Invisible Discrimination: How Targeted Advertising is Being Used to Circumvent the Age Discrimination in Employment Act

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Table of Contents

I. Introduction ........................................................................................................................................... 2
II. What is Targeted Advertising? ........................................................................................................... 4
III. The Age Discrimination in Employment Act ......................................................................................... 6
    a. Asserting a Claim Under the ADEA ............................................................................................... 7
    b. Section 623(e) ............................................................................................................................... 9
    c. Communication Workers of America v. T-Mobile U.S., Inc. ......................................................... 10
III. Analysis ............................................................................................................................................... 12
    a. Facially Neutral ............................................................................................................................ 13
    b. Discriminatory Content Belongs to Facebook ............................................................................... 14
    c. Unseen Advertisements ................................................................................................................. 16
IV. Conclusion ......................................................................................................................................... 18

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I. Introduction

Targeted advertising and social media have been at the forefront of America’s headlines in recent months. Facebook and other social media giants have been called upon to respond to allegations that they have mishandled the personal data of millions of Americans. For example, in August of 2018, the Department of Housing and Urban Developed (“HUD”) filed a complaint against Facebook alleging the tech giant had indirectly misused the personal data of its users to violate the Fair Housing Act (“FHA”) in its advertising practices. Facebook’s alleged advertising practices allowed advertisers to racially discriminate by demarcating “majority-minority zip codes and not showing ads to users who live in those zip codes.” In response to the HUD complaint, Facebook announced that it would remove 5,000 “targeting options” from its advertising functions to “minimize the risk of abuse.” It was likely a prudent move by Facebook from a public relations standpoint, but the extent to which Facebook could be held legally liable for its facilitation of discriminatory advertisements is still unclear; the Communications Decency Act (“CDA”) constitutes a strong defense for potential defendants like Facebook. Despite this

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2 Facebook users’ data being stolen by Cambridge Analytica comes to mind as one example.
3 Press Release, U.S. Dep’t of Hous. and Urban Dev., HUD Files Housing Discrimination Complaint Against Facebook (Aug. 17, 2018). Specifically, the complaint by HUD alleges Facebook allows discriminatory behavior by “enabling] advertisers to control which users receive housing-related ads based upon the recipient’s race, color, religion, sex, familial status, national origin, disability, and/or zip code.” Id.
6 47 U.S.C. § 230(c)(1) (2012). Indeed, Facebook has used this section of the CDA to argue that it is immune from liability when third-party advertisers use its targeted advertising functions in a discriminatory manner. Motion to Dismiss First Amended Complaint at 2, Onuoha v. Facebook, Inc., No. 5:16-cv-06440 (N.D. Cal., Nov. 3, 2016). While the merits of the case have not been ruled on, District Judge Edward J. Davila signaled the likelihood of Facebook prevailing in its argument when he granted Facebook’s motion to stay discovery until the court ruled on Facebook’s motion to dismiss. See Order Staying Discovery at 1, Onuoha v. Facebook, Inc., No. 5:16-cv-06440 (N.D. Cal., Apr. 7, 2017). Moreover, the Seventh Circuit has held an online platform that facilitates third-party
roadblock for potential plaintiffs, anti-discrimination complaints against Facebook are still being filed. However, some plaintiffs are choosing to forgo suing the advertising platforms altogether, instead opting to sue the advertisers themselves in order to circumvent any potential CDA roadblocks.

Once such instance of this strategy is Commc’ns Workers of Am. v. T-Mobile US, Inc., where the plaintiffs are suing third party advertisers who have utilized Facebook’s targeted advertising functions to exclude older job seekers from receiving employment advertisements in violation of the Age Discrimination in Employment Act (“ADEA”). This case represents a different approach to attacking discriminatory practices that have been common in targeted advertising; instead of holding the advertising platform accountable (e.g. Facebook), the plaintiffs are seeking to hold the advertisers themselves accountable.

This paper seeks to highlight the issues raised by discriminatory practices in targeted advertising as they relate to the ADEA and predict the likely outcome of Communications Workers of America. Analysis proceeds in three parts. Part I will briefly explain what targeted advertising is, how advertisers utilize targeted advertising, and the prevalence of targeted advertising in today’s world. Part II will then turn to the current law under the ADEA, its prohibition on discriminatory advertising, and will take an in-depth look at the allegations of discrimination in Communications Workers of America. Finally, Part III will analyze the likely outcome of Communications Workers of America in light of the case law interpreting the advertisements must somehow “induce” the advertiser to post a discriminatory advertisement in order to be violating the FHA. See Chicago Lawyers’ Comm. For Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008) (affirming summary judgment in favor of craigslist because “[n]othing in the service craigslist offers induced anyone to post any particular listing or express a preference for discrimination”).

8 No. 5:17-cv-07232 (N.D. Cal., Dec. 20, 2017).
ADEA’s prohibition on discriminatory advertising and will contemplate future application of anti-discrimination statutes to cases in which discrimination occurs via targeted advertising.

II. What is Targeted Advertising?

Targeted advertising is primarily used in digital advertising.10 Put simply, targeted advertising is advertising that targets individuals based on their past Internet behavior.11 Users access content on the Internet, and advertisers receive information about what the user is looking at from the Internet browser or website.12 Advertisers can then take that information and use it to their advantage by placing new ads for products or services one specific user has already demonstrated an interest in.13 This approach to advertising has proved to be incredibly useful;14 retailers have even been able to learn when potential customers were pregnant and use that information to send them advertisements for baby necessities.15 In fact, in 2017, advertisers spent more money on digital advertising than on television advertising for the first time in history.16

Targeted advertising is successful because it allows advertisers to target individual users on a more granular level than ever before. Facebook, a social media platform that has a foothold

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13 Id.

14 Rebecca Walker Reczek, Christopher Summers, & Robert Smith, Targeted Ads Don’t Just Make You More Likely to Buy — They Can Change How You Think About Yourself, HARV. BUS. REV. (Apr. 4, 2016) https://hbr.org/2016/04/targeted-ads-dont-just-make-you-more-likely-to-buy-they-can-change-how-you-think-about-yourself. The authors noted that a study they conducted indicated that study participants were more likely to purchase a product if they “thought the ad had been targeted to them.” Id.


on the advertising industry, has created an “ad education portal” that allows users to understand how ads are tailored specifically to them. According to the portal, Facebook provides advertisers access to information based on pages liked, places that a user has checked-in on Facebook, sign-ups for email newsletters, viewed webpages and downloaded mobile applications, to name a few. These factors are necessarily specific to any given individual because they are based on affirmative actions taken by Internet users, but Facebook data gets even more personal based on generalized Internet activity. Advertisers can learn which Facebook users have an anniversary within 30 days, which users are parents, which users are newly married, and even where a user is likely to buy their next car.

Advertisers can use this type of personal data in a number of ways: (1) sponsored stories, whereby a paid advertisement consisting of a Facebook friend’s “name, profile picture, and an assertion that the person ‘likes’ the advertiser” appears on a user’s Facebook page; (2) attribute-based targeting, whereby advertisers can pick their audiences based on those which have a “certain attribute”; (3) personally identifiable information (“PII”), whereby advertisers can directly pinpoint the individual they’d like to target using a phone-number or email address; or (4) look-alike audiences, whereby “advertisers can ask Facebook to target users

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20 Dewey, supra note 21.
21 Fraley v. Facebook, Inc., 830 F.Supp.2d 785, 791 (N.D. Cal. 2011) (explaining the type of targeted advertising at issue in a suit brought against Facebook for its advertising practices).
22 TILL SPEICHER ET. AL., POTENTIAL FOR DISCRIMINATION IN ONLINE TARGETED ADVERTISING 3 (Sorelle A. Friedler & Christo Wilson eds., 2018)
23 Id.
who are similar to their existing set of customers.” These tactics are clearly useful to advertisers, but some might argue that the negative externalities of targeted advertising outweigh its utility.

Given that social media platforms and other websites gather an incredible amount on personal data to provide to advertisers, it is no surprise that targeted advertising has its critics. Targeted advertising has essentially created a sort of “surveillance economy” by which companies make money by observing what individuals do on the Internet. Critics have accurately pointed out that harvesting personal data for advertisers has enabled a world in which personal data can be stolen, medical confidentiality rules can be breached, and discrimination can be perpetuated in a less blatant way.

III. The Age Discrimination in Employment Act and Communications Workers of America

The Age Discrimination in Employment Act was enacted in the 1960s along with other well-known anti-discrimination statutes, the Equal Pay Act of 1963 and the Civil Rights Acts of 1964 and 1968. Each of these statutes intended to “transform[] the workplace by breaking down barriers to opportunity and building foundations of equality and fairness.”

24 Id.
25 See David Dayen, Ban Targeted Advertising, THE NEW REPUBLIC (Apr. 10, 2018), https://newrepublic.com/article/147887/ban-targeted-advertising-facebook-google (explaining how the surveillance economy was born from advertisers “kno[ing] every intimate detail about [their] customers” and that the entities that have the “biggest data troves” make the most money from advertisers).
27 See Dayen supra note 28 (“Facebook recently sent a doctor to talk with top hospitals about acquiring patient data, which could violate medical confidentiality rules.”).
28 Id. See also Speicher supra note 25, at 10 (explaining that “malicious advertisers” can use “facially neutral prox[ies] in order to discriminate against certain demographics).
32 See Victoria A. Lipnic, The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA), U.S. EQUAL EMP. OPPORTUNITY COMMISSION (June 2018),
worked to advance those goals and protect workers aged 40 and older\textsuperscript{33} by making it “unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual’s age”\textsuperscript{34} or to “limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.”\textsuperscript{35} Additionally, and most relevant to this Recent Development, the ADEA places certain restrictions on employment advertising in § 623(e):

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.

\textbf{a. Asserting a Claim Under the ADEA}

The ADEA was enacted shortly after the Civil Rights Act and with the same goals in mind.\textsuperscript{36} Because of this, courts have consistently interpreted the ADEA in a similar way to the Civil Rights Act.\textsuperscript{37} Accordingly, there are two ways one may assert a general claim under the ADEA: (1) under a theory of disparate treatment, or (2) under a theory of disparate impact.\textsuperscript{38}

\footnotesize{\textsuperscript{33} 29 U.S.C. § 631 (2012).}
\footnotesize{\textsuperscript{34} 29 U.S.C. § 629(a)(1) (2012).}
\footnotesize{\textsuperscript{35} § 629(a)(2).}
\footnotesize{\textsuperscript{36} \textit{See} Smith v. City of Jackson, Miss., 544 U.S. 228, 233 (2005) (explaining that the Supreme Court has consistently applied the idea that the ADEA was “derived in haec verba from Title VII” and that Title VII cases serve as important precedent for ADEA cases (citation omitted)).}
\footnotesize{\textsuperscript{37} Id.}
\footnotesize{\textsuperscript{38} Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993); \textit{Smith}, 544 U.S. 228 at 232.}
A disparate treatment claim is appropriate when an “employee’s protected trait actually played a role” in the employer’s decision to take an adverse employment action.\(^{39}\) In cases in which the protected trait, the “impermissible” consideration, played a role in addition to a non-protected trait, the “permissible” consideration,\(^ {40}\) the protected trait must be the “but-for” cause of the adverse action.\(^ {41}\) In cases in which only the protected trait played a role in the adverse action, a court would use the \textit{McDonnell Douglas} burden shifting framework to determine if the employer violated the ADEA.\(^ {42}\) Under this framework, the plaintiff bears the burden of first proving a prima facie case of discrimination.\(^ {43}\) Once a prima facie case is established, the burden shifts to the employer to “articulate some legitimate, nondiscriminatory reason for the [adverse action].”\(^ {44}\) The burden then shifts back to the complainant to prove that the employer’s offered explanation for the discrimination was pretext.\(^ {45}\)

A disparate impact claim, on the other hand, is one in which the complainant alleges that some facially neutral employment practice has resulted in one protected class being more adversely affected than others.\(^ {46}\) Plaintiffs typically have a harder time succeeding with a disparate impact claim under the ADEA because the scope for disparate-impact is relatively narrow;\(^ {47}\) the ADEA precludes liability even when older workers are the primarily affected group so long as an employer relies on some reasonable factor other than age.\(^ {48}\) Multiple courts

\(^{39}\) 	extit{Hazen Paper Co.}, 507 U.S. 604 at 610.
\(^{41}\) Id. at 176.
\(^{42}\) See id. at 612 (noting that \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792 (1973) created a “proof framework applicable to ADEA).
\(^{43}\) \textit{McDonnel Douglas Corp.}, 411 U.S. at 802.
\(^{44}\) Id.
\(^{45}\) Id. at 804.
\(^{46}\) Smith v. City of Jackson, Miss., 544 U.S. 228, 239 (2005).
\(^{47}\) See \textit{Smith}, 544 U.S. 228 at 240 (explaining that in 1991, Congress amended The Civil Rights Act to expand the scope of disparate-impact claims, but failed to do so with the ADEA).
\(^{48}\) See id. at 242 (affirming the lower court’s decision that the city police department did not violate the ADEA when its wage-raise policy was based on the reasonable factor of “seniority and position”).
have also found that disparate impact claims do not apply to prospective job seekers,\textsuperscript{49} which could make it more difficult for plaintiffs to succeed under the advertising provision of the ADEA—§ 623(e).

\textbf{b. Section 623(e)}

Section 623(e) of the ADEA specifically addresses age discrimination in help wanted advertising. It prohibits employers and employment agencies from indicating a preference for certain workers based upon age.\textsuperscript{50} Unlike its counterparts in the Civil Rights Act and the Fair Housing Act, the advertising provision of the ADEA has a scant amount of judicial interpretation.\textsuperscript{51} Of the cases that have touched upon § 623(e), the one that provides the most guidance is \textit{Hodgson v. Approved Personnel Service, Inc.}\textsuperscript{52}

In \textit{Hodgson}, the Department of Labor sued an employment agency for its allegedly discriminatory help wanted advertisements.\textsuperscript{53} The court rejected the plaintiff’s contention that certain “trigger words” constituted a per se violation of the ADEA but found that the advertisements in question (advertisements using words such as “young,” “boy,” or “recent college grads”) violated the ADEA.\textsuperscript{54} The Fourth Circuit ultimately held that “broad, general invitation[s] to a specific class of prospective customers . . . do[] not violate the Act.”\textsuperscript{55} However, when “these same words are used in reference to a specific employment opportunity . . . there is an implication that persons older . . . need not apply. Thus, such ads violate the Act.”\textsuperscript{56}

\textsuperscript{49} See e.g., Villareal v. R.J. Reynolds Tobacco Company, 839 F.3d 958, 961 (11th Cir. 2016) (“We conclude that . . . the [ADEA] makes clear that an applicant for employment cannot sue an employer for disparate impact.”).
\textsuperscript{50} 29 U.S.C. § 623(e) (2012).
\textsuperscript{51} See Boyd v. City of Wilmington, North Carolina, 943 F.Supp. 585, 590 (E.D.N.C. 1996) (“[623(e)] has garnered minimal discussion in the federal courts.”).
\textsuperscript{52} 529 F.2d 760 (4th Cir. 1975).
\textsuperscript{53} Id. at 762.
\textsuperscript{54} Id. at 763, 765.
\textsuperscript{55} Id. at 766.
\textsuperscript{56} Id.
It seems, based on *Hodgson*, that whether or not an advertisement violates § 623(e) of the ADEA is an entirely context-dependent question.

Notably, *Hodgson* was decided well before the Equal Employment Opportunity Commission ("EEOC") enacted a regulation concerning help wanted advertisements in 2007, when the EEOC determined that "[h]elp wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as age 25 to 35, young, college student, recent college graduate, boy, girl, or others of a similar nature violate the Act." Whether courts will interpret this provision as a per se rule or as a contextual rule in accordance with *Hodgson* remains to be seen.


In 2017, Linda Bradley, Maurice Anscombe, Lura Callahan, and Communications Workers of America filed a complaint in the Northern District of California against T-Mobile, Amazon.com, Cox Communications, and Cox Media group alleging various violations of the ADEA. After nearly a year of various motions and other litigation proceedings, Plaintiffs amended their complaint for a third time and alleged seven specific causes of action. First, the Plaintiffs contend that Defendants have violated § 623(e) of the ADEA with their targeted advertisements on Facebook. Second, they claim the Defendants have engaged in disparate treatment discrimination through their hiring practices in violation of §§ 623(a) and 623(b) of the

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61 Id. at 52–55.
ADEA. Additionally, counts three through seven allege various violations of state law. All claims are based on the allegation that Defendants utilized Facebook’s targeted advertising functions to illegally dissuade or prevent older workers from applying for employment with Defendant companies.

Turning to § 623(e), the Plaintiffs allege that Defendant companies have utilized Facebook’s targeted advertising functions to “publish . . . notices or advertisements that relate to employment or referral for employment . . . that indicate any preference, limitation, specification, or distinction based on age.” The complaint highlights two examples of this alleged discrimination: first, a T-Mobile employment ad directed at “people aged 18-38 who live or were recently in the United States,” and second, a Facebook employment ad directed at “people ages 21-55 who live or were recently in the United States.” This explicit acknowledgement of the targeted demographic appears when the user clicks on the “Why Am I Seeing This” section of the advertisement, giving the user a glimpse into the specific data that has been collected about him or her and how the advertiser used that data in targeting him or her.

Defendants have moved to dismiss Plaintiffs’ claims on a number of bases including standing, personal jurisdiction, and most importantly, failure to state a claim. The arguments

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62 Id. at 55–59.
63 Id. at 59–70.
64 Id. at 1.
65 Id. at 52.
66 Id. at 2.
67 Id. at 3.
68 Id. at 53.
70 Amazon’s Motion to Dismiss at 4, Commc’ns Workers of America v. T-Mobile U.S., Inc., No. 5:17-cv-07232 (N.D. Cal. Oct. 11, 2018); Defendants Cox Media Group, LLC and Cox Communications, Inc.’s Joinder in Amazon’s Motion to Dismiss and Supplemental Memorandum in Support of Motion to Dismiss at 2, Commc’ns Workers of America v. T-Mobile U.S., Inc., No. 5:17-cv-07232 (N.D. Cal. Oct. 11, 2018).
the Defendant companies have advanced in support of their contention that Plaintiffs have failed to state a claim are consistent for each Defendant. Defendants first argue that Plaintiffs have no claim as to § 623(e) because: (1) the ads used are facially neutral, thus the companies have not “printed, published, or caused to be published” any discriminatory ad; (2) the “Why Am I Seeing This” message from Facebook is not part of the advertisement and comes from Facebook, not the defendant companies; and (3), the Plaintiffs never actually saw the ad and thus could not be deterred from applying to a job because of the ad. The merits of the Defendants’ motions to dismiss will be heard on April 18, 2019.

III. Analysis

It will likely be some time before Communications Workers of America is resolved but when it is, unless it settles, it will provide valuable insight as to how discrimination in targeted advertising will be treated by the federal judiciary. While it is likely that the Defendants will ultimately prevail on the merits, the Defendants’ motions to dismiss should be denied and the Plaintiffs should have an opportunity to argue the merits of their case.

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71 Amazon’s Motion at 8; Defendants Cox Media Group at 5.
72 Amazon’s Motion at 13; Defendants Cox Media Group at 9.
73 See Defendants Cox Media Group at 9 (“Plaintiffs’ claim against CCI and CMG should be dismissed for the reasons stated in Amazon’s lead motion to dismiss.”). While there are additions and differences between the motions to dismiss for each defendant, this Recent Development will only address the arguments outlined in Amazon’s Motion to Dismiss for the sake of space.
74 Amazon’s Motion at 14.
75 Id. at 15.
76 Id. at 16.
77 Bloomberg Law Civil Docket for Case No. 5:17-cv-07232, https://www.bloomberglaw.com/ (follow the hyperlinks after searching the case number in the search bar).
78 It seems unlikely that a federal district court judge would be willing to find in favor of the Plaintiffs. There is a severe lack of judicial precedent interpreting section 623(e) and of the cases that do interpret this provision, no violation is typically found. See e.g., Boyd v. City of Wilmington, N.C., 943 F.Supp. 585, 591 (1996) (finding no violation of section 623(e) when there was no “intent to discriminate”).
79 Only with respect to the allegation that Plaintiffs have failed to state a claim. This Recent Development offers no comment on Defendants’ claims that Plaintiffs lack standing and that there is no personal jurisdiction over Defendants.
The crux of the Defendants’ arguments that the Plaintiffs have failed to state a claim revolves around the idea that the advertisements used are facially neutral, the allegedly discriminatory content (the “Why Am I Seeing This?” message) belongs to Facebook and not to the advertisers, and that the Plaintiffs have never actually seen the advertisements. While these seem like strong arguments at first glance, after a closer look, they can be defeated. Each argument will be addressed in turn.

a. Facially Neutral

The first argument, that the allegedly discriminatory advertisements are facially neutral, appears to be a winning argument at first glance, particularly in light of Hodgson v. Approved Personnel Service, Inc.80 In Hodgson, the Fourth Circuit ruled that words in an advertisement alone cannot be said to be a per se violation of § 623(e), but rather it is the context in which the words are used that determines if a violation of the section occurred.81 Even if the advertisements were widely construed, it is hard to see how the advertisements in question violate § 623(e). None of the advertisements include any of the “trigger” words outlined in the EEOC regulation interpreting § 623(e),82 and there is simply no discriminatory context that can be gleaned from a phrase like “[n]ot enough hours in your day? Work the night shift with Amazon!”83 The law clearly seems to be on the Defendants’ side as to this point. However, policy reasons indicate that facial neutrality should not be used as a defense to discrimination in cases regarding targeted advertising.

If facial neutrality is allowed as a defense in the pre-trial phase, no plaintiff will ever be able to get through the door with claims of discrimination in targeted advertising. Facial

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80 529 F.2d 760 (4th Cir. 1975).
81 Id. at 765.
82 29 C.F.R § 1625.4.
neutrality is arguably the most vital characteristic of targeted advertisements — advertisers use this technology to target individuals or groups of individuals based on specific characteristics without the individual knowing exactly why they are being targeted. Advertisers collect information about consumers and use that information in their determination of where to place ads or who to show the ads to, they do not use the information to determine ad content. Thus, to allow facial neutrality to defeat a claim at the pre-trial phase blatantly ignores the targeted advertising model. This idea is entirely inconsistent with the purposes of a facial neutrality standard, and would entirely eliminate the possibility of bringing a disparate impact claim under the ADEA. Advertisers would then be able to sidestep liability for discrimination and create a facially neutral advertisement but advertise exclusively to people within their targeted demographic.

b. Discriminatory Content Belongs to Facebook

Defendants’ second argument, that the discrimination occurs in the “Why Am I Seeing This?” message as opposed to the actual advertisement, and is thus Facebook’s message, is similarly strong on its face. This argument is strongly tied to the claim that the advertisements are facially neutral, and the Defendants seem to be using this argument to bolster the argument

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84 While it is common knowledge these days that targeted advertising is ubiquitous, it is a technology that is not well-understood by the average consumer. An individual may know they are seeing a particular ad, but they may or may not know why they are seeing that specific ad. For example, in a study of undergraduate consumers, study participants were exposed to advertisements for a high-end watch brand they believed to be behaviorally-targeted toward them. Rebecca Walker Reczek, Christopher Summers, & Robert Smith, Targeted Ads Don’t Just Make You More Likely to Buy — They Can Change How You Think About Yourself, HARV. BUS. REV. (Apr. 4, 2016), https://hbr.org/2016/04/targeted-ads-dont-just-make-you-more-likely-to-buy-they-can-change-how-you-think-about-yourself. The participants who believed (but did not know for sure—the advertisements used in the study were not actually targeted based on the participants’ behavior) they were targeted based on their Internet-use behavior began to perceive themselves as more sophisticated compared to the participants who did not believe they were receiving behaviorally-targeted advertisements. Id. This suggests that consumers, at best, can only guess as to why they are receiving a certain advertisement. See also MIKE SMITH, TARGETED: HOW TECHNOLOGY IS REVOLUTIONIZING ADVERTISING AND THE WAY COMPANIES REACH CONSUMERS 69 (American Management Association 2015) (explaining how “most Internet users are unaware of what’s happening” when information about Internet use is sent to an advertiser).

85 See supra note 44 and accompanying text.
that the claims are facially neutral. Defendants are again correct in stating that the discriminatory message belongs to Facebook and not to the defendant company.\(^86\) The “Why Am I Seeing This?” message comes courtesy of Facebook’s efforts to be more transparent in its advertising functions.\(^87\) It is in that message that the explicit acknowledgement that the advertisement is directed at workers aged “18-54,” or “22-40.”\(^88\) Plaintiffs attempt to get around this inconvenient fact by arguing that Facebook is acting within the capacity of an agency relationship between itself and the Defendant companies;\(^89\) however, the Plaintiffs should not have to resort to agency laws to assert a claim based on discrimination in targeted advertising.

If the Plaintiffs are required to rely on agency law to assert a claim of discriminatory advertising against the advertisers themselves then it will be nearly impossible for any discriminatory targeted advertisement to serve as the basis of litigation. Targeted advertising is done almost exclusively through third party websites like Google or Facebook,\(^90\) thus anybody viewing a targeted advertisement will be viewing it on a webpage that does not belong to the advertiser itself. It follows then, if Defendants’ argument is accepted, that any plaintiff would have to sue the facilitator of the advertisement instead of the advertiser itself. If plaintiffs are relegated to only suing the facilitator of the advertisement (Facebook, Google, etc.) then that facilitator will argue, likely successfully, that it is protected by the Communications Decency Act.\(^91\) This argument advanced by the Defendants in Communications Workers of America, if


\(^{87}\) See Todd Wasserman, Facebook Will Now Tell You Why You’re Seeing Those Ads, MASHABLE (June 12, 2014), https://mashable.com/2014/06/12/facebook-explains-ads/#GOzF_EhWamqX.

\(^{88}\) Exhibit A at 3–7. The employer may still be implicated in a Section 623(e) violation regardless of the explicit acknowledgement of discriminatory advertising content.


\(^{91}\) See supra note 8.
accepted by the court, could potentially leave any future victims of discrimination via targeted advertising without a defendant to sue.

However, it could be argued that this issue is not for the courts to address. Courts are not meant to legislate and it is entirely within Congress’ purview to legislate around the loophole that the CDA creates for defendants like Facebook. Until and unless Congress amends the CDA to close this loophole, it is settled law that the CDA protects online publishers from being liable for content it publishes by a third party. Yet, courts have begun to reject the CDA as a defense in cases where an online publisher was sued for harmful content on its webpage, signaling that courts are willing address some of the legal gray areas in online technology.

c. Unseen Advertisements

Defendants’ final argument, that the Plaintiffs cannot have suffered any discrimination because they did not even see the advertisements in question, presents a catch-22 unique to the issue of discrimination in targeted advertising. Targeted advertisements are designed to only reach a certain audience; unlike a print advertisement in a woman’s magazine where the advertisement is accessible to anyone, woman or not, who buys the magazine, a targeted digital advertisement will simply not appear for someone who is outside the targeted demographic. That is the genius—and the problem—of targeted advertising. A victim of discrimination cannot

92 Indeed, Congress has already attacked the loopholes that the CDA creates for some defendants who facilitate child sex trafficking. See Tom Jackam, Senate launches bill to remove immunity for websites hosting illegal content, spurred by Backpage.com, WASH. POST (Aug. 1, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/08/01/senate-launches-bill-to-remove-immunity-for-websites-hosting-illegal-content-spurred-by-backpage-com/?noredirect=on&utm_term=.4e6658bfba0. Discriminatory advertisements are illegal just like sex trafficking content; under this principle, Congress would amend the CDA to close the loophole for facilitators of discriminatory advertisements.

93 See Christopher Zara, The Most Important Law in Tech Has A Problem, WIRED (Jan. 3, 2017), https://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem/ (detailing recent court cases in which the judge has rejected the CDA as a defense for Internet companies).

know that they are a victim of a discriminatory advertisement unless they see the ad, yet no discrimination will have occurred if the victim was not excluded from seeing the advertisement in the first place.

This is an issue that the *Communications Workers of America* court will have to grapple with, as will any court faced with a discriminatory targeted advertisement suit. There is no case law addressing this conundrum, but the principles surrounding discriminatory print advertisement should be carried over to digital targeted advertising.

One of these principles is outlined in a New York Times article from 1993.95 The article outlines a new policy the newspaper was adopting in light of a recent lawsuit where it was alleged that the newspaper violated fair housing laws by running print advertisements for housing that only showed white people.96 In the lawsuit, which the newspaper settled, the plaintiffs argued that because the advertisements lacked racial diversity, they “only appealed to white readers.”97 The federal judiciary clearly agreed with this notion, as lower courts ruled against the newspaper.98 The principle that can be extrapolated from this is that advertisements can be deemed discriminatory if they only appeal to certain readers based on a protected trait. If this idea is carried over and applied to the world of targeted advertising, advertisements that are targeted in such a way to “only appeal” to certain readers can potentially be deemed as discriminatory despite being facially neutral. If the court in *Communications Workers of America* focuses on the goals and principles underlying anti-discrimination statutes, then the Defendants’ motions to dismiss should be denied.

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96 *Id.*
97 *Id.*
98 *Id.*
IV. Conclusion

Because there is a dearth of case law interpreting § 623(e) of the ADEA, it is hard to say how claims based on this section should or will be handled. The ADEA seems to be a particularly murky statute for a court to wade through, given the fact that age is oftentimes a reasonable basis for discrimination or preference. Unlike its counterparts, the ADEA was enacted to counteract the stereotypes held about older workers as opposed to vitriolic animus. Thus, much of the case law interpreting the ADEA has indicated that there is a much narrower basis on which plaintiffs can assert claims of discrimination. However, a narrow reading of § 623(e), one that dismisses the implications of targeted digital advertising, would enable advertisers to do exactly what Congress sought to prohibit in the first place—discriminatory employment advertisements. While this paper has focused on the ADEA, the issues highlighted herein apply to all types of discrimination in targeted advertising claims. The ADEA is likely only the jumping off point for these issues and this paper urges federal courts to think more broadly about discrimination in targeted advertising than the case and statutory law would seem to require.

100 See Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (“Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact.” (citation and quotation omitted)).
101 See supra note 44. See also Villareal v. R.J. Reynolds Tobacco Company, 839 F.3d 958 (11th Cir. 2016) (holding that job seekers do not have a cause of action under the ADEA if their claim is based on a theory of disparate impact).
102 The EEOC has pointed to statistics indicating that the racial diversity of older workers is steadily increasing. Victoria A. Lipnic, The State of Age Discriminatino and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA), U.S. EQUAL EMP. OPPORTUNITY COMMISSION (June 2018), https://www.eeoc.gov/eeoc/history/adea50th/report.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.