

1-2005

## General Dynamics Land Systems, Inc. v. Cline: Shrinking the Realm of Possibility for Reverse Age Discrimination Suits

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### Recommended Citation

Rebecca L. Ennis, *General Dynamics Land Systems, Inc. v. Cline: Shrinking the Realm of Possibility for Reverse Age Discrimination Suits*, 39 U. Rich. L. Rev. 753 (2005).

Available at: <https://scholarship.richmond.edu/lawreview/vol39/iss2/7>

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# CASENOTES

## *GENERAL DYNAMICS LAND SYSTEMS, INC. V. CLINE:* SHRINKING THE REALM OF POSSIBILITY FOR REVERSE AGE DISCRIMINATION SUITS

### I. INTRODUCTION

In 1967, Congress passed the Age Discrimination in Employment Act (“ADEA”),<sup>1</sup> the purpose of which is “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.”<sup>2</sup> The statute’s primary prohibitive measure is United States Code section 623(a)(1), which makes it illegal for employers “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.”<sup>3</sup> The class of persons that the statute protects is limited to those people forty years of age and older.<sup>4</sup>

While it seems elementary that the ADEA protects older workers from being discriminated against in favor of younger workers, it was not always as clear whether the ADEA does the opposite: protect younger workers from age discrimination, otherwise known as reverse age discrimination.<sup>5</sup> In 2004, the Supreme

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1. 29 U.S.C. §§ 621–634 (2000).

2. *Id.* § 621(b).

3. *Id.* § 623(a)(1).

4. *Id.* § 631(a).

5. For an illustration of contrasting views on reverse age discrimination claims, compare *Cline v. General Dynamics Land Sys., Inc.*, 296 F.3d 466 (6th Cir. 2002), *rev’d*, 124 S. Ct. 1236 (2004), with *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226 (7th Cir. 1992).

Court of the United States resolved the confusion in *General Dynamics Land Systems, Inc. v. Cline*.<sup>6</sup>

This note examines *General Dynamics* and its impact on the future of age discrimination law. Specifically, Part II explains the reverse age discrimination case history that preceded the Court's decision in *General Dynamics*. Part III examines the Court's opinion in detail and attempts to resolve some of the dissent's most important criticisms. Finally, Part IV discusses the impact the case will have on age discrimination law in general.

## II. THE JUDICIAL HISTORY OF REVERSE AGE DISCRIMINATION

### A. *The Supreme Court's Treatment of Reverse Age Discrimination*

Before *General Dynamics*, the Supreme Court of the United States had never directly considered a reverse age discrimination case. The Court's decisions, however, have consistently indicated that the ADEA only covers discrimination against the old, in favor of the young. In 1985, the Court issued its opinion in *Western Air Lines, Inc. v. Criswell*.<sup>7</sup> In holding that age qualifications implemented by employers pursuant to exceptions in the ADEA must be "reasonably necessary" to their businesses,<sup>8</sup> the Court noted that "[t]hroughout the legislative history of the ADEA, one empirical fact is repeatedly emphasized: the process of psychological and physiological degeneration caused by aging varies with each individual. . . . As a result, many older American workers perform at levels equal or superior to their younger colleagues."<sup>9</sup> The references to "degeneration" and the level at which older workers can perform indicate that the Court believed the ADEA to apply only to individuals increasing in years.

In the 1993 case of *Hazen Paper Co. v. Biggins*,<sup>10</sup> the Court considered whether an employer violated the ADEA when it interfered with the vesting of an employee's pension benefits.<sup>11</sup> It held

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6. 124 S. Ct. 1236 (2004).

7. 472 U.S. 400 (1985).

8. *Id.* at 419.

9. *Id.* at 409.

10. 507 U.S. 604 (1993).

11. *Id.* at 608.

that the employer did not violate the ADEA because his actions were not motivated by the employee's age.<sup>12</sup> In its decision, the Court noted that "[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*."<sup>13</sup>

Three years later, in *O'Connor v. Consolidated Coin Caterers Corp.*,<sup>14</sup> the Court considered whether an older worker could claim age discrimination when replaced by a younger employee who was also a member of the ADEA's protected class.<sup>15</sup> Here, O'Connor was fired at age fifty-six and replaced by a person forty years of age who also fell within the class protected by the ADEA.<sup>16</sup> The Court concluded that, for ADEA purposes, it did not matter whether a person was discriminated against in favor of a younger person within the protected class, so long as the discrimination was on the basis of age.<sup>17</sup> The Court said that an inference of discrimination could be drawn from "the fact that a replacement is substantially younger than the plaintiff."<sup>18</sup> The Court's language here, particularly the phrase "substantially younger," represented unwillingness on the part of the Court to recognize an action for age discrimination in favor of older workers. Decisions such as these show that the Court has traditionally considered the ADEA to pertain exclusively to those discriminated against in favor of younger people.

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12. *Id.* at 612. A company's decision to fire an older worker whose pension is close to vesting as a result of his years of service "would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an *accurate* judgment about the employee—that he indeed is 'close to vesting.'" *Id.*

13. *Id.* at 610 (emphasis added).

14. 517 U.S. 308 (1996).

15. *Id.* at 309.

16. *Id.* at 309–10.

17. *Id.* at 312. The lower federal courts used a test adapted from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to determine whether there was a prima facie case of age discrimination. *O'Connor*, 517 U.S. at 311–12. Before *O'Connor*, the fourth factor of that test had been that a plaintiff had to show that "following his discharge or demotion, he was replaced by someone of comparable qualifications outside the protected class." *Id.* at 310. The Court in *O'Connor*, however, modified the fourth factor, stating that "the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas*" test. *Id.* at 312.

18. *O'Connor*, 517 U.S. at 313.

## B. *The Courts of Appeals' Treatment of Reverse Age Discrimination*

The different circuits have addressed the question of reverse discrimination more directly. The prevailing legal view among the courts of appeals has generally been that the ADEA does not allow for reverse discrimination lawsuits.<sup>19</sup> Before any courts had the opportunity to address reverse age discrimination directly, many noted their disapproval of the concept in dicta. In a 1988 decision, *Schuler v. Polaroid Corp.*,<sup>20</sup> the plaintiff sued his employer for age discrimination when his job was eliminated and he was forced to accept a severance plan.<sup>21</sup> The United States Court of Appeals for the First Circuit noted in its discussion of the case that the ADEA "does not forbid treating older persons *more* generously than others."<sup>22</sup>

In the same year that *Schuler* was decided, the United States Court of Appeals for the Seventh Circuit handed down its decision in *Karlen v. City Colleges of Chicago*.<sup>23</sup> In that case, the plaintiff challenged certain aspects of an early retirement program that resulted in fewer benefits the older a person was when he retired.<sup>24</sup> In dicta, the court explicitly stated that "the Age Discrimination in Employment Act does not protect the young as well as the old, or even, we think, the younger *against* the older."<sup>25</sup>

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19. Tracey A. Cullen, Note, *Reverse Age Discrimination Suits and the Age Discrimination in Employment Act*, 18 ST. JOHN'S J. LEGAL COMMENT. 271, 277 (2003) (noting that the majority of federal courts do not allow reverse age discrimination claims); see also Tamar Buchakjian, Comment, *Old vs. Older: Creating a Cause of Action for Reverse Age Discrimination Under the ADEA in Cline v. General Dynamics Land Systems, Inc.*, 36 LOY. L.A. L. REV. 1627, 1639 (2003) (explaining that the First, Second, Seventh, and Ninth Circuits do not allow reverse age discrimination suits).

20. 848 F.2d 276 (1st Cir. 1988).

21. *Id.* at 278.

22. *Id.* The court of appeals ended up holding in favor of the employer, since Schuler could not show a prima facie case of age discrimination. *Id.*

23. 837 F.2d 314 (7th Cir. 1988).

24. *Id.* at 316. The early retirement program in question entitled younger retirees to take a larger percentage of their accumulated sick pay than older retirees. *Id.* It also left intact the health benefits of younger retirees, while those of older retirees were eliminated. *Id.*

25. *Id.* at 318. The court said that if younger workers in the protected class could sue for age discrimination in favor of older workers, "early retirement plans would effectively be outlawed, and that was not the intent of the framers of the Age Discrimination in Employment Act." *Id.*

In 1992, the Seventh Circuit had an opportunity to address reverse age discrimination directly, for the first time, in *Hamilton v. Caterpillar Inc.*<sup>26</sup> Caterpillar implemented an early retirement plan for its employees fifty years of age and older when it decided to close two of its plants in Iowa.<sup>27</sup> Michael Hamilton and others, all between the ages of forty and fifty, brought a class action suit against Caterpillar for age discrimination, since they were too young to take advantage of the early retirement plan.<sup>28</sup> The court held that the ADEA does not allow for reverse discrimination suits, noting that if Congress had meant to protect the young from age discrimination it would not have limited the protected class to those people who are forty years of age and older.<sup>29</sup> Additionally, the court said that it could find no evidence of congressional intent to protect the young from age discrimination.<sup>30</sup>

Finally, in *Stone v. Travelers Corp.*,<sup>31</sup> the United States Court of Appeals for the Ninth Circuit considered whether a severance plan that afforded more choice in distribution of retirement benefits to older employees violated the ADEA as discriminatory against younger retirees.<sup>32</sup> The court did not have to reach the question of whether the ADEA provides a remedy for reverse age discrimination, as it decided the case on narrower grounds,<sup>33</sup> but it expressed incredulity at the idea that the petitioner could recover for being discriminated against because he was too young.<sup>34</sup>

Clearly, before 2004, few courts had directly considered the issue of reverse age discrimination. Those that had occasion to discuss the issue uniformly concluded that the ADEA precludes such lawsuits. This standard changed, however, when the United States Court of Appeals for the Sixth Circuit announced its decision in *General Dynamics*.

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26. 966 F.2d 1226 (7th Cir. 1992).

27. *Id.* at 1227.

28. *Id.*

29. *Id.* The court drew a comparison between the limitation on the protected class in the ADEA and the open class under Title VII of the Civil Rights Act of 1964. *See id.* (“[I]magine that only racial minorities and women could bring suit under Title VII. If Title VII so limited the plaintiff class, we would be unlikely to read that statute to prohibit reverse discrimination either.”).

30. *Id.* at 1228.

31. 58 F.3d 434 (9th Cir. 1995).

32. *Id.* at 436.

33. *Id.* at 437 (finding that the minimum age exceptions in the ADEA precluded any age discrimination claim).

34. *See id.* (“Stone claims that Travelers violated the ADEA by discriminating against him because he was too young!”).

### III. ANALYSIS OF *GENERAL DYNAMICS LAND SYSTEMS, INC. V. CLINE*

#### A. *Background*

Before July 1997, General Dynamics Land Systems ("GDLS") and its employees had a collective bargaining agreement that gave full health benefits to those retired workers who had served for thirty years or more.<sup>35</sup> Beginning in July, a new collective bargaining agreement modified this arrangement; the new agreement only provided health benefits after retirement to those employees who were at least fifty years old as of the time the new agreement went into effect.<sup>36</sup> Cline and other employees objected to the new agreement as a violation of the ADEA, as they were all at least forty years old and protected by the age discrimination laws, but they were not old enough to receive health benefits after retirement under the new agreement.<sup>37</sup>

Cline received a determination from the Equal Employment Opportunity Commission ("EEOC") that the new collective bargaining agreement violated the ADEA, but informal settlement attempts failed.<sup>38</sup> Cline brought an action against GDLS in the United States District Court for the Northern District of Ohio, which dismissed the lawsuit on the basis of the Seventh Circuit's opinion in *Hamilton*.<sup>39</sup>

Despite the apparent clarity and uniformity of the case law on reverse age discrimination, the United States Court of Appeals for the Sixth Circuit reversed the district court's decision, holding that the language of the ADEA was clear and that if Congress had wanted to limit protection under the law to just the older, it would have been more specific.<sup>40</sup> Additionally, the court buttressed its conclusion with 29 C.F.R. section 1625.2(a),<sup>41</sup> an interpretive regulation issued by the EEOC which states that "if two people apply for the same position, and one is 42 and the other

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35. *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 468 (6th Cir. 2002), *rev'd*, 124 S. Ct. 1236 (2004).

36. *Gen. Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1239 (2004).

37. *Id.* at 1239.

38. *Id.*

39. *Id.* at 1239-40.

40. *Id.* at 1240.

41. *Id.*

52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor."<sup>42</sup> The Supreme Court of the United States granted certiorari to "resolve the conflict among the Circuits."<sup>43</sup>

### B. *The Majority Opinion*

Writing for the majority, Justice Souter explained that, primarily, the Court looked to the legislative history of the ADEA to conclude that the law does not provide for reverse age discrimination lawsuits.<sup>44</sup> When Congress declined to include age in the Civil Rights Act prohibitions against discrimination, it asked the Secretary of Labor, W. Willard Wirtz, for a study on problems in age discrimination.<sup>45</sup> The Court noted that, in his report, Wirtz concentrated on discrimination against older workers and that the report "was devoid of any indication that the Secretary had noticed unfair advantages accruing to older employees at the expense of their juniors."<sup>46</sup>

The report resulted in an official proposal for age discrimination legislation. The ensuing hearings, statements of finding, and apparent purpose focused exclusively on discrimination against older workers.<sup>47</sup> The Court concluded that "all the findings and statements of objectives are either cast in terms of the effects of age as intensifying over time, or are couched in terms that refer to 'older' workers, explicitly or implicitly relative to 'younger' ones."<sup>48</sup> Therefore, the phrase from the ADEA that makes it illegal for employers to "discriminate against any individual . . . because of such individual's age"<sup>49</sup> refers only to discrimination against older employees in favor of younger employees.<sup>50</sup>

The Court also couched its conclusion in terms of social history, noting that "[o]ne commonplace conception of American society in recent decades is its character as a 'youth culture,' and in a world where younger is better, talk about discrimination because of age

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42. 29 C.F.R. § 1625.2(a) (2004).

43. *Gen. Dynamics*, 124 S. Ct. at 1240.

44. *Id.*

45. *Id.*

46. *Id.* at 1241.

47. *Id.* at 1241-42.

48. *Id.* at 1242.

49. 29 U.S.C. § 623(a)(1) (2000).

50. *Gen. Dynamics*, 124 S. Ct. at 1243.



is naturally understood to refer to discrimination against the older."<sup>51</sup> According to the Court, Congress thought of age discrimination in the same way in which any ordinary person would.<sup>52</sup>

The Court found its holding to be further supported by the fact that the protected class in the ADEA does not begin until age forty.<sup>53</sup> If Congress had been concerned about discrimination against the young when it passed the law, it would have included younger people in the protected class.<sup>54</sup> Finally, the Court found it to be significant that its own case history, as well as that of the lower federal courts, supported the notion that the ADEA does not allow for reverse age discrimination lawsuits.<sup>55</sup>

### C. *The Majority and the Dissents: Contrasting the Arguments*

#### 1. Plain Meaning of Age

The majority concluded its opinion by addressing three specific arguments made by Cline and the EEOC, who first argued that the word "age" in the ADEA has a plain meaning that must apply uniformly throughout the statute.<sup>56</sup> A separate section of the statute provides a defense for employers against age discrimination when "age is a bona fide occupational qualification."<sup>57</sup> Cline argued that the meaning of "age" in this section could not be limited to old age, as it "would then provide a defense (old age is a bona fide qualification) only for an employer's action that . . . would never clash with the statute (because preferring the older is not forbidden)."<sup>58</sup> Therefore, if the meaning of "age" is applied uniformly throughout the statute, it must always refer to both old and young age.<sup>59</sup> The Court countered this argument by noting that identical words in the same statute do not always have the same meaning when the word in question has more than one

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51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 1244.

56. *Id.* at 1245.

57. 29 U.S.C. § 623(f)(1) (2000).

58. *Gen. Dynamics*, 124 S. Ct. at 1245.

59. *See id.*

common meaning,<sup>60</sup> and by saying that the language in a statute always has to glean its meaning from the words surrounding it, as well as from the social and legislative history.<sup>61</sup> Here, “age” means ‘old age’ when teamed with ‘discrimination.’<sup>62</sup>

In his dissent, Justice Thomas took a diametrically opposed view. He noted first that instead of jumping straight to a consideration of the legislative history of the ADEA, the Court should have looked more closely at the plain meaning of the statute, which, if unambiguous, would preclude a more in depth review.<sup>63</sup> In examining the plain meaning of the phrase “discriminate . . . because of such individual’s age,”<sup>64</sup> Justice Thomas concluded that the statute obviously allows reverse discrimination lawsuits.<sup>65</sup> He conceded that the word “age” could have the alternative meaning of “old age,” but concluded that this is not the primary use of the word, and “the use of the word ‘age’ in other portions of the statute effectively destroys any doubt” as to the intended choice of meanings.<sup>66</sup>

## 2. Senator Yarborough’s Statement

Cline and the EEOC also argued that a statement made by Senator Yarborough during debates on the ADEA supported an action for reverse discrimination.<sup>67</sup> Yarborough, a sponsor of the bill, noted that “[t]he law prohibits age being a factor in the decision to hire, as to one age over the other, whichever way his decision went.”<sup>68</sup> The majority dismissed this statement as “the only item in all the 1967 hearings, reports, and debates going against

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60. *Id.* at 1245–46 (“The presumption of uniform usage thus relents when a word used has several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing.”).

61. *Id.* at 1246–47.

62. *Id.* at 1246.

63. *Id.* at 1250 (Thomas, J., dissenting).

64. 29 U.S.C. § 623(a)(1) (2000).

65. *Gen. Dynamics*, 124 S. Ct. at 1250 (Thomas, J., dissenting).

66. *Id.* at 1250–51 (Thomas, J., dissenting). Justice Thomas also noted that his interpretation of the statute was not defeated by the limitation of the protected class to those forty years of age and older. *Id.* at 1251 (Thomas, J., dissenting). He said that “[a] person over 40 fired due to irrational age discrimination (whether because the worker is too young or too old) might have a more difficult time recovering from the discharge and finding new employment.” *Id.*

67. *Id.* at 1247.

68. 113 CONG. REC. 31,255 (1967).

the grain of the common understanding of age discrimination.”<sup>69</sup> In his dissent, Justice Thomas objected to the Court’s seemingly arbitrary dismissal of Yarborough’s statement, saying that “Senator Yarborough, in the only exchange that the parties identified from the legislative history discussing this particular question, confirmed that the text really meant what it said.”<sup>70</sup>

### 3. Deference to the EEOC

The third and final argument of Cline and the EEOC was that the EEOC’s interpretive regulation, 29 C.F.R. section 1625.2(a), which supported the view that reverse age discrimination is illegal, should, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>71</sup> be given great deference by the Court.<sup>72</sup> The majority also dismissed this argument, saying that it was not necessary to decide how much deference to give an agency regulation when the agency is clearly wrong, as the EEOC was in this case.<sup>73</sup>

In a short dissenting opinion, Justice Scalia said that as “the EEOC’s interpretation [was] neither foreclosed by [the text of] the statute nor unreasonable,” the Court should defer to the regulation and allow suits for reverse age discrimination.<sup>74</sup> Justice Thomas echoed Justice Scalia’s argument in a separate dissent.<sup>75</sup>

### 4. Social History Criticism

Justice Thomas’s dissent also criticized the majority’s “social history” conclusion, noted above, “that if Congress has in mind a particular, principal, or primary form of discrimination when it passes an antidiscrimination provision . . . then the phrase . . . only covers the principal or most common form of discrimina-

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69. *Gen. Dynamics*, 124 S. Ct. at 1247.

70. *Id.* at 1252 (Thomas, J., dissenting).

71. 467 U.S. 837 (1984).

72. *Gen. Dynamics*, 124 S. Ct. at 1248.

73. *Id.*

74. *Id.* at 1249 (Scalia, J., dissenting).

75. *See id.* at 1251–52 (Thomas, J., dissenting). Justice Thomas noted that “[e]ven if the Court disagrees with my interpretation of the language of the statute, it strains credulity to argue that such a reading is so unreasonable that an agency could not adopt it.” *Id.* at 1251.

tion.”<sup>76</sup> Justice Thomas contrasted this conclusion with the Court’s willingness to interpret the Civil Rights Act of 1964 to allow suits for reverse race discrimination, even though Congress undoubtedly only had discrimination against minorities, primarily blacks, in mind when it passed the statute.<sup>77</sup> Justice Thomas concluded that “[i]n light of the Court’s opinion today, it appears that this Court has been treading down the wrong path with respect to Title VII since at least 1976.”<sup>78</sup> The majority summarily dismissed Justice Thomas’s Title VII argument, noting that the word “age” is not analogous to the terms “race” and “sex” in Title VII, as they are “general terms that in every day usage require modifiers to indicate any relatively narrow application.”<sup>79</sup>

#### D. Criticisms of the Court’s Opinion

##### 1. Was the Majority Correct to Consider Legislative History?

One of Justice Thomas’s primary arguments in favor of reverse age discrimination was that courts must go no further than the plain language of the ADEA to determine that such suits are permissible.<sup>80</sup> In a similar case, *Robinson v. Shell Oil Co.*,<sup>81</sup> the Supreme Court had to determine whether the term “employees” includes “former employees” with reference to section 704(a) of Title VII of the Civil Rights Act of 1964.<sup>82</sup> The Court noted that its “first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”<sup>83</sup> Therefore, only if

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76. *Id.* at 1253 (Thomas, J., dissenting).

77. *Id.* at 1253–54 (Thomas, J., dissenting).

78. *Id.* at 1254 (Thomas, J., dissenting).

79. *Id.* at 1247. The Court further noted that “the prohibition of age discrimination is readily read more narrowly than analogous provisions dealing with race and sex. That narrower reading is the more natural one in the textual setting, and it makes perfect sense because of Congress’s demonstrated concern with distinctions that hurt older people.” *Id.*

80. *Id.* at 1250 (Thomas, J., dissenting). For discussions of whether the plain meaning of the ADEA precludes an examination of legislative history, see generally Buchakjian, *supra* note 19, at 1641–43; Cullen, *supra* note 19, at 291–300; Kelly J. Hartzler, Note, *Reverse Age Discrimination Under the Age Discrimination in Employment Act: Protecting All Members of the Protected Class*, 38 VAL. U. L. REV. 217, 246–51 (2003).

81. 519 U.S. 337 (1997).

82. *Id.* at 339. See generally Amy L. Schuchman, *The Special Problem of the “Younger Older Worker”: Reverse Age Discrimination and the ADEA*, 65 U. PITT. L. REV. 339, 360–61 (2004) (explaining the standard used in *Robinson* to interpret statutes).

83. *Robinson*, 519 U.S. at 340.

the statutory language is ambiguous should a court go beyond that language to consider other sources of meaning, such as legislative history. The Court also said that “[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”<sup>84</sup>

Accordingly, the majority in *General Dynamics*, following its own interpretation standards, was only justified in proceeding directly to an examination of legislative history if the language of section 623(a)(1) is ambiguous. The Court was so justified, as the ambiguity of the language in question can be shown especially well by both reference to the language itself and the context of the statute as a whole.

The language, as noted above, reads that “[i]t shall be unlawful for an employer . . . to . . . discriminate against any individual . . . because of such individual’s age.”<sup>85</sup> Primarily, the term “age” is ambiguous. There are multiple dictionary definitions of “age,” some of which say that the word means “the length of time during which a being or thing has existed”<sup>86</sup> and others of which define it as “advanced years; old age.”<sup>87</sup> The multitude of definitions of this word supports the proposition that the language is ambiguous.<sup>88</sup>

Equally significant to the determination of ambiguity is the context of the statute as a whole. For instance, while section 623(a)(1) purports to prohibit age discrimination against “any individual,”<sup>89</sup> section 621(a), which sets forth Congress’s statement of findings, refers almost exclusively to the problems faced by “older persons” and “older workers.”<sup>90</sup> While this would seem to indicate that the statute is only intended to prohibit discrimination against the old, even the terms “older persons” and “older workers” can be interpreted in multiple ways. The phrases could refer to older people in general, which would indeed indicate that

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84. *Id.* at 341.

85. 29 U.S.C. § 623(a)(1) (2000).

86. RANDOM HOUSE UNABRIDGED DICTIONARY 37 (2nd ed. 1993).

87. *Id.*; see also *Gen. Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1250 (2004) (Thomas, J., dissenting) (noting the different definitions of the word “age”); Elena Minkin, Note, *Flourishing Forties Against Flaming Fifties: Is Reverse Age Discrimination Actionable Under the Age Discrimination in Employment Act?*, 48 ST. LOUIS U. L.J. 225, 247–48 (2003) (discussing the different dictionary definitions of age).

88. Minkin, *supra* note 87, at 248.

89. 29 U.S.C. § 623(a)(1) (2000).

90. *Id.* § 621(a) (2000).

reverse discrimination is not protected.<sup>91</sup> On the other hand, the phrases could refer to the class of people protected by the ADEA, those aged forty and older, in which case any discrimination within that class might be prohibited, whether in favor of the older or younger members of the class.<sup>92</sup>

These examples show why the statute, which might seem unambiguous at first glance, actually has a number of words and provisions, both in the section in question and with regard to the statute as a whole, that evade simple definition and classification.<sup>93</sup> Therefore, the Court was correct to resort to the legislative history of the ADEA, which, as evidenced in the Court's thorough discussion, clearly indicated Congress's intention to protect old, not young, employees from age discrimination.<sup>94</sup> Both the legislative and judicial history helped the Court resolve the ADEA's ambiguity and come to its ultimate holding.

## 2. Should the Court Have Deferred to the EEOC's Interpretation of the ADEA?

The dissent also criticized the majority for not deferring to the EEOC's reasonable interpretation of the ADEA.<sup>95</sup> It is true that in *Chevron*, the Court noted that if a statute is ambiguous with respect to the issue in question, the Court should defer to the agency's interpretation of that statute if it is permissible.<sup>96</sup> In a footnote, however, the Court further clarified its position by saying that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."<sup>97</sup> Here, the Court employed the tools of statutory construction by looking to the legislative history of an ambiguous

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91. Minkin, *supra* note 87, at 252.

92. See *id.*; see also Aaron J. Rogers, Note, *Discrimination Against Younger Members of the ADEA's Protected Class*, 89 IOWA L. REV. 313, 335 (2003) (explaining that the phrase "older workers" could be interpreted to refer to the ADEA's protected class).

93. See generally Rogers, *supra* note 92, at 336, which explains that the ADEA's exemptions for minimum age requirements on pension plans can only serve to protect employers from claims by younger employees that they are being discriminated against in favor of older employees. These provisions would also contribute to ambiguity, as they could be inconsistent with the statute's statement of findings.

94. *Gen. Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1240-43 (2004).

95. See *id.* at 1251-52 (Thomas, J., dissenting).

96. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

97. *Id.* at 843 n.9.

statute and found that Congress had an intention to protect older workers, not younger workers, against discrimination.<sup>98</sup> *Chevron* deference to the EEOC regulation was not necessary, since, as the Court concluded, the EEOC's regulation was "clearly wrong."<sup>99</sup>

Additionally, though not noted by the Court, it is significant that the EEOC regulation in question, section 1625.2(a),<sup>100</sup> conflicts with other EEOC regulations. Section 1625.2(b) of the EEOC guidelines says that "[t]he extension of additional benefits . . . to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination."<sup>101</sup> While section 1625.2(a) purports to eliminate reverse age discrimination,<sup>102</sup> the following subsection recognizes, as does the ADEA, that older employees face special problems of age discrimination and must be protected.<sup>103</sup> It would have been impossible for the Court to defer to both of these EEOC regulations at the same time.

### 3. Does the Court's Holding Conflict With Title VII Actions?

The majority rejected Justice Thomas's argument that reverse age discrimination claims should be allowed, just as reverse race and gender discrimination claims are allowed under Title VII, simply by noting that the word "age" is always read more narrowly than the words "race" and "sex."<sup>104</sup> There are, however, further arguments that support the majority's conclusion. For instance, age cannot be considered an immutable characteristic as are race and gender and, as a consequence, age does not require the same level of protection.<sup>105</sup> Additionally, the fundamental difference between employment discrimination based on age and employment discrimination based on race or gender is illustrated by the fact that Congress failed to include a prohibition on age

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98. See *Gen. Dynamics*, 124 S. Ct. at 1240–43.

99. *Id.* at 1248.

100. 29 C.F.R. § 1625.2(a) (2004).

101. *Id.* § 1625.2(b).

102. See *id.* § 1625.2(a).

103. See Minkin, *supra* note 87, at 260–61.

104. *Gen. Dynamics*, 124 S. Ct. at 1247.

105. See Minkin, *supra* note 87, at 269 (arguing that age is not immutable as everyone will eventually become a member of the class).

discrimination in the Civil Rights Act of 1964, which makes it unlawful for an employer "to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."<sup>106</sup>

The Supreme Court has never treated age as carefully as race and gender classifications, which enjoy strict and intermediate scrutiny, respectively.<sup>107</sup> For example, in *Massachusetts Board of Retirement v. Murgia*,<sup>108</sup> the Court held that age is not a suspect class, as the people within the class have not traditionally been discriminated against.<sup>109</sup> Given the fundamental differences between age, race, and gender, it is unsurprising and permissible that the Court chose not to implement an action for reverse age discrimination as it had done with reverse race and gender discrimination.<sup>110</sup>

#### IV. THE IMPACT OF *GENERAL DYNAMICS LAND SYSTEMS, INC. V. CLINE*

The law after the Court's decision in *General Dynamics* is remarkably similar to the status of the law before its decision. As previously noted, before the Court's explicit decision on reverse age discrimination, it had already shown its unwillingness to extend protection to younger workers.<sup>111</sup> The lower federal courts recognized the Court's preference by almost uniformly ruling against allowing actions of reverse age discrimination.<sup>112</sup> Now that the Court has officially ruled against these actions, the lower federal courts have binding authority for their decisions. For instance, soon after the Court handed down its decision in *General Dynamics*, the United States District Court for the Middle Dis-

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106. 42 U.S.C. § 2000e-2(a)(1) (2000).

107. See *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (holding that gender classifications must satisfy a standard of intermediate scrutiny); *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (holding that race classifications must satisfy a standard of strict scrutiny).

108. 427 U.S. 307 (1976).

109. *Id.* at 313.

110. For a discussion of why age is not afforded the same protection as race and gender, see generally Minkin, *supra* note 87, at 266-72.

111. See *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

112. See, e.g., *Stone v. Travelers Corp.*, 58 F.3d 434, 437 (9th Cir. 1995); *Hamilton v. Caterpillar Inc.*, 966 F.2d 1226, 1228 (7th Cir. 1992); *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988); *Karlen v. City Colls. of Chicago*, 837 F.2d 314, 318 (7th Cir. 1988).



trict of North Carolina refused to consider a plaintiff's contention that because he was too young to participate in an early retirement program, he was being discriminated against in violation of the ADEA.<sup>113</sup> The court said that the plaintiff's claim was precluded because the Supreme Court had made it clear that employers were not prohibited from favoring older employees over younger employees.<sup>114</sup>

In practical terms, the Court's decision in *General Dynamics* protects companies that want to treat older employees more favorably in anything from retirement benefits to layoff plans.<sup>115</sup> Additionally, one commentator noted that "[t]he employer, moreover, is free to draw the line, for purposes of disparate treatment in favor of the old, wherever it wishes to—at 50, 60, or 70, for example."<sup>116</sup>

Reverse discrimination claims are not, however, categorically impossible after the Court's holding in *General Dynamics*. States, like Oregon, can write provisions into their age discrimination laws that lower the floor on the protected class to eighteen years of age, which allows employees the maximum amount of protection.<sup>117</sup> Additionally, states are beginning to allow reverse age discrimination claims in their own courts. For instance, in *Zanni v. Medaphis Physician Services Corp.*,<sup>118</sup> the plaintiff was fired and replaced by an older employee who was less qualified for the job.<sup>119</sup> The terminated employee filed an action for age discrimination under Michigan state law,<sup>120</sup> which said that employers could not discriminate against employees because of their age.<sup>121</sup> The law defined "age" as "chronological age."<sup>122</sup> With this definition, the Michigan court easily concluded that the law allowed reverse discrimination actions.<sup>123</sup> The court contrasted the defini-

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113. Hall v. Tyco Int'l Ltd., No. 1:02CV00839, 2004 WL 1763218, at \*31 (M.D.N.C. July 27, 2004).

114. *Id.*

115. Stephen Henderson, *Older Workers May Have Extra Benefits, Court Says*, PHILA. INQUIRER, Feb. 25, 2004, at A2.

116. Beth A. Bourassa, *The Enemy of 40 is 30, Not 50*, N.Y. EMP. L. & PRAC., Apr. 2004, at 3, 4.

117. See OR. REV. STAT. § 659A.030 (2003); Minkin, *supra* note 87, at 265–66 (noting that Oregon is one of the few states to allow the young to sue for age discrimination).

118. 612 N.W.2d 845 (Mich. Ct. App. 2000).

119. *Id.* at 846.

120. *Id.*

121. MICH. COMP. LAWS § 37.2202(1)(a) (2001).

122. *Id.* § 37.2103(a).

123. See *Zanni*, 612 N.W.2d at 847.

tion of "age" in the Michigan statute against the ADEA, concluding that the Michigan law is not as restrictive as the ADEA.<sup>124</sup> Other state courts have made similar conclusions;<sup>125</sup> thus, the state courts are another road open to potential reverse age discrimination plaintiffs.<sup>126</sup>

## V. CONCLUSION

While the state of the law has not significantly changed since the Court's decision in *General Dynamics*, it is now clear that the ADEA does not provide for reverse age discrimination claims. It seems as though employers are free to favor their older workers over their younger employees in collective bargaining agreements, retirement plans, and perhaps even in hiring or promotion decisions. The path to a successful claim now lies in the state courts, unless Congress reacts to the Court's decision by amending the ADEA or passing a new age discrimination statute.

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124. *Id.*

125. See, e.g., *Bergen Commercial Bank v. Sisler*, 723 A.2d 944, 949–50 (N.J. 1999) (holding that New Jersey law allows reverse discrimination claims and noting the textual differences between the state law and the ADEA).

126. See generally Minkin, *supra* note 87, at 262–66 for a discussion of state reverse age discrimination laws and claims.

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