



## Age Discrimination: the Latest from the Barricades

Working 50+ / By John Tarnoff / 4 COMMENTS



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Like the majority of employees it is designed to protect, the Age Discrimination in Employment Act is over 50. Passed in 1967 and modeled on the Civil Rights Act of 1964, the ADEA protects workers over 40 from being denied employment or from being let go on the basis of their age.

## A Tougher Standard

Here's the wrinkle with the ADEA. While the Civil Right Act uses terminology that classifies discrimination as having to be a "motivating factor" – but not the only factor – in establishing discrimination, the ADEA, uses criteria that require age to be the single most important, or even the sole reason for age discrimination. Needless to say, this is a much higher bar to clear. A recent federal appeals case brought by the AARP on behalf of a Chicago lawyer (Kleber v Carefusion) ruled in favor of the company. It made the (to me) outrageous assertion that the ADEA was intended to protect existing workers at a company from being fired, not to protect new workers seeking employment. Read the text of the ADEA and see if you agree with this interpretation.

## This Ain't Going Away Soon

The battle is ongoing. We all know that employers are bending over backwards to maintain the appearance of compliance with the ADEA. But they are also coming up with resourceful ways of circumventing it.

- Facebook's audience targeting has been used by employers to only show job openings to younger candidates. How brilliant is that! Older candidates don't even know they're being discriminated against. They don't even get to see the listings. In the face of looming lawsuits and a government complaint, the company has taken action to mitigate this practice.
- IBM was outed last year by ProPublica for a coordinated and not-so-clandestine program to "cut old heads" and promote younger hires (through their now-discontinued "Millennial Corps" program). The company is now facing a rash of lawsuits and an Equal Employment Opportunities Commission (EEOC) investigation. (If you haven't read the ProPublica report, it is a doozy, and investigative journalism at its finest...).
- Some wins along the way: Lockheed Martin was fined \$51 million including back pay, punitive damages, and penalties for firing a 66 year-old project engineer without cause. The Texas Roadhouse restaurant chain was recently fined \$12 million by the EEOC for its age discrimination practices. In an interview with EEOC Director Victoria Lipnic, my colleague, financial journalist Chris Farrell, reveals that the agency has been steadily increasing its enforcement activities based on the growing number of complaints filed each year (over 18,000 in 2017).



## **Impunity and Arrogance**

When you read through the cases and stats, you realize that like other forms of discrimination, age discrimination is under-reported. It is also ferociously defended and protected by its perpetrators. Companies go to great lengths to disguise their ageist practices. In the IBM case for example, the company had the gall to fire people who were getting older, but then invited them to apply to contractor positions at lower pay rates and without benefits. They THEN instructed the hiring managers for those positions to NOT hire the former employees! The irony of age discrimination, of course, is that EVERYONE is eventually subject to its effects. So it is, in essence, a reflection of our own denial and fear of getting old (and dying). This is why age discrimination is “the last ism.”

## **The Future: Ominous or Hopeful?**

Does the Chicago case (*Kleber v Carefusion*) constitute a harbinger of things to come? Will the courts continue to support age discrimination under the broad rubric of “deregulating” business practices? Or will that case get overturned by the Supreme Court? Will Congress act to bolster the ADEA? The senate-sponsored Protecting Older Workers Against Discrimination Act (POWADA) has bi-partisan backing to do just that, but has not gained much traction.

<https://johntarnoff.com/age-discrimination-update-2019-2/>

My view: don't look to the courts. They're typically on the tail end of the innovation/leadership curve.

Look instead at the demographics. Since the early 1990s, the number of workers 55 and older has doubled. As the aging bubble continues to grow (with the last baby boomer turning 65 on December 31, 2029), the number of older workers in the workforce will keep pace. Women over 55 are also one of the fastest growing segments of the workforce. By 2024, they will outnumber women 16-24 by a 2:1 margin.

There's an economic imperative at work here that employers can't ignore. Employers are going to be better served by re-examining their bias and recognizing how older workers can improve their bottom line. There is a need for skilled workers, for more soft skills and life experience, and many other attributes that older workers bring to the table. I believe that the tide will have to turn **because it is in employers' best economic self interest**.

### **Defy the Stereotypes**

Rather than bemoan the regressive attitudes of the courts, we need to bring our "A" game to every meeting and every interview. By being the change and bringing the value, we can dispel the false myths, and bring about a much more multi-generational workforce.

What's your experience with age discrimination in your work? Is it something you're seeing every day, but not experiencing directly? Or have you been (or are you currently) the target of age discrimination?

If so, what are you doing about it? Do you think we should be fighting back, or using this as a "teachable moment" to bring generations together?