

EMPLOYERS WHO CRY ‘RIF’ AND THE COURTS THAT BELIEVE THEM

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INTRODUCTION

Studies show that plaintiffs alleging violations of the Age Discrimination in Employment Act¹ (ADEA) lose far more cases than they win.² Among the hardest to win are cases like *Sisk v. Falcon Products*,³

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1. 29 U.S.C. §§ 621-34 (2000) (prohibiting discrimination based on an individual's age in places of employment).

2. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 445 tbl.2 (2004). The data collected by the Administrative Office of the U.S. Courts for 1998-2001 shows a win rate of 2.31% for ADEA plaintiffs in pretrial adjudication, 20.93% in bench trials, and 40.5% in jury trials. *Id.* These ADEA win rates are worse than those for employment discrimination cases overall in regard to bench trials (25.94% plaintiff win rate) and only marginally better than those in regard to jury trials (37.73%) and pretrial adjudication (1.99%). *Id.* The picture is arguably bleaker with regard to federal appeals in age bias cases; nearly half of trial court wins by plaintiffs that were appealed, were reversed (42.76% of the 1998-2000 cases), while only a tenth (10.12%) of defendants' trial court wins that were appealed, were reversed. *Id.* at 450 tbl.4. See also Gary Minda, *Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment*, 48 HASTINGS L.J. 511, 539 (1997) (discussing studies demonstrating that "plaintiffs have lost most of the age discrimination suits tried in the courts because of the strict *prima facie* requirement."). Minda discusses a study conducted by Chief Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit, which found that in ADEA cases litigated in his circuit between January 1993 and June 1994, nearly three-fourths of discharge cases were disposed of at summary judgment in favor of the defendant; however, plaintiffs won 47.7% of the cases that reached a jury verdict. *Id.* at 539 n.128.

an ADEA dispute recently decided in a federal court in Eastern Tennessee. Plaintiff Kenneth Sisk alleged that defendant Falcon Products terminated him on the basis of his age. In support of his claim, Sisk produced circumstantial evidence that ADEA plaintiffs typically rely upon in order to meet their burden of proof.⁴ He included evidence showing: (1) that he was 65 years old at his time of the termination; (2) that after his termination, he was replaced by a substantially younger person; (3) that the defendant's stated reasons for the termination shifted and evolved throughout the lawsuit in a manner indicating that these reasons were pretextual; and (4) that a manager involved in the decision-making process made ageist comments close to the time of termination.⁵

In an ordinary "discharge" or "replacement" case—where an employee is fired and then replaced by a person who fills the same position—such evidence would have been enough to survive a defendant's motion for summary judgment.⁶ But in *Sisk* the defendant alleged that the plaintiff's position was eliminated pursuant to a reduction-in-force (RIF), therefore he could not have been "replaced."⁷ The defendant's explanation for termination was crucial to the ultimate disposition of the case because establishing a *prima facie* case of age discrimination under the *McDonnell Douglas* burden-shifting framework is relatively easy in replacement situations. It simply involves showing that a "substantially younger" worker replaced a qualified worker age-40-or-older.⁸ An RIF situation is tougher because—at least in theory—there literally is no replacement. Thus, the Sixth Circuit (which includes Tennessee) requires plaintiffs to show some "additional, circumstantial, or statistical evidence" capable of raising an inference of age bias.⁹ That court has ex-

3. *Sisk v. Falcon Prod. Inc.*, No. 2:02-CV-291, (E.D. Tenn. March 8, 2004) (on file with the authors), *appeal docketed*, Nos. 04-5407 & 5876 (6th Cir. 2004). In April 2005, the *Sisk* litigation stalled, pursuant to an automatic stay issued by the U.S. Bankruptcy Court for the Eastern District of Missouri in St. Louis. See Notice of Bankruptcy Filing, *Sisk*, Nos. 04-5407 & 5408 (6th Cir. Feb. 17, 2005). The bankruptcy court subsequently granted a Motion for Relief from the Automatic Stay, to permit the appeal in *Sisk* to proceed, filed by appellant, Sisk. See Order Granting in Part and Denying in Part Motion for Relief from the Automatic Stay filed by Kenneth L. Sisk, *Sisk*, No. 05-41108-399 (Bankr. E.D. Mo. Apr. 25, 2005). As a result, the *Sisk* case, once again, is pending on appeal before the Sixth Circuit.

4. See *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1465 n.9 (6th Cir. 1990) (clarifying elements of *prima facie* case of age discrimination in discharge situations).

5. See Plaintiff-Appellant Kenneth L. Sisk's Final Opening Brief, at 3-7, *Sisk* Nos. 04-5407 & 5876 (6th Cir. Dec. 31, 2004) (statement of case and statement of facts).

6. See *Barnes*, 896 F.2d at 1465 n.9.

7. *Sisk*, No. 2:02-CV-291, slip op., at 6.

8. *Barnes*, 896 F.2d at 1465.

9. *Id.*

plained that this requirement places a “heavier burden” on plaintiffs in reduction-in-force cases.¹⁰

In our sample case, Sisk produced evidence, including an affidavit from his alleged replacement, demonstrating that the latter’s job duties and functions were substantially the same as those previously performed by Sisk.¹¹ Yet the district court decided the replacement issue in favor of the defendant applying an RIF analysis.¹² The court determined that Sisk was unable to meet the heavier burden of the “additional evidence” requirement, and granted summary judgment for the defendant.¹³

In this article, we use *Sisk* as a vehicle for exploring and criticizing the “heavier burden” of the additional evidence requirement that the Sixth Circuit and several other circuits place on plaintiffs in RIF cases.¹⁴ *Sisk* provides a fruitful avenue for exploring this subject precisely because plaintiffs’ failure to meet this heavier burden is so common.¹⁵

Employers, alas, are “rarely so cooperative as to include a notation in the personnel file, ‘fired due to age’; or to inform a dismissed employee candidly that he is too old for the job.”¹⁶ Yet despite the rarity of “smoking gun” evidence, the federal courts have tended to adopt an unduly deferential posture toward defendants in RIF cases. Even in cases where plaintiffs produce evidence indicating that allegedly “RIFed” positions have not actually been eliminated, courts have still declined to carefully scrutinize defendants’ claims that a legitimate business rationale exists to justify the termination. The result is that an employer’s cry of “RIF” can be used tactically by unscrupulous defendants to evade liability for age discrimination in all but the most egregious cases—a prospect that, in this age of widespread corporate downsizing and restructuring, threatens to turn the ADEA and the protections it affords to older workers into “more loophole than law.”¹⁷

The paper begins in Part I where we position the legal issues associated with RIF cases within the larger economic context of age dis-

10. *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 517 (6th Cir. 1991).

11. *Sisk v. Falcon Prods., Inc.*, No. 2:02-CV-291, slip op. at 2-3, 7 (E.D. Tenn. March 9, 2004); *see also* Plaintiff-Appellant Kenneth L. Sisk’s Final Opening Brief at 10-12, *Sisk v. Falcon Prods., Inc.*, Nos. 04-5407 & 5876 (6th Cir. 2004) (referring to Tony Lawson’s affidavit declaring that his job duties were essentially no different than Sisk’s).

12. *Sisk*, No. 2:02-CV-291, slip op. at 7.

13. *See id.* at 7, 13-14.

14. *See discussion infra* Part II.

15. *See supra* note 2 and accompanying text.

16. *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 638 (5th Cir. 1985).

17. President Lyndon B. Johnson used these words to describe the Federal Election Campaign Act of 1971. Joel M. Gora, “*No Law . . . Abridging*,” 24 HARV. J.L. & PUB. POL’Y 841, 843 (reviewing BRADLEY A. SMITH, *UNFREE SPEECH* (2001)).

crimination, corporate downsizing strategies, and the plight of older displaced workers. In Part II we turn to the difficulties that courts have faced in analyzing RIF cases and describe two general approaches adopted by the federal courts, paying particular attention to the relatively defendant-friendly approach of the Sixth Circuit. Part III explores the litigation disadvantages that the “heavier burden” requirement of the Sixth Circuit’s approach creates for plaintiffs in RIF situations.¹⁸ In particular, we focus on the problem experienced by plaintiffs who, like Sisk, produced evidence that their former positions were not eliminated during an alleged RIF. In Part IV we propose a test that would assist courts in distinguishing between cases where an employee has been terminated *pursuant* to an RIF, and those where an employee has merely been terminated *contemporaneous* to an RIF. This article ends by suggesting that the main obstacle to adopting such a test is less the determination of some courts to protect employers from burdensome lawsuits, than it is the widespread misconception that, since age discrimination is seldom motivated by “animus,” it is not a serious problem.

I. AGE DISCRIMINATION AND OPPORTUNISTIC DOWNSIZING: AN OVERVIEW

Congress enacted the ADEA in 1967 “to promote the employment of older persons based on their ability rather than age.”¹⁹ Modeled after Title VII of the Civil Rights Act of 1964,²⁰ the ADEA prohibits discrimination based on age against persons aged 40 and over.²¹ The Act provides, *inter alia*, that “[i]t shall be unlawful for an employer. . .to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”²²

18. *Wilson*, 932 F.2d at 517 (6th Cir. 1991) (noting “heavier burden” placed on RIF plaintiffs); *see also* *Whitt v. Lockheed Martin Util. Servs., Inc.*, 209 F. Supp. 2d 787, 795-96 (S.D. Ohio 2002) (same).

19. 29 U.S.C. § 621(b) (2000).

20. *Compare* the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2000) (making it unlawful for an employer to discriminate on the basis of age), *with* the Civil Rights Act of 1964, 42 U.S.C. 2000e to e17 (2000) (making it unlawful for an employer to discriminate on the basis of race, color, religion, sex or national origin).

21. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (removing the maximum age limitation applicable to employees protected under the ADEA).

22. 29 U.S.C. § 623(a)(1) (2000).

A. Older Workers and Job Displacement

Congress's principal reason for enacting the ADEA was its concern that older workers face substantial disadvantages "in their efforts to retain employment, and especially to regain employment when displaced from jobs."²³ Nearly 40 years later, studies indicate that older workers continue to face substantial disadvantages in the American workplace—and in some respects may actually have lost ground.²⁴ Consider the following statistics: in 1974, displaced older workers aged 45-54 and 55-64 experienced average durations of unemployment that lasted 15 weeks and 16 weeks respectively; by September of 2003 the corresponding figures had increased to 24.9 weeks and 28.6 weeks.²⁵

Some commentators have pointed out that younger displaced workers also saw substantial increases in average duration of unemployment over the same time period.²⁶ Indeed, it is true that workers of all ages have seen a steady erosion of the job security that tended to characterize the American workplace during the first decades following WWII.²⁷ As rapid changes in technology, consumer preference, and international trade patterns have come to characterize the modern economic landscape since the 1980s, corporate downsizings and restructurings have also become a prominent and apparently, permanent practice of American corporations.²⁸ As two prominent economists recently observed: "[e]ven in

23. *Id.* Congress based these findings in part on a report compiled by the Secretary of Labor pursuant to Title VII. See 42 U.S.C. § 2000e-14 (2000) (the 1972 amendment to this section directs the Secretary of Labor to "make a full and complete study of factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected"). Secretary Wirtz submitted the report in June 1965. See OFFICE OF THE U.S. SECRETARY OF LABOR, *THE OLDER AMERICAN WORKER: AGE DISCRIMINATION* (Jun. 1965) (Report of the Secretary of Labor to the Congress under section 715 of the Civil Rights Act of 1964).

24. See, e.g., Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It is Today, Where It's Going*, 31 U. RICH. L. REV. 579, 670 (1997) (citing studies in which greater age was viewed negatively by employers). For example, a study conducted in 1993 found that identical resumes were 26.5% less likely to receive a positive response from employers when a hypothetical applicant listed their age as fifty-seven rather than thirty-two. *Id.*

25. ARTHUR LARSON & LEX K. LARSON, 8 EMPLOYMENT DISCRIMINATION § 120.02 (2005) (citing data compiled by the U.S. Department of Labor).

26. See LARSON & LARSON, *supra* note 25, at § 120.02 (citing data compiled by the U.S. Department of Labor showing increases in the duration of unemployment for younger workers between 1974 and 2003).

27. Charles Koeber & David W. Wright, *Wage Bias in Worker Displacement: How Industrial Structure Shapes the Job Loss and Earnings Decline of Older American Workers*, 30 J. SOC. ECON. 343, 343 (2001).

28. See *id.* at 345; see also W. Michael Cox & Richard Alm, *The Great Job Machine*, N.Y. TIMES, Nov. 7, 2003, at A27.

2000, when the unemployment rate hit its lowest point of the past decade, 33 million jobs were eliminated.”²⁹

Of course, economists also note that many of those lost jobs were seasonal positions, while an even larger number of new jobs were created in 2000.³⁰ However, the disproportionate toll that this new “flexibility” of the American labor force takes on older workers cannot be so easily explained away.³¹ One recent study found that workers aged 55 to 64 took approximately 40 percent longer to find new jobs in 2004 than workers aged 25 to 34.³² Another study discovered that, even when older displaced workers managed to secure reemployment, they were more likely than their younger counterparts to experience a substantial pay cut.³³ These statistics only begin to suggest the costs of job displacement for workers entering the final stage of their careers. As the American Medical Association has said of mandatory retirement policies: “[t]he physical and mental health of an individual can be affected by loss of status, lack of meaningful activity, fear of becoming dependent, and by isolation. Compulsory retirement produces a chain reaction in the health of such persons.”³⁴

B. Age Discrimination, Age Bias, and Wage Bias

If the disproportionate impact of job displacement on older workers is relatively easy to document, it remains much more difficult to explain *why* “the highest rates of displacement have occurred among the older

29. See Cox & Alm, *supra* note 28, at A27.

30. *Id.*

31. Koeber and Wright identify two main types of “flexibility” that lead to workforce reductions. The first—“internal or job flexibility”—involves altering task requirements in response to changing “workload, technologies, and/or production methods,” and may result in collapsing job classifications, reengineering, and other internal changes. Koeber & Wright, *supra* note 27, at 345. A second type of flexibility is “external or numerical flexibility,” which involves matching “labor inputs to output fluctuations.” *Id.* Firms “often accomplish this by shifting their organization structure, reducing or downsizing the number of permanent and full-time workers while relying more on ‘contingent’ subcontracted and temporary help.” *Id.*

32. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, UNEMPLOYED PERSONS BY AGE, SEX, RACE, HISPANIC OR LATINO ETHNICITY, MARITAL STATUS, AND DURATION OF UNEMPLOYMENT, tbl.31 (2004), available at <http://www.bls.gov/cps/cpsaat31.pdf>.

33. JOHN SCHMITT, CTR. FOR ECON. AND POLICY STUDIES, JOB DISPLACEMENT OVER THE BUSINESS CYCLE, 1991-2001 (2004), available at http://www.cepr.net/publications/displaced_workers.htm.

34. LARSON & LARSON, *supra* note 25, at § 120.62.6.7 (quoting Brief for the American Medical Association as *Amicus Curiae* at 4, *Weisbrod v. Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff’d*, 420 U.S. 940 (1975)).

segments of the working population.”³⁵ Increases in age discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) almost always coincide with downturns in the economy, a correlation which suggests that at least some employers use age as a determining factor when making downsizing decisions.³⁶ The age bias explanation attributes this trend to negative stereotypes about older workers. As the Supreme Court stated in *Hazen Paper Co. v. Biggins*: “[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.”³⁷ Such stereotypes may find expression in the decision-making process of employers instituting RIFs in any number of ways, from a corporate culture that assumes “you can’t teach an old dog new tricks”³⁸ to a conscious desire to bring “new blood” into a firm.³⁹

At other times, age bias may manifest itself in subtler, and even unconscious ways. The eighteenth-century lexicographer Samuel Johnson observed the following tendency of England in his day: “[i]f a young or middle-aged man, when leaving a company, does not recollect where he laid his hat, it is nothing; but if the same inattention is discovered in an old man, people will shrug up their shoulders, and say, ‘His memory is going.’”⁴⁰ It is not difficult to see how this “wicked inclination”⁴¹ may subconsciously color and distort the way employers assess the perform-

35. Koeber & Wright, *supra* note 27, at 344.

36. *E.g.*, Matt Murray, *On the Job: When Age Becomes an Issue at Work*, WALL ST. J., Mar. 3, 2003, at 3:

The Equal Employment Opportunity Commission reported one year ago that the number of age-bias claims against private-sector employers jumped 8.7% to 17,405 in the fiscal year that ended Sept. 30, 2002, compared to the previous year. . . . *Such a jump is to be expected in a downturn, when layoffs are prevalent.*

Id. (emphasis added).

37. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

38. RICHARD A. POSNER, *AGING AND OLD AGE* 335 (1995). Yet as Judge Posner has observed, most companies have succeeded in purging such explicitly ageist slogans “from the vocabulary of their supervisory and personnel staffs.” *Id.*

39. *See, e.g.*, *Hawkins v. Frank Gillman Pontiac*, 102 F. App’x 394, 396 (5th Cir. 2004). This ADEA decision states:

Hawkins testified that when he asked why he could not stay in his position as a sales manager, Hawkins’s direct supervisor told him that Gillman Pontiac wanted ‘new blood’ in the sales manager position. According to Hawkins, when Hawkins asked his supervisor what the ‘new blood’ comment meant, the supervisor clarified the comment by stating, ‘you know, younger people.’

Id.

40. JAMES BOSWELL, *4 LIFE OF SAMUEL JOHNSON* 51 (George Birkbeck Hill ed., Classic Literature Library 2004) (1791), *available at* http://www.classic-literature.co.uk/scottish-authors/james-boswell/life-of-johnson-vol_04/.

41. *Id.*

ance of older workers, as they decide who to let go during an RIF.⁴² Indeed, implicit association tests designed for Project Implicit⁴³—a joint effort of researchers at Harvard University, the University of Virginia, and the University of Washington—have consistently found that test-takers demonstrate a preference for “young” over “old.”⁴⁴ The tests reveal that bias against the elderly begins as early as age eight, persists up to age 68, and is more deeply embedded than the other forms of bias the Project measures, including race, gender, religion, and sexual orientation.⁴⁵ One researcher explained: “[i]t’s the largest bias we see. I was very surprised. People don’t openly discuss ageism much, like they do racism or sexism, yet its strong presence makes it . . . insidious.”⁴⁶

A second explanation as to why older workers experience such high job displacement rates draws on the insights of microeconomic theory and posits that older workers are particularly vulnerable in RIF settings,

42. See, e.g., *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56 (2d Cir. 2004) (ADEA disparate impact case where the court stated: “[e]mployers are free to decide that layoffs are necessary; and ‘criticality’ and ‘flexibility’ may be appropriate criteria to use in making a termination decision. But if a particular criterion is subjective (as ‘flexibility’ and ‘criticality’ are), and if (as here) evidence shows that (i) the subjectivity disproportionately impacted older employees; (ii) the employer observed that the disproportion was gross and obvious; and (iii) the employer did nothing to audit or validate the results, then an employer may be liable for discrimination if equally effective alternatives to the challenged features of the employment practice are available.”). *Id.* at 75; see also *Smith v. City of Jackson*, 125 S. Ct. 1536 (holding that a disparate impact claim is cognizable under ADEA).

43. Project Implicit, <http://projectimplicit.net> (last visited Oct. 21, 2005). Project Implicit’s website, where visitors can take an implicit association test (IAT test), explains:

[a]n ‘association’ is the degree to which one concept is connected to, or associated with, another concept. For example, a person may associate science with males more than females because of beliefs about different competencies or an observation of different participation rates in science. This type of association would reflect a stereotype: the association of a concept (science) with an attribute (male or female). A ‘preference’ or ‘attitude’ is a specific type of association. An attitude is the association between a concept and an evaluation such as good-bad, positive-negative, or pleasant-unpleasant. The IAT can measure the association between concepts and evaluations, which are interpreted as automatic preferences or attitudes. For example, a stronger association between Young and good versus Old and good on an Age IAT would suggest an implicit preference for Young versus Old.

Implicit Association Test: General Questions About the IAT, available at <https://implicit.harvard.edu/implicit/demo/faqs.html> (last visited Oct. 21, 2005).

44. Implicit Association Test: Questions About the Age IAT, <https://implicit.harvard.edu/implicit/demo/agefaqs.html> (last visited Oct. 21, 2005); see also William J. Cromie, *Brain Shows Unconscious Prejudices: Fear Center is Activated*, HARV. U. GAZETTE, June 17, 2003, available at <http://www.hno.harvard.edu/gazette/daily/0306/16-prejudice.html>.

45. See Cromie, *supra* note 44.

46. *Id.* (quoting Mahzarin Banaji, Professor of Social Ethics at Harvard University).

not because of age bias, but because of “wage bias.”⁴⁷ Under this view, employers are largely motivated by one factor: profit. Since older workers tend to command higher salaries than their younger counterparts, they will not fare as well in situations where an employer institutes an RIF as part of a cost-saving strategy, because the “displacement of these older and more highly compensated workers generates greater returns to capital and higher profit margins.”⁴⁸

As far as explanations go, the wage bias theory sheds much light on the financial dynamic of corporate downsizing strategies. But some proponents of the explanation go too far, suggesting that age bias and wage bias should be viewed as competing explanations of the higher displacement rates experienced by older workers.⁴⁹ From a legal standpoint, at least, ADEA cases do *not* turn on the question whether an employer had just one reason for an adverse employment action; rather, they turn on the much narrower question, whether “age tipped the balance” in the decision-making process.⁵⁰

There is a second, more troubling difficulty with the wage bias theory: its tendency to obscure the broader “human-capital” and “efficiency-wage” stories, apart from which the higher salaries of older workers cannot rationally be understood.⁵¹ The “human-capital story” posits that employers pay younger workers less during the training phase of their careers in exchange for payment of a higher wage once the firm has invested in training and the worker becomes more valuable.⁵² These “higher, post-training wages take the form of seniority-based wages and late-vesting pensions, which induce workers to stay with the firm after training.”⁵³ Gary Minda has explained it this way: “[a]n older worker

47. See Koeber & Wright, *supra* note 27, at 343.

48. *Id.* at 346.

49. Koeber and Wright’s study, which analyzed data from the 1998 Current Population Survey’s Biennial Displaced Worker Supplement, reached the following conclusion:

We have attempted to advance an argument that older workers lose their jobs because they are more expensive than their younger counterparts and that their earnings loss is magnified when they are displaced from the goods-producing sector. This structural explanation of age differences in displacement of workers expands an understanding of a problem more typically addressed by arguments over age discrimination or age differences in education and skills.

Id. at 351.

50. *Gehring v. Case Corp.*, 43 F.3d 340, 344-45 (7th Cir. 1994).

51. See Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment*, 92 MICH. L. REV. 8, 15-28 (1993).

52. See *id.* at 13-15.

53. *Id.* at 15 (citing RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS* 160-63, 410, 425-37 (4th ed. 1991)).

who has invested in job-specific skills may actually be receiving wages which partly repay the worker for incurring the cost of job-specific skills" that are not transferable to other firms.⁵⁴ The "expanded efficiency-wage story" sheds further light on the issue of why older workers receive relatively higher wages. Recognizing that most employers tend to act rationally when setting compensation levels, this theory suggests that higher wages may constitute efficient wages.⁵⁵

When viewed in this broader context, the higher wages of older workers are best viewed as reflective of a conscious incentive strategy on the part of firms in which younger workers are first lured to a firm and then, as their productivity and value increases, kept there through the payment of progressively higher wages. In short, these older workers "are not being overpaid."⁵⁶ Chief Judge Posner puts the matter this way:

If [the older worker] is being paid a so-called "efficiency" wage either to discourage shirking or to repay the "bond" that he posted as a young employee by accepting a lower salary in exchange for an implicit promise of compensation later if he behaved, he is merely receiving the benefit of his bargain.⁵⁷

The human capital and efficient-wage theories thus help explain why, from a legal standpoint, it is misleading to distinguish between "wage bias" and "age bias."⁵⁸ What makes the distinction so off base is that it makes the higher wages of older workers seem like a coincidence, having little to do with age. But the reality is that payment of efficient wages is a function of the worker's length of service with a firm and hence, is indirectly the result of the worker's age.⁵⁹ Opportunistic down-

54. Minda, *supra* note 2, at 528-29.

55. *Id.* at 524.

56. "[E]ven if an older worker nearing retirement earns a relatively high salary which exceeds that worker's current productivity, it does not mean that such a worker is in fact earning more than an 'efficient' wage." *Id.* at 529. Minda also observes, however, that economic studies suggest "wages of workers who are nearing the end of a career with a particular employer exceed the current productivity of the worker." *Id.* at 524. Hence, employers perceive "an economic incentive to terminate the relationship," *id.* at 524, thereby creating the potential for exploitation and making older workers "vulnerable to opportunistic firing." *Id.* at 529.

57. POSNER, *supra* note 38, at 337.

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

59. "Because of the close connection between a worker's age and time he spends with the company, the ADEA indirectly protects late-career employees as well." Schwab, *supra* note 51, at 45. The Supreme Court, however, has cast doubt on this connection: "[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993). Lower federal courts following *Hazen* have held

sizing “works” in its goal of reducing an employer’s labor costs only because it trades on the very dynamic regarding wages that the process of aging brings to the employer-employee relationship.⁶⁰

The simple distinction between age and wage bias, therefore, does not withstand scrutiny any more than the alleged distinction that some defendants in Title VII cases have sought (and failed) to make between discrimination based on gender and the potential to become pregnant.⁶¹ In both situations, it is the protected trait itself—gender in the case of a female employee who may become pregnant, and age in the case of the older worker who receives an “efficiency” wage—that determines which persons will be subjected to disparate treatment.⁶²

II. TWO APPROACHES TO ANALYZING RIF CASES

Given the prevalence of ageist stereotypes and academic disputes regarding whether “opportunistic downsizing” of older workers is cost-

that selecting employees for termination based on their higher salaries is not tantamount to using salary as a proxy for age discrimination. *See Schlitz v. Burlington N. R.R.*, 115 F.3d 1407, 1412 (8th Cir. 1997) (holding that RIF criteria, such as salary and grade level “are correlative with age, but are not prohibited considerations”); *Gerth v. Sears, Roebuck & Co.*, No. 94-6664, 1996 U.S. App. LEXIS 22577, at 5 n.5 (“[A plaintiff] cannot prove age discrimination if he was fired/transferred simply because [defendant] desired to reduce its salary costs by discharging him.”) (internal quotations and citation omitted); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1126 (7th Cir. 1994) (noting that, while age and salary are often correlated, “an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on . . . compensation level is necessarily ‘age-based’” (quoting *Hazen Paper*, 507 U.S. at 611)).

60. Thus, studies of corporate downsizings indicate that restructurings at large firms tend to alter the “*compositions* of their workforces more than their sizes,” a fact which tends to confirm that many workforce reductions may be designed to reduce the number of higher paid workers, rather than the number of workers in general. Andrew Hacker, *The Underworld of Work*, N.Y. REV. OF BOOKS, February 12, 2004, at 38.

61. *See, e.g., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (holding that employer’s fetal-protection policy which barred women from holding certain positions constituted sex discrimination for purposes of Title VII). The Court stated: “First, Johnson Controls’ policy classifies on the basis of gender and childbearing capacity, rather than fertility alone. . . . Johnson Controls’ policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing.” *Id.* at 198.

62. *See Minda, supra* note 2, at 566-67 (“In the case of ageism at the workplace, . . . it is stereotypical thinking that underestimates the value of older [workers and that constitutes] the mechanism of age discrimination actually affect[ing] the perception of a worker’s value in downsizing and RIF actions in non-recessionary periods.” And when they are confronted with “opportunistic downsizing . . . [i.e.,] opportunistic layoffs . . . and RIF strategies which are implemented for the purpose of eliminating aging late-career workers because they are too expensive. . . then the courts should be suspicious of the employer’s decision. If the employer attempts to justify its decision on the grounds that aging late-career workers are too expensive, then there is reason to support an inference of age discrimination . . . In such cases it is more probable than not that the age of the worker [and not his or her cost] is the real reason for the decision.”)

saving, inefficient or both, one might expect courts to scrutinize closely ADEA claims that arise in RIF settings. Yet RIF cases remain “largely immune from ADEA regulation.”⁶³ Not only have the courts been reluctant to acknowledge the close analytical nexus between wage bias and age bias,⁶⁴ but much of the federal judiciary has adopted an approach to analyzing RIF cases that makes it exceedingly difficult for plaintiffs to advance past the summary judgment phase, unless they can produce direct evidence of discrimination.⁶⁵ In this section of the article, we explore why courts treat RIF cases this way by taking a closer look at the three-step evidentiary framework, which was established in *McDonnell Douglas Corp. v. Green* and used by the courts to analyze ADEA claims that rely on circumstantial evidence.⁶⁶

Under *McDonnell Douglas*, the plaintiff first must establish a *prima facie* case of disparate treatment.⁶⁷ If the plaintiff succeeds, then “a legally mandatory, rebuttable presumption” of discrimination is created.⁶⁸ The burden then shifts to the defendant at the second stage of the framework “to articulate some legitimate, non-discriminatory reason for the employee’s rejection.”⁶⁹ If a defendant meets its burden of production, then at the third stage the plaintiff is given an opportunity to prove, by a preponderance of the evidence, that the defendant’s stated reason for the adverse employment action is a pretext, designed to disguise discrimination.⁷⁰

Requiring proof of a *prima facie* case disqualifies typical non-discriminatory reasons for a given employment action and thus “is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.”⁷¹ Given this function, the Supreme Court has cautioned that the elements of the *prima facie* case are not rigid, but must be adapted to fit various fact scenarios.⁷² In an ordinary

63. *Id.* at 535.

64. *See supra* note 61 and accompanying text.

65. Since *Hazen Paper*, 507 U.S. 604 (1993), “a growing number of federal judges apparently also subscribe to the view that [age] discrimination legislation was ‘not intended to protect workers from the harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings, and relocations.’” Gary Minda, *Aging Workers in Postindustrial Era*, 26 STETSON L. REV. 561, 582 (1996) (quoting *Allen v. Ethicon, Inc.*, 919 F. Supp. 1093, 1099 (S.D. Ohio 1996)).

66. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-04 (1973).

67. *Id.* at 802.

68. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981).

69. *McDonnell Douglas*, 411 U.S. at 802.

70. *Burdine*, 450 U.S. at 256.

71. *Id.* at 255 n.8.

72. *See McDonnell Douglas*, 411 U.S. at 802 n.13.

replacement case, for instance, the federal courts have held that a plaintiff establishes a *prima facie* case by presenting concrete evidence: (1) that he or she was a member of the protected age group; (2) that he or she was discharged; (3) that at the time of the discharge, he or she was performing the job at a satisfactory level or that met the employer's legitimate expectations; and (4) that following the discharge, he or she was replaced by a substantially younger person.⁷³ Applying this formulation to RIF cases, however, poses a problem because, in a genuine workforce reduction, the plaintiff's position is eliminated and the fourth element can never be satisfied. The courts have responded to this problem by adopting one of two general approaches.

The first approach, originally formulated by the D.C. Circuit in *Coburn v. Pan American World Airways*,⁷⁴ and generally followed by the First, Third, Fourth, Seventh, and Tenth Circuits,⁷⁵ recasts the fourth element to require the plaintiff to merely show that he or she "was disadvantaged [during the RIF] in favor of a younger person."⁷⁶ This requirement may be met by evidence showing, *inter alia*, that the defendant retained a younger employee, whose job responsibilities and duties were substantially the same as that of the plaintiff's former job.⁷⁷ The

73. *E.g.*, *Barnes v. GenCorp., Inc.*, 896 F.2d 1457, 1465 n.9 (6th Cir. 1990) (clarifying elements of *prima facie* case of age discrimination in discharge situations), *cert. denied*, 498 U.S. 878 (1990); *see also* *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) ("Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is *substantially younger* than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.") (emphasis added).

74. 711 F.2d 339, 342 (D.C. Cir. 1983).

75. *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 842 (1st Cir. 1993) (explaining that the fourth element is satisfied where plaintiff demonstrates "either that the employer did not treat age neutrally or that younger persons were retained in the same position"); *In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 295 (3d Cir. 1997) (concluding that the fourth element is satisfied by showing "persons outside of the protected class were retained"); *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993) (applying similar standard where performance was announced criterion for RIF decisions); *Blistein v. St. John's College*, 74 F.3d 1459, 1470 (4th Cir. 1996) (declaring that the fourth element is satisfied "either by showing that comparably qualified persons outside the protected class were retained in the same position or by producing some other evidence indicating that the employer did not treat age neutrally") (internal quotations and citations omitted); *Oxman v. WLS-TV*, 846 F.2d 448, 455 (7th Cir. 1988) (affirming that "an employer's retention of a younger employee either in the same job as the discharged plaintiff or in another job for which the plaintiff also was qualified gives rise to an inference of discrimination . . .") (quotation and citation omitted); *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1167 (10th Cir. 1998) ("[A] plaintiff who is fired pursuant to an RIF and who held a similar position to a younger retained employee can satisfy the fourth element.").

76. *Coburn*, 711 F.2d at 342.

77. *Id.* at 343 (demonstrating that a *prima facie* case established by evidence showing that "younger persons were retained and others later promoted"). The court noted that the plaintiff "was

rationale behind this reformulation rests on the recognition that “the exigencies of a reduction-in-force can best be analyzed at the stage [of the *McDonnell Douglas* framework] where the employer puts on evidence of a nondiscriminatory reason for the firing.”⁷⁸ The *Coburn* standard thus functions as a relatively plaintiff-friendly approach to RIF cases in that virtually any plaintiff in the protected age group will be able to make a *prima facie* showing of age discrimination.⁷⁹

A second, far more defendant-friendly approach to RIF cases, was first articulated by the Fifth Circuit in *Williams v. General Motors Corp.*⁸⁰ and has been followed by the Second, Sixth, Eighth, and Eleventh Circuits.⁸¹ Although these courts formulate the fourth *prima facie* element in slightly different ways, the *Williams* standard generally requires production of some “additional . . . evidence that age was a factor in [the] termination.”⁸² The evidence, either direct or circumstantial, must be sufficient to lead a rational factfinder to conclude that the defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or that the defendant otherwise regarded age as a negative factor in its consideration.⁸³ The *Williams* standard thus repre-

one of four Reservations Supervisors, all of whom have the same general managerial responsibilities,” but that he was only Reservations Supervisor let go during the RIF. *See id.* at 341.

78. *Id.* at 343.

79. *Id.* (noting that “anyone in the protected age group will presumptively have a cause of action under the ADEA”).

80. 656 F.2d 120, 128-29 (5th Cir. 1981).

81. *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990) (explaining that to satisfy the fourth element in RIF situation, plaintiff must produce “additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons”); *Doerhoff v. McDonnell Douglas Corp.*, 171 F.3d 1177, 1180 (8th Cir. 1999) (describing the fourth element as requiring plaintiff to “produce some additional showing indicating that age was a factor in his termination”); *Hollander v. Am. Cyanide Co.*, 172 F.3d 192, 199 (2d Cir. 1999) (declaring that the plaintiff must show the decision to “discharge occurred under circumstances giving rise to an inference of age discrimination.”); *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1331 (11th Cir. 1998) (holding that the *prima facie* case requires “producing sufficient evidence from which a rational fact finder could conclude that his employer intended to discriminate against him in making the discharge decision”).

82. *E.g.*, *LeGrant v. Gulf & W. Manufacturing Co, Inc.*, 748 F.2d 1087, 1091 (6th Cir. 1984) (“[P]laintiff in such reorganization cases must come forward with additional direct, circumstantial or statistical evidence that age was a factor in his termination . . .”); *Burger v. New York Inst. of Tech.*, 94 F.3d 830, 834 (2d Cir. 1996) (“In cases of reductions in force . . . the critical function is always whether the circumstances will logically support an inference that the age of a laid-off employee was a substantial motivating factor.”)

83. *See Williams*, 656 F.2d at 129-30. The Fifth Circuit has since clarified that “*Williams* allows employees to establish a *prima facie* case through any type of circumstantial evidence that younger employees were more favorably treated than older employees.” *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 643 (5th Cir. 1985). The *Thornbrough* court stated that the plaintiff’s allegations, which included evidence that the defendant retained and hired younger work-

sents a substantial departure from what is required of plaintiffs in replacement cases, in which a plaintiff “need not introduce any evidence, either direct or circumstantial, that the employer in fact engaged in intentional discrimination. . . .”⁸⁴

The rationale behind the additional evidence requirement of *Williams* is that it “is supposed to put back into the *prima facie* proof formulation what the unique circumstances of the RIF took out of it—the presumption that the employer discriminated against the employee on the basis of age.”⁸⁵ As the Seventh Circuit has argued, however, this formulation for RIF cases raises a number of problems.⁸⁶ First, the *Williams* standard “seems to stand the *McDonnell Douglas* approach on its head—in effect, requiring the employee to rebut the employer’s putatively legitimate, nondiscriminatory reason for its actions, not the other way around.”⁸⁷ Second, and more importantly, the *Williams* standard places a heavy burden of proof on plaintiffs, which can be difficult to meet at the *prima facie* stage, given “the elusive factual question of intentional discrimination.”⁸⁸ The Seventh Circuit explains the problem this way:

By requiring the plaintiff to produce some evidence of discriminatory intent on the part of the employer to make out a *prima facie* case, the RIF formulation at the very least fuses the “*prima facie*” and “pretext” steps of the *McDonnell Douglas* method. At worst, under this *prima facie* proof formulation for RIF cases, a victim of discrimination no longer can prevail without producing *any* evidence that age was a determining factor in the employer’s motivation. The modification thus obviates the central purpose behind the *McDonnell Douglas* method, which is to relieve the plaintiff of the burden of having to uncover what is very difficult to uncover—evidence of discriminatory intent.⁸⁹

Such, at least, were the Seventh Circuit’s objections in 1987, when it rejected the *Williams* approach. As this article will argue in the next section, the Court of Appeals’ concerns have proven to be prescient, in light of experience in the jurisdictions that have followed *Williams*.

ers at the time of his discharge, “exude[d] that faint aroma of impropriety that is sufficient to justify requiring the [employer] to give reasons for its decision.” *Id.* at 643-44.

84. *Thornbrough*, 760 F.2d at 642.

85. *Oxman v. WLS-TV*, 846 F.2d 448, 454 (7th Cir. 1988) (commenting on the rationale behind the *Williams* approach).

86. *See id.*

87. *Id.*

88. *Texas Dep’t of Comty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981).

89. *Oxman*, 846 F.2d at 454-55.

III. THE PROBLEM OF DETERMINING WHEN AN RIF IS AN RIF

This section focuses on a particular problem that arises when, due to a workforce reduction, an employer terminates a number of employees and then redistributes some or all of their former duties to remaining employees (a “redistribution-of-duties” RIF). This situation can be distinguished from those where a company shuts down a plant or eliminates an entire division or department (an “elimination-of-duties” RIF).⁹⁰ In this second situation, the duties previously performed by terminated employees are simply no longer performed. In a redistribution-of-duties RIF, many, or even all duties, remain intact following the RIF. What may raise the specter of age bias, however, is the identity of the workers who now perform these duties.⁹¹

In particular, this type of RIF may raise at least two possible grounds for suspecting unlawful age bias: (1) that the employer has selected an older worker’s position for elimination because of the employee’s age; or (2) that the position of the older terminated employee was not actually eliminated during the RIF, but was merely renamed or altered in some minor way and subsequently reassigned to a younger person.⁹²

It is relatively simple to distinguish between these two factual scenarios in theory; it is much harder to do so in practice, because RIFs

90. For an analysis of ADEA-related issues raised by the RIF process written from the point-of-view of employers, see Vogel, Weir, Hunke & McCormick, *Reductions in Force—A Guide to the Process*, N.D. EMP. LAW LETTER, Vol. 6, Issue 5, August 2001. The guide notes:

To the extent possible, the first focus of any [RIF] plan should be on what job functions generally need to be eliminated or retained. This may be easy—for example, in a case in which an entire product line has suffered a serious drop in sales, necessitating large cut-backs for that line. In most cases, however, the employer is looking for across-the-board cuts of the workforce. These cuts are often coupled with a redesigned organization.

Id.

91. An example of a redistribution-of-duties RIF would be the announcement by Delta Airlines that it would reduce the number of flight attendants on its Boeing 777 and Boeing 767ER planes by one position. See James Pilcher, *Delta Cutting Crews on Some Flights*, THE ENQUIRER, Jan. 10, 2005, available at <http://news.enquirer.com/apps/pbcs.dll/article?AID=/20050110/BIZ01/501110310>.

92. In fact, the possibility of this second scenario occurring during an RIF may be greater than the words “reduction-in-force” or “downsizing” would imply. Studies indicating that RIFs often do not lead to permanent workforce reductions have led some to conclude that restructurings at large firms may ultimately alter the “compositions of their workforces more than their sizes.” Hacker, *supra* note 60 (citation and internal quotations omitted). That is, the firms “downsize” only to “up-size” shortly thereafter. As Hacker explains: “companies may have first reduced the number of less-educated or older workers or middle managers. Then, after a suitable interval required for retooling and reorganization, they may have replaced most of their former employees with others deemed more appropriate to the company’s current needs.” *Id.* (citation and internal quotations omitted).

typically result in a reshuffling of duties among remaining employees, and hence, involve a restructuring of positions.⁹³ The question then becomes whether a plaintiff who claims he or she was “replaced” following an RIF can prove this claim, given the likelihood that the position held by the alleged replacement will seldom be *identical* to the position previously held by the plaintiff. The issue of when a “restructured” position becomes a “new” position may seem hyper-technical, but in jurisdictions that have adopted the *Williams* standard,⁹⁴ the issue may be determinative in the ultimate disposition of an ADEA claim. The key question thus becomes: should the case be analyzed as an RIF case, thus triggering the additional evidence requirement, or as an ordinary replacement case where there is no such requirement and a *prima facie* case is much easier to establish?

Two recent cases have squarely dealt with this question, one in a district court in the Sixth Circuit,⁹⁵ and the other in the Eighth Circuit.⁹⁶ As we will explain, in both cases, the courts chose the first approach and applied the more stringent RIF analysis, even though both plaintiffs produced evidence that younger employees assumed most of their duties following the alleged RIFs. The courts looked for additional evidence of discrimination, a hard standard to meet since “employers rarely leave a paper trail . . . attesting to a discriminatory intent.”⁹⁷ The result was that both plaintiffs lost a summary judgment motion for failing to establish a *prima facie* case of age discrimination. The two cases, therefore, highlight the problem created by the ease with which the *Williams* standard allows employers to exploit the circumstances of an RIF in order to evade liability for age discrimination.

93. *See id.*

94. *See supra* notes 81-85 and accompanying text.

95. *Sisk v. Falcon Prods., Inc.*, No. 2:02-CV-291, slip op. (E.D. Tenn. March 9, 2004).

96. *Keating v. Harsco Corp.*, 109 Fed. App'x. 835 (8th Cir. 2004).

97. *Hollander v. Am. Cynamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990).

*A. In the Sixth Circuit: Sisk v. Falcon Products*1. Facts and Procedural History⁹⁸

Falcon Products, Inc., manufactures commercial furniture for the food service and hospitality industries with one plant in Newport, Tennessee, and several other plants in the mid-East and lower Midwest.⁹⁹ Kenneth Sisk began working for the Newport plant shortly before his 51st birthday and stayed for most of the next fifteen years, principally as the sole “Plant Engineer,” responsible for plant maintenance and housekeeping.¹⁰⁰ Sisk supervised eight employees for most of his tenure and consistently received favorable performance appraisals, even commendations for his work.¹⁰¹

In October 2001, the Newport Plant Manager told Sisk that he was being discharged as part of a “reduction-in-force” (RIF) and that his job was being eliminated.¹⁰² Nearly eighty non-salaried workers at Falcon’s Newport plant were discharged, yet none of Sisk’s maintenance and housekeeping crew was let go.¹⁰³ Managers of other groups in the plant—groups that *did* experience job cuts—were retained.¹⁰⁴ Overall, Falcon’s business declined, but production at the Newport plant changed very little.¹⁰⁵

One month before Sisk and the others were let go, Falcon brought in a new human resources chief, who was put in charge of the job cuts and who later made statements supporting *newer* managers, in contrast to those such as Sisk with longer tenure at Falcon.¹⁰⁶ One month after Sisk lost his job, the supervisor who fired him asked another Falcon employee, Tony Lawson, to take over Sisk’s job as soon as he could.¹⁰⁷ For several months, Sisk’s duties were distributed among various Falcon

98. The following statement of the facts are adopted largely from the district court’s opinion. *Sisk*, No. 2:02-CV-291, slip op., at 1-4. Additional facts, not disputed by the parties, have been drawn from plaintiff-appellant’s brief, submitted to the Sixth Circuit appealing the district court’s grant of summary judgment. *See* Appellant’s Opening Brief *supra* note 11.

99. *See* Appellant’s Opening Brief, *supra* note 11, at 3.

100. *See id.*

101. *Id.* at 3-4.

102. *See Sisk*, No. 2:02-CV-291, slip op., at 1-2.

103. Appellant’s Opening Brief, *supra* note 11, at 5.

104. *See id.* at 6.

105. *See id.* at 4.

106. *See id.* at 6-7.

107. *Id.*

managers, yet in May 2002, Lawson arrived and assumed duties previously handled by Sisk.¹⁰⁸

As a result, Sisk brought suit in the Eastern District of Tennessee, alleging that Falcon violated the ADEA by unlawfully terminating his employment on the basis of his age. The district court concluded, that despite evidence of Sisk's replacement, the case should be subjected to an RIF analysis and that Sisk could not meet the heavier burden of proving a *prima facie* case of age bias in an RIF situation as established by Sixth Circuit precedent. The district court granted the defendant's summary judgment motion and the case is currently on appeal to the U.S. Court of Appeals for the Sixth Circuit.¹⁰⁹

2. Legal Analysis

A proper analysis of this case hinges on the meaning of "replacement." Neither party disputed the fact that Sisk satisfied the first three prongs of a *prima facie* ADEA case under the *McDonnell Douglas* framework: (1) he was 65 years of age when he was terminated; (2) he was discharged; and (3) he was qualified for his former position.¹¹⁰ What the parties disagreed about is the issue of whether the defendant "replaced" Sisk with a younger employee following the termination.¹¹¹

If a replacement occurred, as the plaintiff contended, then Sisk clearly established the fourth prong of an "ordinary" *prima facie* case under Sixth Circuit precedent.¹¹² The burden should then have shifted to the defendant "to articulate some legitimate, non-discriminatory reason" for the termination.¹¹³ Under this version of the facts, the likely rationale would have been the company's decision to reduce its workforce, as a result of declining sales. Sisk would then have had an opportunity at the pretext stage of the *McDonnell Douglas* framework to demonstrate that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for age discrimination."¹¹⁴ Sisk may well have prevailed in meeting this burden because, *inter alia*, the defendant's de-

108. *Id.* at 7.

109. *Sisk v. Falcon Prods., Inc.*, No. 2:02-CV-291, *appeal docketed*, Nos. 04-5407 & 5876 (6th Cir. 2004).

110. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 n.9 (6th Cir. 1990), *cert. denied*, 498 U.S. 878 (1990).

111. *Sisk*, No. 2:02-CV-291, slip op., at 6.

112. *See Barnes*, 896 F.2d at 1465 n.9.

113. *Id.* at 1464 (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981)).

114. *Id.* (quoting *Burdine*, 450 U.S. at 252-53 (1981)).

cision to assign a younger person to a position that was substantially the same as his own tends to undermine the RIF justification of the termination.¹¹⁵

Falcon claimed, however, that it did not replace Sisk, but rather, that it eliminated his position as part of a workforce reduction.¹¹⁶ Under this version of the facts, Sisk would bear a “heightened” burden for establishing a *prima facie* case.¹¹⁷ The Sixth Circuit has held that this burden can be met only by producing “*additional* direct, circumstantial, or statistical evidence” of discrimination.¹¹⁸

Given the heightened evidentiary burden that plaintiffs in the Sixth Circuit bear in RIF cases, the question whether a replacement occurred posed an important issue of material fact because the answer affected, if not determined, the outcome of the claim.¹¹⁹ Construing all evidence in the light most favorable to the plaintiff - the proper standard when evaluating summary judgment for the defendant¹²⁰ - the record supported Sisk’s contention that he was replaced or, at the very least, presented a question to be resolved by a jury. The strongest evidence in plaintiff’s favor consisted of an affidavit of Tony Lawson, the alleged replacement, in which he stated that his position was substantially the same as the one formerly held by Sisk.¹²¹

The district court, however, improperly resolved the replacement issue in favor of the defendant. The court pointed to what it mischaracterized as “undisputed evidence” establishing (1) that the defendant did

115. See, e.g., *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193, 1196 (8th Cir. 1982) (holding that RIF justification for termination is undermined where “younger persons were hired by [defendant] to fill positions substantially similar to that held by [plaintiff] within the corporation”); *accord Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 316 (6th Cir. 2001) (“Indeed, if [plaintiff] could support the allegation that [defendant] hired a new person for a job that was essentially the same as his own, but which had been cosmetically renamed, this might well have constituted a showing of pretext sufficient to reach the jury.”).

116. *Sisk*, No. 2:02-CV-291, slip op., at 6.

117. E.g., *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 517 (6th Cir. 1991) (“A plaintiff whose employment position is eliminated in a corporate reorganization or workforce reduction carries a heavier burden in supporting charges of discrimination than an employee discharged for other reasons”); *Johnson v. Aikman Auto. Interiors, Inc.*, No. 1:02-CV-365, 2004 U.S. Dist. LEXIS 10175, at *3 (E.D. Tenn. Feb. 26, 2004).

118. *Barnes*, 896 F.2d at 1465 (emphasis added); *accord Gragg v. Gragg v. Somerset Tech. Coll.*, 373 F.3d 763, 767 (6th Cir. 2004).

119. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

120. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 747 (1998); *Strouss v. Michigan Dep’t of Corrs.*, 250 F.3d 336, 341 (6th Cir. 2001).

121. Appellant’s Opening Brief, *supra* note 11, at 10; see also *Palasota v. Haggard Clothing Co.*, 342 F.3d 569, 577 (5th Cir. 2003) (reversing judgment for employer due to credible evidence of replacement in former employee’s testimony that “there was no difference” between plaintiff’s position and different job title filled after plaintiff was terminated).

not immediately assign the plaintiff's duties to a replacement and (2) that there were differences in the positions held by the plaintiff and Lawson.¹²²

As the plaintiff argued, however, this evidence remained very much in dispute—not because Sisk denied that his core duties were first temporarily assigned to another employee, and not because he contended that there were no minor differences between his job duties and Lawson's. Rather, Sisk disputed Falcon Products' contention that these two facts, without more, were sufficient to preclude a jury from determining that the defendant did not eliminate Sisk's position, but simply held it open until a permanent replacement could be found.¹²³

The closest legal precedent to support Sisk's argument can be found in *Barnes v. GenCorp Inc.*,¹²⁴ where the court explained that an RIF analysis should apply whenever:

An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties. . . .¹²⁵

At first blush, the emphasized portion of the text may appear to describe the facts of Sisk's case, as Lawson was assigned to perform the plaintiff's duties, in addition to other duties. Yet the *Barnes* Court explained in a footnote that a court's replacement analysis must sometimes go further: "[o]f course an employer could not avoid liability by changing the job title or by making minor changes to a job indicative of an attempt to avoid liability."¹²⁶

Sisk argued that this is exactly what Falcon Products had done. That is, although Falcon did not change Lawson's job title, it reassigned Lawson to the Newport facility for the purpose of having him assume the majority of Sisk's duties and functions, and it only made "minor changes" to the position. Thus far, however, the Sixth Circuit has not

122. The district court's discussion of the replacement evidence reads:

The undisputed evidence demonstrates that a portion of the plaintiff's duties were initially assumed by Gary Shelton, in addition to Shelton's other duties. Later, Tony Lawson, who was already employed by the defendant, assumed the majority of the plaintiff's duties. However, some of the plaintiff's duties were assumed by Bonnie Guthrie and Mike Nelson.

Sisk, No. 2:02-CV-291, slip op., at 7.

123. See *Anderson*, 477 U.S. at 248.

124. 896 F.2d 1457 (6th Cir. 1990).

125. *Id.* at 1465 (emphasis added).

126. *Id.* at 1465 n.10.

developed a test to determine when changes to a position will qualify as minor. The district court, therefore, had little guidance in its analysis of the issue, making it easier for the court to determine that an RIF analysis should be applied.

B. The Sisk Problem in Other Jurisdictions

The difficulties faced by the plaintiff in *Sisk v. Falcon Products* are not unique to the Sixth Circuit. As suggested by attorneys Filippatos and Farhang—two, of only a few legal commentators to have addressed this issue—the problem appears to be particularly acute in the Third and Sixth Circuits,¹²⁷ which have both described the *Williams* approach to RIF cases as placing a “heavier burden” on plaintiffs at the *prima facie* stage.¹²⁸ This formula runs directly counter to the U.S. Supreme Court’s general description of the criteria for establishing a *prima facie* case as “minimal requirements.”¹²⁹ The “heavier burden” approach has the practical effect of putting the cart before the horse, as attorneys Filippatos and Farhang have put it, in that it involves assuming, *a priori*, that an asserted RIF is genuine. As the attorneys argue, and as *Sisk* demonstrates, however, the question of “whether the alleged RIF is genuine or pretextual is frequently a matter of factual dispute,” and therefore one which either “must be resolved later in the *McDonnell Douglas* burden-shifting framework” or else turned over to the fact-finder for resolution.¹³⁰

However, this is not the way a number of courts have resolved this issue. A particularly egregious example of this dilemma is *Keating v. Harsco Corp.*,¹³¹ a case recently decided in the Eighth Circuit. *Keating* bears a number of factual similarities to *Sisk*, including the fact that the defendant claimed it eliminated the plaintiff’s job pursuant to an RIF and that the plaintiff produced evidence showing a younger worker later assumed his former job duties.¹³² The court determined that these facts did

127. Parisi G. Filippatos & Sean Farhang, *The Rights of Employees Subjected to Reductions In Force: A Critical Evaluation*, 6 EMPLOYEE RTS. & EMP. POL’Y J. 263, 272-73 (2002).

128. Compare *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 517 (6th Cir. 1991) (“[A] plaintiff whose employment position is eliminated in a corporate reorganization or workforce reduction carries a heavier burden in supporting charges of discrimination than does an employee discharged for other reasons.”), and *Hook v. Ernst & Young*, 28 F.3d 366, 375 (3d Cir. 1994) (same), with *Oxman v. WLS-TV*, 12 F.3d 652, 657 (7th Cir. 1993) (holding that “plaintiffs in reduction-in-force cases bear no greater burden of proof than other ADEA plaintiffs”).

129. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

130. See Filippatos & Farhang, *supra* note 127, at 273.

131. 109 F. App’x 835 (8th Cir. 2004).

132. See *id.* at 837.

not constitute the “added evidence” of age discrimination that plaintiffs must produce at the *prima facie* stage of RIF cases.¹³³ As the court explained: “even assuming a younger and less senior employee assumed most of [the plaintiff]’s duties after the RIF, this is not enough to defeat summary judgment where there was no other evidence showing age was a factor in the RIF termination decisions.”¹³⁴ The question which the court left unanswered was, what other evidence, short of an admission on the part of the defendant or some other form of direct proof, would be deemed sufficient to make such a showing. Nevertheless, the message to plaintiffs—as well as to defendants—is clear: in the Eighth Circuit as in the Sixth, RIF cases will remain substantially immune from ADEA regulation, even when it appears that an employer’s reduction-in-force may more accurately be described as a reduction-in-age.

IV. A PROPOSED TEST FOR DETERMINING WHEN AN RIF IS AN RIF

Courts dealing with age discrimination cases frequently make statements similar to this one: “[t]he ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions.”¹³⁵ This kind of rhetoric—although true in the strict sense—nonetheless, obscures Congress’ intent that the ADEA function as a tool for preventing older workers from being forced to endure the harsh realities of job displacement, simply because of “inaccurate and stigmatizing stereotypes.”¹³⁶

Given the “subtle” effects of ageism in the workplace,¹³⁷ as well as the relative ease with which employers can point to downsizing procedures to justify terminations, evidence demonstrating that an alleged RIF has *not* resulted in the elimination of a plaintiff’s position should not be discounted readily by the courts. After all, it is exactly this sort of evidence that, absent further explanation, gives rise to the inference of bias that the *prima facie* case doctrine is designed to permit. As the Supreme Court has explained:

A *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unex-

133. *See id.* at 836.

134. *Id.* at 837.

135. *Allen v. Diebold, Inc.*, 33 F.3d 674, 677 (6th Cir. 1994).

136. *Wexler v. White’s Fine Furniture*, 317 F.3d 564, 572 (6th Cir. 2003) (citation and internal quotations omitted).

137. *See Hopson v. Daimler Chrysler Corp.*, 306 F.3d 427, 436 (6th Cir. 2002).

plained, are more likely than not based on the consideration of impermissible factors And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.¹³⁸

The Fifth Circuit made a similar point, in a case that also involved a dispute over whether an alleged RIF was genuine. According to that court, the question raised by the plaintiff was "why, given the employer's need to reduce his workforce, he chose to discharge the older rather than the younger employee. By shifting the burden of production to the employer, this is the question that we hope to answer."¹³⁹

It remains a well-settled principle of ADEA jurisprudence that employers may act for any reason, good or bad, sensible or not, as long as they do not act "against any individual . . . because of such individual's age."¹⁴⁰ ADEA cases thus turn on a question that is typically only answered through circumstantial evidence: "whether age tipped the balance" in the employer's decision-making.¹⁴¹

Clearly, this question cannot be answered by the RIF approach taken in *Sisk* and *Keating*, because the question never even gets asked due to the fact that it is assumed *a priori* that the employer's claim of RIF is genuine. The claim takes the place of the second-stage of the *McDonnell Douglas* burden-shifting formula, in which the defendant is supposed to articulate "some legitimate, non-discriminatory reason" for its actions.¹⁴² However, as the Sixth Circuit has insisted, "for an employer's proffered non-discriminatory basis for its employment action to be considered honestly held, the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made."¹⁴³ But the defendant is never required to establish this reliance under the approach of the Sixth and Eighth Circuit to RIF cases; instead, the defendant simply claims that an RIF has occurred, and that settles the matter.

138. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (citation omitted).

139. *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633, 645 (5th Cir. 1985).

140. 29 U.S.C. § 623(a)(1) (2000).

141. *Gehring v. Case Corp.*, 43 F.3d 340, 345 (7th Cir. 1994).

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

143. *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998).

To remedy the substantial litigation disadvantage this creates for plaintiffs who may be genuine discrimination victims, federal courts that have adopted the *Williams* “additional evidence” requirement should also adopt tools to assist them in distinguishing between RIF and replacement cases. Such a test need not be complex. It would simply require the courts to acknowledge two propositions that follow directly from the notion of a workforce *reduction*: (1) a position is not eliminated pursuant to an RIF when job duties are only temporarily dispersed to other employees, pending the assignment of a permanent replacement; and (2) a position is not eliminated pursuant to an RIF when the employer reassigns a second employee to perform substantially the same duties and functions that were previously performed by the terminated employee.

In some factual situations, such as when an entire division or department has been eliminated, the RIF test proposed here would make it clear that an RIF analysis should be applied. In other RIF cases, however, the facts underlying an alleged workforce reduction will be disputed by the parties. The courts should then determine whether a genuine issue of fact has been created and, if so, do what they always do: turn the question over to the jury.¹⁴⁴

To illustrate how this test would work in practice, we first return to *Sisk*, in order to show how it would have affected the analysis of the case in a way that would not disturb the controlling Sixth Circuit precedent. We then conclude by suggesting that the major obstacle to the adoption of this test has less to do with the courts’ desire to avoid micromanaging businesses than it does with the misconception that since age bias is seldom motivated by outright animus, it must not be a problem requiring careful scrutiny.

A. The RIF Test in Practice: Sisk Revisited

1. An Employer Does Not Eliminate a Job When It Only Temporarily Disperses Job Duties Pending Assignment of a Permanent Replacement.

As we explained in Section II, the first fact the district court in *Sisk* appears to have stumbled over involved evidence indicating that, within

144. Summary judgment is proper only if “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c).

one month of plaintiff's termination, the defendant initiated communications with Tony Lawson, a "substantially younger" employee,¹⁴⁵ whom defendant later reassigned to its Newport facility to assume plaintiff's former job duties. The district court presumably determined that this fact worked against a finding of replacement because Lawson's reassignment did not take effect immediately and thus was preceded by a temporary dispersal of plaintiff's job duties to other employees. Yet such evidence, bolstered by a series of subsequent contacts that led to Sisk's replacement by Lawson, created at least an issue of fact as to defendant's intent to replace Sisk with Lawson, as soon as a month after Sisk's termination, if not an issue whether such intent existed all along.

The *McDonnell Douglas* analysis was never intended to place an "onerous" burden on a plaintiff.¹⁴⁶ Nor were the precise requirements of the *prima facie* case "intended to be rigid, mechanized, or ritualistic."¹⁴⁷ On the contrary, the Supreme Court devised the test merely to serve as "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."¹⁴⁸

Given the Supreme Court's emphasis on the relevance of "common experience" in employment discrimination lawsuits, the district court's apparent fixation on the fact that plaintiff's termination and replacement were not contemporaneous was misplaced. Because there is great diversity in business practices, and because there are multiple exigencies that arise in maintaining an adequate workforce, hiring decisions often do not follow a rigid timeline. Sometimes a position is filled immediately; sometimes it remains open for months or longer, as an employer searches for a suitable applicant.¹⁴⁹ Regardless, it is common for job duties to be dispersed to other employees, on a temporary basis, until a permanent employee can be hired and trained.¹⁵⁰ The courts, therefore,

145. See *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (suggesting that "[b]ecause the ADEA prohibits discrimination on the basis of age and not class membership. The fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class").

146. *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 572 (6th Cir. 2004) (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

147. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

148. *Furnco*, 438 U.S. at 577.

149. See, e.g., Timothy Aeppel, *In Tepid Job Scene, Certain Workers Are in Hot Demand*, WALL ST. J., Aug. 17, 2004, at A1 (reporting that, despite the elimination of many manufacturing jobs in the United States, a large number of machinist positions remain unfilled due to a shortage of skilled workers).

150. See, e.g., *Grosjean v. First Energy Corp.*, 349 F.3d 332, 335-36 (6th Cir. 2003) (determin-

should not focus rigidly on the length of time that has passed between a termination and a replacement, but should instead inquire, whether, given the circumstances of a particular case, this delay has bearing on “the critical question of discrimination.”¹⁵¹

Consider, for instance, how the issue of time affected the Sixth Circuit’s decision in *Lilley v. BTM Corp.*¹⁵² *Lilley* involved a plaintiff who, like Sisk, alleged that he was replaced after being terminated during a workforce reduction.¹⁵³ In *Lilley*, the employer produced evidence demonstrating that it terminated the plaintiff after it experienced a downturn in business, during which it no longer needed to employ a person to perform the plaintiff’s job functions.¹⁵⁴ Nine months later, however, when “business had picked up to the extent that another employee was needed,” the company hired a “replacement.”¹⁵⁵ As the Court explained, under those circumstances, the plaintiff “was not replaced in any sense relevant to inferring age-based discrimination.”¹⁵⁶

The circumstances of Sisk’s replacement are easily distinguishable from those in *Lilley*. It is unclear whether Falcon actually experienced a substantial business slump at the time of Sisk’s termination.¹⁵⁷ However, whatever occurred in 2001 did not reduce defendant’s need to employ a maintenance supervisor, because the maintenance staff was not, in fact, reduced.¹⁵⁸ Moreover, Falcon did not wait nine months before seeking a replacement; rather, it began taking overt action that resulted in another employee assuming plaintiff’s duties *within one month* of the termination—a short period of time.¹⁵⁹ Despite what the district court implied, replacement or substantial efforts to secure a replacement in a short pe-

ing that the plaintiff in that case was replaced by an employee who permanently assumed his duties, not someone who “temporarily took over his duties in addition to his own”), *cert. denied*, 541 U.S. 1010 (2004).

151. *Furnco*, 438 U.S. at 577.

152. 958 F.2d 746 (6th Cir. 1992)

153. *See id.* at 749.

154. *See id.* at 752.

155. *Id.*

156. *Id.*

157. Compare Appellant’s Opening Brief, *supra* note 11, at 4 (claiming that net sales for the fourth fiscal quarter of 2001 “were barely 1% lower than the same quarter of 2000”) with *Sisk*, No. 2:02-CV-291, slip op. at 13 (declaring that the “[p]ress releases for the defendant in May 2001 reflect a decrease in total revenues for the second fiscal quarter, a sales decline of over 10%, and a net loss of \$0.4 million . . .”).

158. *See* Appellant’s Opening Brief, *supra* note 11, at 5.

159. *See id.* at 6-7.

riod of time casts serious doubt on the defendant's contention that it no longer needed a full-time maintenance supervisor.¹⁶⁰

2. An Employer Does Not Eliminate a Job
When it Reassigns an Existing Employee or
Hires a New Employee to Perform Substantially
the Same Duties and Functions.

A second factual dispute between the parties in *Sisk* concerned evidence indicating that the plaintiff and his alleged replacement, Lawson, did not perform identical job duties.¹⁶¹ Although the district court found that Lawson assumed the "majority of plaintiff's duties," it ultimately determined that Lawson could not be deemed a true replacement because "some of the plaintiff's duties" were assumed by other employees.¹⁶² Falcon also asserted that Lawson was assigned the additional duty of supervising the plant's Computer Number Control (CNC) programmer.¹⁶³ The court did not address this issue during its discussion of replacement, but its opinion did make a general reference to some of the more advanced qualifications possessed by Lawson.¹⁶⁴

Sisk argued that the alleged differences between his duties and Lawson's either did not exist, or else were trivial.¹⁶⁵ In support of this argument, he pointed to the affidavit of Lawson, in which Lawson claimed that the duties and functions of his position were substantially the same as those of *Sisk*'s and that any differences were inconsequential.¹⁶⁶ *Sisk* also pointed to *Barnes v. GenCorp Inc.*,¹⁶⁷ where the Sixth Circuit explicitly (if only in passing) recognized the problem of distinguishing between genuine RIF cases and those where a position does not appear to have been eliminated pursuant to a legitimate workforce reduc-

160. See *Viola v. Philips Med. Sys. of N. Am.*, 42 F.3d 712, 716-17 (2d Cir. 1994) (holding that the plaintiff's prima facie case reached "the threshold of sufficiency, particularly in light of [plaintiff's] third allegation that his position was replaced by a new younger employee within one year of his termination."); *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 136 (2d Cir. 2000) (noting that evidence showing an employee was replaced "only three months after plaintiff was discharged, [tends] to refute the reduction-in-force reason for plaintiff's discharge").

161. Compare Appellant's Opening Brief, *supra* note 11, at 7 (arguing that the job duties were "nearly indistinguishable") with *Sisk*, No. 2:02-CV-291, slip op. at 7 (finding that Lawson only took over some of the plaintiff's duties; the rest were assumed by others).

162. *Sisk*, 2:02-CV-291, slip op. at 7.

163. Appellant's Opening Brief, *supra* note 11, at 10.

164. See *Sisk*, No. 2:02-CV-291, slip op., at 9.

165. Appellant's Opening Brief, *supra* note 11, at 7.

166. *Id.*

167. 896 F.2d 1457 (6th Cir. 1990).

tion: “[o]f course an employer could not avoid liability by changing the job title or by making minor changes to a job indicative of an attempt to avoid liability.”¹⁶⁸

What needs to be fleshed out from this observation is exactly what changes to a job should be deemed “minor.” Sisk argued that although Falcon did not change Lawson’s job title, it reassigned him to the Newport facility for the purpose of having him assume the majority of Sisk’s duties.¹⁶⁹ Sisk also contended that, once this reassignment took place, Lawson’s new job functions were substantially the same as those previously held by Sisk.¹⁷⁰

Under these circumstances, a finding of replacement should follow from the evidence, which would also be consistent with the rationale behind the Sixth Circuit’s modification of the test for establishing a *prima facie* case of discrimination in RIF ADEA cases. As the Sixth Circuit declared in *Barnes*, “‘the most common legitimate reasons’ for the discharge [in RIF cases] are the work force reductions” themselves.¹⁷¹ Thus, the fact that an RIF results in termination of older workers will not necessarily, without more, give rise to a rational inference of discrimination.¹⁷² Nor will the mere fact that an RIF has resulted in a reshuffling of job duties among remaining employees, some of whom may be younger than a terminated employee, necessarily give rise to an inference of discrimination.¹⁷³ To hold otherwise would, as the Sixth Circuit has noted, “allow every person age 40-and-over to establish a *prima facie* case of age discrimination if he or she was discharged as part of a work force reduction.”¹⁷⁴

The modified *prima facie* case requirement as formulated by the Sixth Circuit takes on a more troubling cast, however, when a plaintiff establishes that the majority of his or her job duties and functions were not, in fact, eliminated during the RIF, which the employer has identified as justifying the worker’s discharge. When a plaintiff further establishes that these duties were in fact reassigned to a younger employee, whose new job has been reconfigured, such that he or she no longer performs previous duties and functions, but now performs substantially the same duties and functions that the plaintiff once did, then common experience

168. *Id.* at 1465 n.10.

169. Appellant’s Opening Brief, *supra* note 11, at 11-12.

170. *Id.* at 10.

171. *Barnes*, 896 F.2d at 1465.

172. *Id.*

173. *See id.*

174. *Id.*

suggests something other than an innocent reshuffling of job functions has occurred.¹⁷⁵

The difficulty posed by the district court's failure to appreciate this point is best illustrated by means of a hypothetical. Suppose an employer, who harbors negative stereotypes about the declining abilities of older workers, decides to implement an RIF. The employer selects an employee who is 65 years of age for discharge—the same age as Sisk at the time of his termination. Shortly thereafter, the employer reassigns the position's functions to a younger worker, whose newly reconfigured job is now, as far as duties and time allocation go, substantially the same as the older employee's. Thus far, the hypothetical poses strong evidence favoring a "replacement" analysis, not a "RIF" analysis.

Now imagine two further aspects of the same hypothetical. First, one duty formerly performed by the older employee is assigned to a third employee. This duty is described in an official job description in the following way: "[r]esponsible for the skilled utilization of heavy-duty motorized, commercial grade electric acuminating machine featuring X-Acto precision steel spiral cutters." Second, because the younger employee speaks Spanish, she is assigned the additional duty of fielding calls from the company's Spanish-speaking clients when the person who usually takes these calls cannot do so.

Under the facts of this hypothetical, a court would likely have no "smoking gun" evidence of the employer's age bias. Thus, the only reason to suspect improper bias here, would be the fact that the position held by the younger employee is *substantially* identical to the position formerly held by the older employee. Under the logic employed by the district court in *Sisk*, however, this fact would get a plaintiff nowhere, not even past the *prima facie* case requirement, simply because there were discernable differences in job duties. A court would never even learn that the first change in the duties assigned to the new employee, versus the former employee, in our hypothetical case was *de minimis*, because the employer's description of this duty was actually an intentionally obfuscated way of describing the use of an electric pencil sharp-

175. See, e.g., *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193, 1196 (8th Cir. 1982) (holding that RIF justification for termination is undermined where "younger persons were hired by [the defendant] to fill positions substantially similar to that held by [the plaintiff] within the corporation"); accord *Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 316 (6th Cir. 2001) ("Indeed, if [the plaintiff] could support the allegation that [the defendant] hired a new person for a job that was essentially the same as his own, but which had been cosmetically renamed, this might well have constituted a showing of pretext sufficient to reach the jury.").

ener.¹⁷⁶ Nor would the court realize that the second change in duties was also negligible because, let us assume, the hypothetical company has virtually no Spanish-speaking clients.

According to the plaintiff Sisk, the facts described in this hypothetical are closely analogous to those of his case. The facts illustrate why, given the sometimes highly fact-dependent nature of a replacement inquiry, it makes sense at the *prima facie* stage to focus on whether objective factors, such as the number of duties shared in common by two positions and the amount of time required to perform these duties, indicate that a plaintiff held *substantially* the same position as the alleged replacement. It would be such factors that would tend to rule out reduced-workforce needs as an explanation for a termination and raise a suspicion of unlawful bias. An initial focus on the position as a whole—rather than this or that particular duty should therefore serve the primary goal of the *prima facie* case doctrine: “progressively . . . sharpen[ing] the inquiry into the elusive factual question of intentional discrimination.”¹⁷⁷

Of course, a plaintiff who met this *prima facie* burden would have done no more than create a “rebuttable presumption” of discrimination.¹⁷⁸ The employer could still avoid the burden of an unfounded lawsuit by articulating a nondiscriminatory reason for its actions, perhaps by explaining how a seemingly minor change it made to a position is critical to its business needs. Or perhaps the employer should explain that reassignment of all duties to a new employee, however soon after the plaintiff’s termination, reflected a genuine reversal of an RIF, and not a replacement. Whatever the reason might be, the employer should not find the reason difficult to articulate, if indeed the reason exists. “[A]ll that the *McDonnell Douglas* presumption of discrimination has required of American business and governmental agencies is that they document their employment decisions so as to leave an adequate record of nondiscriminatory bases for such actions.”¹⁷⁹

The approach urged here is consistent with other Sixth Circuit decisions addressing the replacement issue. In *Tinker v. Sears, Roebuck & Co.*,¹⁸⁰ for example, the plaintiff was terminated pursuant to a workforce

176. The description in the hypothetical job description was adapted from an advertisement for the Boston “Powerhouse” Sharpener. See Dick Blick Art Materials website, at http://www.dickblick.com/zz214/12a/products.asp?param=0&ig_id=3811 (last visited Sept. 17, 2004).

177. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981).

178. *Barnes*, 896 F.2d 1457, 1464 n.7 (6th Cir. 1990).

179. *Halfond v. Legal Aid Soc’y*, 70 F. Supp. 2d 155, 161 (E.D.N.Y. 1998).

180. 127 F.3d 519 (6th Cir. 1997).

reduction. Shortly thereafter, the defendant changed the status of a second employee from part-time to full-time “in order to have him assume [plaintiff’s] duties in addition to his own.”¹⁸¹ The court found that, since the defendant had to “fundamentally change” the employee’s status to accomplish this reassignment of duties, its action was “analogous to hiring a new employee to cover the terminated employee’s duties,” and thus constituted a replacement.¹⁸² For precisely the same reason, the decision of defendant Falcon to reassign Sisk’s duties to Lawson was analogous to hiring a new employee because the reassignment could not have been achieved without transferring Lawson from one facility to another or substantially changing his primary job functions.¹⁸³

*B. Dispelling the Illusion that
Age Bias Rarely Lurks Below the Surface*

The test proposed here rests on the recognition that the uncritical acceptance of employer cries of “RIF” is deeply problematic, given the strong likelihood that, in this era of widespread corporate downsizing, at least some terminations occurring during a workforce reduction do not occur as a result of those reductions. In October 2001, the month in which the plaintiff, Sisk, was terminated, more than 200,000 American workers lost their jobs in what the U.S. Department of Labor calls “mass layoffs,” *i.e.* workforce reductions of at least 50 workers filing for unemployment insurance during a five-week period.¹⁸⁴ For the entire year, there were more than 21,000 mass layoffs in the United States, resulting in 2,496,784 claims for unemployment insurance.¹⁸⁵ It follows that there

181. *Id.* at 522.

182. *Id.*

183. *Compare* Wilkins v. Eaton Corp., 790 F.2d 515, 521 (6th Cir. 1986) (finding that the replacement requirement of prima facie case was met, where another employee was promoted from part-time to full-time and the new position required the employee to perform duties which he had not previously performed), *and* Flebotte v. Dow Jones and Co., 51 F. Supp. 2d 36, 41 (D. Mass. 1999) (reaching the same result where an employer assigned plaintiff’s duties to a younger employee who never previously performed those duties), *with* Godfredson v. Hess & Clark, Inc., 173 F.3d 365, 373 (6th Cir. 1999) (finding that replacement did not occur where employees who assumed plaintiff’s duties maintained their previous responsibilities and “performed work related to that performed by [the plaintiff] prior to the reduction in force”).

184. Press Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Mass Layoffs in October 2001 (Nov. 30, 2001), *available at* <ftp.bls.gov/pub/news.release/History/mm1s.11302001.news> (last visited Sept. 17, 2004).

185. Press Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Mass Layoffs in December 2001 (Jan. 29, 2002), *available at* <ftp.bls.gov/pub/news.release/History/mm1s.01292002.news> (last visited Sept. 17, 2004).

is an ongoing need for courts to exercise caution when an employer claims that it has eliminated an older worker's position pursuant to an RIF. The test urged here simply attempts to strike a balance between the interests of plaintiffs and defendants in a way that is fair to both. As the Sixth Circuit has noted: "[a]lthough courts should resist attempting to micro-manage the process used by employers in making their employment decisions, neither should they blindly assume that an employer's description of its reasons is honest."¹⁸⁶ That is, courts should bear in mind that the *McDonnell Douglas* analysis calls for "a case-by-case approach that focuses on whether age was in fact a determining factor in the employment decision" in controversy.¹⁸⁷

Why then has the federal judiciary, at least in some circuits, shown reluctance to scrutinize closely age bias claims that arise in RIF situations? After all, claims under the Equal Pay Act typically turn on similar determinations of whether two employees are performing "equal work."¹⁸⁸ Likewise, determining whether an employment relationship exists between two parties may involve searching factual inquiries.¹⁸⁹

One possible explanation for the deference to employer RIF claims is a misperception that, since age bias is seldom motivated by animus, it is not a serious danger in circumstances where an employer can articulate a facially plausible non-discriminatory reason for the adverse action affecting an older worker. This is the gist of the argument that Chief

186. *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998).

187. *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 n.9 (6th Cir. 1990).

188. The Equal Pay Act provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .

29 U.S.C. § 206(d)(1) (2000).

189. *E.g.*, *Lilley v. BTM Corp.*, 958 F.2d 746, 750 n.1 (6th Cir. 1992)

The determination of employment status is a mixed question of law and fact. Normally, a judge will be able to make this determination as a matter of law. However, where there is a genuine issue of fact or conflicting inferences can be drawn from the undisputed facts, as here, the question is to be resolved by the finder of fact in accordance with the appropriate rules of law.

Id.

Judge Richard A. Posner presents in *Aging and Old Age*.¹⁹⁰ In that article, Judge Posner examines the problem of age bias through the lens of rational choice theory and concludes, *inter alia*, that “animus discrimination” is not a serious problem because most people responsible for employment decisions are themselves within the protected age group.¹⁹¹ This judgment is hard to square with studies showing that age bias is so firmly rooted in our culture, that even older people tend to adhere to stereotypes about the declining abilities of *other* older people.¹⁹² However, our primary objection to Judge Posner’s analysis is more basic. In the chapter in which he downplays the problem of age discrimination, he also explains that employers may actually have an economic incentive to engage in what he somewhat euphemistically calls “statistical discrimination” based on age, *i.e.*, using membership in a class as a proxy for adversely assessing the productivity of an individual worker, on the basis that the average productivity of all persons in that class is low.¹⁹³ This analysis lends credibility to a presumption that if it smells like age bias, it probably warrants an ADEA claim. Judge Posner writes that he finds the argument that this sort of discrimination is inefficient “unpersuasive.”¹⁹⁴ Instead, he contends that “statistical discrimination” may well function as an information-cost saving strategy because it makes it easier for employers to “weed out” inefficient workers in this performance-blind fashion, without conducting more costly individual assessments.¹⁹⁵

The “incentive” and inclination to treat even high-performing older workers according to stereotypes based on supposed attributes of older workers as a whole, was discussed and criticized at length by the “Wirtz Report,” on which the ADEA was based.¹⁹⁶ Indeed, Judge Posner’s cal-

190. See POSNER, *supra* note 38. Richard A. Posner is Chief Judge of the U.S. Court of Appeals for the Seventh Circuit. We do not mean to suggest, of course, that Judge Posner lets his opposition to the ADEA color how he decides cases involving ADEA claims.

191. See *id.* at 319-20. One reviewer summarized rational choice theory as positing that “people are rationally self-interested decision makers; they are capable of computing the costs and benefits of the various alternatives open to them; and they seek to choose that alternative that is likely to give them the greatest happiness.” Thomas S. Ulen, *The Law and Economics of the Elderly*, 4 ELDER L.J. 99, 109 (1996) (reviewing Posner’s article).

192. See *supra* note 43 and discussion Part I.B.

193. See POSNER, *supra* note 38, at 322.

194. *Id.* at 327.

195. See *id.* at 327-28.

196. See generally WIRTZ REPORT, *supra* note 23 (reprinted in the legislative history of ADEA by the U.S. Equal Employment Opportunity Commission (EEOC)-named after its author, Labor Secretary, Willard Wirtz) (discussing factors which tend to result in discrimination on the basis of age).

culus goes to the heart of why age bias opponents fought so hard to preserve an ADEA claim based on a theory of "disparate impact."¹⁹⁷ However "rational" such discrimination is alleged to be in a broader sense, it is plainly irrational in individual terms, and according to the "efficiency wage" theory discussed above, in regard to older workers generally. An employer openly adhering to such a rationale affords his employees a plausible basis for asserting claims of intentional discrimination, in violation of the ADEA.

Judge Posner's myopic analysis of "statistical discrimination" based on age might simply be dismissed as a lively academic argument, were it not for the fact that some public communications with employers reflect a similar tone. Thus, for instance, one recent legal newsletter contained an article titled: "Out with the old, in with the new: employer liability for age bias during RIF."¹⁹⁸ It is hard to imagine finding a similar play on words in a discussion on race or sex discrimination. Another such article urges employers instituting workforce reductions to make sure supervisors are "thoroughly trained in evaluation procedures" because, as the article explains, it is during the planning phase of RIFs that "smoking gun" evidence of ageism is likely to be created.¹⁹⁹ The article counsels supervisors on how to avoid making ageist comments, but fails to add that employers have an interest in challenging the underlying ageist assumptions that such statements would reflect.²⁰⁰ Once again, it is difficult to imagine a comparable article about racism or sexism adopting a similarly neutral tone.

Why the difference? Perhaps one factor is simply a lack of awareness of the history, nature, and extent of ageism in the American workplace. Although the term "ageism" was not coined until the year 1975,²⁰¹ age-based prejudice in U.S. workplaces has roots that are old and well-established.²⁰² During the nineteenth century, for instance, stereotypes

197. See, e.g., Brief of AARP et al. as *Amici Curiae*, at 2, 6, 8, *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005) (No. 03-1160); *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005) (recognizing disparate impact as viable theory of ADEA liability).

198. *Out with the Old, in With the New: Employer Liability for Age Bias During RIF*, MINN. EMP. LAW LETTER, Nov. 2004, Vol. 14, Issue 9, at 7.

199. *Reductions in Force—A Guide to the Process*, N.D. EMP. LAW LETTER, Aug. 2001, Vol. 6, Issue 5.

200. See *id.*

201. The term "ageism" was first coined in 1975 by Robert N. Butler, M.D., to describe the "deep and profound prejudice against the elderly which is found to some degree in all of us." ROBERT N. BUTLER, *WHY SURVIVE?: BEING OLD IN AMERICA* 11 (1975). Butler observed that this prejudice involves "a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender." *Id.* at 12.

202. See generally 4 OLD AGE IN A BUREAUCRATIC SOCIETY: THE ELDERLY, THE EXPERTS,

about declining abilities of older workers generated a “hostility to age” that became an increasingly pervasive aspect of American business culture as the nation industrialized.²⁰³ Newspaper advertisements announcing job openings often requested only “young” applicants. By the turn of the century, many employers had adopted explicit age limits for hiring new workers and American “men found it difficult to secure employment at ages as low as 35 or 40; for women it was even younger.”²⁰⁴

CONCLUSION

Congress intended the ADEA to address these longstanding inequities, as well as others, that have emerged as the U.S. economy has evolved. By adopting the relatively simple test that we propose in this article, courts will not only find it easier to distinguish genuine RIF cases from replacement cases, but will also affirm that, while employers retain appropriate leeway to adjust their workforce to changing economic conditions, they cannot exploit the circumstances of a reduction-in-force in order to evade liability under the ADEA.

AND THE STATE IN AMERICAN HISTORY: CONTRIBUTIONS TO THE STUDY OF AGING (David Van Tassel & Peter N. Stearns, eds., 1986) (discussing different aspects of age discrimination throughout American history); *see also* WIRTZ REPORT, *supra* n. 23, at 6-9 (noting that Colorado, in 1903, was the first state to outlaw “discrimination in employment on account of age”; and describing several studies of employer age restrictions, concluding that these policies and practices have “a direct and marked [adverse] effect upon the actual employment of older workers”).

203. Brian Gattou, *The New History of the Aged*, 4 OLD AGE IN A BUREAUCRATIC SOCIETY, *supra* note 203, at 9.

204. KERRY SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS 8 (2001).