

## **SMALL BUSINESSES AND THE OLDER WORKER**

Lynn Hoffman & Nina Radojevich-Kelley, Metropolitan College of Denver

### **Abstract**

As the U.S. workforce continues to age, older workers will present unique challenges and opportunities to small business owners. In many instances, small business owners will have to rely on their older workers' expertise and experience. Although many myths exist about older workers, they are both productive and reliable. While they provide significant value to small business owners, they present both drawbacks and positives to the workforce as is true of all generations. With the increase in the number of older workers has come an increase in age discrimination lawsuits that will prompt both the courts and Congress to address the current law. Given the uncertain state of employment discrimination law, the paper presents guidelines to small businesses to enhance the contribution of these employees and simultaneously avoid lawsuits.

### **Introduction**

The U.S. workforce is growing older. This demographic shift provides some unique opportunities to small business owners to fully utilize their older workers. Small business owners will have to acknowledge their strengths and weaknesses, overcome stereotypes about older workers, and meet some of their special needs.

### **Age Data: The Older Worker**

What does the term "older worker" mean exactly? The Age Discrimination in Employment Act (ADEA) defines an older worker as anyone over the age of 40 (29 U.S.C.A. sections 621, 1967). Chronological age has been the most common method to classify individuals as older. Historically this was set at the age of 65 which was considered retirement age (Sheppard & Rix, 1977).

This number dates back to the year 1916 when Germany set it as the official retirement age (Strenger & Ruttenberg, 2008). This was based on a 49 year life expectancy making 65 seem "older" (Strenger & Ruttenberg, 2008). During the 20<sup>th</sup> century in the U.S. the retirement age was considered to be 70 (Alley & Crimmins, 2007).

### **The Demographic Shift**

This demographic shift is readily apparent. The baby boomer generation has 76 million individuals born between 1946 and 1964 (Matarazzo and Mika, 2006). In contrast the next generation, Generation X, has 46 million individuals. Current estimates place the older workers at 20% of the workforce by 2015 which would be an increase of nearly 50% through the year 2014 (Montgomery, Borgatta & Kosloski, 1990). This generation is the fastest growing age group in the workforce (Strack, Baier & Fahlander, 2008).

### **Underlying Factors in the Demographic Shift**

There are several factors accounting for this demographic change. First life expectancy in the US has shifted to around 80 years of age (Strenger & Ruttenberg, 2008). Medical advances allow many of these individual to achieve a higher quality of life than previous generations. Just because individuals reach 65 years of age does not automatically mean that they will leave the workforce (Salopek, 2007). With better health, many want to stay active and engaged.

### **Age Stereotypes and Age Bias**

Age bias is a very complex term and can include age stereotype, discrimination, prejudice, and ageist attitudes ” (Finkelstein & Farrell, 2007). For example an age stereotype is an attitude, opinion, expectation or belief that categorizes an individual into a certain group of people such as “older.”

There is a stereotype that older workers are: resistant to change, slow to make decisions, and resistant to technology and less ambitious. Some people view them as having low creativity and lower physical ability (Finkelstein & Farrell, 2007). Another stereotype views them as cranky, ineffectual, and unwilling to learn new things (Finkelstein & Farrell, 2007). These stereotypes are summarized in old sayings like “Over the hill” or that, “You cannot teach old dog new tricks” (Strepp, 1990, p. 5).

### **Medical Effects of Aging**

As we age there is a decline in some physical abilities and some possible productivity effects (Hale, 1990). The ageing process can bring medical issues requiring sick leave and health care issues (Hale, 1990). Health issues and early retirement do affect the number of such individuals in the workforce ( Montgomery, Borgatta & Kosloski, 1990, p. 21). They do have a higher risk of illness, infection, and sometimes suffer from the effects of disease and lower immunity (McMahan & Sturz, 2006). Some individuals may experience losses of: vision, hearing, memory, breathing capacity, and stamina. The results can include: ill health from terminal illnesses, weakened immune weakness, unhealthy nervous systems, and other general inefficiencies of the human body (McMahan & Sturz, 2006; Hale, 1990).

However these effects are entirely individualistic. Productivity declines in older age groups depend on each individual and are not generalizable to an entire group (Hale, 1990). Hale (1990) also found that 75% of older adults are healthy enough to maintain themselves and take part in normal daily activities including work.

### **Drawbacks of Employing Older Workers**

The above indicates that older workers can sometimes have health issues which can create absences or vacancies. Hale (1990) cites other drawbacks including: long term vacancy issues, potential attitude issues, lack of desire or ability to work long hours, and overall fatigue and depression.

Hale’s (1990) research’s also notes that sometimes older workers are resistance to change and training. (Other researchers found the opposite, that they are amenable to new ideas and training (McMahan & Sturz, 2006)).

### **Positives of Older Workers**

On a positive side Hale (1990) notes that older workers bring the following: lower turnover rates, more loyalty, higher quality of work, strong work ethics, belief in the intrinsic value of work, and belief in the intrinsic value of their work. They are capable of achieving a good work life balance, are not focused just on monetary gain, can take risks, can assume managerial tasks, and want to bring value to their employers (Hale, 1990).

McMahon and Sturz (2006) believe that older workers are more loyal, actually take fewer sick days, have fewer injuries, and are willing and capable trainees. They argue that older workers are very capable and therefore valuable to their employers.

### **Small Business Owners/Managers Need for Older Workers**

The issue of whether or not older workers embrace new technology and training is an important one. The Small Business Administration's Report to the President 2008 noted that small businesses provide a large portion of the U.S. training (Small Business Administration's Report to the President, 2008). In order for older workers to stay engaged and pass on their knowledge they will have to both receive training and be part of the training of successive generations. Salopek (2007) believes that not only are older workers trainable but are eager and willing to both train and mentor their younger protégés. If the U.S. desires to remain competitive in the world marketplace they cannot ignore the abilities of this group.

### **Legal Issues Involving Older Workers**

As the number of older workers has increased so have age discrimination lawsuits and the dollars awarded. The number of EEOC's age discrimination cases increased from 15,785 in 1998 to 24,582 in 2008 an increase of 62%. In the same time period the amounts of the awards increased from 44.3 million dollars to 82.8 million, an increase of 87% (EEOC, Age Discrimination in Employment Charges, 2009). A recent Supreme Court case attempted to clarify age discrimination law but created a powerful incentive for Congress to intervene. Older workers have political power and can be expected to appeal to Congress to change the court's direction which it did with the Civil Rights Act of 1991 (29 U.S.C. A. sections 2000e).

The following sections explain current age discrimination law, the two types of legal theories that are used and the recent Supreme Court case that affected both legal theories.

### **Background and Coverage of the Act**

In the preamble to the Age Discrimination Act (ADEA), Congress argued that older workers have higher unemployment rates and are disadvantaged in obtaining and retaining employment. It disapproved of arbitrary age limits that do not consider an individual's performance (Age Discrimination in Employment, 29 USCA Sec 621, 1967).

The ADEA disallows employers from discriminating, limiting, classifying, or segregating employees on the basis of their age. Like Title VII of the Civil Rights Act the law covers compensation, terms, conditions, or privileges of employment. This has been interpreted to mean anything that happens to the employee at work which would include but is not limited to: recruitment, selection, promotion, training, orientation, performance appraisals, retention, discharge and benefits including retirement plans. Therefore almost any action by a small business owner/manager that affects the business's workforce is covered by the ADEA.

The law covers all employers in interstate commerce with twenty or more employees. The Small Business Administration's definition of small business includes some employers with as many as 500 employees, therefore the law covers all but very small employers (Small Business Administration, 2009). In addition, many states have similar age discrimination statutes with different levels of employees. An example is Colorado's civil rights laws which include employers with one employee (Colorado Civil Rights Act, 2008).

Because the ADEA is a federal law it is based on the Constitution's interstate commerce clause and only applies to small employers in interstate commerce. However, the courts have consistently ruled that most U.S. businesses in today's global and interconnected economy are either affected or contribute to the interstate economy. Consequently, only the very small and completely local small businesses that do not serve the public or customers in other states are exempt.

### **Applicable Employment Discrimination Theories**

There are two distinct theories of employment discrimination: disparate treatment and disparate impact. The following explains that the former is very limited and based on individual circumstances while the latter is much broader and can include groups such as class action lawsuits. The Supreme Court narrowed the former and eliminated the latter. The case and its implications are explained and a perspective on why Congress will probably intervene is presented.

#### **The Theory of Disparate Treatment**

This theory has been used extensively since the Supreme Court decision in *McDonnell Douglas v. Green* (U.S. Supreme Court, 1971). In this case, Green was a black union activist who had worked at his job for a number of years with high proficiency. Green was involved in various union activities including a park-in where the union blocked access to the employer's parking lot. When the company lost a government contract, it laid off Green and many other workers. When the company's finances improved, they started advertising and rehiring. Green applied for his old job, was denied, and the company continued recruiting with the eventual selection of other workers. Green was able to show that there was a job available, he was qualified for placement, and the company did not hire him, continued to search, and hired other employees. The Supreme Court's *McDonnell Douglas* case created the three part analysis of disparate treatment. The plaintiff must prove the following: 1) that they are a member of the protected class- over 40 years of age, 2) that there was a job available, and 3) the plaintiff was qualified for the job. The company must then articulate a legitimate, non-discriminatory explanation for the employment decision. The court then determines if the reason is satisfactory or if it is a pretext hiding age discrimination.

The doctrine is very narrow for three reasons. First the theory looks at an individual's situation not a group's so it infrequently uses a group or class action lawsuit like disparate impact. Second, the plaintiff must be able to prove that he/she was qualified for the job. Therefore most cases depend on the adequacy of the employer's stated reason which could be actual or developed after the employment decision.

Because this theory is based on individual claims, the size and potential employer liability are much smaller. The plaintiff bears the burden of proof and is confronted by employers who usually have more resources for lawsuits.

#### **Disparate Treatment and Mixed Motives**

The Supreme Court ruling in *Price Waterhouse v. Hopkins* added to the disparate treatment theory (*Price Waterhouse v. Hopkins* 490 U.S. 228). If a company commingled both discriminatory and non discriminatory motivations, it had to show that it would have reached the same decision absent the discriminatory reasons. The plaintiff, a CPA seeking partnership status, argued that the company discriminated against her because of her gender. Some partners had made comments about her femininity. Conversely, the company offered proof alleging her performance deficiencies.

## **Disparate Impact**

The theory of disparate impact was developed in *Griggs v. Duke Power, Company* (*Griggs v. Duke Power*, 401 U.S. 424, 1971). The employer had historically discriminated against blacks resulting in segregation of most of the black employees into lower paying outside jobs.

Conversely, most of the whites worked at higher paying inside jobs. After the Civil Rights became effective, the company instituted two tests and the requirement of a high school diploma as criteria for any inside jobs. Using statistical evidence, Griggs showed that fewer blacks in the South at that time had high school diplomas. In addition, some of the whites had never taken either of the two tests and were performing their jobs proficiently.

The Court ruled that Congress intended to remove artificial barriers to employment, tests had to be validated, and any practice - even if neutral on its face - was illegal if it had a discriminatory impact on a protected group. The company carried the burden of proof to show that its practice was job related, a business necessity, and that no alternative practice existed that would discriminate less (*Griggs, v. Duke Power*, 1971).

Since 1971 numerous cases have further developed the theory. This expansion continued until the Supreme Court in *Wards Cove v. Antonio* attempted to limit this development (490 U.S. 642, 1989). The fact situation in *Wards Cover* mirrored that of *Duke Power's* where the company had segregated many Filipino workers into lower paying and dirtier jobs in the fish cannery while most of the higher paid and inside workers were white. The ruling limited disparate impact and placed the burden of proof on the plaintiffs (490 U.S. 642, 1989). Dissatisfied with the ruling, Congress put the theory of disparate impact with its concepts of business necessity, and job relatedness into Title VII by passing the Civil Rights Act of 1991(29 U.S.C. 2000e-2(k), 2000).

Currently, the theory of disparate impact allows the use of statistical evidence to show that there is a disproportionate impact on a protected group by the employer's practice. It allows for group or class action lawsuits in which an individual or group can sue claiming that others were similarly treated by the employer. The concept can affect actions by the employer that were unintentional or even accidental as long as a group was affected. Therefore, the size of the lawsuits and the size of the employer's liability are much greater in disparate impact cases.

### **The Current Supreme Court Case: Gross v. FLB**

The US Supreme Court in a recent 2009 case attempted to clarify some of the issues in the ADEA. In this case, it disallowed use of the disparate impact argument in ADEA cases and severely limited plaintiff's ability to win disparate treatment cases. This case has the potential to motivate Congress to place Supreme Court decisions of disparate impact into the ADEA like it did to the Civil Rights Act. The number of older workers is increasing and with it their economic and political influence.

In *Gross v. FBL Financial Services, Inc* (129 S. Ct. 2342, June 18, 2009), Gross filed suit alleging that his employer demoted him and violated the ADEA. He had worked at FBL since 19771 in the position of claims administration director and was then at the age of 54. The employer reassigned some of his job duties to a younger woman (in her forties) who he had previously trained and renamed his position as claims administration coordinator.

Although both individuals received the same compensation, Gross considered the reassignment and renaming a demotion and an age violation. FBL defended its actions by arguing that his reassignment was part of a corporate restructuring and that the position was better suited to his skills.

The District Court instructed the jury to return a verdict to Gross if he had proved by a “preponderance of the evidence” that FBL demoted him to claims project coordinator and that his “age was a motivating factor.” Gross’s age would provide a motivating factor if it played a part or a role in FBL’s decision to demote him. Conversely, the jury was instructed to find for FBL if it had proven by a preponderance of the evidence that FBL would have demoted him regardless of his age. The jury returned a verdict for Gross and awarded him \$46,945 in lost wages.

### **The Supreme Court Ruling in Gross**

The Court ruled that the ADEA and Title VII were different laws and that the theory of disparate impact developed under Title VII could not be used in Age Discrimination cases (*Gross v. FBL*, 2009). The court argued that Congress could have amended the ADEA when it amended Title VII and did not. It also disallowed the mixed motive argument. However, the biggest change requires future plaintiffs to prove with a preponderance of the evidence that age discrimination was the “but-for” cause of the employer’s action. Thus the burden of proof does not shift to the employer to show that they would have reached the decision absent age as a motivator.

### **The Current State of Age Discrimination Law after Gross**

There are several impacts of this decision. First, restricting age discrimination cases to disparate treatment removes the use of statistical evidence and group or class action claims. The proof must center on that individual’s situation. The disallowance of mixed motives arguments strengthens the company’s position while limiting the plaintiff’s. The latter bears almost the total burden of proof. Even if the plaintiff provides some evidence that age was a factor they must additionally prove that the employer almost totally relied on age – the but-for” factor.

Because this is a current case, no case law exists that clarifies what level of proof meets this but-for level. At the extreme a plaintiff would have to find and provide evidence that an unaware supervisor or small business owner made the mistake of saying age was the reason verbally, in company documents, or company emails. As soon as small business owners are made aware of the decision, the prudent ones will be careful to avoid any comments by themselves or their managers in any form. This includes communication that is verbal or written in company documents, emails, text messages and others. If asked, employers would only have to articulate a seemingly rational reason even if it came after the fact. Therefore, it is doubtful that many age discrimination plaintiffs will succeed.

### **Guidelines for Employers**

Small business owners and managers can take the following simple steps to ensure that they do not violate the Age Discrimination in Employment Act:

- ✓ Perform a job analysis on every job in the company to put into company records the requirements including job descriptions and job specifications.
- ✓ Perform a complete orientation of each new hire to ensure that they know the above.
- ✓ Do regular performance appraisals which are documented and shared with the employee.
- ✓ Never verbally or in any company computer system, email system, voice system or other any comment about any employee’s age.
- ✓ Base discipline and discharge on documented employee performance. All company communications either verbal or written would be limited to this documentation.

### **The Future of Age Discrimination Claims**

The future is definitely uncertain. There is a large body of court cases on disparate impact and disparate treatment. Corbett (2009) argues that these number of court cases have left employment law unwieldy and unclear and believes that Congress should amend both Title VII and the ADEA.

### **The Future Relationship of Older Workers and Their Small Business Owners**

The demographic shift resulting in older workers in the workforce is very pronounced. This presents some opportunities and issues to small business owners. While age does create some physical issues for some older workers, the above research shows that many are very loyal and capable employees. As time progresses, small business have the opportunity to tap into their expertise and use them to fill the labor shortage while they train and mentor the succeeding generations.

Conversely they do have some special needs as does any of the current generations. As the aging process continues some may need flexible time to take care of health and other issues. Others may need to have some health care insurance coverage.

### **References**

#### *Laws and Court Cases*

Age Discrimination in Employment (ADEA), 29 U.S.C.A. Section 621, 1967 as amended.  
Colorado Age Discrimination, C.R.S. section 24-34-401 (2008).  
Griggs v. Duke Power Company, 401 U.S. 424 (U.S. Sup. Ct. , 1971).  
Gross v. FBL Financial Services, Inc., 129 S.Ct. 2342 (U.S. Sup. Ct., 2009).  
McDonnell Douglas v. Green, 411 U.S. 792 (U.S. Sup. Ct, 1973).  
Price Waterhouse v. Hopkins, 490 U.S. 228 (U.S. Sup. Ct, 1989).  
Wards Cove Packing Company v. Atonio, 490 U.S. 642 (U.S. Sup. Ct, 1989).  
Amendment to Title VII, 42 U.S.C. sections 2000e-2(k), 2000.

#### *Other References*

Alley, D. & Crimmins, E. (2007). "The demography of aging and work." In *Aging and work in the 21<sup>st</sup> century*, edited by Shultz, K.S., & Adams, G.A, pp. 7-23. Mahwah, N.J. ; London : Lawrence Erlbaum Associates.

Corbett, W. (2009). Fixing Employment Discrimination Law. [Southern Methodist University Law Review](#) 62 81.

EEOC (2009). Age Discrimination in Employment Act (ADEA) Charges FY 1992 to FY 2008). [www.EEOC.gov](http://www.EEOC.gov).

Finkelstein, L.M. & Farrell, S.K. (2007). "An expanded view of age bias in the workplace." In *Aging and work in the 21<sup>st</sup> century*, edited by Shultz, K.S., & Adams, G.A, pp. 73-108. Mahwah, N.J. ; London : Lawrence Erlbaum Associates.

Finkelstein, L.M., Higgins, K.D. & Clancy, M. (2000). Justifications for ratings of older and young applicants: An exploratory content analysis. *Experimental Aging Research*, 26, 263-283.

Hale, N. (1990). *The older worker*. San Francisco: CA: Jossey-Bass Publishers.

- Matarazzo, J., & Mika, J. (2006, September). How to be popular. *American Libraries*, 37(8), 38-40. Retrieved August 7, 2009, from Academic Search Elite database.
- McMahan, S., & Sturz, D. (2006, September). Implications for an Aging Workforce. *Journal of Education for Business*, 82(1), 50-55. Retrieved August 7, 2009, from Academic Search Elite database.
- Montgomery, R.V., Borgatta, E.P., & Kosloski, K.D. (1990) "Social policy toward the older worker: Assumptions, values and implications." In *The aging of the American work force: Problems, programs, policies*, edited by Bluestone, I., Montgomery, R.J.V., & Owen, J.D, pp. 19-30. Detroit: Wayne State University Press.
- Salopek, J. (2007, August). Wit and wisdom walking. *T+D*, 61(8), 20-22. Retrieved August 7, 2009, from Business Source Premier database.
- Sheppard, H. L., & Rix, S. E. (1977). *The graying of working America: The coming crisis in retirement-age policy*. New York: Free Press.
- Small Business Administration (2009). [www.SBA.gov](http://www.SBA.gov).
- Small Business Administration (2008). Small Business Administration's Report to the President, 2008. [www.SBA.gov](http://www.SBA.gov)
- Strack, R., Baier, J., & Fahlander, A. (2008, February). Managing Demographic Risk. *Harvard Business Review*, 86(2), 119-128. Retrieved August 7, 2009, from Business Source Premier database.
- Strenger, C., & Ruttenberg, A. (2008, February). The Existential Necessity of Midlife Change. *Harvard Business Review*, 86(2), 82-90. Retrieved August 7, 2009, from Business Source Premier database.
- Strepp, J. (1990). "Older Workers: New problems, new opportunities." In *The aging of the American work force: Problems, programs, policies*, edited by Bluestone, I., Montgomery, R.J.V., & Owen, J.D, pp. 31-36. Detroit: Wayne State University Press.