"GROWING PAINS" IN INDIANA AGE DISCRIMINATION LAW

DAVID T. VLINK*

INTRODUCTION

Age discrimination is on the rise. Age discrimination claims are now the fastest-growing category of employment discrimination claims being filed with the Equal Employment Opportunity Commission (EEOC).[1] From 2007 to 2008, age discrimination claims increased nearly 29%, more than doubling the increase in claims for sex discrimination (14%), and nearly tripling the increase in claims for race discrimination (11%).[2] In fact, in terms of the total number of charges filed with the EEOC, age discrimination is the third most frequently charged form of employment discrimination behind race and sex discrimination.[3] As these numbers indicate, age discrimination is a very real and increasing problem. As a result, Indiana must take steps to strengthen its protections against age discrimination in the workplace.

The Supreme Court recently issued a landmark age discrimination ruling in *Gross v. FBL Financial Services, Inc.*,[4] which brought the issue of age discrimination to the forefront of employment discrimination law. In *Gross*, the Supreme Court held that even when an age discrimination plaintiff shows that age was a "motivating factor" in an employer's employment decision, the burden never shifts to the employer to prove that it would have made the same decision regardless of the plaintiff's age.[5] Consequently, a mixed-motive jury instruction is never proper in employment discrimination cases brought pursuant to the federal Age Discrimination in Employment Act (ADEA).[6] The *Gross* decision means that from now on, absent Congressional action,[7] age discrimination

---

* J.D. Candidate, Indiana University School of Law—Indianapolis, 2011; B.A., Purdue University Calumet, Hammond, Indiana, 2007.

1. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHARGE STATISTICS FY 1997 THROUGH FY 2010, http://www.eeoc.gov/eeoc/statistics/ enforcement/charges.cfm (last visited Feb. 3, 2011) [hereinafter EEOC, CHARGE STATISTICS].

2. According to the EEOC, the following changes occurred from 2007 to 2008: (1) age discrimination charges increased from 19,103 to 24,582; (2) sex-related charges increased from 24,826 to 28,372; and (3) race-related charges increased from 30,510 to 33,937. EEOC, CHARGE STATISTICS, *supra* note 1.

3. *See id.*

4. 129 S. Ct. 2343 (2009).

5. *Id.* at 2352.

6. 29 U.S.C. §§ 621-34 (2006 & Supp. 2009).

7. Immediately after the *Gross* decision came down, Congressman George Miller (D-Cal.), Chairman of the House Committee on Education and Labor, issued a press release stating that his committee would hold hearings on the *Gross* decision, with the purpose of overturning it. *See* Press Release, H. Comm. on Educ. and Labor, Congress to Hold Hearings on Supreme Court's "Gross" Ruling on Age Discrimination, Says Chairman Miller (June 30, 2009), *available at*

plaintiffs must prove that age was the "but-for" cause of the alleged discriminatory employment action.[8] Commentators have noted that the "but-for" standard is "a stricter and typically more difficult showing for the plaintiff" and will make it more difficult for age discrimination plaintiffs to prevail on their claims.[9]

This recent federal development in age discrimination law is particularly relevant to Indiana employees because the Indiana Age Discrimination Act (IADA)[10] specifically exempts from its coverage any employer subject to the ADEA.[11] The ADEA applies to all employers nationwide with twenty or more employees.[12] Thus, most Indiana employees who allege age discrimination must proceed under the ADEA, with its recently restricted burden of proof, because there is no comparable state statute under which the employee can seek relief. Moreover, even for workers who are covered because their employer has fewer than twenty employees, the IADA does not provide them a private right of action to take their claims to court. Instead, the IADA leaves enforcement entirely to the Indiana Commissioner of Labor, who has little remedial authority.[13] In addition, a recent Indiana Supreme Court decision, *Montgomery v. Board of Trustees of Purdue University*,[14] held that state employers are "subject to" the ADEA.[15] This holding came despite the United States Supreme Court's ruling in *Kimel v.*

---

http://democrats.edworkforce.house.gov/newsroom/2009/06/congress-to-hold-hearing-on-su.shtml (last visited Feb. 3, 2011). Subsequently, on September 6, 2009, Congressman Miller—along with Senators Tom Harkin (D-Iowa) and Pat Leahy (D-Vt.)—introduced the Protecting Older Workers Against Age Discrimination Act, H.R. 3721, 111th Cong. (2009), which would overturn *Gross* and make clear that the mixed-motive motivating factor standard applies to ADEA cases. As of this writing on February 3, 2011, however, no major action has been taken on this legislation.

8. *Gross*, 129 S. Ct. at 2352.

9. *E.g.*, Jeffrey Campolongo, Gross *Decision May Result in More Older Workers Being Fired*, LEGAL INTELLIGENCER, June 26, 2009 (contending that the *Gross* decision "certainly raises the burden for ADEA plaintiffs").

10. IND. CODE §§ 22-9-2-1 to -11 (2010).

11. *See id.* § 22-9-2-1 (noting that the term "employer" does not include "a person or governmental entity which is subject to the federal Age Discrimination in Employment Act").

12. 29 U.S.C. § 630(b) (2006) ("The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.").

13. *See* Hague v. Thompson Distrib. Co., No. 1:02-CV-01744-RLY-TA, 2005 WL 995689, at *7 (S.D. Ind. Feb. 9, 2005). The *Hague* court explained that

> [t]here is no private right of action provided under state law. A complaining party must take up its age discrimination complaints with the Commissioner of Labor, who has the power to investigate, facilitate, and hold hearings on the complaint. Other than that, the . . . [IADA] offers no remedy to an individual.

Id. (citing Helman v. AMF, Inc., 675 F. Supp. 1163, 1165 (S.D. Ind. 1987)).

14. 849 N.E.2d 1120 (Ind. 2006).

15. *See id.* at 1126-28.

Florida Board of Regents[16] that the Eleventh Amendment[17] bars age discrimination actions for damages by state employees against their employers in federal court.[18] As a result of *Montgomery*, state employees have no protection under the IADA; as a result of *Kimel*, they also cannot pursue their claims in federal court. The effect of these statutes and other precedent leaves Indiana employees inadequately protected from age discrimination—particularly state government employees, who find themselves in a "Catch-22" situation where they are unable to seek redress in either the state or federal courts.

The purpose of this Note is twofold: to demonstrate that Indiana does not adequately protect its workers from age discrimination and to propose solutions to this problem. Part I examines Indiana's treatment of age discrimination, focusing mainly on the IADA and the *Montgomery* decision, and contrasting it with how Indiana treats other forms of discrimination in the Indiana Civil Rights Law (ICRL).[19] Part II addresses federal treatment of age discrimination before *Gross*, given its particular relevance to Indiana workers. Part III looks at how other states treat age discrimination, with an emphasis on Indiana's neighboring states. Part IV proposes solutions to the problem, drawing on the approaches of other states and previous attempts at reform proposed by Indiana legislators.

I. Indiana's Treatment of Age Discrimination

This section examines Indiana's treatment of age discrimination by introducing and analyzing the Indiana Age Discrimination Act (IADA) and *Montgomery*, a recent Indiana Supreme Court case that has had a major impact on how the IADA is now interpreted in Indiana. Additionally, this section takes a brief look at administrative treatment of age discrimination under the Indiana State Personnel Act.[20] Finally, this section concludes by contrasting the IADA with Indiana's primary civil rights statute, the ICRL.

A. The Indiana Age Discrimination Act

Under Indiana law, age discrimination in employment is considered an "unfair employment practice and against public policy."[21] Specifically, the IADA provides:

---

16. 528 U.S. 62 (2000).

17. U.S. CONST. amend. XI. The Eleventh Amendment, which states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State[,]" has generally been interpreted to prohibit suits against states for damages in federal courts. *See* Hans v. Louisiana, 134 U.S. 1, 10-11 (1890).

18. *Kimel*, 528 U.S. at 91 (holding that "in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals.").

19. IND. CODE §§ 22-9-1-1 to -18 (2010).

20. *Id.* §§ 4-15-2-1 to -43.

21. Karl Oakes, 5 IND. LAW ENCYC. *Civil Rights* § 11 (West 2011).

> It is declared to be an unfair employment practice and to be against public policy to dismiss from employment, or to refuse to employ or rehire, any person solely because of his age if such person has attained the age of forty (40) years and has not attained the age of seventy-five (75) years.[22]

The IADA, however, does not provide victims of age discrimination in employment a private cause of action to vindicate their rights in court.[23] Instead, remedial authority is left solely to the Indiana Commissioner of Labor ("the Commissioner"), who the IADA charges with investigating complaints of age discrimination and combating such discrimination through "informal methods of conference, conciliation and persuasion."[24] Despite the Commissioner's apparent authority, the Commissioner is effectively powerless to combat age discrimination. The most the Commissioner can do is "state his findings of fact" that an employer committed age discrimination.[25] Thus, although the stated policy of the IADA is clear and forceful, its remedial effect is minimal.

In addition to the IADA's lack of remedies, the statute also has a coverage problem. Section 1 of the IADA states, "'Employer' shall mean and include any person in this state employing one (1) or more individuals . . . the state and all political subdivisions, boards . . . and commissions thereof, but does not include . . . a person or governmental entity which is subject to the federal Age Discrimination in Employment Act."[26] The effect of this provision is that the Commissioner and Indiana state courts are "deprived of jurisdiction if the employer falls within the definition of employer as defined under [the] ADEA."[27] Given that the ADEA applies to any employer nationwide with twenty or more employees,[28] the IADA only applies to a small number of employers: those with fewer than twenty employees.

B. Montgomery v. Board of Trustees of Purdue University

There have been only a small number of Indiana cases dealing with age discrimination. Presumably, most Indiana age discrimination plaintiffs choose to pursue their claims under the federal statute. However, one recent Indiana Supreme Court case—*Montgomery v. Board of Trustees of Purdue University*[29]—addresses age discrimination under the IADA.

---

22. IND. CODE § 22-9-2-2.

23. Hague v. Thompson Distrib. Co., No. 1:02-CV-01744-RLY-TA, 2005 WL 995689, at *7 (S.D. Ind. Feb. 9, 2005) (explaining that "[t]here is no private right of action provided . . . [in the IADA].").

24. IND CODE §§ 22-9-2-5 to -6.

25. *Id.* § 22-9-2-6.

26. *Id.* § 22-9-2-1.

27. Helman v. AMF, Inc., 675 F. Supp. 1163, 1165 (S.D. Ind. 1987).

28. 29 U.S.C. § 630(b) (2006).

29. 849 N.E.2d 1120 (Ind. 2006).

In *Montgomery*, plaintiff Michael Montgomery had worked for Purdue University ("the University") for nearly thirty years before the University fired him in 2002 at the age of fifty-eight.[30] The University terminated Montgomery for declining involuntary retirement[31] and conceded, for the purposes of a motion to dismiss, that it terminated Montgomery solely because of his age.[32] Montgomery filed a complaint in state court, bypassing the Commissioner. Both lower courts granted the University's motion to dismiss for failure to state a claim.[33]

On appeal to the Indiana Supreme Court, the issue was whether the University was "subject to" the ADEA and therefore exempt from the IADA.[34] The Indiana Supreme Court began its analysis by noting that the ADEA has two primary enforcement mechanisms: direct enforcement by the Equal Employment Opportunity Commission (EEOC) and private civil actions by aggrieved individuals.[35] The court then discussed the doctrine of sovereign immunity under the Eleventh Amendment.[36] It particularly focused on the United States Supreme Court's decision in *Kimel v. Florida Board of Regents*,[37] which held that the ADEA's provisions authorizing state employees to sue their employers in federal court for money damages violated the Eleventh Amendment.[38] The court noted that pursuant to *Kimel*, the University was clearly not "subject to" the ADEA under the private litigant method of enforcement in federal courts, as Indiana has not consented to ADEA suits in federal court.[39] The court pointed out, however, that pursuant to the doctrine of *Ex parte Young*,[40] an aggrieved state employee can sue a state employer for injunctive relief in federal court by naming a state official as the defendant. Furthermore, the EEOC, as an arm of the federal government, is not subject to the Eleventh Amendment's prohibition on suing states in federal court.[41]

Montgomery argued that these remedies were "meaningless" and "illusory" because the EEOC rarely exercises its direct enforcement authority, and the decision to grant the injunctive remedy of reinstatement—albeit subject to the

---

30. *See id.* at 1122.

31. Montgomery v. Bd. of Trs. of Purdue Univ., 824 N.E.2d 1278, 1279 (Ind. Ct. App. 2005), *aff'd in part*, 849 N.E.2d 1120 (Ind. 2006).

32. Brief of Appellant at 2, Montgomery v. Bd. of Trs. of Purdue Univ., 849 N.E.2d 1278 (Ind. Ct. App. 2005) (No. 79A05-0411-CV-591), 2004 WL 3216683 at *2.

33. *Montgomery*, 824 N.E.2d at 1279, 1282-83.

34. *Montgomery*, 849 N.E.2d at 1122-23.

35. *Id.* at 1123.

36. U.S. CONST. amend XI.

37. 528 U.S. 62 (2000).

38. *Id.* at 91.

39. *Montgomery*, 849 N.E.2d at 1125-26. The court noted that Indiana has not consented to ADEA suits in federal courts because waiver of sovereign immunity by the states must be "express, unequivocal and voluntary." *Id.* (citing Edelman v. Jordan, 415 U.S. 651, 673 (1974)).

40. 209 U.S. 123 (1908).

41. *Montgomery*, 849 N.E.2d at 1126-27.

availability of positions—is within the trial court judge's discretion.[42] The court ultimately rejected Montgomery's arguments, concluding that "[i]f the law imposes standards of conduct on state employers, they are 'subject to' it. The fact that some remedies may be constitutionally barred does not change this result."[43] Thus, the court held that Indiana state employers are "subject to" the ADEA; as such, they are not statutory employers under section 1 of the IADA.[44] Post-*Montgomery*, therefore, state government employees cannot bring IADA claims because state employers are "subject to" the ADEA.

After finding the University "subject to" the ADEA, the court next addressed Montgomery's argument that the IADA creates a private cause of action for violation of public policy under *Frampton v. Central Indiana Gas Co.*[45] In *Frampton*, the Indiana Supreme Court created an exception to the employment-at-will doctrine[46] by holding that an employee has a claim for wrongful discharge "when . . . [the] employee is discharged solely for exercising a statutorily conferred right."[47] The court rejected this argument for multiple reasons. First, the court explained that "the IADA has never expressly provided for enforcement through private judicial action"[48] and that "the legislative history of the IADA does not support Montgomery's argument that the [g]eneral [a]ssembly intended to create a private cause of action for monetary damages under the IADA."[49] The court further supported its finding by opposing the use of a public policy argument, stating that "[g]eneral expressions of public policy do not support new exceptions to the employment-at-will doctrine."[50] Thus, the court ultimately concluded that the text of the IADA, coupled with its legislative history and the court's own jurisprudence on employment-at-will, weighed against creating a private cause of action for age discrimination in Indiana. In sum, whether Indiana employees who have been discriminated against because of their age should have any remedies "is a policy judgment" which "must come from the [g]eneral [a]ssembly."[51]

Justice Rucker authored a short dissent in *Montgomery* in which he characterized Montgomery's situation as a "Catch-22," stating, "So here we have an employee fired because of his age but [who] in effect has no remedy, according to today's opinion, despite both state and federal legislation designed to protect employees fired because of age. Certainly the legislature could not

---

42. *Id.* at 1127.

43. *Id.*

44. *Id.*

45. 297 N.E.2d 425 (Ind. 1973).

46. In Indiana, the employment-at-will doctrine states that either an employee or employer may terminate the employment relationship at any time for "good reason, bad reason, or no reason at all." Cantrell v. Morris, 849 N.E.2d 488, 494 (Ind. 2006).

47. *Frampton*, 297 N.E.2d at 428.

48. *Montgomery*, 849 N.E.2d at 1129.

49. *Id.* at 1128.

50. *Id.*

51. *Id.* at 1130-31.

have intended the result reached in this case."[52] Unfortunately, Justice Rucker did not provide any analysis to accompany his opinion. There is, however, some circumstantial evidence to bolster Justice Rucker's claim. In *Town of South Whitley v. Cincinnati Insurance Co.*,[53] the court stated that the IADA "is intended to provide coverage only where a plaintiff cannot proceed under the federal act."[54] This makes sense considering that the provision of the IADA exempting employers "subject to" the ADEA was enacted pre-*Kimel*, when it was thought that Congress had broad authority to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment.[55] Furthermore, even if one accepts the court's reasoning in *Montgomery* that state employers are still "subject to" the ADEA, there is no doubt that individual plaintiffs are severely restricted in their ability to proceed under the ADEA post-*Kimel*. In any event, Justice Rucker's ultimate conclusion was correct: Montgomery was left without a remedy, as the court dismissed his lawsuit against the University for failure to state a claim.[56]

Montgomery was not the only person adversely affected by this ruling, though. In *Keene v. Marion County Superior Court*,[57] the plaintiff, a sixty-four-year-old man, was terminated by his employer and replaced with a forty-year-old employee.[58] He filed a complaint for age discrimination under the IADA, which the lower courts initially dismissed as untimely.[59] On appeal to the Indiana Supreme Court, the issue was whether the lower courts were correct in deeming the complaint time-barred.[60] The court did not reach this issue, however, noting that "[s]ubsequent to our granting transfer and holding oral arguments in this case, we decided *Montgomery* . . . ."[61] Thus, the court held, "Because the employer here is not subject to the IADA (because it is subject to the federal ADEA), the trial court correctly dismissed Keene's claims."[62] As in *Montgomery*, a government employee allegedly fired for age discrimination "in effect . . . [had] no remedy."[63]

C. The Indiana State Personnel Act

Lest one get the impression that Indiana state government employers are free to terminate their older workers with impunity, it bears noting that the Indiana

52. *Id.* at 1131 (Rucker, J., dissenting).
53. 724 F. Supp. 599 (N.D. Ind. 1989).
54. *Id.* at 603 (citing Helman v. AMF, Inc., 675 F. Supp. 1163 (S.D. Ind. 1987)).
55. U.S. CONST. amend. XIV, § 5.
56. *Montgomery*, 849 N.E.2d at 1131 (majority opinion).
57. 849 N.E.2d 1141 (Ind. 2006).
58. *Id.* at 1141.
59. *Id.* at 1141-42.
60. *Id.* at 1142.
61. *Id.*
62. *Id.*
63. Montgomery v. Bd. of Trs. of Purdue Univ., 849 N.E.2d 1120, 1131 (Ind. 2006) (Rucker, J., dissenting).

State Personnel Act ("Personnel Act")[64] prevents them from doing so. The Personnel Act prohibits state employers from discriminating against their employees "on the basis of politics, religion, sex, *age*, race, or because of membership in an employee organization."[65] The Personnel Act also sets up a system whereby state employees who allege mistreatment can file a complaint with the head of the agency for which they work and, if the head's decision is unsatisfactory, with the Indiana State Personnel Department's personnel board.[66] If the employee is unsatisfied with the personnel board's findings, the employee can appeal to the Indiana State Employee Appeals Commission (SEAC).[67] If the SEAC finds discrimination, "the employee shall be reinstated without loss of pay."[68] But the SEAC's authority to fashion remedies is limited to reinstatement, and it cannot order an agency to create a new position if the employee's position is no longer available.[69]

The Personnel Act does not, however, cover every employee who would be considered a state employee for Eleventh Amendment purposes. Purdue University, for example, is not listed as part of the "state service" in section 3.8 of the Personnel Act.[70] Moreover, Montgomery would not appear to be a "regular employee" as defined in section 3.7 of the Personnel Act (as is required in order to file a complaint with the Indiana State Personnel Department).[71] Therefore, even though the Personnel Act could be used as a fallback remedy for certain employees wishing to pursue reinstatement (and only reinstatement) for alleged age discrimination, it appears that Montgomery also would not have been able to proceed under the Personnel Act.

D. The IADA Compared to the Indiana Civil Rights Law

The Indiana Civil Rights Law (ICRL)[72] is Indiana's primary anti-

---

64. IND. CODE §§ 4-15-2-1 to -43 (2010).

65. *Id.* § 4-15-2-35 (emphasis added).

66. *Id.* The complaint must be filed within thirty (30) days of the alleged mistreatment, and it must be in writing. *Id.* The Indiana State Personnel Department is a state agency charged with administering the Personnel Act. *Id.* § 4-15-1.8-7(a)(18).

67. *Id.* § 4-15-2-35. The SEAC is a bipartisan board whose mission is "[t]o hear or investigate those appeals from state employees as is set forth in . . . [the Personnel Act], and fairly and impartially render decisions as to the validity of the appeals or lack thereof." *Id.* § 4-15-1.5-6(1).

68. *Id.* § 4-15-2-35.

69. *See* Ind. Dep't of Envtl. Mgmt. v. West, 838 N.E.2d 408, 417 (Ind. 2005). In *West*, the court applied the federal disparate treatment framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), during the liability phase in reviewing the SEAC's finding that the Indiana Department of Environmental Management (IDEM) violated the Personnel Act. *West*, 838 N.E.2d at 413.

70. *See* IND. CODE § 4-15-2-3.8.

71. *See id.* §§ 4-15-2-3.7 to -3.8.

72. *Id.* §§ 22-9-1-1 to -18.

discrimination statute. The law prohibits discrimination based on "race, religion, color, sex, disability, national origin, or ancestry,"[73] but not age. The ICRL states that "equal . . . employment opportunities . . . are hereby declared to be civil rights" and that "[i]t is the public policy of the state to provide all of its citizens equal opportunity for . . . employment."[74] Furthermore, the ICRL provides that

> [t]he practice of denying these rights [equal education, employment, access to public accommodations, and opportunity for acquisition of land] to properly qualified persons by reason of the race, religion, color, sex, disability, national origin, or ancestry of such person is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of public policy of this state and shall be considered as discriminatory practices.[75]

The ICRL is significantly more comprehensive in scope and remedies than the IADA. There are several major discrepancies in the way Indiana treats age discrimination under the IADA compared to other forms of discrimination under the ICRL, the most important of which are discussed below.

1. Declaration of the Right.—The first meaningful distinction between the IADA and the ICRL is that the ICRL declares equal opportunities for each of the listed classes—race, religion, color, sex, disability, national origin, and ancestry—to be a "civil right,"[76] whereas the IADA merely declares age discrimination to be "unfair."[77]

2. Investigating Complaints.—The ICRL sets up an independent Indiana Civil Rights Commission, which is authorized to "receive and investigate complaints alleging discriminatory practices."[78] The Indiana Civil Rights Commission is further empowered to hold hearings on complaints of discrimination and to fashion meaningful remedies in the event that it finds discrimination to have occurred in a given case.[79] The IADA, on the other hand, puts the Indiana Commissioner of Labor in charge of investigating complaints as an ancillary responsibility.[80] This discrepancy in treatment sheds light on the level of importance Indiana puts on eliminating age discrimination as compared to the other types of discrimination covered by the ICRL.

3. Remedies.—The remedies available under the ICRL are far superior to the remedies—or lack thereof—available under the IADA. Under the ICRL, the Indiana Civil Rights Commission is authorized to issue cease and desist orders

---

73. *Id.* § 22-9-1-3(*l*)(1)-(2).

74. *Id.* § 22-9-1-2(a).

75. *Id.* § 22-9-1-2(b). Thus, similar to federal law, but unlike any of its neighboring states, Indiana fails to make age a protected class under its primary anti-discrimination statute. However, unlike federal law, Indiana includes disability as a protected class.

76. *Id.* § 22-9-1-2(a).

77. *Compare* IND. CODE § 22-9-1-2, *with id.* § 22-9-2-2.

78. *Id.* § 22-9-1-6(e).

79. *See id.* § 22-9-1-6(k)(A)-(D).

80. *Id.* §§ 22-9-2-5 to -6.

and orders requiring violators to "restore [the] complainant's losses incurred as a result of the discriminatory treatment, as the commission may deem necessary to assure justice."[81] Restoration of the victim's losses includes the equitable remedy of reinstatement[82] and economic damages to compensate for lost wages, salary, or commissions.[83] In stark contrast, the IADA leaves enforcement entirely up to the Indiana Commissioner of Labor as an ancillary responsibility, and the most he can do is "state his findings of fact."[84]

4. Availability of a Private Cause of Action.—The *Montgomery* court determined that the IADA does not allow an age discrimination plaintiff to file a lawsuit against the alleged discriminator.[85] The ICRL, on the other hand, specifically provides for a private right of action.[86] Section 16 of the ICRL states that "[a] respondent or a complainant may elect to have the claims that are the basis for a finding of probable cause decided in a civil action . . . . However, both the respondent and complainant must agree in writing to have the claims decided in a court of law."[87] This option is not available, however, if the Indiana Civil Rights Commission has already begun a hearing on the alleged discrimination.[88] If the case is decided in court and the plaintiff proves discrimination, the court can grant the same remedies as the Indiana Civil Rights Commission.[89] Even though the ability to pursue a private right of action under the ICRL is limited by provisions requiring both parties to agree and eliminating the right if the commission has begun a hearing,[90] the availability of a private right of action under the ICRL is important. The private right of action is recognized as an effective means of redressing grievances.[91] In sum, the fact that the ICRL provides for a private right of action means that it provides more protection than the IADA, despite the fact that the ICRL imposes some limitations on a plaintiff's

---

81. *Id.* § 22-9-1-6(k)(A).

82. *See* Ind. Civil Rights Comm'n v. Culver Educ. Found., 510 N.E.2d 206, 211 (Ind. Ct. App. 1987) (approving the Commission's order granting reinstatement since "the remedy of reinstatement is not precluded by [section 6(k)(A) of the ICRL]"), *vacated by* 535 N.E.2d 112 (Ind. 1989); Ind. Civil Rights Comm'n v. Midwest Steel Div., 450 N.E.2d 130, 140 (Ind. Ct. App. 1983) (noting that "the remedial power of reinstatement . . . [was] not precluded.").

83. *See Midwest Steel Div.*, 450 N.E.2d at 140 (noting that economic damages for employment discrimination are permitted, but emotional damages are precluded).

84. IND CODE §§ 22-9-2-5 to -6.

85. Montgomery v. Bd. of Trs. of Purdue Univ., 849 N.E.2d 1120, 1130-31 (Ind. 2006).

86. *See* IND. CODE § 22-9-1-16(a).

87. *Id.*

88. *Id.* § 22-9-1-16(b).

89. *Id.* § 22-9-1-17(b) ("If the court finds that a discriminatory practice has occurred[,] the court may grant the relief allowed under . . . [Indiana Code section] 22-9-1-6(k).").

90. *See* Kathryn E. Olivier, Note, *The Effect of Indiana Code Section 22-9-1-16 on Employee Civil Rights*, 42 IND. L. REV. 441, 467 (2009) (arguing that Indiana should not require consent from both parties to institute a private civil action).

91. *See* 42 U.S.C. § 1983 (2006) (providing a private cause of action for constitutional violations).

ability to file a discrimination lawsuit.

II. Federal Treatment of Age Discrimination

In *Gross v. FBL Financial Services, Inc.*,[92] the United States Supreme Court recently altered the standard for proving disparate treatment claims under the ADEA. Many commentators believe this changed standard makes it more difficult for ADEA plaintiffs to succeed on their claims.[93] Because of the IADA's provision exempting employers "subject to" the ADEA, this recent federal development is particularly relevant to Indiana employees' discrimination claims. This section will provide a brief history of federal anti-discrimination law up to *Gross* and give a detailed analysis of the *Gross* decision and its implications for future ADEA claims.

A. Federal Anti-Discrimination Law Before Gross

Title VII of the Civil Rights Act of 1964 ("Title VII")[94] is the grandparent of employment discrimination statutes. Although the ultimate goal of Title VII is to eliminate discrimination in the workplace, Title VII was primarily proposed to combat racial discrimination in employment against blacks.[95] As enacted, however, Title VII prohibited discrimination on the basis of color, sex, national origin, or religion. Section 703(a)(2), the primary anti-discrimination rule of Title VII, states:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . .[96]

In the debates leading up to the passage of Title VII, Congress considered adding age as a protected category, but that idea was ultimately rejected.[97] Congress felt that it did not know enough about age discrimination and ordered the Secretary of Labor ("the Secretary") "to make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and

---

92. 129 S. Ct. 2343 (2009).

93. *See, e.g.*, Campolongo, *supra* note 9 (stating that the new standard announced in *Gross* is "a stricter and typically more difficult showing for the plaintiff"; thus, "the *Gross* decision "certainly raises the burden for ADEA plaintiffs").

94. 42 U.S.C. §§ 2000e-2000e-17 (2006 & Supp. 2009).

95. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 202 (1979) (commenting that "the goal[] of the Civil Rights Act . . . [was] the integration of blacks into the mainstream of American society . . . .").

96. 42 U.S.C. § 2000e-2(a)(1).

97. *See* Smith v. City of Jackson, 544 U.S. 228, 232 (2005) (noting that amendments offered to add age as a protected class under Title VII were twice defeated).

individuals affected."[98] The Secretary issued his report in June 1965 and found that although age discrimination was generally not prejudice-based, like race discrimination, there was a significant problem of discrimination against older workers which involved "their rejection because of assumptions about the effect of age on their ability to do the job *when there is in fact no basis for these assumptions*."[99] The Secretary urged Congress to enact "effective measures in this most deserving and much neglected cause."[100]

Congress followed the Secretary's advice and passed the ADEA in 1967.[101] In passing the ADEA, Congress sought to "promote employment of older persons based on their ability rather than age" and to "prohibit arbitrary age discrimination in employment."[102] As enacted, the ADEA used identical "because of" language to prohibit age discrimination as was used in Title VII to prohibit other forms of discrimination.[103] Borrowing from the language used in Title VII, the primary anti-discrimination rule of the ADEA states, "It shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . ."[104]

Other than making it illegal to discriminate against an individual "because of" a protected class, Congress provided little guidance to courts on how to analyze disparate treatment claims under both Title VII and the ADEA. The courts thus have evaluated disparate treatment claims under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*.[105] Proving discrimination under *McDonnell Douglas* and its progeny involves a three step burden-shifting

---

98. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265.

99. REPORT OF THE SEC'Y OF LABOR, 89TH CONG., THE OLDER AMERICAN WORKER: AGE DISCRIMINATION EMPLOYMENT 2 [hereinafter REPORT OF THE SEC'Y OF LABOR] (emphasis in original).

100. *Id.* at 1.

101. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-34).

102. 29 U.S.C. § 621(b).

103. *Compare* 29 U.S.C. § 623(a) (declaring it unlawful to discriminate "because of" age), *with* 42 U.S.C. § 2000e-2(a)(1) (declaring it unlawful to discriminate "because of" race, color, religion, sex, or national origin).

104. 29 U.S.C. § 623(a)(2).

105. 411 U.S. 792 (1973). Courts have traditionally applied the *McDonnell Douglas* framework to ADEA claims. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) (noting that the courts of appeals have employed *McDonnell Douglas* in ADEA disparate treatment claims and assuming that it applied there). In *Gross*, however, the Supreme Court cast doubt on *McDonnell Douglas*'s continuing applicability to ADEA claims, stating that "the Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas* . . . is appropriate in the ADEA context." Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 n.2 (2009).

process. First, a plaintiff must make a prima facie showing of discrimination.[106] Second, if the plaintiff successfully makes a prima facie showing, a presumption of discrimination arises, and the employer has the burden of articulating a legitimate non-discriminatory reason for its actions.[107] Third, once the employer articulates its legitimate reason, the plaintiff has an opportunity to rebut the employer's reason by showing that it is pretextual.[108] If the plaintiff proves pretext, then the jury is allowed to infer discrimination.[109] This process is known as the "pretext method"[110] of proving disparate treatment.

Another way to prove disparate treatment is to utilize the "mixed-motives method."[111] Initially endorsed in *Price Waterhouse v. Hopkins*,[112] the mixed-motives method allows a plaintiff to prevail under disparate treatment by showing that a protected trait was a "motivating factor" in the challenged employment action.[113] As in the pretext situation, a mixed-motives plaintiff is still required to

---

106. *McDonnell Douglas*, 411 U.S. at 802. To make a prima facie case, a plaintiff must show

> (i) that he belongs to a . . . [protected class];
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
> (iii) that, despite his qualifications, he was rejected; and
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id.

107. *Id.*; *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981) (explaining that the employer's burden at this stage is simply a "burden of production" to introduce through admissible evidence that the plaintiff "was rejected, or someone else was preferred, for a legitimate, non[-]discriminatory reason.").

108. *Burdine*, 450 U.S. at 256 (noting that the plaintiff "must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision.").

109. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (explaining that the plaintiff's prima facie case, along with his showing that the employer's proffered non-discriminatory reason was pretextual, permits, but does not compel, the jury to "infer the ultimate fact of intentional discrimination").

110. *See, e.g.*, Lindsey Watkins, Case Note, *Employment Discrimination—Age Discrimination—The Fifth Circuit Holds a Plaintiff May Utilize the Mixed-Motives Method of Analysis in Age Discrimination Cases, Absent Any Direct Evidence of Discrimination:* Rachid v. Jack in the Box, Inc., 58 SMU L. REV. 487, 487 (2005).

111. *See* Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835, 839 (Ind. 2009) (noting that "[t]here are presently two alternative methods of establishing liability in a federal Title VII case. A plaintiff may pursue a 'single motive' theory of discrimination. Or a plaintiff may pursue a 'mixed-motive' theory of discrimination." (internal citation omitted)).

112. 490 U.S. 228 (1989), *superseded by statute as stated in* Landgraf v U.S. Film Prods., 511 U.S. 244 (1994).

113. In explaining the "motivating factor" concept, the Court stated, "[W]e . . . know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both . . . [illegitimate] and legitimate factors at the time of making a decision, that decision was 'because of' . . . [the illegitimate factor]

make a prima facie showing, and the defendant is required to articulate a legitimate non-discriminatory reason.[114] But instead of showing that the defendant's proffered reason is pretextual, the plaintiff can show that "the defendant's reason, while true, is only *one* of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic."[115] Under *Price Waterhouse*, if the plaintiff makes this motivating factor showing, the employer was afforded an affirmative defense to demonstrate that it would have made the same decision regardless of the plaintiff's protected trait.[116] This differs from the pretext context, where the employer's burden to articulate a legitimate non-discriminatory reason is merely a burden of production; the employer in a mixed-motive case bears both the burdens of production and persuasion with respect to the affirmative defense.[117]

In 1991, Congress amended Title VII to codify the motivating factor standard.[118] In the process, it eliminated the affirmative defense with respect to liability, making the defense relevant only to the issue of damages.[119] Prior to *Gross*, courts had traditionally applied the full *Price Waterhouse* framework to ADEA age discrimination suits.[120] Congress did not amend the ADEA in 1991

---

and the other, legitimate considerations . . . ." *Id.* at 241.

114. *See* Carey v. FedEx Ground Package Sys., Inc., 321 F. Supp. 2d 902, 916 (S.D. Ohio 2004) (explaining how mixed-motives comes into play in the "third stage . . . once the defendant has produced a legitimate, non[-]discriminatory reason for its conduct").

115. *Filter Specialists*, 906 N.E.2d at 842 (emphasis in original).

116. *Price Waterhouse*, 490 U.S. at 258 (holding that once the plaintiff makes the motivating factor showing, "the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's . . . [protected trait] into account.").

117. *See, e.g.*, Weston-Smith v. Cooley Dickinson Hosp., Inc., 282 F.3d 60, 64 (1st Cir. 2002) (noting that under the mixed-motives method, once an employee makes the motivating factor showing, "the employer may then assert an affirmative defense, bearing the burdens of production and persuasion . . . ." (citations omitted)).

118. Civil Rights Act of 1991, Pub. L. No. 102-166, §107, 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-2(m) (2006)).

119. *See* 42 U.S.C. § 2000e-2(m) (stating that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"); *id.* § 2000e-5(g)(2)(B). Section 2000e-5(g)(2)(B) states that

> [o]n a claim in which an individual proves a violation under . . . [42 U.S.C. §] 2000e-2(m) . . . and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under . . . [42 U.S.C.§] 2000e-2(m) . . . and
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . .

120. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 11, Gross v.

as it did Title VII, which explains why the courts continued to grant the full affirmative defense in ADEA cases.[121] The issue in the circuits leading up to *Gross* was whether a plaintiff needed to present direct or merely circumstantial evidence of discrimination in order to utilize the mixed-motive framework.[122]

B. Gross v. FBL Financial Services, Inc.

Gross presented the Supreme Court with the opportunity to settle the relatively modest direct versus circumstantial evidence issue, but the Supreme Court did not actually decide this issue. Jack Gross had worked for FBL Financial Services for thirty-two years (from 1971 to 2003) when, at the age of fifty-four, he was transferred from the position of claims administration director to claims project coordinator.[123] FBL transferred Gross's job duties to a younger woman whom Gross had previously supervised.[124] Even though Gross's pay was not reduced, he considered this reassignment a demotion and filed a claim for disparate treatment under the ADEA in the United States District Court for the Southern District of Iowa.[125]

At the district court level, the court instructed the jury on the motivating factor standard, and the jury returned a verdict for Gross.[126] On appeal, the Eighth Circuit overruled this decision, finding that the trial court erroneously tendered the motivating factor instruction.[127] In the Eighth Circuit's view, a motivating factor instruction is proper only where the plaintiff presents direct evidence "'sufficient to support a finding by a reasonable fact finder that an

---

FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009) (No. 08-441), 2009 WL 253859 at *11 (noting that "[t]he lower courts . . . unanimously have agreed that the mixed-motive approach endorsed in *Price Waterhouse* applied to claims under the ADEA.").

121. *See* Baqir v. Principi, 434 F.3d 733, 745 n.13 (4th Cir. 2006) (noting that "[b]ecause Congress did not similarly amend the ADEA [in 1991], however, ADEA mixed-motive cases remain subject to the *Price Waterhouse* analysis." (citation omitted)).

122. In *Desert Place, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003), a Title VII case, the Supreme Court held that direct evidence was not required in order to get a mixed-motive instruction. The circuits were split, however, as to whether *Desert Palace* applied to ADEA mixed-motive suits. *See* King v. United States, 553 F.3d 1156, 1160 (8th Cir. 2009) (applying mixed-motive to ADEA suits in cases where the plaintiff had direct evidence of discrimination); Rachid v. Jack in the Box, Inc., 376 F.3d 305, 311 (5th Cir. 2004) (stating that "direct evidence of discrimination is not necessary to receive a mixed-motive analysis for an ADEA claim" (citation omitted)).

123. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2346 (2009).

124. *Id.* at 2346-47.

125. Gross v. FBL Fin. Servs. Grp., No. 4:04-CV-60209-TJS, 2006 U.S. Dist. LEXIS 98081, at *1 (S.D. Iowa June 23, 2006), *rev'd sub nom.* Gross v. FBL Fin. Servs., Inc., 526 F.3d 356 (8th Cir. 2008), *vacated*, 129 S. Ct. 2343 (2009).

126. *Id.* at *2.

127. Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 362 (8th Cir. 2008), *vacated*, 129 S. Ct. 2343 (2009).

illegitimate criterion actually motivated' the adverse employment action."[128] Therefore, according to the Eighth Circuit, the jury should only have been instructed as to whether age was the determining factor in FBL's decision to demote Gross.[129]

Gross appealed, and the Supreme Court granted certiorari.[130] On appeal, the parties framed the issue as "whether a plaintiff must 'present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII case.'"[131] The Supreme Court, however, did not decide this issue. Instead, the Court reframed the issue as whether the mixed-motive framework is even applicable to disparate treatment cases under the ADEA.[132] Ultimately, the Supreme Court, in a five-to-four decision, held that it is not.[133]

In coming to this conclusion, the Court employed both a textual analysis of the ADEA and an analysis of the legislative history of Title VII as it relates to the ADEA. With regard to the textual analysis, the Court noted that the relevant language in the ADEA—"because of"—means "by reason of: on account of."[134] Thus, according to the Court, "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act."[135] According to the Court, it follows that "[t]o establish a disparate-treatment claim under the plain language of the ADEA,

---

128. *Id.* at 359 (quoting Thomas v. First Nat'l Bank of Wynne, 111 F.3d 64, 66 (8th Cir. 1997)). What constitutes "direct evidence" of discriminatory intent is a somewhat murky concept in employment discrimination law because an employer will hardly ever come right out and say, "I am firing you because you are [insert protected trait]." *See* Powe v. Ga. Pac. Co., 488 F. Supp. 467, 474 (W.D. Mich. 1980) (noting that intent must usually be proven indirectly through circumstantial evidence since "most discriminators before the courts today are too sophisticated to admit to discriminatory intent either on the witness stand or in their inner-company memoranda."). That said, the Eighth Circuit defined direct evidence as evidence that "show[s] a specific link between the alleged discriminatory animus and the challenged decision." *Gross*, 526 F.3d at 359 (quoting *Thomas*, 111 F.3d at 66).

129. *Gross*, 526 F.3d at 362.

130. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 680 (2008).

131. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2348 (2009) (quoting petition for writ of certiorari).

132. *Id.* In justifying this decision, which is highly unusual for the Court, the Court stated, "Although the parties did not specifically frame the question to include this threshold inquiry, '[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein.'" *Id.* at 2348 n.1 (quoting SUP. CT. R. 14.1). For an interesting take on how FBL convinced the Court to shift focus, see Michael Zimmer, *The Employer's Strategy in* Gross v. FBL Financials, CONCURRING OPINIONS (Nov. 4, 2009, 10:43 AM), http://www.concurringopinions.com/archives/2009/11/the-employers-strategy-in-gross-v-fbl-financials.html.

133. *Gross*, 129 S. Ct. at 2352.

134. *Id.* at 2350 (citing 1 WEBSTER'S 3D NEW INT'L DICTIONARY 194 (1966)).

135. *Id.* (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (explaining that for "because of" to be satisfied, the employee's protected trait must have "had a determinative influence on the outcome")).

therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."[136]

In so holding, the Court disregarded its prior decision in *Price Waterhouse*, which interpreted the exact same "because of" language in an almost identical setting.[137] The *Gross* Court found it instructive that the *Price Waterhouse* Court interpreted the "because of" language under Title VII, whereas the language at issue here was under the ADEA.[138] If this analysis were to leave one unsatisfied and wondering why the exact same language in two nearly identical statutes should be interpreted so differently, the Court addressed that issue when it stated:

> [W]e reject petitioner's contention that our interpretation is controlled by *Price-Waterhouse*, which initially established that the burden of persuasion shifted in alleged mixed-motive Title VII claims. In any event, it is far from clear that the Court would have the same approach were it to consider the question today in the first instance.[139]

Thus, not only was *Price Waterhouse* inapplicable because it was a Title VII case, its interpretation of the "because of" language was also probably wrong, according to the *Gross* Court.

The majority in *Gross* was also persuaded by the fact that when Congress codified *Price Waterhouse*'s mixed-motive motivating factor standard in the 1991 Civil Rights Act, it failed to similarly amend the ADEA. According to the majority, this failure to similarly amend was affirmative evidence that Congress did not intend for the motivating factor to extend to the ADEA because "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[140] This principle is especially true, according to the majority, when two statutes are amended simultaneously (as the ADEA and Title VII were in 1991) because "'negative implications raised by disparate provisions are strongest' where the provisions were 'considered simultaneously when the language raising the implications was inserted.'"[141] Thus, the fact that Congress neglected to amend the ADEA to reflect the motivating factor standard in 1991 was the second major reason the majority found to deny mixed-motive claims under the ADEA. The Court stated its holding as follows:

> We hold that a plaintiff bringing a disparate treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The

---

136. *Id.* (citing Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 652 (2008) (noting that the words "by reason of" require at least a showing of "but-for" causation)).

137. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 231-37 (1989), *superseded by statute as stated in* Landgraf v U.S. Film Prods., 511 U.S. 244 (1994).

138. *See Gross*, 129 S. Ct. at 2349 (noting that "this Court's interpretation of the ADEA is not governed by Title VII decisions such as *Price Waterhouse*").

139. *Id.* at 2351-52 (citations omitted).

140. *Id.* at 2349.

141. *Id.* at 2345 (quoting Lindh v. Murphy, 521 U.S. 320, 330 (1997)).

> burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.[142]

Simply put, the *Gross* Court determined that the *Price Waterhouse* mixed-motive framework no longer applies to ADEA disparate treatment claims.

C. *Implications of* Gross

The *Gross* decision does not bode well for age discrimination plaintiffs who file their claims under the ADEA—which almost all Indiana employees are forced to do so by the IADA's provision exempting employers "subject to" the ADEA from its coverage—because the "but-for" standard requires a higher showing of intent than the motivating factor standard. According to one commentator, after *Gross*, "[t]he employee will have to prove that age discrimination, rather than cost savings, or efficiency or something [else], was not only a cause, not only the significant cause, not only the motivating cause, but the exclusive cause of an adverse employment action."[143] Ultimately, *Gross* will make it "more difficult for individuals to bring successful workplace age discrimination cases against their employers."[144] Indiana employees are especially affected by the *Gross* decision because they have no alternative state statute under which they can pursue their claims. Indiana is unique in this regard, as the following section demonstrates.

III. How Indiana's Neighboring States Treat Age Discrimination

Every state in the United States has a statute that prohibits age discrimination.[145] If Indiana recognizes the deficiencies in its age discrimination regime and decides to take steps to expand protection, it can learn from how other states deal with the problem. This section briefly highlights the pertinent anti-age discrimination statutes and cases that interpret those statutes (Indiana's Midwest neighbors—Kentucky, Ohio, Michigan, and Illinois) to briefly show how Indiana's age discrimination protections are inferior to other states' measures.

A. *Kentucky*

Kentucky prohibits age discrimination along with the other major types of

---

142. *Id.* at 2352.

143. Kimberly Atkins, *Surprise Ruling Makes Age Bias Cases Tough for Plaintiffs*, Minn. Law., June 29, 2009; *see also* Campolongo, *supra* note 9.

144. Steven D. Irwin, *ADEA Decision Ill-Timed in Tougher Economy*, Pa. Law Wkly., Aug. 24, 2009, at A13.

145. For a comprehensive listing of all fifty states' age discrimination statutes, see Hillina Taddesse Tamrat, Note, *Sovereign Immunity Under the Eleventh Amendment:* Kimel *and* Garrett, *What Next for State Employees?*, 11 Elder L.J. 171, 183 n.126 (2003).

discrimination in the Kentucky Civil Rights Act (KCRA).[146] The KCRA was modeled after Title VII and provides:

> It is an unlawful employment practice for an employer . . . [t]o fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, *age forty (40) and over*, because the person is a qualified individual with a disability, or because the person is a smoker or nonsmoker. . . .[147]

If an individual in Kentucky believes he has been the victim of age discrimination, the KCRA affords the individual administrative remedies or a private right of action, whichever the complainant prefers.[148] In the event that age discrimination is found to have occurred, the KCRA allows the plaintiff to recover "actual damages sustained, together with the costs of the law suit," as well as attorney fees.[149] The Kentucky courts have interpreted "actual damages" to mean full compensatory damages, including damages for mental and emotional distress.[150] Punitive damages, however, are not available.[151]

B. Ohio

Ohio prohibits age discrimination under two separate statutory provisions within its civil rights act. First, age discrimination is included with other forms of discrimination in section 4112.02(A) of Ohio's code, which provides:

> It shall be an unlawful discriminatory practice . . . [f]or any employer, because of the race, color, religion, sex, military status, national origin, disability, *age*, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.[152]

Age discrimination is also singled out for special treatment in section 4112.14(A) of Ohio's code, which provides:

---

146. KY. REV. STAT. ANN. §§ 344.010 to -.500 (West, Westlaw through 2010 legislation).

147. *Id.* § 344.040(1)(a) (emphasis added).

148. *See id.* § 344.450; *see also* Canamore v. Tube Turns Div. of Chemetron Corp., 676 S.W.2d 800, 804 (Ky. Ct. App. 1984) (noting that section 344.450 "is intended to give those individuals who do not wish to proceed before the . . . [Kentucky Human Rights Commission] an opportunity in circuit court to have the fullest range of remedies allowable").

149. KY. REV. STAT. ANN § 344.450.

150. *See* Childers Oil Co. v. Adkins, 256 S.W.3d 19, 28 (Ky. 2008) (utilizing the *McDonnell Douglas* framework regarding age discrimination).

151. *Id.* at 26-27; Ky. Dep't of Corr. v. McCullough, 123 S.W.3d 130, 140 (Ky. 2003).

152. OHIO REV. CODE ANN. § 4112.02(A) (West, Westlaw through 2010 legislation) (emphasis added).

> No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically capable to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee.[153]

Both sections provide an age complainant with a private right of action to pursue his claim in court.[154] A complainant may not, however, institute a civil action under section 4112.14 if he has the opportunity to arbitrate the claim or if the dispute has already been arbitrated.[155] In addition, if an age complainant so chooses, he may elect to pursue administrative remedies with the Ohio Civil Rights Commission.[156]

Successful discrimination plaintiffs in Ohio, including age discrimination plaintiffs, are "entitled to 'make whole' relief."[157] Therefore, in addition to back pay, a successful age discrimination plaintiff in Ohio is also entitled to reinstatement or front pay in the event that reinstatement is inappropriate.[158] Attorney fees are not explicitly provided for by statute as required by the "American rule" on attorney fees,[159] which Ohio follows,[160] but Ohio makes an exception to the rule in civil rights cases where punitive damages are proper.[161] Punitive damages are available upon a showing of actual malice.[162]

C. Michigan

Michigan bans age discrimination in its primary anti-discrimination statute, the Elliott-Larsen Civil Rights Act.[163] Section 202(1) of the act states that

> [a]n employer shall not do any of the following: (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege

---

153. *Id.* § 4112.14(A).

154. *Id.* § 4112.02(N); *id.* § 4112.14(B).

155. *Id.* § 4112.14(C).

156. *Id.* § 4112.05(B)(1).

157. Potocnik v. Sifco Indus., Inc., 660 N.E.2d 510, 518 (Ohio Ct. App. 1995).

158. *See id.*

159. The so-called "American rule" on attorney fees states that "the prevailing party cannot recover attorney fees as part of the cost of litigation in the absence of statutory authorization." Sutherland v. Nationwide Gen. Ins. Co., 657 N.E.2d 281, 282 (Ohio Ct. App. 1995) (citing Sorin v. Bd. of Educ. of Warrensville Heights Sch. Dist., 347 N.E.2d 527, 528-29 (Ohio 1976)).

160. *See id.* at 283 (noting that "Ohio courts have held fast to the 'American rule' proscribing an award of attorney fees in the absence of statutory authorization").

161. *Id.*

162. Srail v. RJF Int'l Corp., 711 N.E.2d 264, 274 (Ohio Ct. App. 1998) (age discrimination case).

163. MICH. COMP. LAWS ANN. §§ 37.2102 to -.2804 (West, Westlaw through 2010 legislation).

of employment, because of religion, race, color, national origin, *age*, sex, height, weight, or marital status.[164]

The Michigan act provides for a private cause of action.[165] Successful plaintiffs can recover damages for any "injury or loss caused by each violation of . . . [the Elliott-Larsen Civil Rights Act], including reasonable attorney's fees."[166] Those damages may include "damages for humiliation, embarrassment, outrage and disappointment as well as loss of wages, loss of pension rights and employee benefits, loss of seniority and loss of employment."[167] In addition, costs, including attorney and witness fees, are recoverable.[168] Punitive damages, however, are not recoverable.[169]

D. Illinois

Age discrimination in Illinois is addressed alongside other forms of discrimination in the Illinois Human Rights Act (IHRA).[170] The IHRA prohibits "unlawful discrimination,"[171] which includes discrimination based on "race, color, religion, sex, national origin, ancestry, *age*, order of protection status, marital status, physical or mental disability, military status, sexual orientation, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations."[172]

An individual alleging age discrimination in Illinois can choose to file a charge with the Illinois Human Rights Commission or institute a private civil action.[173] If a complainant files a charge with the commission and the commission finds that discrimination has occurred, the commission is authorized to enter a cease and desist order, award actual damages as well as attorney fees

---

164. *Id.* § 37.2202(1)(a) (emphasis added).

165. Section 801 states, "A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both." *Id.* § 37.2801(1).

166. *Id.* § 37.2801(3).

167. Schafke v. Chrysler Corp., 383 N.W.2d 141, 143 (Mich. Ct. App. 1985) (age discrimination case).

168. MICH. COMP. LAWS ANN. § 37.2802.

169. *See* Gilbert v. Daimler Chrysler Corp., 685 N.W.2d 391, 400 (Mich. 2004) (explaining that in Michigan, punitive damages are only recoverable when expressly authorized by statute, and "the Civil Rights Act does not authorize punitive damages").

170. 775 ILL. COMP. STAT. ANN. 5/1-101 to 5/10-104 (West, Westlaw through 2010 legislation).

171. *Id.* 5/2-102(A).

172. *Id.* 5/1-102(A) (emphasis added).

173. *Id.* 5/10-102(A)(1) ("An aggrieved party may commence a civil action in an appropriate [c]ircuit [c]ourt not later than 2 years after the occurrence or the termination of an alleged civil rights violation. . . ."); *id.* 5/7B-102(A)(1) ("Within one year after the date that a civil rights violation allegedly has been committed or terminated, a charge in writing under oath or affirmation may be filed with the [d]epartment by an aggrieved party. . . .").

and costs, and assess a civil penalty.[174] Actual damages include damages for emotional harm and mental suffering.[175] If, on the other hand, a complainant files a civil action and a court finds a violation, the court is authorized to award actual and punitive damages, injunctive relief, and attorney fees and costs.[176]

IV. Age Discrimination Should Be Addressed

A. The Problem

As this Note has thus far demonstrated, Indiana treats age discrimination far less seriously than the types of discrimination covered by the ICRL, and it lags far behind other states in terms of the protection it affords older workers. One could argue, however, that age discrimination is materially different from other forms of discrimination in that discrimination based on race, sex, religion, and national origin is prejudice-based, whereas age discrimination is generally based on unfounded stereotypes.[177] It follows, then, that age discrimination should be kept separate from other types of discrimination. Professor Rhonda Reaves, echoing this sentiment, argues against what she calls "cross-contamination," which is "[t]he failure to recognize relevant differences" between age and race discrimination, and which "can have the unintended effect of undermining fundamental principles of anti-discrimination law."[178] However, even Reaves acknowledges that age discrimination laws are necessary;[179] she just urges the courts to acknowledge the fundamental differences between age and race discrimination and not to allow flexible principles in the age context to seep into the race context.[180]

The argument against mixing stereotype-based discrimination with prejudice-based discrimination is reasonable. However, this does not mean that qualified older workers are any less deserving of protection.[181] As one writer points out,

---

174. *Id.* 5/8B-104(A)-(D).

175. *See* Szkoda v. Ill. Human Rights Comm'n, 706 N.E.2d 962, 972 (Ill. App. Ct. 1998) (citing Arlington Park Race Track Corp. v. Human Rights Comm'n, 557 N.E.2d 517, 524 (Ill. Ct. App. 1990) ("The 'actual damages' provision of section 8B-104(B) of the Act also includes damages for emotional harm and mental suffering.")).

176. 775 ILL. COMP. STAT. ANN. 5/10-102(C)(1)-(2).

177. *See* REPORT OF THE SEC'Y OF LABOR, *supra* note 99, at 2 (finding that age discrimination occurs "because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*," not "prejudice based on dislike or intolerance of the older worker").

178. Rhonda M. Reaves, *One of These Things Is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839, 844 (2004).

179. *Id.* at 902.

180. *Id.*

181. A few words of caution are in order here. I am merely advocating the modest proposal that qualified older workers should not have adverse employment actions taken against them "because of" their age. As with all discrimination laws, this does not mean that an employer would

"evidence of stereotypical thinking supports an ultimate inference of intent to discriminate precisely because it is an unconscious expression of bias."[182] Indeed, Congress enacted the ADEA on the assumption that age discrimination was the result of stereotypes (not prejudice), yet Title VII and the ADEA share a common purpose: "the elimination of discrimination in the workplace."[183] In any case, the effects of age discrimination are more important than the cause. And the consequences of age discrimination are real, as evidenced by the EEOC's statistics.[184] Moreover, in 2009, the number of older workers who elected to collect Social Security benefits early increased by nineteen percent.[185] As Richard Johnson, senior fellow at the Urban Institute, commented, "[t]here are just not enough jobs for older people. They have no choice but to go on Social Security."[186] The economy does not fully explain this, as there are studies that show that employers are less likely to hire older workers than younger workers.[187] The problem of age discrimination is only exacerbated by the fact that age fifty-five and over is the fastest growing age segment in the American workforce.[188]

Professor Joanna Lahey summed up the problem well when she commented that "employers clearly do *treat older workers differently*[,] and the impact can be really harmful, especially for those with low savings who most need work."[189] Indeed, "[t]he essence of discrimination is that otherwise similarly situated

---

be forced to hire, promote, or retain older workers who are unqualified. It just means that an employer cannot discriminate on the basis of a worker's age. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (requiring a discrimination plaintiff to show he was qualified as an element of the prima facie case); Sommer v. City of Elkhart, No. 3:08-CV-522, 2009 WL 5200525, at *4 (N.D. Ind. Dec. 23, 2009) (noting that "[i]f it is true that . . . [the plaintiff] was unqualified and that she failed to even apply for the positions she claims she was denied, then her claim fails.").

182. Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1279 (2008).

183. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)).

184. EEOC, CHARGE STATISTICS, *supra* note 1; *see also supra* notes 1-3.

185. Richard Wolf, *Social Security Collectors Up 19%*, U.S.A. TODAY, Oct. 1, 2009, at A1, *available at* http://www.usatoday.com/news/nation/2009-10-01-social-security_N.htm.

186. *Id.*

187. *See, e.g.*, JOANNA N. LAHEY, CTR. FOR RETIREMENT RESEARCH AT BOS. COLL., DO OLDER WORKERS FACE DISCRIMINATION? 3 (July 2005), *available at* http://crr.bc.edu/images/stories/Briefs/ib_33.pdf. Lahey conducted a study in which she sent out four thousand resumes to employers in Boston, Massachusetts and St. Petersburg, Florida. *Id.* The age of the applicants on the resumes, indicated by their date of high school graduation, ranged from thirty-five to sixty-two. *Id.* Lahey found that, all else equal, a worker over the age of fifty was forty percent less likely to be called back. *See id.*

188. *See* U.S. DEP'T OF LABOR, EMPLOYMENT PROJECTIONS: CIVILIAN LABOR FORCE BY AGE, SEX, RACE, AND ETHNICITY, http://www.bls.gov/emp/emplab06.htm (last modified Dec. 8, 2010).

189. LAHEY, *supra* note 187, at 4 (emphasis added).

individuals are treated differently because of their race, sex, religion, or age."[190] In the end, whether age discrimination is prejudice-based or stereotype-based should be largely irrelevant to the issue of whether it should be tolerated. With such anemic age discrimination laws, especially with regard to state employees, Indiana effectively tolerates age discrimination. Indiana has no good reason to have such weak age discrimination laws.

B. The Solutions

Indiana has two fundamental deficiencies within its age discrimination regime. First, state employees are practically left in the cold as a result of the IADA provision that exempts employers "subject to" the ADEA because of *Kimel*'s holding that sovereign immunity bars ADEA actions by state employees against their employers in federal court. Second, the IADA does not provide the option for a private cause of action or meaningful remedies even for the employees who are covered by it, and age is not a protected class under the ICRL. Indiana should adopt legislation to rectify these shortcomings. If the Indiana General Assembly fails to do so, the courts should revisit the issue of whether termination based on age could form the basis of a common law wrongful discharge claim. This section explores both options.

1. Legislative Solutions.—The most ideal option for Indiana would be to adopt legislation to rectify the IADA's shortcomings. The easiest and most effective action would be to simply add age as a protected class under the ICRL, as Kentucky, Ohio, Michigan, and Illinois do in their respective civil rights statutes. This addition would provide relief for employees unable to proceed under the federal ADEA—either because of sovereign immunity or because their employers utilize fewer than twenty employees—because under the ICRL, "'[e]mployer' means the state or any political or civil subdivision thereof and any person employing six (6) or more persons within the state . . . ."[191] This approach would also make available the same remedies to age discrimination victims as are currently available to race, color, religion, sex, disability, national origin, and ancestry plaintiffs under the ICRL. Such remedies would include reinstatement and recovery of lost wages, salaries, and commissions.[192] However, this approach would not allow prevailing plaintiffs to recover attorney fees (as the ICRL currently does not have an attorney fee provision), non-economic damages, or punitive damages.[193] Despite the aforementioned shortcomings of the ICRL,[194] adding age to the list of categories covered by the ICRL would best protect age discrimination victims because it would put age discrimination on par with race,

---

190. Cooper v. Oak Park Sch. Dist., 624 F. Supp. 515, 516 (E.D. Mich. 1986) (citing C. Thorrez Indus., Inc. v. Mich. Dep't of Civil Rights, 278 N.W.2d 725, 727 (Mich. Ct. App. 1979)).

191. IND. CODE § 22-9-1-3(h) (2010).

192. *Id.* § 22-9-1-6(K)(A); *see also* Ind. Civil Rights Comm'n v. Midwest Steel Div., 450 N.E.2d 130, 140-41 (Ind. Ct. App. 1983).

193. *See supra* Part I.A-D.

194. *See generally* Olivier, *supra* note 90.

color, sex, national origin, disability, national origin, and ancestry discrimination. This action would thereby eliminate the anomaly that is age discrimination under current Indiana law.

Indeed, in 2009, a bipartisan bill that would have made age a protected category under the ICRL was introduced and considered in the Indiana General Assembly.[195] The bill's authors noted the increasing problem of age discrimination, and they argued that it was unfair to have such a discrepancy in the way age discrimination is treated under the IADA compared to other forms under the ICRL.[196] This legislation passed the Indiana House of Representatives by a vote of fifty-eight to thirty-seven,[197] but senate amendments severely weakened it, stripping the provision adding age as a protected category under the ICRL.[198] In the end, the bill only increased the maximum age limit for age discrimination claims from seventy to seventy-five and added a provision allowing the Indiana Commissioner of Labor to publicize the results of age discrimination complaints.[199] Thus, it appears that the most effective method for strengthening Indiana's protections against age discrimination is probably unrealistic in Indiana's current political climate.[200]

There are, however, other legislative measures that might be able to pass the Indiana General Assembly. For instance, the legislature could amend the IADA to rectify the statute's current shortcomings. In order to do this, the remedial authority of the Indiana Commissioner of Labor must be enhanced. As it stands

---

195. H.B. 1014, 116th Gen. Assemb., Reg. Sess. (Ind. 2009). This bill was authored by Representatives Vernon Smith (D-Gary), David Niezgodski (D-South Bend), and Ed Soliday (R-Valparaiso).

196. *See* Press Release, Indiana House Democrats, Smith Fighting to Protect Hoosiers Against Age Discrimination (Feb. 3, 2009) (on file with author).

197. Ind. H. Roll Call, H.B. 1014, 116th Gen. Assemb., Reg. Sess. (Ind. 2009).

198. Opponents of the bill argued that it would cost employers too much money to defend age discrimination complaints and that some workers might use the new law as "a weapon to extort money from the people not equipped to handle these claims." Richard Gootee, *Bill Aims to Bulk Up Age-Bias Laws*, INDY.COM (Apr. 2, 2009), http://www.indy.com/posts/bill-aims-to-bulk-up-age-bias-laws. Ironically, opponents of the bill also argued that it was unnecessary because of the "options already in place . . . including federal anti-discrimination laws." *Id.*

199. H.B. 1014, 116th Gen. Assemb., Reg. Sess. (Ind. 2009) (as passed by Indiana House of Representatives, Apr. 29, 2009).

200. The Indiana General Assembly did pass one bill targeted at age discrimination in the 2010 session, however. House Bill 1005, authored by Representative Vernon Smith, removes a provision from Indiana law that eliminated a teacher's indefinite contract once the teacher turned seventy-one years old. H.B. 1005, 116th Gen. Assemb., 2d Reg. Sess. (Ind. 2010) (as passed by Indiana House of Representatives, Jan. 26, 2010). This provision discriminated on the basis of age because it forced older teachers to work under one-year contracts for no other reason besides their age. *See* Press Release, Indiana House Democrats, House Passes Smith Bill to Eliminate Teacher Age Discrimination (Jan. 26, 2010), *available at* http://www.in.gov/legislative/house_democrats/smith_news_20100126.pdf. The bill was signed into state law in 2010. IND. CODE § 20-28-6-8 (2010).

now, the IADA "offers no remedy to an individual."[201] This is unacceptable. At the very least, the Indiana Commissioner of Labor should be able to order reinstatement and damages for back pay. Alternatively, keeping in mind that the commissioner has responsibilities beyond mediating age discrimination disputes, the IADA could provide for a private right of action in state court with remedies limited to what is available under the ICRL. However, to do this, the IADA would have to provide for attorney fees—unlike the ICRL, which currently does not. Without a provision for attorney fees, alleged victims of age discrimination will be discouraged, if not precluded, from pursuing their claims in court. Indeed, Indiana's neighboring states—Kentucky, Ohio, Michigan, and Illinois—all provide for attorney fees in their respective civil rights statutes.[202]

Finally, to blunt the impact of *Gross*, any age discrimination legislation that Indiana adopts should reflect the "motivating factor" standard of causation. In fact, Indiana courts currently recognize the mixed-motive framework in race, religion, color, sex, disability, national origin, and ancestry suits under the ICRL.[203] Reflecting the "motivating factor" standard could easily be done by adopting language parallel to Title VII's statutory motivating factor standard, which states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[204] Legislation is pending in the United States Congress to codify the motivating factor standard in the ADEA,[205] which, if passed, would moot the issue with respect to Indiana plaintiffs who can proceed under the ADEA. However, the "motivating factor" standard should still be included in any new legislation to afford equal treatment to those who are relegated to the Indiana statutes.

2. Judicial Solutions.—In *Montgomery*, the plaintiff argued that the IADA creates a private cause of action for termination in violation of public policy under *Frampton*.[206] The Indiana Supreme Court rejected this argument for various reasons,[207] chief among them that "[g]eneral expressions of public policy

---

201. Hague v. Thompson Distrib. Co., No. 1:02-CV-01744-RLY-TA, 2005 WL 995689, at *7 (S.D. Ind. Feb. 9, 2005).

202. 775 ILL. COMP. STAT. ANN. 5/8B-104(D) (West, Westlaw through 2010 legislation); KY. REV. STAT. ANN. § 344.450 (West, Westlaw through 2010 legislation); MICH. COMP. LAWS ANN. § 37.2802 (West, Westlaw through 2010 legislation); Sutherland v. Nationwide Gen. Ins. Co., 657 N.E.2d 281, 283 (Ohio Ct. App. 1995).

203. *See* Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835, 839 (Ind. 2009) (noting that "a plaintiff may pursue a 'mixed-motive' theory of discrimination" and upholding the civil rights commission's finding that the plaintiff's race was the "motivating factor" behind the termination.).

204. 42 U.S.C. § 2000e-2(m) (2006).

205. *See* Protecting Older Workers Against Age Discrimination Act, H.R. 3721, 111th Cong. (2009). At the time of publication, this legislation remains in the phase of subcommittee hearings.

206. Montgomery v. Bd. of Trs. of Purdue Univ., 849 N.E.2d 1120, 1127 (Ind. 2006).

207. *See supra* Part I.B.

do not support new exceptions to the employment-at-will doctrine."[208] On its face, this opinion might appear to foreclose any possibility that Indiana courts will recognize a wrongful discharge claim for age discrimination. However, in future cases, plaintiffs could argue that the IADA creates a right not to be fired because of age. Indeed, Indiana courts recognize a cause of action for wrongful discharge for employees who are terminated solely for exercising a statutorily conferred right.[209] The *Montgomery* court did not have the opportunity to expressly reject this argument because Montgomery did not raise it in this way, instead arguing that his discharge violated "public policy."[210]

Other persuasive sources of law support the argument that the IADA creates a right to be free from age discrimination in employment and that therefore, there must be remedies to protect that right. In *Sullivan v. Little Hunting Park, Inc.*,[211] the United States Supreme Court noted that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies."[212] Another United States Supreme Court case, *Texas & Pacific Railway Co. v. Rigsby*,[213] elaborates on this concept: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the . . . [classes] for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied."[214] In addition, the Restatement (Second) of Torts also supports creating a wrongful discharge cause of action for age discrimination:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.[215]

Thus, Indiana's own precedent, along with persuasive sources from the United States Supreme Court and the Restatement (Second) of Torts, supports the argument that Indiana should recognize a cause of action for wrongful discharge for termination based on age.

In addition to all of the above sources, the state of Ohio's reasoning is particularly persuasive. In *Leininger v. Pioneer National Latex*,[216] a sixty-year-

---

208. *Montgomery*, 849 N.E.2d at 1128.

209. Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973).

210. *Montgomery*, 849 N.E.2d at 1127.

211. 396 U.S. 229 (1969).

212. *Id.* at 239.

213. 241 U.S. 33 (1916).

214. *Id.* at 39; *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1987) (noting that the Voting Rights Act "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition.").

215. RESTATEMENT (SECOND) OF TORTS § 874A (1979).

216. 875 N.E.2d 36 (Ohio 2007).

old woman was fired from her human resources position after nineteen years with her employer and was then replaced by a twenty-one-year-old.[217] Consistent with Ohio precedent,[218] the plaintiff filed a common law wrongful discharge claim against the employer for age discrimination.[219] Despite earlier precedent in Ohio supporting an age discrimination cause of action for wrongful discharge, the Ohio Supreme Court held that a wrongful discharge cause of action for age discrimination no longer existed "because the remedies in . . . [the Ohio Civil Rights Act] provide complete relief for a statutory claim for age discrimination."[220] In so holding, the court reasoned that "[n]ow, remedies are available to plaintiffs such as Leininger, pursuant to . . . [the Ohio Civil Rights Act], that were not available to . . . [plaintiffs before Leininger]."[221] In other words, the reason there was no wrongful discharge cause of action was because the Ohio Civil Rights Act had been revised to provide relief for victims of age discrimination. The wrongful discharge cause of action was no longer necessary because doing away with it would not jeopardize public policy[222]—age discrimination was now adequately addressed by statute. In Indiana, on the other hand, age discrimination is currently not adequately protected by statute.[223] Therefore, Indiana courts should recognize a wrongful discharge age discrimination cause of action to protect employees' right to be free from age discrimination and Indiana's public policy against age discrimination.

CONCLUSION

Withholding employment opportunities from someone because of his age, rather than his qualifications, is fundamentally wrong. Even conceding that age discrimination originates from unfounded stereotypes (rather than from prejudice, like some other forms of discrimination), age discrimination is still unacceptable and has adverse consequences to the victim and the overall economy. Although many Indiana workers are protected from age discrimination by the federal ADEA (albeit less so after *Gross*), many are not so protected as a result of sovereign immunity and the amount of employees their employers have. For those Indiana employees who are unable to proceed in federal court, they literally have no recourse under Indiana law. As Justice Rucker so fittingly put it, these Indiana employees find themselves in a "Catch-22."[224] Indiana should follow the

---

217. *Id.* at 38.

218. *See* Gessner v. City of Union, 823 N.E.2d 1 (Ohio 2004); Livingston v. Hillside Rehab. Hosp., 680 N.E.2d 1220 (Ohio 1997), *superseded by statute as stated in Leininger*, 875 N.E.2d at 44.

219. *Leininger*, 875 N.E.2d at 38.

220. *Id.* at 44.

221. *Id.* at 40.

222. *See id.* at 39.

223. *See supra* Parts I.A, I.D.

224. Montgomery v. Bd. of Trs. of Purdue Univ., 849 N.E.2d 1120, 1131 (Ind. 2006) (Rucker, J., dissenting). According to Justice Rucker, "[a] Catch-22 is generally understood as a no-win

example of its neighboring states and add age as a protected class under the ICRL. Alternatively, since that outcome appears to be unlikely as a political matter, Indiana should at least enhance the investigative and remedial authority of the Indiana Commissioner of Labor or provide an alternative route for age discrimination complainants to have their day in court. If the Indiana General Assembly does not take action, Indiana courts should protect both employees' right to be free from arbitrary age discrimination and Indiana's public policy against discrimination. Furthermore, they should allow age discrimination to form the basis of a common law wrongful discharge action.

---

situation or paradox." *Id.* at 1131 n.1.