Born in the Bandwidth: "Digital Native" As Pretext for Age Discrimination in Hiring

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Introduction

"Young people are just smarter," Facebook Chief Executive Officer Mark Zuckerberg told an audience at Stanford University.[1] "'Why are most chess masters under 30?' he asked. 'I don't know . . . Young people just have simpler lives. We may not own a car. We may not have family.'"[2] In Silicon Valley, the mecca of tech start-ups, it is trendy to hire "digital natives."[3] The term, first coined by Marc Prensky, describes young people who, due to their digital upbringing, are adept and pervasive technology users.[4] Unlike previous generations, "[t]hey have spent their entire lives surrounded by and using computers, videogames, digital music players, video cams, cell phones, and all the other toys and tools of the digital age."[5] According to Prensky's research:

> [O]ver 10,000 hours playing videogames, over 200,000 e-mails and instant messages sent and received; over 10,000 hours talking on digital cell phones; over 20,000 hours watching TV . . . , over 500,000 commercials seen—all before the kids leave college. And, maybe, at the very most, 5,000 hours of book reading. These are today's "Digital Native[s]."[6]

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1. Margaret Kane, *Say What? "Young People are Just Smarter"*, CNET (Mar. 28, 2007, 7:57 AM), http://www.cnet.com/news/say-what-young-people-are-just-smarter/.

2. *Id.*

3. Michelle Quinn, *Quinn: Time to Challenge Silicon Valley's Youth Premium*, San Jose Mercury News (Oct. 24, 2015, 12:45 PM), http://www.mercurynews.com/michelle-quinn/ci_29018606/quinn-time-challenge-silicon-valleys-youth-premium?source=infinite-up.

4. Marc Prensky, *Digital Natives, Digital Immigrants Part 1*, On the Horizon, Oct. 2001, at 2, http://dx.doi.org/10.1108/10748120110424816 [hereinafter Prensky, *Part 1*].

5. *Id.*

6. Marc Prensky, *Digital Natives, Digital Immigrants, Part 2: Do They Really Think Differently?*, On the Horizon, Dec. 2001, at 2, http://dx.doi.org/10.1108/10748120110424843 [hereinafter Prensky, *Part 2*].

Others have defined the term "digital natives" to include children born after 1980, when the new availability of desktop computers launched a series of technological developments that made digital devices an integral part of daily life.[7] For this group, variously known as "Millennials," the "Net Generation," or "Generation Y,"[8] the world looks different. Digital natives approach relationships differently, view institutions differently, and access information differently than previous generations.[9] Some argue digital natives' brains are different.[10] Prensky called those not born in the age of technology "digital immigrants"[11] because they grew up in a world without electronics and now must adapt to the digital environment.[12] Digital natives are fluent in technological language; digital immigrants speak with an accent.[13]

The term "digital native" is now commonplace.[14] Many companies, especially in Silicon Valley, believe youthful workers bring technological expertise, efficiency, and innovation.[15] Employers also prefer young workers for their lack of family obligations and ability to work longer hours.[16] In 2011, venture capitalist Vinod Khosla "told a conference that people over forty-five basically die in terms of new ideas."[17] Michael Moritz of Sequoia Capital stated he was "an incredibly enthusiastic fan of very talented twentysomethings starting companies."[18]

Idealization of youth is not new, but it raises new concerns about age discrimination in hiring. Recruiters and employers, especially in the media and technology industries, increasingly list "digital native" as a required qualification in job listings.[19] Although the term may

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7. JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 1–2 (2008).

8. *The Net Generation, Unplugged*, ECONOMIST (Mar. 4, 2010), http://www.economist.com/node/15582279?story_id=15582279 (this generation includes people born between 1980 and 2000).

9. Mike Musgrove, *Talkin' About the Digital Generation*, WASH. POST: POST I.T. (Oct. 17, 2008, 5:10 PM), http://voices.washingtonpost.com/posttech/2008/10/tech_podcast_features_john_pal.html.

10. Prensky, *Part 2*, *supra* note 6, at 2.

11. Prensky, *Part 1*, *supra* note 4, at 3.

12. *Id.* at 2.

13. *Id.*

14. Gregor E. Kennedy & Terry S. Judd, *Beyond Google and the "Satisficing" Searching of Digital Natives*, *in* DECONSTRUCTING DIGITAL NATIVES: YOUNG PEOPLE, TECHNOLOGY AND THE NEW LITERACIES 119, 119 (Michael Thomas ed., 2011).

15. Noam Scheiber, *The Brutal Ageism of Tech: Years of Experience, Plenty of Talent, Completely Obsolete*, NEW REPUBLIC (Mar. 23, 2014), http://www.newrepublic.com/article/117088/silicons-valleys-brutal-ageism.

16. Kane, *supra* note 1; *see also supra* text accompanying note 2.

17. Scheiber, *supra* note 15.

18. *Id.*

19. Between fall 2015 and spring 2016, the authors searched the Indeed job search engine, using the term "digital native," and found numerous posts listing digital native as a job requirement. Search "Digital Native," INDEED, http://www.indeed.com. For example, Imagination, a content marketing agency, required each Associate Digital Market-

seem skill-specific, it actually is an implicit age qualifier signaling that older workers need not apply.[20] If digital native refers to a person born after the advent and dissemination of personal use technology, it refers to a particular generation. While no claims have been filed yet regarding employers' use of this term, many legal analysts, applicants, and journalists have taken notice.[21]

The Age Discrimination in Employment Act of 1967 (ADEA or the Act)[22] prohibits employment discrimination on the basis of age against persons over forty years old. The Equal Employment Opportunity Commission (EEOC) has determined that employers violate the ADEA if they use terms such as "recent college graduates" in job advertisements.[23] However, the EEOC has not yet commented on the legality of job postings that seek digital natives.[24] Once claims are filed, the EEOC will likely conclude that the term constitutes disparate treatment discrimination because it illegally excludes digital immigrants over forty.[25]

This Article argues that although digital proficiency may be a valid job criterion, the term "digital native" is an illegal age-based qualifier. Part I describes the ADEA's purpose and analytical framework and discusses the relationship between age and evolving technologies. Part II describes the EEOC's response to age-based words and phrases in job advertisements. Part III argues that using the term "digital native" in job postings violates the ADEA because it relies on an age-based stereotype that older workers are less technologically proficient than younger workers.

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ing Analyst applicant to be a "Digital Native—lives and breathes digital environments." Hewlett Packard was seeking a Creative Developer "that is a digital native that is inspired by technology and driven to creating innovative solutions." KeyBank was looking for a "digital native with a clear understanding of digital technology and consumer trends" to be an Online Banking Senior Project Manager. See *infra* notes 53–56 for additional examples.

20. Catherine Skrzypinski, *Job Ads for "Digital Natives" Raise Age Bias Concerns*, SOC. HUM. RESOURCES MGMT. (June 18, 2015), http://www.shrm.org/hrdisciplines/staffingmanagement/articles/pages/job-ads-digital-natives-age-bias.aspx#sthash.Y5IKr5ta.dpuf.

21. *See, e.g.*, Vivian Giang, *This Is the Latest Way Employers Mask Age Bias, Lawyers Say*, FORTUNE (May 4, 2015), http://fortune.com/2015/05/04/digital-native-employers-bias/; Rex Huppke, *Hiring Only Digital Natives? Bad Idea*, CHI. TRIB. (May 8, 2015), http://www.chicagotribune.com/business/careers/ct-biz-0511-work-advice-huppke-20150508-column.html.

22. 29 U.S.C. §§ 621–634 (2012).

23. *See* EQUAL EMP'T OPPORTUNITY COMM'N, PROHIBITED EMPLOYMENT POLICIES/PRACTICES, http://www.eeoc.gov/laws/practices/#job_advertisements [hereinafter EEOC, PROHIBITED EMPLOYMENT POLICIES] (last visited Feb. 15, 2016).

24. *Id.*; *see also* Giang, *supra* note 21 ("According to Joseph Olivares, a spokesperson for the EEOC, the agency has not taken a position on whether using the term "digital native" in an ad is discriminatory . . . . [J]ob seekers need to file a complaint first before the EEOC can investigate. So far, none have been filed.").

25. *See generally* EEOC, PROHIBITED EMPLOYMENT POLICIES, *supra* note 23. Recruiting digital natives could be analogous to recruiting "recent college grads." *See id.*

I. Background

A. *Age Discrimination in Employment Act*

The ADEA prohibits employment discrimination on the basis of age[26] against persons over forty.[27] Its purpose is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[28] The ADEA complements Title VII of the Civil Rights Act of 1964 (Title VII),[29] which prohibits employment discrimination on the basis of race, religion, gender, ethnicity, and color.[30] The ADEA and Title VII are linked together by a common goal of eradicating workplace discrimination.[31]

The ADEA generally prohibits age preferences, limitations, or specifications in job notices and advertisements.[32] It states: "It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on age."[33] A plaintiff can prevail only by showing age was a "but-for" factor in the employer's decision not to hire.[34] Although the ADEA expressly prohibits discrimination in hiring,[35] it is often hard to prove because plaintiffs usually only have access to circumstantial, not direct, evi-

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26. 29 U.S.C. § 623.

27. *Id.* § 631.

28. *Id.* § 621(b).

29. 42 U.S.C. §§ 2000e–2000e-17 (2012); Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 769 (1986–87).

30. 42 U.S.C. § 2000e-2(a).

31. Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1097 (1993).

32. *See* EQUAL EMP'T OPPORTUNITY COMM'N, AGE DISCRIMINATION, http://www.eeoc.gov/eeoc/publications/age.cfm (last visited Feb. 15, 2016).

33. 29 U.S.C. § 623(e).

34. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009) (plaintiff must show, by preponderance of the evidence, that age was "but-for" factor of the challenged adverse employment action). Unlike Title VII of the Civil Rights Act of 1964 (Title VII), plaintiffs cannot bring mixed-motive claims under the ADEA. *Id.* at 176–77. In *Gross*, the Court decided that the mixed-motive analysis was unavailable in ADEA cases because Congress amended Title VII expressly to permit mixed-motive claims, 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2012), but did not similarly amend the ADEA. *See id.*; *see also* 29 U.S.C. § 623(a). Although burdens of proof under Title VII and the ADEA differ, both disparate treatment and disparate impact claims remain available under the ADEA. *See* Smith v. City of Jackson, 544 U.S. 228, 232 (2005) (disparate impact claim based on facially neutral employment policy available under ADEA; employers can raise a reasonable-factor-other-than-age (RFOA) defense in such cases).

35. 29 U.S.C. § 623(a).

dence of discrimination.[36] If the plaintiff presents only circumstantial evidence, courts apply the *McDonnell Douglas*[37] burden-shifting framework.[38] In failure-to-hire cases, this framework requires a prima facie showing that the plaintiff: (1) was over forty, (2) was not hired, (3) was qualified, and (4) the employer hired a younger worker.[39] Then the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for failing to hire the applicant.[40] If the employer presents a legitimate nondiscriminatory reason, the plaintiff can only succeed by proving the employer's justification is pretext for discrimination.[41]

In disparate treatment cases, the employer can also assert a bona fide occupational qualification (BFOQ) affirmative defense.[42] An action otherwise prohibited by the ADEA is lawful if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[43] In *Usery v. Tamiami Trail Tours, Inc.*,[44] the Fifth Circuit established a two-prong test to determine whether a valid BFOQ exists.[45] The first prong requires the employer to prove that the age-related job qualification is "*reasonably necessary* to the essence of [the employer's] business."[46] The second prong requires the employer to prove that the qualification is more than merely "'convenient' or 'reasonable,'" but also that the employer "is compelled to rely on age

36. Williams v. Gen. Motors Corp., 656 F.2d 120, 130 (5th Cir. 1981) (evidentiary requirement "simply insists that a plaintiff produce some evidence that an employer has not treated age neutrally, but has instead discriminated based upon it." Specifically, "the evidence must lead the fact finder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) defendant regarded age as a negative factor in such consideration.").

37. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

38. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 141 (2000). *McDonnell Douglas* was a Title VII case, but the Supreme Court has presumed this framework also applies in ADEA cases. *Id.*; *see also* Eglit, *supra* note 31, at 1097 (because Congress modeled ADEA after Title VII, courts use a parallel construction).

39. *See Reeves*, 530 U.S. at 142.

40. *See id.*

41. *See id.* at 143.

42. *See* 29 U.S.C. § 623(f)(1) (2012); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 229 (5th Cir. 1976). The BFOQ affirmative defense is most commonly used in direct evidence cases. *See* A. Mackenzie Smith & Cassandre Charles, *Title VII of the Civil Rights Act of 1964*, 5 GEO. J. GENDER & L. 421, 467 (2004). It is uncommon in circumstantial evidence cases for employers to argue a legitimate nondiscriminatory reason for failing to hire an applicant and simultaneously argue it discriminated against the applicant but did so on the basis of a BFOQ. *See* Roman Amaguin, Garcia v. Spun Steak Company: *Has the Judicial Door Been Shut on English-Only Plaintiffs?*, 16 U. HAW. L. REV. 351, 356 (1994). Making both arguments appears inconsistent and might hurt the employer's position. *See* 3 Emp. Discrimination Coordinator Analysis of Fed. L. (West) § 137:10 (Apr. 2016). The statute, however, does not prohibit an employer from arguing both. *See* 29 U.S.C. § 623(f)(1).

43. 29 U.S.C. § 623(f)(1).

44. *Tamiami*, 531 F.2d at 236.

45. *Id.*

46. *Id.*

as a proxy for the . . . qualifications."[47] An employer can satisfy this second prong by proving that it had "a factual basis for believing that all or substantially all [persons over a particular age] would be unable to perform . . . the duties of the job involved,"[48] or "alternatively, . . . that age was a legitimate proxy for the . . . job qualifications [because] . . . it is 'impossible or highly impractical' to deal with older employees on an individualized basis."[49] The specific legal framework a court selects for evaluating ADEA claims and defenses will affect its conclusion regarding the legality of using the term "digital native" in job postings.

B. Age Discrimination and Technology

Age has become an especially sensitive issue in the technology industry.[50] Companies want to hire young workers not only for their energy and new ideas, but also—and most importantly—for their fluency in technology and social media.[51] Some job postings *require* applicants be digital natives as well as proficient in specified software programs and systems.[52] The term "digital native" appears in postings by such high profile companies as Red Bull,[53] Michael Kors,[54] Hearst Magazines,[55] and Under Armour.[56] The qualifications for a Red Bull Programming Specialist, Digital Music, included "[d]igital native, tech savvy, follower of digital trends."[57] The Michael Kors listing for "Vice President, Global Marketing" requested "[a] brand leader who is a digital native."[58] The ideal candidate for a "Digital Content Editor, Cosmopolitan/Elle.com Italy" at Hearst Magazines was "a digital native with 3+ years experience writing for the web."[59] Under Armour was seeking a "Manager, Connected Fitness Strategy (E-commerce)," who was "a digital native who fully engages in the digital environment,

47. W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 414 (1984).

48. *Id.* (quoting *Tamiami*, 531 F.2d at 235).

49. *Id.*

50. *See* Noam Scheiber, *The Brutal Ageism of Tech: Meet Silicon Valley's Obsolete Workforce*, NEWSTATESMAN (Mar. 24, 2014), http://www.newstatesman.com/2014/03/brutal-ageism-tech#1 down.

51. *Id.*

52. *See supra* note 19 and accompanying text (job postings on Indeed).

53. Red Bull North America, Inc., *Programming Specialist, Digital Music*, POOKIE.IO (Dec. 17, 2015), http://www.pookie.io/jobs-for-programming-specialist-digital-music, santa-monica-ca,-e7510dc5506aa144.

54. Michael Kors, *Vice President, Global Marketing—Michael Kors—New York—NY*, JOB MASK (Dec. 18, 2015), http://www.jobmask.com/jobs/vice-president-global-marketing-michael-kors-new-york-ny/.

55. *Careers, Digital Content Editor, Cosmopolitan/elle.com Italy*, HEARST MAGAZINES, http://hire.jobvite.com/CompanyJobs/Careers.aspx?k=Job&c=qwA9VfwU&j=ojT31fw0&s=Indeed (last visited Mar. 4, 2016).

56. Under Armour, *Manager, Connected Fitness Strategy (E-commerce), Sports Equipment*, WORK IN SPORTS.COM (Dec. 13, 2015), http://www.workinsports.com/wisquickregapply.asp?idx=176804.

57. Red Bull North America, Inc., *supra* note 53.

58. Michael Kors, *supra* note 54.

59. HEARST MAGAZINES, *supra* note 55.

from commerce to social activities, and is constantly looking for and engaging in new digital trends."[60]

An analysis by PayScale, a company that collects compensation data,[61] showed that only six of thirty-two successful technology companies had a median age greater than thirty-five.[62] Yet, the Bureau of Labor Statistics reported the overall median age of American workers is 42.3 years old.[63]

Google, in particular, has faced criticism concerning the young age of its workforce.[64] According to PayScale, in 2013, the median age of Google employees was only twenty-nine.[65] In 2015, sixty-year-old Robert Heard, a software engineer, filed a federal proposed class action against Google asserting the company had discriminated against job applicants over age forty and routinely excluded them from positions for which they were qualified.[66] Similarly, in 2010, the California Supreme Court reinstated a state age discrimination lawsuit filed by Google executive, fifty-four-year old Brian Reid, finding that Reid had presented sufficient evidence of discrimination in his firing to survive summary judgment.[67] Reid's colleagues called him an "old man," "old guy," and "old fuddy-duddy."[68] Although Google argued these were "stray remarks" that the court should disregard, the court declined to do so at the summary judgment stage.[69] Google and Reid eventually settled out of court.[70]

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60. Under Armour, *supra* note 56.

61. *See* PAYSCALE, http://www.payscale.com (last visited Mar. 4, 2016).

62. Jennifer Wadsworth, *Tech Workers Are So, So Young*, PAYSCALE (July 15, 2013), http://www.payscale.com/career-news/2013/07/tech-workers-are-so-so-young; *see also* Greg Baumann, *Silicon Valley Age Discrimination: If You've Experienced It, Say Something*, SILICON VALLEY BUS. J. (Jan. 5, 2015, 10:46 AM), http://www.bizjournals.com/sanjose/news/2015/01/05/silicon-valley-age-discrimination-if-youve.html (median age at various Silicon Valley tech firms: 33 at Adobe Systems, Inc.; 31 at Apple, Inc.; 32 at eBay Inc.; 28 at Facebook Inc.; 30 at Google Inc.; 29 at LinkedIn Corp.; 32 at Nvidia Corp.; and 31 at Yahoo Inc.).

63. U.S. BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY: HOUSEHOLD DATA ANNUAL AVERAGES, http://www.bls.gov/cps/cpsaat18b.htm (last visited Apr. 11, 2016).

64. Patrick Thibodeau, *Median Age at Google Is 29, Says Age Discrimination Lawsuit*, COMPUTERWORLD (Apr. 23, 2015, 1:20PM), http://www.computerworld.com/article/2914233/it-careers/median-age-at-google-is-29-says-age-discrimination-lawsuit.html.

65. *Id.* (data based on 840 profiles of full-time, U.S.-based employees, with approximately 4% margin of error).

66. Complaint at 11, Heath v. Google Inc., No. 5:15-cv-01824-BLF, 2015 WL 1848086 (N.D. Cal. Apr. 22, 2015). The case is still pending.

67. *See* Reid v. Google, Inc., 235 P.3d 988, 991 (Cal. 2010).

68. *Id.* at 992.

69. *Id.* at 1008. The court held that the issue whether to disregard remarks as "stray" was reserved for trial, not to be decided on summary judgment. *Id.* It also observed that disregarding stray remarks at the summary judgment stage would violate California's procedural laws requiring courts to consider the totality of the circumstances on summary judgment motions. *Id.* (citing CAL. CIV. PROC. CODE § 437c, subd. (c) (West 2016)).

70. Aaron Glantz, *Old Techies Never Die; They Just Can't Get Hired as an Industry Moves*, N.Y. TIMES (Jan. 28, 2012), http://www.nytimes.com/2012/01/29/us/bay-area-technology-professionals-cant-get-hired-as-industry-moves-on.html?_r=0.

Unrelated to the *Reid* case, research on the relationship between youth and technology skills suggests that employers likely will be unable to prove that age is an appropriate proxy for technological skill level. It has never been proven that digital natives are all encompassing technological masters.[71] The Berkman Center for Internet and Society at Harvard University and the University of St. Gallen in Switzerland created the "Digital Natives Project," a collaborative exploration of the "legal, social, and political implications of a generation 'born digital'—those who grow up immersed in digital technologies, for whom a life fully integrated with digital devices is the norm."[72] The project website explains:

> Are all youth digital natives? Simply put, no. While we frame digital natives as a generation "born digital," not all youth are digital natives. Digital natives share a common global culture that is defined not by age, strictly, but by certain attributes and experiences [related to] . . . how they interact with information technologies, information itself, one another, and other people and institutions. Those who were not "born digital" can be just as connected, if not more so, than their younger counterparts. And not everyone born since, say, 1982, happens to be a digital native. Part of the challenge of this research is to understand the dynamics of who exactly is, and who is not, a digital native, and what that means.[73]

Digital natives may not be as skilled technologically as once thought.[74] Most young adults use technology for "fun and games," not "technically challenging Web development and programming."[75] Thus, digital native has an ambiguous and perhaps evolving meaning.

Prensky now argues for the term "digital wisdom."[76] Digital wisdom refers both to "wisdom arising *from* the use of digital technology to access cognitive power beyond our innate capacity and to wisdom *in* the prudent use of technology to enhance our capabilities."[77] Digital wisdom, accordingly, transcends the generational divide defined by the immigrant/native distinction[78]:

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71. *See* Brian Proffitt, *Millennials: They Aren't So Tech Savvy After All*, READWRITE (June 7, 2012), http://readwrite.com/2012/06/07/millennials-arent-so-tech-savvy-after-all.

72. *Digital Natives*, BERKMAN CTR. FOR INTERNET & SOC'Y, https://cyber.law.harvard.edu/research/youthandmedia/digitalnatives# (last visited Mar. 28 2016).

73. *Are All Youth Digital Natives?* BERKMAN CTR. FOR INTERNET & SOC'Y, https://cyber.law.harvard.edu/research/youthandmedia/digitalnatives/areallyouthdigitalnatives (last visited Mar. 4, 2016).

74. *See* Proffitt, *supra* note 71.

75. *Id.*

76. Marc Prensky, *H. Sapiens Digital: From Digital Immigrants and Digital Natives to Digital Wisdom*, INNOVATE: J. ONLINE EDUC., Feb.–Mar. 2009, at 1.

77. *Id.*

78. *Id.*

> The digitally wise distinguish between digital wisdom and mere digital cleverness, and they do their best to eradicate digital dumbness when it arises . . . . They know that just knowing how to use particular technologies makes one no wiser than just knowing how to read words does. Digital wisdom means not just manipulating technology easily or even creatively; it means making wiser decisions because one is enhanced by technology. Therefore, the digitally wise look for the cases where technology enhances thinking and understanding . . . . Those who are truly digitally wise do not resist their digitally enhanced selves but accept them gladly, even as they make careful judgments about what digital enhancements are appropriate and when.[79]

Although digital native may have nuanced meaning for some, if the term commonly connotes a person's generation or age, its use in job postings violates the ADEA.

II. EEOC Response

A. Terms Prohibited in Job Advertisements

Employers often use advertisements to fill open positions.[80] The ADEA limits the content of these advertisements:

> It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.[81]

An advertisement may specify age only if it "is a bona fide occupational qualification reasonably necessary to the normal operation of the . . . business."[82]

The Department of Labor (DOL) and the EEOC are responsible for implementing and enforcing the ADEA.[83] To promote statutory compliance, the EEOC issued regulations prohibiting employers from using seemingly innocent terms in advertising, such as "recent college graduate," which suggest preference for youth[84]: "(a) [H]elp wanted notices or advertisements [shall not] contain terms and phrases such as *age 25 to 35*, *young*, *college student*, *recent college graduate*, *boy*, *girl*, or others of a similar nature . . . unless one of the [statutory] exceptions applies."[85] Generally, job descriptions must use neutral lan-

79. *Id.*

80. *See, e.g.*, Michael Kors, *supra* note 54.

81. 29 U.S.C. § 623(e) (2012).

82. *Id.* § 623(f)(1).

83. DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 773 (8th ed. 2010).

84. *See* 29 C.F.R. § 1625.4 (2015).

85. *Id.* Gendered terms such as boy or girl may also constitute sex discrimination under Title VII.

guage and omit "code words" or ambiguous language that could be construed as discriminatory or that limit or deter older applicants.

Case law is consistent with the agency regulations. In *Hodgson v. Approved Personnel Service, Inc.*,[86] the Fourth Circuit held that including "recent graduate" in an advertisement was not "merely informational"[87] and violated the ADEA by deterring older workers from applying.[88] Similarly, in *DeBuhr v. Olds Products Co.*,[89] the district court held that an advertisement that limited candidates to five to ten years of experience[90] was circumstantial evidence of age discrimination.[91]

In 2013, the California Fair Employment and Housing Department settled an age discrimination claim against Facebook arising from an attorney job posting.[92] The advertisement listed job requirements, including at least four years of legal experience and "Class of 2007 or 2008 preferred."[93] After agency investigation, Facebook settled by "promising to no longer mention law school graduation dates in job ads for its legal team."[94] Although there is evidence that Facebook "has continued to use 'new grad'" in subsequent job postings, no other claimant has pursued discrimination charges.[95] Once the EEOC prohibited specific phrases, employers sought new ways to communicate a preference for younger workers, including the term "digital native."[96]

B. Inclusion of "Digital Native"

Since the 1990s technology boom, employers have desired young, tech-savvy employees.[97] Simultaneously, age discrimination complaints have increased, rising from 15,785 in 1997 to 20,144 in 2015.[98] In 2015, there were 163 claims of discriminatory advertising,

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86. 529 F.2d 760 (4th Cir. 1975).

87. *Id.* at 766 ("Most 'recent graduates' are composed of young people. When the term is used with a specific job, it violates the Act since it is not merely informational to the job seeker[,] but operates to discourage the older job hunter from seeking that particular job and denies them an *actual* job opportunity." (quoting Brennan v. Approved Pers. Serv., Inc., No. C-315-G-72, 1974 WL 292, at *3 (M.D.N.C. Sept. 20, 1974), *rev'd sub nom.* Hodgson v. Approved Pers. Serv., Inc., 529 F.2d 760 (4th Cir. 1975))).

88. *Id.*

89. No. 95 C 1462, 1996 WL 277644 (N.D. Ill. May 22, 1996).

90. *Id.* at *2.

91. *See id.* at *4.

92. Verne Kopytoff, *Tech Industry Job Ads: Older Workers Need Not Apply*, FORTUNE (June 19, 2014, 10:45 AM), http://fortune.com/2014/06/19/tech-job-ads-discrimination/.

93. *Id.*

94. *Id.*

95. *Id.*

96. *See, e.g.*, Michael Kors, *supra* note 54.

97. *See* Giang, *supra* note 21.

98. EQUAL EMP'T OPPORTUNITY COMM'N, AGE DISCRIMINATION IN EMPLOYMENT ACT (INCLUDES CONCURRENT CHARGES WITH TITLE VII, ADA AND EPA) FY 1997–FY 2015, http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm (last visited Mar. 26, 2016).

154 of which were ADEA claims.[99] According to a May 2015 *Fortune* article, an EEOC spokesperson said that the agency had not received any age discrimination charges filed for an employer's use of "digital native" in a job a posting, explaining why the EEOC has yet to decide whether the term is discriminatory.[100]

III. Analysis

Like the terms "young" and "recent grad,"[101] "digital native" implies a preference for younger workers. If including this term in job postings precludes or discourages people over forty from applying, it constitutes unlawful age discrimination. As the following case study shows, courts are beginning to recognize that statements about technological ignorance may constitute disparate treatment age discrimination.[102]

A. *Case Study:* Marlow v. Chesterfield County School Board

Marlow v. Chesterfield County School Board[103] is one of few reported cases addressing the legality of an employer's expressed preference for digital natives. There, the district court considered whether a comment concerning an employee's lack of "21st Century skills" and discussion of the distinction between "digital natives" and "digital immigrants" evidenced age discrimination.[104]

In 1987, the Chesterfield County schools hired Debra Marlow as the Director of Community Relations.[105] For approximately twenty years, she demonstrated satisfactory performance.[106] In 2004, the school system hired Tim Bullis, who had only two years of experience in education, as Marlow's Assistant Director of Community Relations.[107] In 2006, a new superintendent, Dr. Marcus Newsome, implemented a six-year strategic plan to incorporate "21st Century skills" at all levels of the school system.[108]

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99. EQUAL EMP'T OPPORTUNITY COMM'N, STATUTES BY ISSUE FY 2010–FY 2015, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited Mar. 26, 2016).

100. Giang, *supra* note 21.

101. *See supra* Part II.A.

102. Even if the EEOC and courts do not agree that use of "digital native" in hiring constitutes disparate treatment discrimination, they should at least construe the term as unlawfully excluding a class of older applicants under the disparate impact theory, which could only be justified by business necessity or the reasonable factor other than age (RFOA) defense. *See* Smith v. City of Jackson, 544 U.S. 228, 232 (2005) (disparate impact claim based on facially neutral employment policy available under ADEA; employers can raise RFOA defense in such cases).

103. 749 F. Supp. 2d 417 (E.D. Va. 2010).

104. *Id.* at 421, 426, 428.

105. *Id.* at 422.

106. *Id.*

107. *Id.*

108. *Id.*

Newsome described the plan as focused primarily on "integration of modern technologies for research, organization, evaluation, and communication of information."[109] In spring 2008, the school system needed to make significant reductions in budget.[110] In summer 2008, Bullis was promoted.[111] On January 12, 2009, Newsome informed Marlow that her position was being eliminated and that he would recommend her for another position, one she considered a demotion.[112] Marlow objected, asserting her seniority over Bullis, her former subordinate.[113] Newsome told her he wanted "21st Century communication skills, and Tim [Bullis] is better at that."[114] On January 30, 2009, Newsome officially informed Marlow that he would recommend to the school board elimination of her position for the next school year.[115] Bullis retained his job.[116] Marlow voluntarily retired, effective July 1, 2009.[117]

In August, Newsome showed his staff a PowerPoint presentation on "21st Century Learning," including slides of people using various technologies.[118] "One slide explained the distinction between 'digital natives,'" defined on the slide as "those who are born at a time when a particular technology exists, and 'digital immigrants,' who are born before a particular technology is invented."[119] The slide also explained that "[d]igital immigrants are said to have a 'thick accent' when operating in the digital world in distinctly pre-digital ways, when, for instance, one might 'dial' someone on the telephone to ask if his e-mail was received."[120] Another slide appeared to show that "brain function while using technology is higher in those who are 'digital natives.'"[121]

Marlow sued under the ADEA, citing the PowerPoint presentation as circumstantial evidence that Newsome proposed to eliminate her job because she lacked "21st Century skills."[122] The school board moved for summary judgment,[123] arguing that the reference to "21st Century skills" was "nothing more than a reference to a well-established skill set, which constitutes a legitimate, nondiscriminatory reason" for

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109. *Id.* at 423.
110. *Id.* at 424.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* (alteration in original).
115. *Id.* at 425.
116. *Id.* at 431.
117. *Id.* at 425.
118. *Id.* at 426.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 427.
123. *Id.*

Newsome's decision to eliminate her job and recommend her reassignment.[124] The court found that the phrase was not dispositive; rather, "the issue [was] whether the Superintendent harbored an age-related bias when evaluating employees' '21st Century skills.'"[125] The court concluded:

> Such evidence could . . . at least suggest that the Superintendent and other decision-makers on his staff may have correlated age with technology skills. Such a correlation, which can constitute age-bias, may have been what the Superintendent meant when he questioned Marlow's "21st Century skills." Or, as the School Board asserts, it may only have been an innocuous, gratuitous comment. Ultimately, such a resolution of the issue is for a jury to decide.[126]

Evaluating the evidence in deciding the summary judgment motion, the district court observed that Newsome associated competency in "21st Century skills" with age.[127] The court explained that the "distinction, as presented in the PowerPoint presentation, appears to associate 'chronological age' with technological competency."[128] In isolation, the slide presentation may have been insufficient. However, viewed together with Newsome's reference to Marlow's lack of 21st century skills and the school's selective application of its layoff policies,[129] Marlow's evidence of age discrimination was sufficient to prevent summary judgment.[130]

Marlow illustrates that a court considers context when assessing employers' use of an ambiguous phrase. There, Newsome's explanation of "digital natives" and "digital immigrants" indicated that he viewed "digital natives" as having abilities that "digital immigrants" lacked. The case suggests the likely illegality of employers using "digital native" in job postings.[131] Although the term is potentially ambiguous, its use in job advertisements, especially as a *required* qualification, could provide a plaintiff sufficient circumstantial evidence to plead a prima facie case of age discrimination.[132]

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124. *Id.* at 435.
125. *Id.*
126. *Id.* at 428.
127. *Id.* at 436.
128. *Id.*
129. "The School Board had a stated [Reduction in Force] policy which required that, when two positions are of the same 'position classification,' certain factors must be applied to determine which position to [eliminate], including job performance, special skills, and specific needs. When no significant difference existed, the less senior person would be 'laid off.'" *Id.* at 424–25.
130. *Id.* at 436–37.
131. Roy A. Ginsburg, *Ambiguous Language Masking Discrimination*, LEXOLOGY (Nov. 15, 2010), http://www.lexology.com/library/detail.aspx?g=48e7abfc-8084-4be1-9dce-49588bd39424.
132. *Id.*

B. "Digital Native" Violates the ADEA

Using "digital native" in a job posting could constitute direct evidence that the employer "'announced, or admitted, or otherwise unmistakably indicated that age was a determining factor' in the particular employment action."[133] Alternately, it may be circumstantial evidence of age bias.[134] Employers may contend that the term does not clearly refer to a specific age group but merely to a required skill set—a legitimate nondiscriminatory reason. Technology companies, in particular, may assert the term expresses their preference for applicants with superior understanding of the digital world—a requirement for many advanced information technology positions and "a catch-all for tech-savvy workers, regardless of age."[135] As *Marlow* demonstrates, courts may well disagree, concluding that "digital native" refers to a generation of young people. If a job posting already lists specific technological skill requirements, then including "digital native" is redundant. Plaintiffs who can show that an employer's inclusion of the term evidenced a correlation of youth and competency should be able to rebut employers' claims that the term was nondiscriminatory.

If, however, the employer can establish some other legitimate reason for not hiring the plaintiff, the burden shifts back to the plaintiff to prove that the reason is pretextual.[136] The plaintiff must then show that age was the "but-for cause" of the adverse employment action—an especially difficult task in failure-to-hire cases.[137] The plaintiff may succeed by showing that the employer used the term "digital native" to discourage older applicants from applying.[138]

Even if the plaintiff can prove pretext, an employer might alternatively argue that its use of "digital native" qualifies as a BFOQ.[139] Because this is an affirmative defense, the employer has the burden of production and persuasion on both parts of the defense. First, the employer must demonstrate the job requirement is "reasonably necessary" to "the essence of the business."[140] In a digital native case, the

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133. *Marlow*, 749 F. Supp. 2d at 427 (citing Cline v. Roadway Express, Inc., 689 F.2d 481, 485 (4th Cir. 1982)).

134. *See id.* at 428.

135. *Is "Digital Native" The New Form of Age Discrimination?* MEYERS LAW FIRM, LC (May 7, 2015), http://www.meyerslaw.com/news/discrimination/is-digital-native-the-new-form-of-age-discrimination/.

136. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). "[A]t this last step, the burden to demonstrate pretext merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." Bandy v. Advance Auto Parts, Inc., No. 7:11-cv-365, 2012 WL 6018741, at *4 (W.D. Va. Nov. 29, 2012).

137. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009).

138. For example, this could be demonstrated by a low average employee age. *See, e.g.*, *supra* notes 64–70 (Google ADEA lawsuits as a result of its young workforce).

139. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 228 (5th Cir. 1976); *see also supra* notes 42–49 and accompanying text.

140. *Tamiami*, 531 F.2d at 235.

employer would likely fail at this because a digital native requirement is not reasonably necessary to ensure older workers can perform job duties.[141] An employer can meet the second part if it shows either: (1) all, or substantially all, older workers are unable to perform the job duties; or (2) that it is impossible or impractical to assess older workers' capabilities individually.[142] In digital native cases, employers would unlikely be able to show that all or substantially all older workers lack sufficient technological skills, or that it is impossible or impracticable to assess digital abilities individually.

The EEOC and courts should find that use of "digital native" in job advertisements is discriminatory. As demonstrated by the employer's use of "21st Century skills" and "digital native" in *Marlow*, courts may view negative comments about technological expertise as age discrimination.[143] Preference for "digital natives" may merely represent an employer's desire for digital proficiency, but the term effectively removes an entire class of older people from job consideration. Employers can attract digitally proficient applicants without using such discriminatory terms.

Workplace diversity matters. People from different age groups offer distinct theoretical and practical knowledge, skills, and access to social networks. Diversity promotes creativity, adaptation, and a greater likelihood that proposed ideas will be appropriately evaluated from multiple perspectives.[144] Despite the stereotype that young people are more innovative, studies investigating the relationship between age and innovation generally find no significant correlation.[145]

Characterizing all young people as having high-level technological skills is factually inaccurate. A homogeneous young workforce loses the advantage that each age group can bring to workplace decision-making and problem solving.[146] Fundamentally, restricting positions to "digital natives" denies older workers employment opportunities, contravening the core purpose of the ADEA.[147]

Conclusion

The ADEA prohibits age discrimination against those over forty. The EEOC has prohibited using terms such as "recent college gradu-

141. *Id.*

142. *Id.*

143. *See* Marlow v. Chesterfield Cty. Sch. Bd., 749 F. Supp. 2d 417, 438 (E.D. Va. 2010).

144. AGING WORKERS AND THE EMPLOYEE-EMPLOYER RELATIONSHIP 35 (P. Matthijs Bal, Dorien T.A.M. Kooij & Denise M. Rousseau eds., 2015).

145. *Id.* at 40.

146. Mike Levy & Rowan Michael, *Analyzing Students' Multimodal Texts: The Product and the Process*, *in* DECONSTRUCTING DIGITAL NATIVES: YOUNG PEOPLE, TECHNOLOGY AND THE NEW LITERACIES 94 (Michael Thomas ed., 2011).

147. *See* 29 U.S.C. § 621 (2012).

ate" from job advertising but has not yet addressed the legality of the term "digital native." The EEOC should declare "digital native" an unlawful discriminatory age qualifier. Although employers likely include the phrase in job advertisements to attract innovative applicants with advanced technological and digital skills, its use could, and likely will, result in liability because it reflects a preference to hire younger workers. Employers should find non-discriminatory means to attract desired applicants. The ADEA requires employers to ignore age in making hiring decisions.