



2011

Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967

Jessica Z. Rothenberg
New York University

Daniel S. Gardner
New York University

Follow this and additional works at: <http://scholarworks.wmich.edu/jssw>

 Part of the [Gerontology Commons](#), [Social Work Commons](#), and the [Work, Economy and Organizations Commons](#)

Recommended Citation

Rothenberg, Jessica Z. and Gardner, Daniel S. (2011) "Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967," *The Journal of Sociology & Social Welfare*: Vol. 38: Iss. 1, Article 2.
Available at: <http://scholarworks.wmich.edu/jssw/vol38/iss1/2>

This Article is brought to you for free and open access by the Social Work at ScholarWorks at WMU. For more information, please contact maira.bundza@wmich.edu.



Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967

JESSICA Z. ROTHENBERG

DANIEL S. GARDNER

New York University
Silver School of Social Work

A growing number of older adults are finding that retirement is no longer affordable and they must work well into their later years. Unfortunately, over 42 years after passage of the Age Discrimination in Employment Act (ADEA) of 1967, age discrimination in the workplace continues to present serious impediments to employment in later life. Using a critical gerontology perspective, this paper reviews the history of work-related age discrimination and analyzes the ADEA and its limited effectiveness at protecting the civil and economic rights of older workers. The authors discuss implications and suggest policy alternatives that would support the employment and enhance the economic well-being of older adults.

Key words: ADEA; older workers; age discrimination; ageism; retirement; critical gerontology

For a growing number of older adults, retirement is no longer an affordable option. Older workers, low income and economically insecure elders in particular, are now working well into their “golden years” (Federal Interagency Forum on Aging-Related Statistics, 2008). According to an American

Association of Retired Persons (AARP, 2009) survey of 767 adults age 45 and over, 22% of respondents aged 45-54 and 27% aged 55-64 have postponed plans to retire. Given the current economic recession, depressed housing and credit markets, and declining home, pension, and investment values, the number of adults planning to work past "retirement age" will likely continue to increase in the coming years (Johnson, 2009).

Older workers and those who seek employment after the age of 65 have historically confronted intractable institutional and social barriers. The Age Discrimination in Employment Act (ADEA) of 1967 was part of an unprecedented turn in 1960s public policy toward advancing economic and social justice by protecting the rights of vulnerable populations. The Act was intended to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment" (ADEA, 1967, Section 2).

However, in many ways, the ADEA has been ineffective in supporting the civil and economic rights of older workers. Over 42 years since passage of the ADEA, ageism and age discrimination in the workplace remain serious impediments to employment and financial well-being in later life. The ADEA has never effectively reduced discrimination in hiring or protected the most vulnerable older adults—women, the poor and unemployed, and elders of color. Each year, an estimated 15 – 20,000 reports of age discrimination are filed with the Equal Employment Opportunity Commission (EEOC, 2009), which currently enforces compliance with the ADEA. The number of complaints, widely held to underestimate the extent of actual incidents (International Longevity Center [ILC], 2006), has risen over the past ten years, reaching an all time high of over 24,500 reports in 2008 (EEOC, 2009). Negative societal stereotypes about older adults are still prevalent and most elders report experiencing or witnessing instances of age-based discrimination (ILC, 2006).

This paper provides a critical analysis of the ADEA, and argues it is an inherently flawed civil rights-era policy that has been largely ineffective in addressing age discrimination

among older workers. The Act was premised on invalid assumptions about the basis of age discrimination and was designed to enhance economic interests that do not always intersect with the interests of older workers. Using a critical gerontology perspective that emphasizes the interrelationships between social policy and struggles for economic, labor, and social justice, the authors review the history of age discrimination in the workplace and analyze the ADEA in terms of its design, enforcement, and effectiveness over the past four decades. Implications and policy alternatives are discussed that could further support employment rights and enhance the economic well-being of older adults.

Age Discrimination in the Workplace

Ageism, defined as discriminatory beliefs, attitudes, and practices regarding older adults (Butler, 1969), is pervasive in modern American society. A majority of older adults report experiencing one or more instances of age-based discrimination during their careers (Ory, Hoffman, Sanner, & Mockenhaupt, 2003). A meta-analysis by Kite and colleagues (Kite, Stockdale, Whitley Jr., & Johnson, 2005), comparing attitudes toward older and younger adults, documents significant age-bias regarding elders' competence, attractiveness, and behavioral intentions. Pernicious stereotypes of older workers as senile, slow, unproductive, frail, and unable to "learn new tricks" are widespread and intractable (Roscigno, Mong, Byron, & Tester, 2007; Weiss & Maurer, 2004). Lahey (2005) found that employers are hesitant to hire older workers because they believe them to be difficult to train, resistant to change, and less flexible and adaptable than younger workers.

A study of hiring practices comparing employer responses to two equally qualified resumes—one identified as 57 years old and the other as 32 years old—found that older workers received less favorable feedback 27% of the time (Bendick, Jackson, & Romero, 1996). A related study in which pairs of identical but age-disparate participants applied for vacant positions via phone, letters, and interviews found that the older applicant received less favorable responses 41% of the time (Bendick, Brown, & Wall, 1999). In an analysis of how women

aged 35, 45, 50, 55, and 62 fared in the labor markets of Boston, MA and St. Petersburg, FL between 2002 and 2003, Lahey (2005) found that younger applicants needed to respond to an average of 19 ads in order to earn an interview, while the older applicants needed to respond to 27. Younger workers were also 40% more likely to be called back for an interview than their older counterparts.

Disparities in hiring are particularly difficult for older adults who have been laid off or who seek employment after retirement. In 2008, unemployed workers age 45 and older spent an average of 22 weeks looking for work, compared to 16 weeks among workers aged 44 and younger (Bureau of Labor Statistics, 2009). According to a U.S. Department of Labor (2006) survey of workers displaced between 2003 and 2005, 75% of workers aged 25-54 were reemployed by 2006, compared to 61% aged 55-64, and only 25% aged 65 and older. There is little rationale in today's service and information economy for denying elders the opportunity to work, or for compulsory retirement at the age of 65, a practice that was common throughout much of the 20th Century. Although Congress passed the Mandatory Retirement Act (an amendment to the ADEA) to limit such practices among most workers under the age of 70 in 1978 (and abolished mandatory retirement altogether in 1986), older adults are still more likely to be "forced" into retirement than younger workers (Chan & Stevens, 2004).

Historical and Socio-political Contexts

It is enlightening to view the history of age-based discrimination and the ADEA from a critical gerontology perspective. Critical gerontologists study the role that structural inequalities (related to race/ethnicity, class, gender, age, and disability), age stratification, and social policy play in shaping the experience of aging and the lives of older adults (Minkler & Estes, 1999). Estes (1979) proposed a political economy of aging that views public policy as simultaneously reflecting and defining "the life chances, conditions and experience of elders in different locations of society" (Estes, 1999, p. 17). Over the past three decades, critical gerontology has enriched our theoretical understandings of the social constructions of dependency

(Townsend, 1981), retirement (Atchley, 1993; Phillipson, 1999), health and health care (Lynch, Estes, & Hernandez, 2005) in later life.

The percentage of older adults in the workforce (full-time, part-time, or actively seeking employment) has been increasing since the mid-1990s, following a century of steady decline (Mosisa & Hippie, 2006; Quinn, 1997). Between 1890 and 1960 the percentage of men aged 65 and over in the work force declined from 68% to 31% (United States Bureau of the Census [U.S. Census], 1975). While some of this trend is attributable to the passage of the Social Security Act of 1935 that provided a guaranteed income to workers who retired at the age of 65, it primarily reflects the nation's transition from an agricultural to an industrial economy (Ransom & Sutch, 1986). Farm work relied on small-scale production organized around family or community life, with each member of the unit playing an important function in maintaining economic self-sufficiency. In contrast, industrial workers were hired for a wage and employment was organized around maximizing profits for the company. Wage-labor at the turn of the 20th Century was often grueling, with 53-hour workweeks on average, thousands of work-related deaths each year, and minimal safety regulations, employment benefits, or job security (Fisk, 2001). Ideal workers had strength and stamina, and were healthy enough to continue working despite poor conditions and long hours, traits largely attributed to youth (Segrave, 2001). Younger workers were also preferred because they could be paid lower wages, and because prior work experience was considered more of a hindrance than an asset in the new de-skilled factory jobs.

Over time, age discrimination became an integrated feature of the modern industrial economy, increasingly associated with the growth of American capitalism. The issue of age-based discrimination received some attention in the early part of the 20th Century, but was not recognized as a social problem until World War II (Segrave, 2001). Between 1940 and 1945, the wartime economy significantly increased the demand for labor, and as a result, the number of men aged 65 and older in the workforce jumped by 75% (U.S. Census, 1975). The increase, which mirrored the first widespread entry of women into the workplace, demonstrated that older adults were capable and

amenable to modern employment. After the war, employment rates for older adults reverted to nearly pre-war levels. However, studies conducted in 1942 and 1951 by the Bureau of Old-Age and Survivors Insurance found that only 5% of male benefit recipients had retired voluntarily; over half had been laid off, and roughly one-third stopped working for health-related reasons (Wentworth, 1945, 1955). At the same time, arbitrary age limits became increasingly common in hiring practices. A pivotal study conducted by the Department of Labor in 1965 found that over 60% of low-skilled industrial jobs had age cut-offs between 35 and 49 years of age, and over 13% of sales jobs were limited to workers under the age of 35 (Bessey & Ananda, 1991).

Policy-makers first grew concerned about the existence and extent of age-based workplace discrimination because of economic, political and social developments. The United States emerged from World War II with a strong and expanding economy, in contrast to parts of the world that were ravaged by years of war. The GDP more than doubled between 1940 and 1960, and new jobs were created in both manufacturing and the growing service sector (Yuskavage & Fahim-Nader, 2005). Continual development and modernization required a more efficient workforce with managers that base employment decisions on individual qualifications and merit as opposed to stereotypes and prejudices (Allen & Farley, 1986; Bell, 1962). This ideology directly challenged Jim Crow laws in the American South and socially-sanctioned racism in the North, and helped the Civil Rights Movement gain institutional support.

The first comprehensive federal workplace anti-discrimination legislation was Title VII of the Civil Rights Act of 1964, which prohibited employment discrimination based on race, religion, sex or national origin. Policy-makers considered including age in the bill, but this was deemed too controversial and voted down (EEOC, 2009). Instead, under pressure from groups such as the newly developed American Association of Retired Persons (AARP), National Retired Teachers' Association (NRTA), and the Older Women's League, the Secretary of Labor was given the task of investigating the problem of age-based discrimination (Macnicol, 2006). In 1965, Secretary Wirtz presented his report to Congress, and over the next two years,

Congress held hearings and subsequently passed anti-discrimination measures for older adults.

Age Discrimination in Employment Act

The Age Discrimination in Employment Act of 1967 (ADEA) is the principal legislation concerned with protecting individuals over the age of 40 from arbitrary age-based workplace discrimination. The Act was designed to ensure that, whenever possible, employers use ability instead of arbitrary age limits in workplace decisions. The Equal Employment Opportunity Commission (EEOC) enforces the Act by investigating all claims of age discrimination and resolving cases where evidence suggests that employers used age as a criterion for lay-offs, promotions, hiring, training opportunities, or any other personnel decisions (EEOC, 2009).

Initially, ADEA protections were limited to workers between the ages of 40 and 65 affected by age discrimination (the upper age limit was moved to 70 years in 1978 and then largely eliminated in 1986). Reflecting the liberal ideology of the time, Congress believed eliminating age discrimination against middle-aged workers would serve an economic function by increasing the supply of skilled labor and improving the productivity of the work force (Schuster & Miller, 1984). Based on a commonly held view that ageism stemmed from misinformed individual beliefs and prejudices about older workers (Achenbaum, 1991), the bill's sponsors assumed age discrimination could be eliminated from workplaces through educational campaigns designed to combat stereotypes about older workers (Biek, 1986). This policy focus failed to account for the institutional nature of age discrimination and its relationship to capitalist development and wage labor. Thus, the ADEA was designed to improve workforce productivity, and not to address the underlying causes and material basis for age-based discrimination and ageism.

Implementation and Enforcement

The ADEA was enforced by the Wage and Hour Division of the Department of Labor until 1978, when it was transferred to the Equal Employment Opportunity Commission (EEOC).

The EEOC is required to conduct a 60-day investigation into every claim of age-based discrimination. The majority of cases are then closed either for administrative reasons or because they are found to have "no reasonable cause," meaning there is insufficient evidence to support the claim. For example, according to the EEOC (2009), of the 16,134 resolutions issued in ADEA cases in 2007, 10,002 (62%) were found to have "no reasonable cause" and 2,754 (17%) were closed for administrative reasons. Not including claims that were withdrawn or resolved without EEOC intervention, only 4% of resolutions were found to have reasonable claims of age-based discrimination and moved on to the conciliation phase, where only 1% of all resolutions were successfully mediated (i.e., the claimant was sufficiently compensated) by the EEOC. When conciliation is deemed unsuccessful the EEOC can bring a suit to federal court, but this rarely happens. In 2007, only 32 suits were filed under the ADEA, a mere .2% of all age discrimination cases resolved that year.

Potential claimants are required to file with the EEOC within 180 days of the alleged discriminatory action (the statute is extended to 300 days when a state anti-discrimination law is available). However, evidence of discrimination is not always immediately apparent. An individual might not suspect that age was a factor in a job termination until similar stories come to light or a pattern is established over time. Even when an individual believes he or she is the victim of age-based discrimination, there must be sufficient evidence to support a reasonable cause or the case will be closed following the initial investigation. The complainant then has only 90 days to file an independent lawsuit after the case is closed by the EEOC. For many, this is not enough time to weigh the costs and benefits of filing suit or to raise the necessary funds for legal representation.

The EEOC is coordinated by five commissioners and a General Counsel ("Chairman" in the original text), who are all appointed by the President and confirmed by the Senate for terms of four or five years (EEOC, 2009). As such, EEOC priorities, decisions, enforcement practices, etc., have changed in relation to different administrations as well as broader political shifts. For example, when President Reagan appointed

Clarence Thomas to chair the EEOC in 1982, the agency shifted away from a focus on “broad, systemic employment practices that operated to discriminate against large classes of individuals” (EEOC, n.d.). The new Commission viewed its mandate as responding to and remedying individual claims of discrimination and civil rights infringements. During this period, groups such as AARP complained that charges were not being dealt with in an efficient manner, and that all equal employment acts were not being adequately enforced (Macnicol, 2006). Additionally, while the overall number of claims increased significantly during this time (partly because in 1978 the ADEA and Equal Pay Act were transferred to the EEOC), the number of staff members was scaled back from 3,390 in 1980 to 2,853 in 1990, a decline of nearly 16%. This reduction led to a backlog of over 100,000 pending charges. The EEOC staff has continued to decline, and in 2007 the EEOC employed a staff of only 2,158 individuals, 37% smaller than the 1980 workforce (EEOC, 2009).

Protection of Vulnerable Populations

The ADEA recognized that women, minorities, and the unemployed were particularly vulnerable to age-based employment discrimination. However, according to Miller, Kaspin, and Schuster (1990), the majority of successful ADEA cases are wrongful termination suits (75.9%) brought by men (82%) laid off from white-collar or managerial positions (79%). One stated goal of the ADEA is to encourage employment opportunities for older workers; however, this is where the legislation has been least successful (Adams, 2004). Prior to the passage of the ADEA, Miller (1966) found that as a result of explicit (and non-explicit) age discrimination, men 45 and older spent on average 50% longer looking for work than men under 45 (21 weeks versus 14 weeks). Forty years later, workers 45 and older spent on average 37% longer, or approximately 6 additional weeks, looking for work than younger workers. Further, studies continue to indicate that age discrimination in hiring is still prevalent throughout society (Bendick et al., 1996; Bendick et al., 1999; Lahey, 2008). However, unless explicit and willful (such as job advertisements with age limits) it is difficult to prove specific instances of discrimination, as job applicants

generally have no concrete evidence of the criteria by which they were or were not hired (Neumark, 2009). Individuals who face discrimination at the point of hiring are isolated from other applicants and workers, making it difficult to determine patterns of discrimination or organize other affected individuals.

Since the EEOC is under-staffed, under-funded, and flooded with thousands of reports every year, it can only pursue a limited number of cases, usually the ones with the best chance of winning and a complainant willing to dedicate the necessary time, money, and energy (Neumark, 2003). As a result, suits that are brought by relatively younger men who challenge termination from professional positions have significantly higher success rates and are awarded up to three times more money than other claims (Rutherglen, 1995).

Legal Challenges and Legislative Amendments

Only a small number of reported instances of age discrimination—usually cases with the strongest claims and the clearest evidence—go to trial, and only 26% of these judgments are awarded to the employee (Miller, Kaspin, & Schuster, 1990). Not only is it difficult to prove age-based discrimination, but the ADEA also allows for several exceptions that employers frequently cite in their defenses. The ADEA stipulates that age may be considered in employment decisions where it is a “bona fide occupational qualification” (BFOQ), meaning that an employee over a certain age would “not be capable of performing the job in a manner that is reasonably necessary to the normal operation of the particular business” (ADEA, 1967). This defense applies to occupations where public safety is a concern (e.g., airline pilots, fire fighters, and prison guards), but the clause allows employers to treat older adults as a homogeneous group, instead of evaluating each individual on his or her merits and abilities. According to Macnicol (2006), the Act is intended “to outlaw only ‘unreasonable’ or ‘arbitrary’ discrimination; federal courts have tended to take the view that age discrimination in employment is justified if there is any rational basis for it” (p. 244).

The BFOQ defense can only be used in specific cases, so the “reasonable factor other than age” (RFOA) defense is cited much more frequently (Bass & Roukis, 1999). Under RFOA,

the employer needs to show that factors other than age were used in making the decision in question. Unlike Title VII cases, where the defense needs to prove that the action was a “business necessity,” meaning that it could not be accomplished in any other way, in ADEA cases employers only need to demonstrate a business decision was “reasonable,” even if older workers were disproportionately affected (Bentley, 2007; Burke & Wilson, 2006). An economically sound business decision, such as laying off the most expensive workers who happen to have the most seniority and are disproportionately older, would qualify as an acceptable RFOA defense (Keller, 2006). For example, in *Hazen Paper Co. v. Biggins* (1993), the Supreme Court ruled that while seniority and age are correlated, they remain “analytically distinct,” meaning that an employer can make a workforce decision based on seniority without it being “age-based.”

Undermining the ADEA

Over the past 42 years, the ADEA has been weakened to the point where, at best, it does not provide sufficient protection to “older workers as a group,” and at worst is seemingly used to rationalize discriminatory practices, as in BFOQ and RFOA arguments. This is, in part, attributable to shifts in the political consensus as the nation moved rightward and neo-liberal economics became the norm. In the 1980s, the American economy slowed, leading to massive restructuring, corporate mergers, and widespread layoffs (Smith, 2006). The manufacturing industry was hit particularly hard, as technological advancements and factory relocations displaced millions of workers (Horvath, 1987). Older workers were disproportionately affected since they made up a higher proportion of the manufacturing workforce, and had, on average, higher salaries and health benefits (Flaim & Sehgal, 1985; Horvath, 1987). The number of age-related complaints filed with the EEOC increased from approximately 10% of all EEOC cases in 1980 to 25% in 1991, indicating a significant increase in age-related dismissals (Macnicol, 2006).

In most cases, the courts have ruled in favor of the employer, finding that economic necessity and the free market were the motivating factors for layoffs—a legitimate RFOA

defense. At the same time, large firms developed retirement packages designed to entice workers into early retirement and waive ADEA rights (Wiencek, 1991), an alternate retirement system that provided a back-door way for employers to regulate the workforce (Hudson & Gonyea, 2007; Quadagno & Hardy, 1991). The 1990 Older Workers Benefit Protection Act (OWBPA) created guidelines to ensure that workers did not unknowingly give up their ADEA rights. While the OWBPA regulated the retirement packages, it also effectively codified a “questionable” practice (Harper, 1993). Since then, corporations have used OWBPA to circumvent the ADEA and “inoculate themselves against age complaints” (Grossman, 2003, pp. 44-45).

Court rulings over the last fifteen years have continued to reflect a commitment to neo-liberal economics and the needs of the free market at the expense of social justice. In *Marks v. Lorai Corp.* (1997), an ADEA case brought before The California Appellate Court in 1997, the judge ruled that, “cost-based layoffs often constitute perfectly rational business practices grounded in employers’ concern for economic viability ... Congress never intended the age discrimination laws to inhibit the free market economy” (pp. 15-16). It was further noted that the ADEA called for “statutory prohibition against ‘arbitrary age discrimination,’ not against factors which indirectly work to the disadvantage of older workers” (p. 30).

Figure 1. Number of Age Discrimination Claims: 1990 - 2008

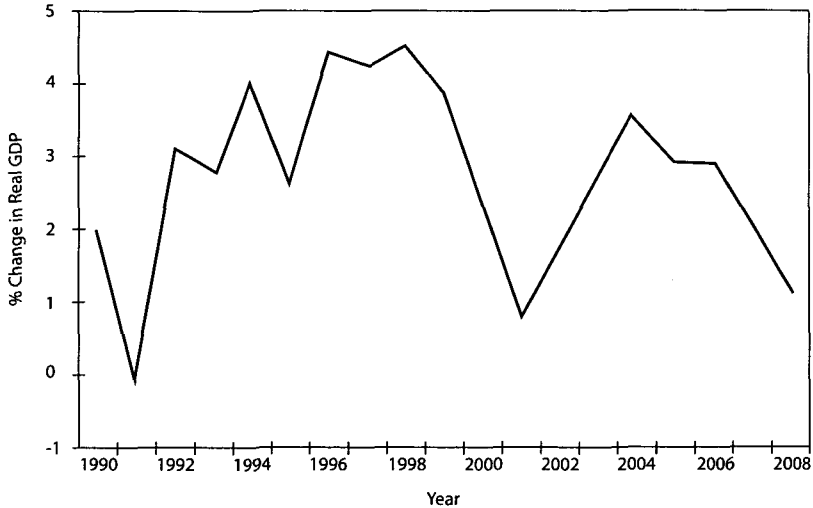


In *Smith v. City of Jackson, Mississippi* (2005), the Supreme Court ruled that “disparate impact” should be available under the ADEA, meaning that seemingly neutral decisions that disproportionately affect a protected group are illegal as long as the prosecution can prove that an alternate measure would have the same business outcome. Many legal analysts thought the ruling might lead to a dramatic increase in ADEA lawsuits and employer payouts (Burke & Wilson, 2006; Keller, 2006). However, the court immediately narrowed the scope of disparate impact cases by reinforcing the RFOA defense and concluding, “Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in disparate impact on a protected class, the reasonable inquiry [established in ADEA] included no such requirement” (Supreme Court of the United States, 2005, p. 14). According to Justice Stevens, who wrote the opinion, “certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group” (p. 12).

Economic and Labor Dynamics

The ADEA has been least effective at protecting older workers during periods of recession, downsizing, and economic restructuring (Minda, 1997). During the 2001 economic recession, for example, age discrimination claims filed with

Figure 2. Percent Change in Real GDP: 1990 - 2008



EEOC increased by 24%, peaking in 2002 with 19,921 reports (Hedge, Borman, & Lammlein, 2006). In 2007, when the U.S. economy again began to slow, the number of reports jumped 15% to 19,103. And in 2008, at the height of economic recession, age discrimination reports totaled 24,582—a 29% increase over the previous year. Between 1992 and 2008, the annual number of claims reflects a negative correlation with booms and busts of the economic cycle.

As illustrated in Figure 1, the number of age discrimination claims received by the EEOC rose to nearly 20,000 per year in the early 1990s, in 2002, 2003, and 2007, and then jumped to over 24,500 in 2008 (EEOC, 2009). Juxtaposed against changes in the American GDP over the past twenty years (Bureau of Economic Analysis, 2009), it is clear that reports of age discrimination have risen following economic downturns, particularly over the last three major economic recessions (see Figure 2). According to Minda (1997), “age discrimination law has become infused with competitive economic rationales which have largely immunized downsizing from age discrimination regulation” (p. 515).

During the current economic recession, older workers have again been disproportionately affected. Between June 2008 and June 2009, the unemployment rate for adults 55 and over increased by 106% (from 3.4% to 7.0%) compared to a 70% increase for the population at large (Bureau of Labor Statistics [BLS], 2009). In June 2009, unemployed adults aged 55 to 64 spent an average of 30 weeks looking for employment, compared to a national average of 22 weeks (BLS, 2009). This does not account for workers who became frustrated and stopped looking, were forced into early retirement, or had to settle for part-time work or lower pay. According to an AARP (2009) survey of 51 adults over 45 years old that lost a job in 2008, only 28% were reemployed by May 2009.

From a labor perspective, discrimination based on age, gender, race, ethnicity, nationality, or sexual preference only serves to weaken the ongoing campaign to advance social and economic justice. Crain (2006) notes that the 30-year offensive on workers’ rights has coincided with a dramatic decline in union membership, and attributes organized labor’s decline, in part, to its inability or unwillingness to take up issues of

discrimination as issues of “collective economic harm that affect all workers” (p. 160). One study in New Zealand found a positive relationship between unionization rates and employers’ willingness to comply with anti-discrimination legislation (Harcourt, Wood, & Harcourt, 2004). This analysis further suggests that age discrimination is inextricably linked to broader economic and labor forces.

Policy Recommendations

Effectively challenging age discrimination in employment would require significant changes to the ADEA related to the funding, coverage, provisions, and enforcement of the Act. Inherent flaws in the philosophy and intent of the ADEA necessitate making major amendments to the existing legislation in lieu of creating new legislation to address age discrimination more directly. One such change would be eliminating the “reasonable factor other than age (RFOA)” exemption, which allows employers to use discriminatory practices so long as something else (usually profit related) is identified as the motivating factor. This would bring the Act into parity with the protections granted to women and minorities under Title VII and the Civil Rights Amendment of 1991, which allows for disparate impact claims and uses “business necessity” as the exemption test instead of the RFOA (Civil Rights Act, 1964).

In 1952, Abrams noted that “the main barrier to the employment of older workers is simply the lack of available jobs” (p. 65). The ADEA originally included provisions for re-education and training programs to help older workers acquire the skills needed to compete for employment; the programs, however, were never properly implemented or funded, and were eventually abandoned (Macnicol, 2006). Re-implementing such programs would give unemployed, underemployed, and unsatisfied older workers the option of training in a new field. In December 2008, the Department of Labor announced that approximately \$10 million had been allocated for Older Worker Demonstration Grants, and solicited proposals for programs focused on “providing training and related services for individuals age 55 and older that result in employment and advancement opportunities in high growth industries and

economic sectors" (Department of Labor, 2008). In addition, since educational and training programs would not address the underlying problem of limited job availability, effective age discrimination legislation might also include employment initiatives that create new jobs and help older adults secure employment. In order to meet the needs of older workers, educational and employment programs need to be adequately funded and staffed, and to be accessible to older adults in urban, suburban, and rural areas. This proposal might be difficult to promote in the current economic environment, when political leaders are faced with unprecedented federal deficits. Perhaps supportive employment programs would need to be incorporated into existing community and social service structures (e.g., senior centers, NORCs, etc.).

In its current form, filing a claim of age discrimination under the ADEA is difficult and time-consuming, and the law tends to favor the defendant/employer instead of the claimant. First, the time restrictions on filing suits should either be eliminated or changed to reflect when the discriminatory act is discovered, not when the act took place. Further, individuals need more than 90 days to file private suits after the EEOC cases close, so the time frame should either be significantly expanded or include extensions. An alternative approach would be to utilize organizations such as labor unions, professional associations, or non-profit groups such as AARP. When available, they could pick up cases that the EEOC is unable to pursue. This would give workers the opportunity to pursue legal action, whereas they might not have been able to afford it otherwise, hopefully chipping away at the up to 70% of cases closed after EEOC investigation. Crain (2006) suggests that taking up issues of discrimination would also strengthen the labor movement more generally, an argument that could be extended to other groups as well.

From a social justice perspective, employment legislation needs to protect the rights of older adults regardless of their relationship to the workforce (i.e., as active workers, retired, unemployed, etc). The EEOC needs to develop mechanisms to better monitor business employment practices, with a focus on detecting discrimination in hiring. Additionally, all adults over the age of 40 should be able to participate in ADEA educational and employment programs.

Finally, as the Anti-Ageism Task Force (ILC, 2006) points out, “in the absence of comprehensive national health insurance and pension systems, employers confront high costs that increase as workers grow older, discouraging employers from hiring and retaining older workers” (p. 3). A comprehensive single-payer health care system that de-linked insurance from employment would undermine the material basis for age-based discrimination and ageism in the workforce (Lahey, 2007).

Conclusions

The ADEA, EEOC, and Title II programs emerged in the Civil Rights era, when Americans and the federal government sought to promote social justice and equality by addressing systematic patterns of discrimination through direct action, advocacy and progressive legislation. While discrimination based on race, gender, age and sexual orientation continue to be acknowledged social problems, the EEOC has limited itself to addressing these issues in the most narrow and individual way possible by focusing on receiving, investigating, and litigating complaints. As a result, the larger aims of challenging institutional discrimination and protecting older workers have been sidelined. Many policy analysts now view the ADEA as “a piece of well-intentioned legislation of the 1960s that has ultimately failed in its primary purpose, the reduction in long-term unemployment among older workers” (O’Meara, 1989, p. 48).

The pervasiveness of ageism, negative age-based stereotypes, and incidents of age-based workplace discrimination are more directly affected by economic conditions than by any amendment or piece of legislation. And given the current state of the economy, the defunding of programs such as Medicaid, Medicare, food stamps, transportation services, and the limited availability of employer-sponsored retirement benefits and pension plans, there is urgent need for reform. Ultimately, older adults—regardless of their labor status—need more than protection from arbitrary age-based workplace discrimination; they need protection from neo-liberal policies that support deregulation and the free market at the expense of the economic well-being of individuals.

Effective legislation for older workers must address the economic basis for all forms of age-discrimination and connect with broader struggles for social and economic justice. Anti-discrimination legislation that subordinates the rights of vulnerable groups to corporate interests and profitability will always be ineffective. Older and younger workers and their advocates (including social workers, labor unions, policy makers, activists and politicians) need to advance policies that protect the dignity and worth of human beings—policies that promote real equality and put the rights of people before the interests of the free market.

References

- American Association of Retired Persons (AARP). (2009). *AARP bulletin survey on employment status of the 45+ population*. Retrieved on from <http://www.aarp.org/research>.
- Abrams, A. J. (1952). Barriers to employment of older workers. *Annals of the American Academy of Political and Social Sciences*, 279, 62-71.
- Achenbaum, W. A. (1991). Putting the ADEA into historical context. *Research on Aging*, 13(4), 463-469.
- Adams, S. J. (2004). Age discrimination legislation and the employment of older worker. *Labour Economics*, 11, 219-241.
- Age Discrimination in Employment Act of 1967 (Pub. L. 90-202), as amended, as it appears in Volume 29 of the United States Code, beginning at section 621. Retrieved on from www.eeoc.gov.
- Allen, W. R. & Farley, R. (1986). The shifting social and economic tides of Black America, 1950-1980. *Annual Review of Sociology*, 12, 277-306.
- Atchley, R. (1993). Critical perspectives on retirement. In T. Cole, A. Achenbaum, P. Jakobi, & R. Kastenbaum (Eds.). *Voices and visions of aging: Toward a critical gerontology* (pp. 3-19). New York: Springer.
- Bass, S. L. & Roukis, G. S. (1999). Age discrimination in employment: Will employers focus on business necessities and the ROFTS defense? *Commercial Law Journal*, 104(2), 229-239.
- Bell, D. (1962). *The end of ideology: On the exhaustion of political ideas in the 50s*. Harvard University Press: Cambridge: MA.
- Bendick, M., Brown, L. E., & Wall, K. (1999). No foot in the door: An experimental study of employment discrimination against older workers. *Journal of Aging & Social Policy*, 10(4), 5-23.
- Bendick, M., Jackson, C. W., & Romero, J. H. (1996). Employment discrimination against older workers: An experimental study of hiring practices. *Journal of Aging & Social Policy*, 8(4), 25-46.

- Bentley, M. (2007). How Americans (almost) learned to respect their elders: *Smith v. City of Jackson* and the availability of the Disparate Impact Theory under the Age Discrimination in Employment Act. *Mississippi College Law Review*, 26, 347-373.
- Bessey, B. L. & Ananda, S. M. (1991). Age discrimination in employment: An interdisciplinary review of the ADEA. *Research on Aging*, 13(4), 413-457.
- Biek, D. L. (1986). The scourge of age discrimination in the workplace: Fighting back with a liberalized class action vehicle and notice provisions. *Case Western Reserve Law Review*, 37, 103-147.
- Bureau of Economic Analysis (2009). *National Economic Accounts: Gross Domestic Product: Percent change from preceding period*. Retrieved from <http://www.bea.gov/>.
- Bureau of Labor Statistics (2009). *Labor force statistics from the current population survey*. Retrieved from <http://www.bls.gov>.
- Burke, D. D. & Wilson, L. V. E. (2006). Disparate impact discrimination and the ADEA: Coming of age. *Journal of Individual Employment Rights*, 12(2), 99-117.
- Butler, R. N. (1969). Ageism: Another form of bigotry. *Gerontologist*, 9, 243-246.
- Chan, S. & Stevens, A. H. (2004). How does job loss affect the timing of retirement? *Contributions to Economic Analysis & Policy*, 3(1), Article 5.
- Civil Rights Act of 1964, Title VII, (Pub. L. Nos. 88-352), Vol. 42 Sec. 2000e. (1964). Retrieved from <http://www.eeoc.gov/laws/statutes/titlevii.cfm>.
- Crain, M. (2006). Strategies for union relevance in a post-industrial world: Reconceiving antidiscrimination rights as collective rights. *Labor Law Journal*, 57(3), 158-170.
- Department of Labor: Employment and Training Administration (2008). Notice of availability of funds and solicitation for grant applications for the Older Worker Demonstration. *Federal Registry*, 73(245), 77844-77862.
- Equal Employment Opportunity Commission (2009). *About EEOC*. Retrieved from <http://www.eeoc.gov>.
- Equal Employment Opportunity Commission (n.d.) *EEOC: Thirty-Fifth Anniversary*. Retrieved from <http://www.eeoc.gov/eeoc/history/35th/1980s/index.html>.
- Estes, C. (1979). *The aging enterprise*. San Francisco: Jossey-Bass.
- Estes, C. (1999). Critical gerontology and the new political economy of aging. In M. Minkler & C. Estes (Eds.), *Critical gerontology: Perspectives from political and moral economy* (pp. 17-35). Amityville, NY: Baywood Publishing Co.
- Federal Interagency Forum on Aging-Related Statistics (2008). *Older Americans 2008: Key indicators of community wellbeing*. Retrieved from <http://agingstats.gov/>.

- Fisk, D. M. (2001). American labor in the 20th century. *Compensation and working conditions*. Retrieved from <http://www.bls.gov>.
- Flaim, P. O. & Sehgal, E. (1985). Displaced workers of 1979-1983: How well have they fared? *Monthly Labor Review*, 108(6), 3-16.
- Grossman, R. J. (2003). Are you overlooking older workers? *HR Magazine*, 48(8), 40-46.
- Harcourt, M., Wood, G., & Harcourt, S. (2004). Do unions affect employer compliance for the law? New Zealand evidence for age discrimination. *British Journal of Industrial Relations*, 42(3), 527-541.
- Harper, M. C. (1993). Age-based exit incentives, coercion, and the prospective waiver of ADEA rights: The failure of the Older Workers Benefit Protection Act. *Virginia Law Review*, 79(6), 1271-1344.
- Hazen Paper Co., et al. v. Biggins, 507 U.S. 604 (1993). Retrieved on June 14, 2008 from <http://www.supreme.justia.com>.
- Hedge, J. W., Borman, W. C., & Lammlein, S. E. (2006). *The aging workforce: Realities, myths, and implications for organization*. Washington, DC: American Psychological Association.
- Horvath, F. W. (1987). The pulse of economic change: Displaced workers of 1981-1985. *Monthly Labor Review*, 110(6), 3-12.
- Hudson, R. B. & Gonyea, J. G. (2007). The evolving role of public policy in promoting work and retirement. *Generations*, 31(1), 68-75.
- International Longevity Center (ILC), Anti-Ageism Taskforce. (2006). *Ageism in America*. Retrieved from <http://www.ilcusa.org>.
- Johnson, R. W. (2009). Employment opportunities at older ages: Introduction to the special issue. *Research on Aging*, 31(1), 3-16.
- Keller, D. (2006). Older, wiser and more dispensable: ADEA options available under *Smith v. Jackson*: Desperate times call for disparate impact. *Northern Kentucky Law Review*, 22(2), 259-281.
- Kite, M. E., Stockdale, G. D., Whitley, Jr., B. E., & Johnson, B. T. (2005). Attitudes toward younger and older adults: An updated meta-analytic review. *Journal of Social Forces*, 61(2), 241-266.
- Lahey, J. (2005). *Do older workers face discrimination?* Retrieved on May 17, 2008 from <http://www.bc.edu/centers/crr/>.
- Lahey, J. (2007). *Does health insurance affect the employment of older workers?* Retrieved from <http://www.bc.edu/centers/crr/>.
- Lahey, J. (2008). Age, women, and hiring. *Journal of Human Resources*, 43(1), 30-56.
- Lynch, M., Estes, C., & Hernandez, M. (2005). Chronic care initiatives for the elderly: Can they bridge the gerontology-medicine gap? *Journal of Applied Gerontology*, 24(2), 108-124.
- Macnicol, J. (2006). *Age discrimination: An historical and contemporary analysis*. Cambridge: Cambridge University Press.
- Marks v. Loral Corporation. California Court of Appeal, Fourth District, Division 3. (1997). Retrieved from <http://caselaw.findlaw.com/ca-court-of-appeal/1122261.html>.

- Miller, C. S., Kaspin, J. A., & Schuster, M. H. (1990). Impact of performance appraisal methods on Age Discrimination in Employment Act cases. *Personnel Psychology*, 43(3), 555-578.
- Miller, D. (1966). Age discrimination in employment: The problem of the older worker. *New York University Law Review*, 41, 383-424.
- Minda, G. (1997). Opportunistic downsizing of aging workers: The 1990s version of age and pension discrimination in employment. *Hastings Law Journal*, 48, 511-576.
- Minkler, M. & Estes, C. L. (1999). *Critical gerontology: Perspectives from political and moral economy*. Amityville, NY: Baywood Pub.
- Mosisa, A. & Hipple, S. (2006). Trends in labor force participation in the United States. *Monthly Labor Review*, 129(10), 35-57.
- Neumark, D. (2003). Age discrimination legislation in the United States. *Contemporary Economic Policy*, 21(3), 297-317.
- Neumark, D. (2009). The Age Discrimination in Employment Act and the challenge of population aging. *Research on Aging*, 31(1), 41-68.
- O'Meara, D. P. (1989). *Protecting the growing number of older workers: The Age Discrimination in Employment Act*. Philadelphia: University of Pennsylvania Press.
- Ory, M., Hoffman, M. K., Sanner, B., & Mockenhaupt, R. (2003). Challenging aging stereotypes: Strategies for creating a more active society. *American Journal of Preventative Medicine*, 25, 164-171.
- Phillipson, C. (1999). The social construction of retirement: Perspectives from critical theory and political economy. In M. Minkler & C. Estes (Eds.), *Critical gerontology: Perspectives from political and moral economy* (pp. 315-327). Amityville, NY: Baywood Publishing Co.
- Quadagno, J. S. & Hardy, M. (1991). Regulating retirement through the Age Discrimination in Employment Act. *Research on Aging*, 13(4), 470-475.
- Quinn, J. (1997). *Retirement trends and patterns in the 1990s: The end of an era?* Public Policy and Aging Report. Washington, DC: National Academy on Aging.
- Ransom, R. L. & Sutch, R. (1986). The labor of older Americans: Retirement of men on and off the job, 1870-1937. *The Journal of Economic History*, 46(1), 1-30.
- Roscigno, V. J., Mong, S., Byron, R., & Tester, G. (2007). Age discrimination, social closure and employment. *Social Forces*, 86(1), 313-334.
- Rutherglen, G. (1995). From race to age: The expanding scope of employment discrimination law. *Journal of Legal Studies*, 24(2), 491-521.
- Schuster, M. & Miller, C. S. (1984). An empirical assessment of the Age Discrimination in Employment Act. *Industrial and Labor Relations Review*, 38(1), 64-74.

- Segrave, K. (2001). *Age discrimination by employers*. Jefferson, NC: McFarland & Company, Inc.
- Smith, et al. v. City of Jackson, Mississippi, et al., 544 U.S. 288 (2005). Retrieved from www.supremecourt.us.gov.
- Smith, S. (2006). *Subterranean fire: A history of working-class radicalism in the United States*. Chicago: Haymarket Books.
- Townsend, P. (1981). The structured dependency of the elderly: A creation of social policy in the twentieth century. *Ageing & Society*, 1, 5-28.
- United States Bureau of the Census (1975). *Historical statistics of the United States. Colonial times to 1970, part 1*. Washington DC.
- United States Department of Labor, Bureau of Labor Statistics (2006). Worker displacement, 2003-2005. Retrieved from <http://www.bls.gov/eps>.
- Weiss, E. M. & Maurer, T. J. (2004). Age discrimination in personnel decisions: A reexamination. *Journal of Applied Social Psychology*, 34(8), 1551-1582.
- Wentworth, E. C. (1945). Why beneficiaries retire. *Social Security Bulletin*, 8(1), 16-20.
- Wentworth, E. C. (1955). Why do beneficiaries retire? Who among them return to work? *Social Security Bulletin*, 18(5), 3-12, 35-37.
- Wiencek, T. J. (1991). Washington targets benefits in fight against age discrimination. *Management Review*, 80(8), 31-34.
- Yuskavage, R. E., & Fahim-Nader, M. (2005). Gross domestic product by industry for 1947-86: New estimates based on the North American Industry Classification System, *Survey of Current Business*. Retrieved from <http://www.bea.gov>.