Age Discrimination in Employment Law

Joseph E. Kalet

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Preface

> A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.
>
> Oliver Wendell Holmes,
> U.S. Supreme Court Justice
>
> Towne v. Eisner, 245 U.S. 418, 425 (1917)

Since the passage of the Wagner Act in 1935—the first statute attempting to protect workers in the workplace from unfair employment practices—the courts have attempted to grapple with the word "discrimination." It comes in as many shapes and sizes as the imagination can devise. Congress has attempted to prevent discrimination on the basis of union affiliation, race, sex, religion, handicap, and so on.

But the grayest, and thereby the most troublesome, area of employment discrimination involves employment decisions based on the individual's age. From hiring to training, to promotion to involuntary retirement, employers are making decisions that affect individuals' lives based on a characteristic that they involuntarily assume: age. Such immutable characteristics as sex or race are clearly defined, for the most part, and adjudication usually turns on the employer's conduct. In age discrimination, there may be a question whether a 48-year old "aggrieved person" is in fact *old enough* to prove that his replacement by a 42-year old employee constituted age discrimination. In addition to examining the employer's conduct, the court may be required to examine the employee's status within the protected age group under the Act.

Additionally, employment decisions may be supported or masked by economic considerations. The courts have uniformly stated that an employment decision may not be based on economic considerations; otherwise, this would enable employers to use an economic basis to justify an improper employment decision.

Finally, increased age invariably brings with it diminished physical and/or mental capacity. Where safety is an issue, courts have wrestled with mandatory retirement rules for air line pilots, and others, on the basis of diminished physical/mental ability to perform. This has led to an infusion of scientific and medical data into the courtroom, further complicating ADEA enforcement.

As with most areas of law, the focus of issues shifts with time, from procedural to substantive, from proving a case to the remedy that should be applied. Relatively unresearched in any text were such issues as discovery and EEOC-supervised settlements in age discrimination cases. Other areas could easily constitute an entire book standing alone, such as proving an age discrimination case via statistics.

The hybrid nature of the Age Discrimination in Employment Act—part Title VII of the Civil Rights Act of 1964, part Fair Labor Standards Act of 1938—has left many unanswered questions as to the meaning of "selective incorporation" where the statute and its legislative history are silent. Splits in the federal Circuit Courts illustrate the problem and exacerbate the difficulty for attorneys attempting to advise clients on age issues, such as how to implement a reduction-in-force without running afoul of a statute with unsettled case law and potentially devastating liquidated damages liability.

This book does not attempt to provide answers to questions on which the courts have divided. After nine years as a legal editor, I have learned that the most effective way to indicate what the courts decided is to "let the cases do the talking." Interpolation and speculation are the province of law review articles. This book simply represents the latest, most comprehensive source of information available on case law and regulations issued under the Age Discrimination in Employment Act of 1967, as amended, through November 1985.

The author owes a debt of gratitude to many individuals, but I must first acknowledge Senator Jacob K. Javits for his kind assistance. I wish to thank certain of my law instructors at the George Washington University-National Law Center in Washington, D.C.: Professors Leroy Merrifield, Don Rothschild, and Ben Schieber (visiting professor from Louisiana State University Law School) for their dedication to labor law, and for all their contributions to my legal education. A special thanks to Ms. Audrey Free, GWU-NLC.

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Joseph E. Kalet

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1

Introduction to the ADEA

Legislative History

On January 23, 1967, President Lyndon B. Johnson recommended the Age Discrimination in Employment Act in his Older Americans Message:

> "Hundreds of thousands, not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. Despite our present low rate of unemployment, there has been a persistent average of 850,000 people age 45 and over who are unemployed . . . . In economic terms, this is a serious—and senseless—loss to a nation on the move. But the greater loss is the cruel sacrifice in happiness and well-being, which joblessness imposes on these citizens and their families. Opportunity must be opened to the many Americans over 45 who are qualified and willing to work. We must end arbitrary age limits on hiring."[1]

The Age Discrimination in Employment Act (ADEA) of 1967 was an outgrowth of the civil rights legislation that started with the Equal Pay Act of 1963, followed by Title VII of the Civil Rights Act of 1964, the Voting Rights Act, and so forth.

However, efforts to prohibit arbitrary age discrimination through legislation occurred as early as the 1950s.[2] Early efforts to include age as a protected class within those classes protected under Title VII of the Civil Rights Act of 1964 were unsuccessful, at least in part due to the perception that there was insufficient information available to make a considered judgment about the nature of age discrimination.[3] As a compromise, Title VII contained a provision directing the Secretary of Labor to make a "full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected."[4] The report was transmitted to Congress by the Labor Secretary approximately one year later.[5]

In 1966, Congress directed the Labor Secretary to submit specific legislative proposals for prohibiting age discrimination,[6] which was followed by a draft

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[1]113CONG. REC. 34743–44 (1967).

[2]*See* Age Discrimination Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Congress, 1st. Session 23 (1967); statement of Senator Javits.

[3]110 CONG. REC. 2596–99, 9911–13, 13490–92 (1964).

[4]Section 715, 78 Stat. 265 (since superseded by §10 of the EEO Act of 1972, 86 Stat. 111).

[5]Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (1965).

[6]FLSA Amendments of 1966, §606, 80 Stat. 845.

bill in 1967.[7] Subsequently, President Johnson issued his recommendation for the ADEA in his Older Americans Message.[8]

Congress undertook studies of its own and both Houses conducted hearings on the proposed legislation.[9]

The Secretary of Labor's report made findings which were confirmed by the Executive Branch and Congress that:

(1) Many employers adopted specific age limits in those states that did not have age discrimination prohibitions even though many other employers were able to operate successfully in the absence of these limits;
(2) In the aggregate, the age limits had a marked effect on the employment of older workers;
(3) Although age discrimination rarely was based on the sort of animus motivating other forms of discrimination (e.g., racial, religious, union), age discrimination was based on stereotypes unsupported by objective fact and was often defended on grounds different from its actual causes;
(4) The available empirical evidence demonstrated that arbitrary age limits were in fact generally unfounded and that, overall, the performance of older workers was at least as good as that of younger workers;
(5) Arbitrary age discrimination was profoundly harmful in at least two ways: It deprived the national economy of the productive labor of millions of individuals and imposed on the U.S. Treasury substantially increased costs in unemployment insurance and Social Security benefits and, it inflicted economic and psychological injury to those workers who were deprived of employment because of age discrimination.

The Report led directly to the enactment of the ADEA in 1967. The Act's Preamble emphasizes both the individual and social costs of age discrimination.[10]

The original intent of the drafters of what was to become the ADEA was merely to accord age the same protected status as that extended to race and sex under Title VII. However, it became clear early on that age was a different "animal," and that mere inclusion of the term "age" into Title VII would not be an adequate way to address age discrimination. Since all workers would eventually be within this protected class and that class knows no bounds as to other immutable characteristics, the drafters of the early proposals decided instead that a separate statute would be necessary.

Because Title VII had already established a framework within which the ban on employment discrimination could be enforced, the Title VII enforcement scheme and proof considerations were followed extensively in the drafting of the ADEA. But the absence of a full remedial scheme in Title VII, apparently for political reasons, required the drafters to look elsewhere. They found what

[7]113 CONG. REC. 1377 (1967).

[8]*Supra* note 1.

[9]*See* Age Discrimination in Employment: Hearings Before the Subcommt. on Labor of the Senate Commt. on Labor and Public Welfare, 90th Cong., 1st Sess. (1967); Age Discrimination in Employment: Hearings Before the General Subcommt. on Labor of the House Commt. on Education and Labor, 90th Cong., 1st Sess. (1967); *see also* Hearings on Retirement and the Individual before the Senate Select Commt. on Aging, 90th Cong., 1st Sess. (1967).

[10]Section 2, 29 U.S.C. §621.

they were looking for in the Fair Labor Standards Act of 1938 (FLSA), with its long and extensive record of remedial devices, both legal and equitable, and with the juxtaposition of liquidated damages and the good-faith defense via the Portal-to-Portal Act of 1947, amending the FLSA.

The ultimate legislation that Congress passed as the ADEA is in fact a hybrid: part Title VII, part FLSA. (See Chapter 4 at "FLSA/Title VII Hybrid.") As originally enacted, the ADEA prohibited discrimination on the basis of age against individuals within the protected age group of 40 to 65 years, inclusive, for private sector employees.[11]

The Act was amended in 1974 to extend its coverage to federal and state government employees. The Supreme Court upheld that extension of the Act's coverage, rejecting a claim that state sovereignty under the Tenth Amendment to the Constitution prohibited it. The extension did not "directly impair" a state's ability to "structure integral operations in areas of traditional governmental functions," the Court ruled.[12] Subsequent amendments to the Act have extended its coverage to federal employees, raised the ceiling to age 70 for private sector employees, and removed entirely the upper age limit for federal employees' protection under the Act.

EEOC Role

Following the 1978 amendments, the Equal Employment Opportunity Commission (EEOC) was given the responsibility for conciliation, investigation, and recordkeeping under the ADEA, and enforcement of the Act in both the federal and private sectors, administratively as well as in the courts. Prior to the 1978 amendments, the Secretary of Labor was responsible for these functions. This transfer of functions was accomplished under Reorganization Plan No. 1, authorized by the Reorganization Act of 1977.[13] The Reorganization Act authorized the President to rearrange executive departments and agencies. However, either house of Congress could veto this change, known as the so-called "one-house veto" provision. Procedurally, the Act required the President to transmit any proposed reorganization plan to both houses, and such a plan would become effective if neither house passed a resolution of disapproval within 60 days.[14]

As authorized by the Act, President Carter prepared and submitted to Congress Reorganization Plan No. 1 of 1978,[15] which was designed to reorganize and expand the functions of the EEOC, including *inter alia*, enforcement responsibility for the ADEA. Since neither house passed a resolution of disapproval, the entire Plan, including the transfer of enforcement authority for the ADEA from the Labor Secretary to the EEOC, and the "one-house veto" provision, became effective.[16]

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[11]Pub. L. No. 90–202, effective June 12, 1968, 29 U.S.C. §621–634.

[12]EEOC v. Wyoming, 460 U.S. 226, 31 FEP 74 (1983).

[13]Pub. L. No. 95–17, 91 Stat. 29, 5 U.S.C. §§901–912.

[14]5 U.S.C. §§903, 906(a).

[15]43 FED. REG. 19807, 92 Stat. 3871, 1978 U.S. CODE CONG. & AD. NEWS 9795–9800.

[16]*See generally* EEOC v. Allstate Insurance Co., 467 U.S. 1232, 34 FEP 1785 (1984); Burger, Chief J., dissenting from dismissal of appeal for lack of jurisdiction.

In 1983, the Supreme Court decided *Immigration & Naturalization Service v. Chadha*,[17] which involved a "veto" provision in the enabling legislation that was essentially identical to that in the Reorganization Act of 1978. The Court determined that the one-house veto provision was unconstitutional. In one broad stroke, the Court invalidated every use of the legislative veto provision, despite its presence in over 200 federal laws since the mid-1930s. The Court declared that the veto clause violated constitutional mandates of separation of powers, bicameralism, and presentment.[18] In effect, the Court held that the convenience, flexibility, and efficiency of the device could not overcome the fact that it was clearly inconsistent with our constitutional structure.

Following *Chadha*, the EEOC was faced with a similar challenge to its enforcement authority because of the presence of the unconstitutional legislative veto provision in the Reorganization Act of 1978. In *EEOC v. CBS, Inc*,[19] the Second Circuit answered several questions raised by the Commission to justify its continued ability to enforce the Act, despite the defective provision. The Commission argued that the legislative veto provision was "severable" from the rest of the Reorganization Act, and that this reading of the Act would not subvert the congressional intent that the Commission have enforcement authority. Excision of an offending or defective clause is often used to preserve an otherwise valid statutory enactment, but the Second Circuit rejected the claim of severability. It observed that the consequences of exercising the veto provision, the comments on the floor of Congress, and materials contained in the committee reports demonstrated that the veto provision was a "key provision," an "integral and necessary" part of the Act, and that Congress would not have passed the Act without this provision.[20]

The Commission argued that Congress approved and ratified by acquiescence Reorganization Plan No. 1 when it appropriated funds for EEOC enforcement of the ADEA. However, the Second Circuit regarded appropriations bills as "particularly unsuitable" vehicles for implying ratification of unauthorized actions, especially actions that are unconstitutional as opposed to merely technically improper, inasmuch as the substantive aspect of such bills are subject to much less scrutiny than the substantive programs themselves.[21]

Finally, the appeals court observed that Section 905 of the Civil Service Reform Act of 1978 (CSRA) Pub. L. No. 95–454, 92 Stat. 1111, 1224, 5 U.S.C. 1101 (note), states that any provision of Reorganization Plan No. 1 or 2 that is inconsistent with the CSRA is superseded, and that this language tends to invalidate Plan No. 1, since Section 905 makes no reference to the specific transfer of enforcement authority at issue, and is not the type of "deliberate" action by Congress that would serve to ratify an otherwise unauthorized transfer.

The appeals court granted the EEOC's motion for a stay until December 31, 1984, reasoning that automatic dismissal would be an unnecessarily drastic

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[17]462 U.S. 919, 51 U.S.L.W. 4903 (1983).

[18]*Id.*

[19]743 F.2d 969, 35 FEP 1127 (CA 2, 1984).

[20]*Id.*, 35 FEP at 1131.

[21]*Id.*, 35 FEP at 1132.

remedy. This provided Congress with an opportunity to affect a change in the legislation, to determine whether and how the EEOC would continue enforcing the ADEA.[22] By October 1984, Congress had passed and the President had signed H.R. 6225, sponsored by Rep. Jack Brooks (D., Tex.), chairman of the House Government Operations Committee. The bill was enacted into law on October 19, 1984 as Pub. L. No. 98–532, and amends Title 5, Chapter 9 of the Reorganization Act, to read:

> "Section 1. The Congress hereby ratifies and affirms as law each reorganization plan that has, prior to the date of enactment of this Act, been implemented pursuant to the provisions of chapter 9 of title 5, United States code, or any predecessor Federal reorganization statute.
> "Section 2. Any actions taken prior to the date of enactment of this Act pursuant to a reorganization plan that is ratified and affirmed by section 1 shall be considered to have been taken pursuant to a reorganization expressly approved by Act of Congress."

This amendment to Title 5 constituted a retroactive severance of the legislative veto provision. The EEOC's authority to enforce the ADEA and other statutes under the aegis of the Reorganization Act of 1977 was thus affirmed.

[22] *Id.*

2

What the Act Provides

Section by Section Analysis

The ADEA prohibits job discrimination against workers between the ages of 40 and 70 years, with no age ceiling for federal workers. The Act is intended to "promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."[1]

Section 3 of the Act authorizes the Secretary of Labor, now the EEOC, to undertake studies and provide information to labor unions, management, and the general public about the needs and abilities of older workers, as well as their potential for continued employment and contribution to the economy. To that end, the EEOC is encouraged to undertake research with a view to reducing barriers to employment of older persons and the promotion of measures for utilizing their skills; to publish the findings of studies and other materials and otherwise make them available to employers, professional societies, the various media, and other interested persons for the promotion of employment; to foster, through the public employment service system and cooperative effort, the development of facilities of public and private agencies for expanding the opportunities and potentials of older workers; and to sponsor and assist state and community informational and educational programs.

Section 4 of the Act makes it an unlawful employment practice for an employer to treat employees or make employment decisions on the basis of age concerning hiring, discharging, training, and classifying. Section 4 also prohibits employment agencies from classifying, failing or refusing to refer for employment, or discriminating against an individual in any other way, because of such individual's age. Labor organizations are barred from excluding or expelling from membership or otherwise discriminating against individuals because of age. They are also barred from limiting, segregating, or classifying individuals, or failing or refusing to refer for employment individuals in any way that would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect an individual's status as an employee or job applicant because of age. Labor organizations are also precluded from causing or attempting to cause an employer to discriminate against an individual based on age.

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[1]29 U.S.C. §621(b) (1984).

Section 4 also makes it unlawful for an employer, employment agency, or labor organization to discriminate against any individual because that individual has opposed any practice prohibited by the Act or has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under the Act. The printing or publication of notices or advertisements indicating a preference, limitation, specification, or discrimination based on age is prohibited.

Age can be a bona fide occupational qualification (BFOQ) under certain conditions, and Section 4 makes age as a BFOQ a valid basis for making an employment decision. Other exceptions to the general prohibitions on making age a basis for an employment decision include "other reasonable factors," employee benefit plans, and good cause.

The 1978 amendments to the Act changed the treatment of involuntary retirement. Previously, an employer could impose involuntary retirement if it were done in observance of a bona fide seniority system. Under the amendments, however, it is forbidden to retire employees involuntarily pursuant to a seniority system or employee benefit plan and thus, it is no longer permissible as a valid defense to a charge of unlawful forced retirement that the employer acted under the terms of a seniority system or benefit plan. Finally, Section 4 requires any covered employer to provide the same group health plan to employees over age 65 as is provided to employees under age 65.

Section 5 directs the Secretary of Labor, now the EEOC, to make an appropriate study of institutional and other arrangements giving rise to involuntary retirement and to report findings and any appropriate legislative recommendations to the President and Congress.

Section 6 provides for the delegation of functions, and the appointment of personnel and technical assistance in the administration of the Act. It also authorizes the Secretary to cooperate with other regional, state, and local agencies in furnishing technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of the Act.

Section 7 authorizes the EEOC to investigate and to require the keeping of records "necessary or appropriate" for the administration of the Act. It establishes enforcement procedures and remedies as are provided under the Fair Labor Standards Act of 1938, as amended. Section 7 also requires the EEOC to attempt to eliminate discriminatory practices and to effect voluntary compliance with the Act through "informal methods of conciliation, conference and persuasion." Any "person aggrieved" may bring a civil action for "legal or equitable relief," but the right of such a person to bring an action terminates upon the commencement of an action by the EEOC to enforce the person's right. A jury trial is authorized for any issue of fact for recovery of amounts owing as a result of a violation of the Act. Section 7 also establishes timeliness requirements for filing a charge with the EEOC, including statute of limitations, tolling during conciliation period, and reliance on administrative rulings.

Section 8 requires the posting in conspicuous places of a notice prepared or approved by the EEOC setting forth information deemed appropriate by the Commission for administering the Act.

Section 9 authorizes the EEOC to issue rules and regulations it deems necessary or appropriate for enforcing the Act and allows the Commission to

establish ''reasonable exemptions'' to and from any or all provisions of the Act as the Commission finds ''necessary and proper in the public interest.''

Section 10 establishes criminal penalties, including fines, imprisonment, or both for violating the Act.

Section 11 is the definitional section; it defines the meaning, for the purposes of the ADEA, of such words as ''person''; ''employer''; ''employment agency''; ''labor organization''; ''employee''; ''commerce''; and ''industry affecting commerce.''

Section 12 establishes age limits of covered individuals, 40 years to 70 years of age, and 40 years of age to unlimited for federal government employees and job applicants. This section also exempts ''bona fide executives or high policymakers'' from the prohibition against compulsory retirement and establishes a ''retirement benefit test'' that equals $44,000.[2]

Section 13 requires the EEOC to submit a report to Congress annually covering its activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered under the Act as it finds advisable.

Section 14 explains the effect of a federal action under the Act as it supersedes any state action and the effect of a state action that was commenced before the federal action was filed.

Section 15 governs nondiscrimination on account of age in the federal government employment sector, including EEOC authority to enforce the Act against listed federal entities, and other aspects of enforcement, investigation, and bringing of actions against the federal government. This section also requires the EEOC to report to the President and Congress on the effects of ADEA coverage over federal government employment practices.

Section 16 governs the authorization of appropriation of sums necessary to carry out the purposes of the Act.

1978 Amendments

In 1978, Congress amended the ADEA in significant ways. (Pub. L. No. 95–256) The 1978 Amendments affected Sections 4, 5, 7, 12, 15, and 16 and sections in Title 5 of the U.S. Code concerning Government Organization and Employees. The amendments made substantive changes in the Act as well as causing a transfer of functions from the Secretary of Labor to the Equal Employment Opportunity Commission.[3] (See Chapter 1, ''EEOC Role'' for detailed discussion.)

One important change in the substantive provisions of the Act concerned the aspect of involuntary retirement. Section 4(f)(2) was amended effective April 6, 1978 for employees under age 65, and effective January 1, 1979 for employees age 65 through 69. The substance of the change was a proviso that no employee benefit plan ''shall excuse the failure to hire any individual, and

[2]As amended by Pub. L. No. 98–459, eff. 10-9-84.

[3]Reorganization Plan No. 1 of 1978, §2, 43 FED. REG. 19807, 92 Stat. 3781, set out in Appendix to Title 5, Government Organization and Employees, eff. 1-1-79, as provided by §1–101 of Executive Order No. 12106, December 28, 1978, 44 FED. REG. 1053.