end of that bell-shaped curve.

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

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

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

The National Federation of Independent
Business is the nation's leading advocacy organization
representing small and independent businesses. NFIB's
national membership spans the spectrum of business
operations ranging from sole proprietorships, to firms
with hundreds of employees. While there is no
standard definition of a small business, the typical
NFIB member employs just 10 employees, and reports
gross sales of about $500,000 per year. NFIB
membership is a reflection of American small business,
and I am here today on their behalf to share small
business perspective.
Today's small business owners who according to the Small Business Administration employ just over half of all private sector employees, contend with anti-discrimination laws, family medical and other protected leave laws, wage hour laws, privacy laws, and workplace safety laws. They often struggle to decipher the mysteries of overlapping, and sometimes even conflicting federal, state, and local employment laws. The problem is compounded by the fact that very few small businesses employ a professional human resources employee.

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

The ADEA, as you all know, makes it unlawful for an employer to "fail, or refuse to hire, or to discharge any individual or otherwise discrimination against any individual because of the individual's age." The ADEA further provides, very importantly, that "it shall not be unlawful for an employer to take any action otherwise prohibited where
the differentiation is based on Reasonable Factors Other Than Age."

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

The question of who bears the burden of demonstrating that an employment practice is reasonable or unreasonable has implications for small business owners that large corporations would not, necessarily, face. Small business owners are far less likely, as I noted before, to employ a professional HR executive, and much less likely to have legal advice. For example, a survey of small business owners found that only two out of every five small businesses consulted an attorney for advice within the last 12 months. And of those who did speak with an attorney, only 12 percent asked the attorney about an employment matter. As a result, small business owners often do not document employment decisions, or retain the
evidence that they need that might help them survive a legal challenge.

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

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

Ordinary aging and career advancement patterns tend to result in older workers as a group holding higher level, better paid, and longer established positions of employment than younger
counterparts. Because of these natural correlations, many business decisions and practices, even though age-neutral and intent tend to impact older workers differently than younger ones. Take, for example, a hypothetical small business that manufactures sporting equipment. The business employs roughly 25 people, most of whom are entry level, and lower paid workers who operate machinery, make finished products, take orders, and handle shipping. They also employ two skilled professionals, both of whom are over age 40. One is an engineer, the other is an accountant. In order to continue making payroll for the rest of the year, the owner needs to cut labor costs by 10 percent. Because demand for his product is still strong, cuts in labor will result in either reduced production, or will be work that the owner, himself, is going to have to take over.

The owner decides he will make the decision based on three criteria, total cost of compensation, necessity for maintaining output, and necessity for maintaining quality of product. The engineer, the accountant, and the most highly paid member of the production staff become the three targeted positions, because they're the most highly compensated positions.
The engineer is an important part of the testing and quality control process, and the owner is concerned that he would not be able to perform those job duties himself. The member of the production staff is the most highly paid, because he's also the most productive worker. Cutting him would adversely affect output. However, the owner has kept the company books before when he started the company, and he thinks he can hold the accounting job for a few months until, hopefully, the economy turns around. Therefore, he makes the decision to terminate the accountant, and eliminate the position.

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

Small business owners rarely make the difficult decisions that surround downsizing lightly. Small businesses studies show are more likely than
large corporations to keep employees on the payroll even during tough times. An employee is not just a revenue source, he is a member of the owner's extended family. Small businesses tend to hire conservatively, and they run lean, mean operations. This makes the typical small business employee much more valuable to a business owner than a corporate employee is to the average shareholder.

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

Thank you very much.

VICE CHAIR THERNSTROM: You get a prize.

(Laughter.)

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

MS. McCANN: Good morning, and thank you
for the opportunity to speak to you this morning on behalf of AARP regarding age discrimination employment in the context of this country's current economic crisis.

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

Approximately three and a half years ago, AARP held a celebration and a symposium to celebrate the 40th anniversary of the enactment of the Age Discrimination and Employment Act. During its 40 plus years, the ADEA has made tremendous strides in eliminating the most blatant forms of age discrimination. For example, mandatory retirement has been eliminated for the vast majority of Americans,
and job ads which were once prevalent announcing maximum hiring ages for positions are a distant memory. However, despite these achievements, age discrimination continues to pervade the workforce, and impede the achievement of equality in the workplace.

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

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

Why has the ADEA fallen short of its goal of eliminating arbitrary age discrimination? One
reason, which my colleague, Cathy Ventrell-Monsees, will discuss is our society's perplexing willingness to tolerate age discrimination. But this willingness to tolerate age discrimination is not held only by the public, it is shared, reinforced, and exacerbated by the courts, particularly the U.S. Supreme Court.

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

I think the most blatant comment I've heard that has been sanctioned by courts came out of the U.S. Court of Appeals for the 4th Circuit, where
a Vice President was justifying why when they
conducted a reduction in force older workers were
over-represented in those that were let go. He said
that -- the Vice President said, "Well, there comes a
time when older workers must make way for younger
workers." That's why they were over-represented.

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

Specifically, in 1993, in the case of
Hazen Paper Company v. Biggins, the court suggested
that the ADEA's reach was limited to discrimination
based on inaccurate and stigmatizing stereotypes about
older workers. In other words, that that was the only
type of discrimination that you could challenge. This
limitation has been used to sanction laying off
individuals who are eligible for retirement, because after all, the fact that you're eligible for retirement benefits, and could probably bear the brunt of a layoff better than a younger worker, is not an inaccurate or stigmatizing stereotype, although that's not very consoling to the 55-year old with kids in college. And for refusing to hire individuals eligible for early retirement benefits because they might leave soon, anyway. Again, not an inaccurate and stigmatizing stereotype.

In 2000, in the case of Kimel v. Florida Board of Regents, the court ruled that the 11th Amendment protected state governments from being sued for monetary damages by older state employees who have been discriminated against based on age. In Smith v. City of Jackson, the court ruled that the scope of disparate impact liability under ADEA is far more narrow than under Title VII. In 2008, in Kentucky Retirement System v. EEOC, the court stated that the clear and strong protections of the Older Workers Benefit Protection Act, which prohibit age discrimination in benefits, were beside the point, and that a disability retirement plan that blatantly discriminated based on age was perfectly okay. And most recently, just last year in Gross v. FBL
Financial Services, the court imposed a far more stringent causation standard on age discrimination victims than faced by other victims of discrimination. This relegation of age discrimination to second-class civil rights status is unwarranted, and must stop. AARP applauds the Commission for holding this briefing this morning, and is hopeful that it signals that it is time for the Administration, Congress, and society at-large to act with greater resolve to stop this tragic waste and loss of talent, energy, and wisdom. Thank you.

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

MS. VENTRELL-MONSEES: Thank you. I've studied age discrimination practices in law for 25 years, and given the questioning this morning, I'm going to depart from my written presentation, and I would like to focus on ageist stereotyping because that seems to be a real concern here. But first I must reiterate that the purpose -- one of the purposes of the ADEA, like Title VII, and other Civil Rights law, is that Congress has said employers must not make decisions based on group generalizations. An employer must make an individual assessment of that particular
person's abilities, not based on their race, or sex, or age, national origin, or religion. That's the premise from which we operate.

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

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

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

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

If you compare an example, an ageist stereotype, an older worker who, pick an age, 55, 65,
whatever it might be, they might be retiring soon.
They might be leaving the workforce soon. All right?
I can say, why is it lawful for an employer to say I'm not going to give that person a promotion because I assume they're going to retire soon? Why would that be lawful? Compare that to sexism. None of us would question that it must be unlawful if an employer said here's a woman who's likely to have a child. Why would I give her that promotion that's going to require more hours every week, if she's not going to be around?
Clearly, that's sexism.

And what I have to reiterate over and over is, take the ageist stereotypes and compare them to the stereotypes that are at play for racism and sexism. Society and Title VII condemn reliance on racist and sexist stereotypes. Do you see any of that condemnation in the ageism area? No. Why? Well, that's the $64 million question, I guess. Is age really different? Is it less serious? Well, ask an older worker who has been fired, ask an older woman if she was fired because of age discrimination. Is the sting any less severe because it was based on age and not sex, if it was based on sex and not age. Ask the older worker who loses his job, now has no income. The economic trauma he suffers and his family suffers
is the same whether he lost his job because he's too old, or because he was African American, the same consequences.

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

Age should not be treated differently. Older workers deserve the exact same protections, the rights, and remedies that all other workers have. I agree with Professor Harper, the ADEA is inadequate. It needs to be strengthened in the procedures, the
methods of proof, the class action requirements, the entire statute. Older workers deserve equal treatment, and equal protection. We should stand for that, and we should adhere to it. Thank you.

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

COMMISSIONER KIRSANOW: Actually, I think Commissioner -

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

COMMISSIONER KIRSANOW: Go ahead.

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

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

COMMISSIONER YAKI: I'm often neglected.

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

VICE CHAIR THERNSTROM: It doesn't -- Commissioner Gaziano, I promise you will have plenty of time.
COMMISSIONER HERIOT: We could arm
wrestle.

COMMISSIONER GAZIANO: Do I get an extra
round?

MR. CONNOLLY: May I ask a question?

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

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

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

MR. CONNOLLY: The question is, do you
think effective recommenders ought to be the people
that are analyzed, or aggregated statistics company-
wide, nationwide? And the second question is, does
anybody have evidence that older employees that are
laid off attend outplacement services on a continuing and regular basis, as do younger people?

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

I believe we were starting with Commissioner Heriot.

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

COMMISSIONER GAZIANO: The period of unemployment is longer.

COMMISSIONER HERIOT: The period is longer. That's not stereotyping contrary to the ADEA. I mean, you were saying here the law requires you to look at the individual. Actually, the law doesn't require me to look at the individual, the law requires the employer in making a decision to look at the
particular applicant's characteristics, and not age.
But when trying to explain why that period of
unemployment is longer for older workers, when we say
older workers may be less willing to move, that's not
a violation of the ADEA. My sister is not going to
move to Denver. She's in Houston now. If there's a
job in Denver, she's not going to move. And
sterotypes are simply generalizations, many of which
are simply true. Many older workers would be happy to
move to Moscow for a job, and if the ADEA is in effect
in Russia, then we'd want the employers not to
consider age in hiring, but they don't have to go and
reach out to my sister in Houston, if she's not going
to move to Moscow, or to Denver, or wherever.

With regard to training, employers are not
supposed to take age into consideration in offering
training. That's our law. However, the employee, or
the potential employee certainly can do it. In fact,
someone did suggest to my sister why don't you go back
to college and get your degree. Well, by the time she
got her degree she'd be 65, and she'd like to retire
at 65. She wouldn't be able to earn back that money.
She's not violating the law. She's not engaging in a
stereotype. She's making a decision for Jane Hollman,
and she has different considerations.
Same with each of the reasons we were
talking about in the last panel. It's not engaging in
the kind of invidious stereotyping, we're simply
trying to determine why that aggregate statistic is
what it is.

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

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

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

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

COMMISSIONER HERIOT: Nobody is going to dispute that.

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

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

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

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

COMMISSIONER GAZIANO: No. I get an extra round, I'm arguing. Anyway, the first question is, I
don't know if this is true, but assuming the Military Officer Training School says we do not accept, we have to invest so much money, we do not accept candidates for the Officer Training School who are older than X, I'll make up 30, but if you have a better -- is that -- this is the pure legal question for you two. Is that, in fact, illegal, maybe the military has an exemption, but is that --

MR. HARPER: It does, yes.
COMMISSIONER GAZIANO: It does. Okay.

So, that is okay for the military, but that kind of determination would be illegal if a private employer--

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

COMMISSIONER GAZIANO: Right.

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

COMMISSIONER GAZIANO: Okay. Well, I appreciate -- by the way, your recommendation is
interesting. I don't know that I'd accept it, but the
BFOQ maybe should be relaxed.

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

COMMISSIONER GAZIANO: Okay.

MR. HARPER: I mean, if there are -

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

MR. HARPER: Yes, it is, although, I would
think that it's rational for an employer to do that.
I mean, I understand why the employers do that, and I
don't think they're bad, or malignant, nefarious for
doing that. I think it's a rational thing. I consider
it sort of rational, not irrational, but it is illegal, and I think it should be illegal, even though it's rational, and even though I understand it economically.

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

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

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

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

VICE CHAIR THERNSTROM: We all have that illusion.

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

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

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

VICE CHAIR THERNSTROM: If they're rational.

(Laughter.)

MS. McCANN: They're in the position that they're being considered, they're obviously a trusted employee, and I think that, hopefully, they would be honest. I'm not saying -- so, that's one way, is you -- and the same thing with someone being interviewed for a job, and you can ask them, are you truly
interested in this salary? The law says that it's okay to ask these questions, as long as you ask them to everybody, so if you ask your 60-year old sister would you be willing to relocate to Moscow, and she says no, then the 30-year old comes in and you say would you be willing to relocate to Moscow? They may not be willing to either. The question is legitimate.

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

VICE CHAIR THERNSTROM: Exactly.

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

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

COMMISSIONER HERIOT: Can I just interject
one quick question here that's relevant to that? What do you think about the idea of penalties for people who end up finking out, you know, a 60-year old gets training.

MS. McCANN: It can be done.

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

(Simultaneous speech.)

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

VICE CHAIR THERNSTROM: But wait a minute.

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

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

I had a case where two extremely qualified people sued, but they did not request a transfer to another department, and put the burden on the employee
to make that request. And I still haven't heard the
answer to why aggregate statistics are remotely
relevant to age discrimination cases, when really the
effective recommender is the person making the
decision.

VICE CHAIR THERNSTROM: Commissioner -
COMMISSIONER KIRSANOW: I was next.
VICE CHAIR THERNSTROM: Oh, I'm terribly
sorry. Commissioner Kirsanow.

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

MR. HARPER: Most.

COMMISSIONER KIRSANOW: Most. Right.

VICE CHAIR THERNSTROM: Another sign of
age.

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

MR. HARPER: It should be adjusted up.

COMMISSIONER KIRSANOW: Up, down,
whatever.

MR. HARPER: Yes. I'll let the other
panelists answer the policy. I just will point out
that in Europe, under the EU Directive, age is now being included in their laws, and it's going both ways. It's symmetrical. It's both discrimination against the young, and discrimination against the old. And the Supreme Court held here that there's some ambiguity in the statute. The Supreme Court held here, I think correctly, that this particular statute is asymmetrical, and only proscribes discrimination against the older, in part because it's 40 and above that's the protected class, which it sends a strong signal which influence the court. But whether it should -- what your question is, should it be moved up, so that only people like 50 and older would get the advantage. Is that your -

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

MR. HARPER: Right.

COMMISSIONER KIRSANOW: But the threshold begins at 40, and I'm wondering whether or not it makes sense to move that upwards, maybe to winnow out some, and I don't know this, I'm just positing this,
those claims that may be less than meritorious.
You've got individuals who are 41 years old, or 42
years old that may bring a charge based on simply
perception that they've been discriminated against on
the basis of age. Again, going to stereotype, there
are stereotypes that work the other way. In other
words, someone, an employer, a decision maker may make
a rational decision in terms of a layoff, and someone
who's in the protected class may perceive it as on the
basis of age because well, my gosh, you said something
like I was going to be retained based on my
anticipated future benefit. Ah-hah, that is
indicative, that's indirect evidence of age. So, I'm
wondering whether or not it makes sense to adjust it,
and what sense, 45, 50, or something like that.

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

MR. HARPER: That's right.

MS. McCANN: -- that protect against age
discrimination at any age, because you can be
stereotyped because you're a younger worker, too.
There was a classic New Jersey case where a very
qualified employee was hired to be a Vice President of
the bank, apparently, presented himself in a very mature way. Then when they found out he was in his 20s, the bank was embarrassed that they had hired a 20-something year old as a Vice President, and they fired him, and he prevailed under New Jersey law.

MR. HARPER: Yes, that's right.

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

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

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

COMMISSIONER KIRSANOW: Let me ask another question with respect to the policy issue. I've heard from several of you, and I don't, necessarily,
disagree, but I want to explore this, that age should be treated the same as other Title VII protected classes, but with one or two exceptions, say religion, that's the only one I can think of. The difference between age and the other protected classes is, the other protected classes are immutable.

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

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

(Laughter.)

COMMISSIONER KIRSANOW: So, the point -

(Off mic comment.)

COMMISSIONER KIRSANOW: I think Professor Harper said, and I think this is true based on my experience, that age discrimination is among the types of discrimination out there, more pervasive and resilient. I'm not so sure that is the most invidious or has the type of historical parallel let's say race
discrimination has, or other types of discrimination. None of us at this point want to engage in any kind of philosophical discussion about that, but the immutability of a protected class I think does augur toward the types of proof that may be required by a trier of fact, or a court in a particular case.

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

MR. CONNOLLY: Does anybody disagree -  
COMMISSIONER KIRSANOW: Sir. Mr. Connolly-  

MR. CONNOLLY: -- that if we lay people off -  
COMMISSIONER KIRSANOW: Mr. Connolly.  
MR. CONNOLLY: -- on the basis of favoring -  

(Simultaneous speech.)  
VICE CHAIR THERNSTROM: Nobody is interrupting people here.  
MR. CONNOLLY: I didn't realize I was interrupting. I'm sorry.  
VICE CHAIR THERNSTROM: You were interrupting Commissioner Kirsanow.  
MR. CONNOLLY: I can't hear as well.  
COMMISSIONER KIRSANOW: I'm not suggesting, necessarily, that that's an appropriate comment to make, but in the race cases I've seen, you will have, say, let's just take an example, a white decision maker who calls somebody, exact case I've had, an old coon. Is that -- or saying you're M-F-N. Okay? Maybe because I belong to that protected class, although I don't consider myself -
(Interference.)

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

(Laughter.)

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

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

It's a very legitimate point. And, in fact, it's one that the U.S. Supreme Court has used to rule that age is not a suspect class, but is only entitled to Rational Basis Review and Equal Protection claims. So, it is something that the court is aware of, and has taken note of.
I think the answer is that once you enter the protected class -- I think it's immutable, but in a different way. Once you become an older worker, you can't say God, this sucks. I am not getting any interviews. Back when I was 30, I got in the door. I'm going back and being a 30-year old. You can't do that once you are in the protected class, so it's not immutable like race and gender, but in many ways it is. There's no going back once you get there.

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

MS. McCANN: Exactly.

MS. VENTRELL-MONSEES: No, you cannot. And I wanted to address the question about, or the consideration of how invidious discrimination is against other classes, and then compare to age, and that's a historical perspective, and no one disputes that. From our perspective, when Congress decided to use the exact same language prohibiting age discrimination as it did in Title VII, from a legal perspective, that entails, should entail the same standards of proof. Congress didn't use weaker language, didn't impose greater burdens on older workers in the language that it chose. It certainly could have, and so from a policy perspective, and a
litigator's perspective, when we look at those words that are identical, and the prohibitions of the Age Act, and in Title VII to say that there should be no difference in how an older worker proves age discrimination, than compared to how a woman proves sex discrimination. And, indeed, the courts in many areas use the same theories, same proof theories, some of the same defenses, some of the same inferences, like a same actor inference.

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

When Congress makes the policy decision to apply the same standards, we, as advocates, would say the courts should apply the same standards. And the fact that there may have been less historical discrimination against older workers, and the fact
that the discrimination, historically, was different, it's not invidious. Okay? But we can take the same comparison of the history of race discrimination compared to sex discrimination.

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

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

MR. HARPER: That's not -

COMMISSIONER KIRSANOW: But going -

MR. HARPER: Go ahead.

COMMISSIONER KIRSANOW: But going to Ms. Milito's point, there are -- in terms of policy, and standards of proof, you have got a smaller employer who, for the reasons that Ms. Milito posited, has to terminate someone who is in a protected class. If the standard of proof is one that is a strict McDonnell Douglas balancing test, in order to make a prima facie case, Ms. Milito's company is going to be hit with the costs of defense, which are prohibitive. And the policy inquiry is whether or not we have -- we want to protect those individuals who may be the subject of discrimination, but by the same token, we have to understand that it is a business, and we make a legitimate business case, but because the standards of proof are such, virtually everybody can bring, or make out a prima facie case causing Ms. Milito's client to incur significant damages, which then, the law of unintended consequences results in employers being skittish about hiring overall, but specifically hiring anybody in a particular protected class. Those are the real world implications.
They're not being bad guys. They're not being bad guys, they're really not. Their mom and pop guys going like, geez, how do I maintain my business? Because, remember, it's the same kind of consideration that the Fair Labor Standards Act was promulgated for; that is, you've got smaller businesses who are permitted to hire people outside the statute, meaning family members, so they can survive.

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

MR. HARPER: But what -- in all due respect, what Ms. Milito's example, her hypothetical could have equally been used for race, or sex. It could have had two -- the two people that were being considered for layoff both could have been a member of the same race. They both could have been white. You know, Title VII is symmetrical. Everybody is in the protected class. It's unlike ADEA, but they both could have been women, or they both could have been African American, and she could have made the same point. I think you were suggesting that. So, I think that once the decision is made by Congress to
proscribe something, and the -- we can debate which
classes should be covered, but the decision was made
to cover age because of the stereotyping found in the
Wirtz report. And I think it was a good decision, and
because of the impact, potential impact on the
economy. But once that decision is made, why should
the proof methodologies be different?

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

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

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

COMMISSIONER TAYLOR: I'm listening to
this debate, and I'm wondering about the disconnect
between the language Congress uses in the statute, and
the way the public perceives this issue, and the way
the courts treat the issue. So, I'm trying to get my mind around that, and there's been a lot of discussion about it. And it brought to mind a real world example.

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

MR. HARPER: Harvard or Yale.

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

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

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

VICE CHAIR THERNSTROM: That's rational discrimination.

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

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

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

COMMISSIONER GAZIANO: Excuses. The
President says this job is really so important, it's worth discriminating on the basis of age.

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

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

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

VICE CHAIR THERNSTROM: Yes.

MS. VENTRELL-MONSEES: Okay?

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

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

VICE CHAIR THERNSTROM: These are political appointments.

MS. VENTRELL-MONSEES: Right.

COMMISSIONER TAYLOR: Wait a minute.

MS. VENTRELL-MONSEES: But I understand your disconnect, because look at -- our society is full of disconnects. We are very confused because we may -- whether you walk the walk, and talk the talk,
we're inconsistent in application of some of the principles that Congress may espouse, but then we build in exceptions. Okay? We have BFOQs. Right? We have them for, in Title VII all but race. There's a BFOQ for age to recognize some balancing, where gender may be relevant to a particular job, where age may be relevant to a particular safety job.

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

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

COMMISSIONER TAYLOR: I know why, but -
MR. HARPER: Bush and Obama both want -- and every President, because things are polarized politically. You know the reason --

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

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

COMMISSIONER YAKI: Stop. This is Commissioner Yaki. Let me just say this. Sorry for interrupting you, but I've been very patient throughout this entire discussion. I mean, Commissioner Taylor, please. If you really want to start going down that pathway, then we can start talking about the application of Title VII to political appointees by prior administrations in terms of their composition, makeup, and what have you, in terms of diversification to America, but we don't,
because we understand that the pool is very limited, that the types of things we're talking about are very limited. It is part of the political versus what is process. And whether you think it's hypocrisy for the political process to say well, we're only going to apply this, or I'm going to appoint my friends, and their friends, and their proteges to the Office of Legal Counsel, or the AG's office, or whatever it is, and they all happen to be of one ilk versus another. I mean, we can do that, but that's a debate that we settle every four years politically through an election, because people then get to -- we elect people because we know they're probably going to make those kinds of choices.

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

My question, though -

COMMISSIONER TAYLOR: I want to respond to that -

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

COMMISSIONER YAKI: No, the law --

(Simultaneous speech.)

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

MS. McCANN: Or any political appointee.

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

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

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

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

COMMISSIONER YAKI: I mean, but --

VICE CHAIR THERNSTROM: Wait a minute. Every -- I mean, political appointments, calculations are made about racial balance, gender balance,
whatever, all the time.

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

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

COMMISSIONER TAYLOR: I'm just pointing out -

COMMISSIONER YAKI: I think there is.

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

(Simultaneous speech.)

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

(Simultaneous speech.)

COMMISSIONER TAYLOR: Not that I have a problem with, because, actually, my position supports
equal application of law. My position supports applying these standards across the board. Your position supports exempting the political -

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

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

COMMISSIONER TAYLOR: Thank you.

COMMISSIONER YAKI: You may the person who
actually believes that this is a principle that
eyou're seeing, perhaps I'm just
jaded from 20 years of being in politics, that
frequently whenever these things comes up, it's simply
brought up and used as a mechanism to divide and
further antagonize an electorate, and diminish their
confidence in government by simply trying to create
inconsistencies, where, really, the consistency is
simply that of every four years that whoever is
criticizing changes sides. And the people who win
every four years, or two years, aren't the ones who
criticize, it's the ones who are on the outside. And
that's just American democracy. That's just the way
the -

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

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

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

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

COMMISSIONER YAKI: But I actually have a
question before -- my question was Professor Harper's
statement, he ended prematurely. And there were other
recommendations that he was talking about that he did not get to talk about. And I was just going to ask him -- well, at least there was one you hurriedly went through, but you said there was another one that --

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

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

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

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

My proposal is that -- I think the Supreme Court was correct in Hazen Paper under the current statute. I disagree with the criticism of Hazen Paper, but I think the statute should be somewhat modified so that if the employee is willing to take a lower wage, if they're willing -- let's use her hypothetical. Okay? The hypothetical that two -- let's say they're two accountants, and the employer says well, I'm going to get rid of the more expensive accountant, who has more experience and seniority, because they're at a higher wage. I think that's a cost justification, and that's justified. That's not
based on age, that's based on salary, or seniority. However, I think that if that higher wage is based on
the employer's pushing that up with seniority, the --
it would -- I think it makes sense, policy sense, to
say that the employer should give the employee the
opportunity to work at the lower wage. So, it
shouldn't be able to use its own internal labor market
increase as an excuse not to employ. Some employees
won't. And you're right, some employees won't work at
the lower wage, but I don't think that the higher wage
should be an excuse to not give the employee the
opportunity.

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

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

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

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

In a reduction in force, qualified employees will, necessarily, be let go. Okay? So, it seems to me, and I don't know if this is the appropriate balance, that possibly having a more elevated standard of proof, or possibly an additional standard to make out a prima facie case, such as
showing replacement, as opposed to reassignment. If you have a disparate treatment of a single employee, I think you have the McDonnell Douglas standard that could apply, or graft on any other iteration, all the other cases. Any thoughts with respect to that?

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

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

   MS. VENTRELL-MONSEES: Well, here's the -- the standard needs to be flexible, and the courts get into traps when the standard is not flexible, because
the facts of a particular RIF may differ. There may
be no replacements. Jobs can be assumed by -

COMMISSIONER KIRSANOW: Reassigned.

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

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

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

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

(Laughter.)

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

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

COMMISSIONER TAYLOR: I can acknowledge all the political realities, and I can acknowledge exactly every point you have made. I can also say to Commissioner Yaki that I don't raise this issue for purposes of bludgeoning any particular administration,
whatsoever. I raise it, though, for this reason, not as an attack on the political analysis, but as a defense of the small business owner to say why is a small business owner not as valuable, for that person who started a business, or for a company that is trying to grow its business. I think that person, or that company has values and principles that need protection as much as any political class or process, so it's a defense of an entity, not an attack on the political analysis.

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

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

VICE CHAIR THERNSTROM: Right.

MR. HARPER: But I understand your point.

VICE CHAIR THERNSTROM: Yes. I mean -

COMMISSIONER GAZIANO: Can I make -
VICE CHAIR THERNSTROM: Sure.

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

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

COMMISSIONER GAZIANO: Okay. But let me get out the whole question. I also know that you disagree with the court's technical analysis. I will let the court speak for itself, whether the '91 amendments should have applied to -- I think they know that better, and I'll let them -- but I want to now get back several interesting discussions, particularly...
between Ms. Milito, and you, and Commissioner Kirsanow on why you think it's illogical to have any different standards. And here I will suggest that the Supreme Court and Congress, the Supreme Court and Congress are considered with the relationship between likely Type 1 and Type 2 errors, Type 1 error being that the person discriminated against doesn't get a recovery, Type 2 errors, the person gets a recovery where there's no discrimination in the case of -- this is implicit in a lot of the Supreme Court's opinion. In the case of race discrimination, the Supreme Court said there's two reasons to apply strict scrutiny, one of which is not just because it's immutable. Certainly, that is a factor, and that's in all their decisions, but it is -- there is no difference, or almost always no difference between the races, and, therefore, there can be almost no good reason to discriminate, so we need a strict standard to flesh it out, as compared to gender discrimination. There aren't many, but there are a few differences between men and women, so we'll have an intermediate scrutiny. The other reason that relates to immutability, but is different, is with regard to race, it could be the decision maker, not only is it immutable, but it's an other, it's different than you;
whereas, a fact in gender, even us guys, we almost all have sisters, mothers, daughters, wives, partners who we love, so it is less likely in some sense that we would want them -- with regard to age, no matter whether it's reversible, or not, once we are in it, we all know we will be in -- we either are in it, or will be in it, so for all of those reasons, a policy maker might decide that the Type 2 error risk is really much greater, and we really do not need a burden of proof like strict scrutiny, or intermediary scrutiny to flesh out the likely impermissible motives. We think it's a much closer question as ex ante, so we don't want to tilt the table. What do you think about that?

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

(Simultaneous speech.)

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

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

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

COMMISSIONER GAZIANO: Aren't there similar or -

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

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

MR. HARPER: I see the argument, and it could be made to Congress. I don't agree with it, but I think it definitely -- there's some weight to it, and it could be made to Congress. However, when you have statutes that have the exact same words, it seems to me that a court, and this is a question of what a court should do, and what Congress should do, but a
court ought to interpret those words in the same way. And that brings me back to Gross, and the reason I say that that is a very activist judicial opinion is not because they didn't follow the 1991 Act. I think that there were very good reasons for them not to follow the 1991 Act. It's because they didn't choose -- because they moved away from the choice between the '91 Act on the one hand, and their prior precedent, Price Waterhouse, under the same language on the other, and they went over here. Congress amends Price Waterhouse in one direction, and rather than going in that direction, it was fine for them, because they didn't amend ADEA to go with the '91 Act, but rather than going in that direction, the court goes totally in the other direction.

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

MS. MILITO: Please, please, please.

MR. HARPER: I'm sorry that I -

VICE CHAIR THERNSTROM: I'm very, very
sorry. I am really going to cut off discussion, but have it outside.

(Laughter.)

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

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

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

(Laughter.)

VICE CHAIR THERNSTROM: Now, wait a minute.

MR. HARPER: We've having fun here.

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

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

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER KIRSANOW: Because our reports will go places, maybe even to the EEOC, and I am interested in your comments with respect to the kind of -- having a discussion with respect to taking a reduction in pay, because I think, unfortunately, in
our discrimination laws, it's an adversarial process that's been set up, with maybe the exception of the ADA. I like the interactive process, maybe give a safe harbor to employers who engage in that process without there being a presumption that they're engaged in invidious age discrimination.

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

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

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

STAFF DIRECTOR DANNENFELSER: Ten.

VICE CHAIR THERNSTROM: Ten?

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

(Whereupon, the proceedings went off the record at 12:20 p.m.)
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CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Age Discrimination Briefing

Before: US Commission on Civil Rights

Date: 06-11-10

Place: Washington, DC

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

[Signature]
Court Reporter