The Age Discrimination in Employment Act: Looking Back at the Last Fifty Years

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This year marks the 50th anniversary of the Age Discrimination in Employment Act (ADEA),[1] which was signed into law by President Lyndon B. Johnson in 1967. Congress created the legislation in an effort to promote the employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination in employment.[2] During the past fifty years, the ADEA has been amended several times, including in 1978, 1986, 1990 and 1996,[3] thereby expanding the scope of the law and the protection afforded older workers. While the overall effect of the amendments has been to expand the law, court decisions have tightened the requirements for proving a violation, and, according to the Equal Employment Opportunity Commission (EEOC), outdated assumptions about age and work persist as stereotypes and barriers to the employment of older workers.[4] This article looks back at some of the significant changes to the ADEA and legal decisions interpreting the law since its enactment.

Evolution of Covered Age

Following on the heels of Title VII of the Civil Rights of 1964, the ADEA prevents age discrimination and provides equal employment opportunity under conditions that were not explicitly covered in Title VII. Under the ADEA, it is unlawful for any employer to refuse to hire, discharge or to otherwise discriminate against any individual because of his or her age, with respect to the individual's compensation, terms, conditions, or privileges of employment; or to limit, segregate, or classify employees in any way that would deprive an individual of employment opportunities or adversely affect his or her status as an employee because of such individual's age.[5] Similar to Title VII, the ADEA also makes it unlawful for an employer to discriminate against any employee, or applicant for employment, because such individual has opposed any practice made unlawful by the ADEA, or because such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under the ADEA.[6]

The ADEA originally protected only workers between the ages of 40 and 65. Congress subsequently moved the upper age limit to 70 and, in 1986,

eliminated the upper age limit all together, creating protection for all employees over 40 and making it unlawful for employers to compel most employees to retire.[7] The law's coverage is broad; it applies to covered employers, employment agencies and labor organizations. An employer is covered by the law if it is engaged in an industry affecting commerce and has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.[8] In the 1984 Amendments to the ADEA, Congress extended coverage of the Act to U.S. citizens employed abroad and extended its application to foreign entities controlled by U.S. employers.[9]

Expansion for Releases of Age Discrimination Claims

In 1990, Congress extended the reach of the ADEA by passing the Older Workers Benefit Protection Act of 1990 (OWBPA), which declared that the ADEA's reference to "'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." [10] The OWBPA also established that a release of an ADEA claim must be "knowing and voluntary" to be valid.

Pursuant to the OWBPA, the EEOC established certain criteria that must be met for a release of an ADEA claim to be "knowing and voluntary:" it must be written in a manner calculated to be understood by the employee; it must specifically refer to the employee's ADEA rights or claims; it cannot waive any rights or claims arising after the date the release is signed; it must be supported by consideration not already owed to the employee; and it must advise the employee in writing to consult with an attorney before signing the release.[11] In addition, the release must provide the employee at least 21 days to consider the release before signing it and an additional 7 days to revoke the release, unless the employee's termination is part of an exit incentive or other employment termination program (including group layoffs), in which case the employee must have 45 days to consider the release before signing it and an additional seven days to revoke the release.[12] When group layoffs or exit incentive programs are involved, the employee must be given certain information on the class of employees covered and the individuals who are eligible and selected for the program.[13]

Discrimination Within the Protected Class

In 1996, the United States Supreme Court held that the ADEA prohibits discrimination against older employees in favor of younger employees when both are within the protected class of 40 years and older.[14] In O'Connor v. Consol. Coin Caterers Corp., the Court reversed the lower court's dismissal of the plaintiff's claim that he was discriminated against because of his age, 56, when he was replaced by a 40 year old. The lower court dismissed the claim because the plaintiff was not replaced by a younger employee outside the protected class (i.e., younger than 40). In reversing the lower court, the U.S. Supreme Court reasoned, "the fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age.[15] In 2004, the United States Supreme Court considered whether the ADEA prohibited discrimination based on age in general and held that it only prohibits discrimination against older employees; the ADEA does not bar an employer from favoring an older employee over a younger one.[16]

Expansion of Statute of Limitations

In 2009, President Barack Obama signed into law The Lilly Ledbetter Fair Pay Act, which significantly expanded the time period during which an employee can raise a claim of pay discrimination under the ADEA and Title VII by extending when the statute of limitations begins to run.[17] Under the ADEA, an employee must file a charge of discrimination within 180 days (or in states, such as South Carolina, that have a state or local agency that enforces a law prohibiting employment discrimination, within 300 days) from the date of the "unlawful employment practice."[18] If the employee does not file a charge within this statute of limitations, his or her claim of discrimination is time barred. The Fair Pay Act declared that an unlawful employment practice occurs not only when a discriminatory pay decision or practice is adopted but also when the employee becomes subject to the decision or practice, as well as each additional application of that decision or practice. Under the Act, each time the employee receives a paycheck pursuant to a discriminatory pay decision or practice, an unlawful employment practice has occurred, thereby resetting the statute of limitations.[19]

Burden of Proving Claim

The year 2009 also marked the United States Supreme Court's decision in the case of Gross v. FBL Financial Services, in which it held that a plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action.[20] In other words, but for his or her age, the plaintiff would not have experienced the adverse employment action. This decision distinguishes the burden of proof for an age discrimination claim from the burden of proof for a Title VII discrimination claim, the latter of which requires only that the plaintiff show that his or her race, sex or other protected characteristic was a "motivating factor" in the employment decision. The Court reasoned that because Congress failed to codify the "motivating factor" standard into the ADEA, as it did with Title VII, the Court should presume that the omission was intentional.[21]

Critics argue that the higher standard of proof created by the Court in Gross makes it too difficult for an employee to prove age discrimination, requiring that age be the sole reason for the discrimination, rather than a motivating factor. In her book, Betrayed: The Legalization of Age Discrimination in the Workplace, Judge Patricia Barnes criticizes the Gross decision and argues that age discrimination has effectively been legalized.[22] Since the Gross decision, Congress has attempted on several occasions to pass a bill overturning Gross, but to date has had no success.

Potential Changes in the Future

To mark the ADEA's fiftieth anniversary, the EEOC held a public meeting on June 14, 2017 entitled "The ADEA @ 50 - More Relevant than Ever," and invited a panel of experts to address current obstacles affecting older workers in the workplace. Laurie McCann, senior attorney at AARP Foundation Litigation, testified that the ADEA "has become a second-class civil rights law" both in terms of statutory language and how the language has been interpreted by the courts. She urged the EEOC to exercise its regulatory power to step up enforcement of the ADEA." According to a 2013 AARP study, nearly two-thirds of older workers reported witnessing or experiencing age discrimination in the workplace, and 92 percent of those responding said such discrimination was very or somewhat common.[23]

The AARP and other proponents of ADEA reform suggest that the EEOC should spend more resources combating age discrimination in hiring, that Congress should enact legislation to overturn the Gross decision and that the ADEA should be amended to cover smaller employees.[24] However, during the last five years, there has been slight decline in the number of age discrimination charges filed with the EEOC. In 2012, the EEOC received 22,857 charges of age discrimination and obtained $91.6 million in benefits for claimants. [25] In 2016, the EEOC received 20,857 age discrimination charges and obtained $88.2 million in benefits for claimants.[26] Only two of the 86 lawsuits the EEOC filed in 2016 were based on age discrimination.

There is no doubt that much has changed in the past fifty years. The amendments to the ADEA have extended its scope and coverage, while the court has, arguably, made it more difficult for a worker to prove age discrimination. Whether Congress takes action to overturn the Gross decision or to further expand the ADEA is yet to be seen. What we do know is that there is a greater number of older individuals in the workforce than ever before; people are healthier, living longer, and, in many cases, wanting and needing to work longer than previous generations. Employers should regularly review their policies and practices to ensure that older applicants and employees are treated the same as younger individuals in connection with hiring and all terms and conditions of employment.

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[1] 29 U.S.C. 621, et seq.

[2] 29 U.S.C. 621(b).

[3] Pub. L. 95–256, § 1, Apr. 6, 1978, 92 Stat. 189; Pub. L. 99–592, § 1, Oct. 31, 1986, 100 Stat. 3342; Pub. L. 101–433, § 1, Oct. 16, 1990, 104 Stat. 978; Pub. L. 104–208, div. A, title I, § 101(a) [title I, § 119], Sept. 30, 1996, 110 Stat. 3009, 3009–23.

[4] June 14, 2017 letter from Victoria A. Lipnic, Acting Chair, U.S. Equal Employment Opportunity Commission, www.eeoc.gov/eeoc/history/adea50th/index.cfm.

[5] 29 U.S.C. 623(a)(1) and (2).

[6] 29 U.S.C. 623(d).

[7] 29 U.S.C. 631.

[8] 29 U.S.C. 630(b).

[9] § 802, Pub. L. 96-459, 98 Stat. 1767 (October 9, 1984).

[10] *Pub. L. 101-433;* 29 C.F.R. §1625; 20 U.S.C. 630(l).

[11] 29 C.F.R. §1625.22.

[12] Id.

[13] Id.

[14] *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996).

[15] *Id.* at 312.

[16] *General Dynamics Land Systems, Inc. v. Cline,* 540 U.S. 581124 S.Ct. 1236 (2004).

[17] Pub.L. 111–2, S. 181.

[18] 29 U.S.C. 626(d)(1).

[19] The Fair Pay Act was in direct response to the 2007 U.S. Supreme Court ruling in the case of *Lilly Ledbetter v. Goodyear Tire and Rubber Company,* 550 U.S. 618, 127 S.Ct. 2162 (2007). Ledbetter, a longtime employee of Goodyear, charged her employer with wage discrimination when she discovered that she had been paid less than a male supervisor at another plant. By the time she learned of the practice, several years had passed. The Supreme Court ruled that she was no longer entitled to file a claim because she had failed to do so within 180 days of the initial discriminatory wage decision. In her well recognized dissent, Justice Ruth Bader Ginsburg encouraged Congress to change the law.

[20] 557 U.S. 167, 129 S.Ct. 2343 (2009).

[21] *Id.* at 2345.

[22] Barnes, Patricia G., *Betrayed: The Legalization of Age Discrimination in the Workplace* (2014).

[23] *AARP, Staying Ahead of the Curve 2013: The AARP Work and Career Study, Older Workers in an Uneasy Job Market 28,* Table 10 (January, 2014).

[24] *The Age Discrimination Law At 50: A Mixed Bag*, Forbes (February 14, 2017).

[25] ADEA Charge Data, www.eeoc.gov/eeoc/history/adea50th/charge-data.cfm

[26] *Id.*

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