

Legal Aspects of Age Discrimination in the Workplace

Laurie A. McCann
Senior Attorney
AARP Foundation Litigation

■ How Prevalent Is Age Discrimination?

- The short answer is no one really knows
- One indication is the number of charges filed with the EEOC and state fair employment agencies
- AARP's Value of Experience Survey
 - In a 2017 survey of individuals age 45 and over, 61% of respondents said they have either seen or experienced age discrimination in the workplace and 38% of those believe the practice is "very common." Older women, African-Americans, Hispanics and those who are unemployed were more likely to feel they were the subject of discrimination.
- Experimental Hiring Discrimination Research
 - Multiple experimental studies have documented significant discrimination against older applicants in the hiring process, including one study that sent out similar resumes to over 13,000 lower skill positions in 12 cities across 11 states, totaling 40,000 applicants, to determine if employers were less likely to respond to the resumes of younger applicants. The results showed that employers were significantly less likely to call back older applicants

What Barriers Impede Enforcing Prohibitions Against Age Discrimination?

- Lack of Evidence – Employers Rarely Leave a “Smoking Gun”
- Court-Created Onerous Evidentiary Burdens
 - Stray Remarks vs. Ageist Comments
 - Age Must be the “But-For” Cause of the Harm
 - Depriving Hiring Discrimination Victims of the Disparate Impact Theory of Proof
- Age Discrimination is viewed through an economic lens not a civil rights lens.

How Do These Barriers Impact the Prevalence of Age Discrimination?

- Congress intended the ADEA and other civil rights statutes to serve two purposes – (1) to compensate the victims of discrimination and (2) to deter future violations.
- They are intended to serve as a “spur or catalyst” to cause employers “to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges” of discrimination. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).
- Successful cases should incentivize employers to be more mindful about the potential impact their policies and practices have on older employees.
- Only 8 percent of organizations include age as part of their diversity and inclusion initiatives.

Intersectional Discrimination

- When an individual is treated differently because he or she belongs to more than one protected category (i.e., older women, or older black women) and is subjected to a set of stereotyping unique to his or her status.
- They are not discriminated against for being just female, or just being old, but by being old and female
- For older women to be protected from this intersectional discrimination, they must use both the ADEA and Title VII of the Civil Rights Act, recognizing older women as a subgroup of two protected classes. However, in practice, courts generally do not understand or allow this
- Meanwhile, intersectional claims that fall under the same statute (e.g., race-and-gender, both under Title VII) are generally accepted by courts. This odd quirk seems to stem from the mere fact that the ADEA is a separate statute.

What Do We Need to Know?

- Do victims of age discrimination fare better in states that have omnibus civil rights statutes as opposed to a separate age statute like the federal scheme?
- Why are the stereotypes about older workers so difficult to combat more than 50 years after the enactment of the Age Discrimination in Employment Act (ADEA)?