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Has the Law Evolved Enough to Combat Pervasive Age Discrimination?

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By **KATHRYN BARCROFT**, September 11, 2019 at 11:30 AM



Activist organizations have been hard at work studying the pervasiveness of age discrimination in corporate America and have noted the difficult legal standards to prove it, which leave many workers without options in the workplace after a certain age. While #MeToo has become a large focus in corporate America, the law surrounding age discrimination and the hurdles to litigation are largely ignored. The issue is of particular importance as employees are living longer and choose, or need to work later in life, rather than having the means to retire with a sizeable pension. The realities of age discrimination are a real concern for all races and genders in the workforce as they plan their careers and are sometimes illegally forced to leave a company due to age discrimination.

Ageism is a worldwide problem that can affect the employment status of older workers. The issue has garnered the attention of the World Health Organization (“WHO”), an organization that has noted in relation to their upcoming study on ageism, that age discrimination is “an incredibly prevalent and insidious problem.” Paula Spain, *Ageism: A ‘Prevalent and Insidious’ Health Threat*, New York Times (April 26, 2019). Further, “unlike other forms of discrimination... [it] is socially accepted and usually unchallenged, because of its largely implicit and subconscious nature.” Alana Officer & Vânia de la Fuente-Núñez, *A global campaign to combat ageism*, World Health Organization (March 9, 2018). A full report on WHO’s findings is anticipated in 2020.

In June 2018, the Equal Employment Opportunity Commission released a study for the 50th anniversary of the Age Discrimination in Employment Act (“ADEA”), which tracked the growth of older workers in the workforce with significant concerns about an aging population in the United States. 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)*, EEOC (June 2018). According the EEOC study, the last 25 years have brought about the most dramatic changes in the age of the nation’s workforce with the number of workers age 55 and older in the workplace almost doubling in amount. *Id.* Per the report, the oldest population of “age 65+ workers” is only rising with a projected to growth of “75 percent by 2050, while the group of

workers age 25 to 54 is only expected to grow by 2 percent over this same period.” *Id.* Not surprisingly, a large part of the projected change is female workers who are staying in or re-joining the workforce in record numbers with women “55 and older” comprising over “over 25 percent of the women's labor force by 2024, which is almost double their share from 2000.” *Id.*

Unfortunately, a rise age in older members of the U.S. workforce has not meant significant change. An AARP nation survey reported in July 2018 revealed that 61 percent of workers over 45 had either witnessed or directly experienced age discrimination and 38% of these workers reported that the practice is “very common.” Rebecca Perron, *The Value of Experience Study*, AARP (July 2018). Examples of discrimination experienced by those in the study included supervisors making discriminatory comments related to their age and non-selection for jobs and/or promotions. *Id.* For the respondents in the survey who had been laid off, one third of them believed it was due to their age. *Id.*

Instances of age discrimination can vary in severity, and most experts in this area urge employers to rethink how they address employees including labels related to workers seniority within a company, age related comments, organizational classifications based on age. More nefarious instances of age discrimination include an employer secretly pushing older workers out by mandating that they work longer hours than they had worked previously

with an increase in the workload of assignments, imposing new unmanageable travel requirements, reassignment to less desirable positions in the same company, sudden performance improvement plans, “PIPs”, to document fake performance issues, failure to provide challenging assignments and pigeon holing a worker in menial tasks beneath their ability, isolating the older worker spatially from others at the company, “suggesting” early retirement with a better package if the older worker agrees to leave amicably, and engaging in a pattern of hiring younger workers. The goal is to force the older workers to resign or create a non-discriminatory record of performance issues and replace these workers with younger and less expensive employees.

The Age Discrimination in Employment Act (ADEA) and New York State and New York City’s Human Rights Law apply to New York employees seeking redress against companies. While these laws provide statutory relief for employees to take action concerning age discrimination, it must be asked, as with sexual harassment laws, has the law gone far enough to take action in response to concern over age discrimination in the workforce? The same level of publicity that has accompanied the #MeToo movement should be in full force, given the sobering statistics that threaten older workers.

Unfortunately, plaintiffs seeking to litigate an age discrimination claim are in an even more difficult position than other protected groups alleging discrimination, especially under the

ADEA. In 2009, the Supreme Court held that a plaintiff suing under the ADEA is required to prove by a preponderance of the evidence that a plaintiff's age was the "but for" cause for the employer's adverse employment action. See *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167 (2009). The Court's ruling departed from the prior burden-shifting whereby a plaintiff was merely required to prove by a preponderance of the evidence that age was a "motivating factor" behind the adverse employment action and then the employer had the opportunity to prove that the adverse employment action would have occurred in the absence of the improper motivating factor. The current standard is higher and more difficult to prove than the standard that exists under Title VII of the Civil Rights Act of 1991 burden shifting analysis, argued for in the Supreme Court's dissent in the *Gross v. FBL* case, wherein a plaintiff is only required to prove the "motivating factor" standard which applies to "status-based discrimination" claims, i.e., claims based on race, color, religion, sex, and national origin.

More recently, the Seventh Circuit has dealt another blow to litigants with the law trending in arguably the wrong direction. On January 23, 2019, the Court of Appeals for the Seventh Circuit held a cause of action for disparate impact under the ADEA is available only to existing employees, rather than new applicants. See *Kleber v. CareFusion Corp.*, 914 F.3d 480 (7th Cir. January 23, 2019). The Court's holding that the ADEA does not permit job applicants to challenge employer hiring practices under a theory of disparate impact is

significant in that an applicant over 40 years old is not able, in certain jurisdictions, to challenge a company's hiring policy that is neutral on its face, yet disproportionately impacts older applicants.

Despite the challenges would-be plaintiffs face to bringing successful ADEA claims, a few recent cases demonstrate at least an ostensible willingness on the part of some companies to settle large age discrimination suits and modify their practices to reduce age discrimination. It remains to be seen, however, whether the companies' promised policy changes will effect meaningful change both internally and throughout the industry.

Google recently was involved in a class-action, in which more than 200 job applicants, over the age of 40, settled for \$11 million. Patrick Thibodeau, *Google age discrimination lawsuit may force HR changes*, TechTarget SearchHRSoftware (August 9, 2019). The allegations concerned the denial of engineering positions to these applicants based on their age, as Google's workforce was comprised of younger workers in these positions, based on the U.S. Department of Labor's statistical information. *Id.* Internal changes are required as part of the settlement, including hiring practices and employee surveys. *Id.*

Similarly, IBM is under fire for allegedly terminating “thousands of older employees over the past few years as part of a rebranding strategy to appeal to millennial workers.” Stephen Johnson, *IBM fired up to 100,000 older employees to attract millennial workers, says lawsuit*, Big Think (August 2, 2019). In March 2018, a ProPublica article disclosed that IBM’s management denied employees information concerning how to decide whether they were in fact victims of age bias or discrimination and required them to sign away their right to proceed in court; targeted older people for layoffs and termination with discriminatory techniques and in many instances money save from the older employees departures was used to hire young replacements; took steps to convert cuts in the workforce to label them retirements and boost resignations to reduce the number of employees counted as layoffs; requested that employees involved in layoffs apply for other internal positions and then worked behind the scenes to request that the managers hiring for those positions not hire the older workers; and reprimanded older workers for their skills being out of date but then hired them back with lower pay as contract workers with fewer benefits. *Id.* IBM’s alleged tactics are a roadmap to the tactics of many corporations in targeting older workers.

Two recent cases provide a modicum of hope, after lengthy court battles, for some relief. For example, in *Westmoreland v. TWC Administration LLC*, No. 18-1600 (4th Cir. May 22, 2019), the Fourth Circuit upheld a jury award \$334,500 in damages for age discrimination where the evidence was sufficient to support a 60-year-old plaintiff’s claims. In

Westmoreland, the plaintiff worked for the company and its successor corporations for nearly 30 years until she was replaced by a 37-year-old. After she was terminated, her supervisor told her “[o]h girl, you don’t have nothing to worry about. You’ll get another job. Just go home and take care of those grandbabies,” which directly referenced the plaintiff’s age. *Id.* The plaintiff’s award, however, came after a long battle with two trials – with the first trial declared a mistrial.

More recently, in the news, in or about August 19, 2019, a former Los Angeles Times columnist was awarded \$15.4 million in damages following his claims that he was discriminated against by his former employer for his age and disability. Richard Winton, *Jury awards former Times sports columnist \$15.4 million*, Los Angeles Times (August 19, 2019). The columnist, T.J. Simers, had worked for the paper since 1990 but resigned in 2013 after he was demoted from columnist to a writer shortly following a mini-stroke with his column being taken away. *Id.* After his health began to decline, his managers placed his work “under increased scrutiny and criticism” even though both had previously “praised his writing and reporting.” *Id.* He alleged this was not due to the quality of his work, but rather, it was age and disability discrimination. *Id.* Simer’s battle took several years with the first damages award largely thrown out by the trial judge, an appeal, and then the Appeals Court finally agreeing that Simers had been the victim of age and disability discrimination and sending the case back for the damages phase to be retried. *Id.*

While various organizations have been working to bring awareness to the ongoing issue of age discrimination, more has to be done at the state and federal level to ensure that enough policy exists to protect older workers including lowering the legal standards to prove age discrimination. The long battles waged by employees are hard fought and require vast sums of money for older workers. A movement similar to #MeToo, with new legislation proposed to establish not only lower legal standards but also to require preventative policies and trainings to develop an awareness of the pervasiveness of the issue. There also needs to be a societal shift in attitudes toward older workers which will increase worker health and increase productivity at companies. Cost-cutting concerns associated with higher salaries or increased health care needs should not influence the many benefits that experienced workers including institutional knowledge, wealth of experience, and the organizational benefit of a multi-generational workforce with older workers comprising more of the workforce.