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AGE-BASED HOSTILE ENVIRONMENT

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ABSTRACT: As the workforce ages, the number of age harassment cases will continue to increase and become a significant problem in the workplace. The EEOC recognizes age harassment as being an illegal activity. Cases were reviewed and guiding principles provided. Some cases do not rise to the level of illegal age harassment but would constitute bullying. Organization are encouraged to go beyond the law and propagate policies that go beyond the law to include serious forms of bullying.

Key words: Hostile environment, age and employment, Congress, ADEA

INTRODUCTION

Age is a common factor used in legislation and by society to establish rights, privileges, behavioral expectations and, often pejorative stereotypes. (Eglit, 2009). Older workers are often considered less employable the longer they remain unemployed. (Manger, 2014). In recognition of these realities, Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA) "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." (Civil Rights Act).

The ADEA's origin arose from a 1964 Executive Order issued by President Johnson declaring a public policy against age discrimination in employment. In 1967, after considerable debate, Congress passed the ADEA in order to eliminate age discrimination. The Congressional debate addressed a balancing of the right of older workers to be free from age discrimination in employment with the employers' prerogative to control managerial decisions. The ADEA, and its numerous amendments, are intended to recognize these competing interests by prohibiting arbitrary age-based discrimination in the employment relationship. Most states subsequently adopted their own anti-discrimination laws, largely

patterned on the precepts of the ADEA protecting workers. (Special Committee on Aging, 1992).

But not all anti-discrimination laws are created equal. Although the ADEA has been described as "…part of a wider statutory scheme to protect employees in the workplace" along with Title VII of the Civil Rights Act (race, color, gender, national origin and religion); the Americans with Disabilities Act of 1990 (disabilities); the National Labor Relations Act (union activities) and; the Equal Pay Act of 1963 (sex), the ADEA has a more narrow scope than these other regulatory schemes. (Crawford v. Median General Hospital, 1996). In fact, except for the substitution of "age" for "race, color, religion, sex, or national origin," the language defining "prohibited employer practices" under the ADEA and Title VII is identical. Unlike Title VII, however, the ADEA significantly narrows its coverage by permitting any "otherwise prohibited" activity. (Smith v. City of Jackson, 2005].

Furthermore, unlike the Title VII regulatory schemes that prohibit categories of conduct that have historically plagued minority groups in society in the fields of employment, housing, consumer financing, and other social benefits, the ADEA and other age-based discrimination laws limit their applicability solely to employment and labor organization matters. (Swift, 2006). Exacerbating this difference in the scope of age versus Title VII forms of other discrimination is an apparent reluctance or inability by the courts to enforce age discrimination laws in a consistent manner. A 2004 study that analyzed age-based rulings versus racial and gender discrimination cases indicates a direct correlation between the judges' age and their sensitivity to age discrimination. The youngest judges were less sympathetic to age discrimination claims than older judges. (Manning, Carroll and Carp, 2004).

Thus, in the almost fifty years since the passage of ADEA, the growth of federal and state laws prohibiting age discrimination suggest age-based discrimination is virtually as pernicious in American society as racial and gender discrimination. (Neumark, 2003). This problem is exacerbated by the fact that Baby Boomers appear to be postponing their retirements during the economic downturn which began in 2008, thus creating greater numbers of workers who may become victims of age discrimination.

The U.S. is aging - individuals over the age of 40 constitute 55.5% of the total population. Twenty-four percent of those employed in the workforce are 54 years old and older, and this number is expected to increase to at least 34% by the year 2020 (Department of Labor, 2013). As the workforce ages, the number of age discrimination charges are up 51% since 1999. Age discrimination charges presently represent 23.2% of the total chargers related to all forms of harassment (EEOC, 2013). Age discrimination also reduces hiring opportunities for older

workers by exacerbating the stigma of unemployment that becomes stronger as individuals age. [Manger].

Given these realities, it is reasonable to assume that the number of age harassment charges will continue to rise and expected to rise significantly in the future. The more narrow scope of age discrimination laws compared to other discrimination laws, their inconsistent enforcement, and the projected growth in the number of age discrimination claims, makes age discrimination worthy of study for significant social, legal and corporate productivity reasons. Age discrimination and how to combat it is, therefore, worthy of study.

It should be noted that reverse discrimination against younger workers in favor of older workers is not prohibited under the ADEA because discrimination against relatively younger workers is outside the Act's scope of protection. (General Dynamics Land Systems, Inc. v. Cline, 2004).

Curbing the unrelenting growth of age discrimination requires continued attention by company management and the federal and state legislatures. This paper will address a fundamental issue that should contribute to narrowing the gap between the efficacy of the weaker ADEA and the more robust Title VII in the common mission of both statutes – to protect individuals in the workplace from hostile work environments: Age discrimination: What level of hostility must exist in the workplace to establish the existence of age discrimination?

THE DEVELOPMENT OF THE DOCTRINE OF THE HOSTILE WORKPLACE ENVIRONMENT

The legal doctrine of the hostile workplace environment is, as commented above, common to both the ADEA and Title VII. The rationale for the doctrine is that sufficiently abusive harassment in a workplace has an adverse effect on a "term, condition, or privilege of employment". (Ellison v. Brady, 1994). Although the doctrine is now well-established, its development moved at a slow pace through the courts. The first appellate recognition of the doctrine was by the U.S. Court of Appeals in the 1971 racial harassment case, *Rogers v. EEOC*. (Rogers v. EEOC, 1971). The U.S. Supreme Court's first recognition of the doctrine occurred in *Meritor Savings Bank, FSB v. Vinson* (Meritor Savings Bank, FSB v. Vinson, 1986) a sexual harassment case.

Remarkably, 29 years after the ADEA became law, the U.S. Court of Appeals held for the first time, that an age discrimination claim arising from a hostile work environment can be made under ADEA. (Crawford v. Median General Hospital, 1996). The court also held that such a claim should be interpreted similarly to hostile environment claims brought under Title VII because the ADEA's prohibitions are modeled on those of Title VII. *Crawford* is a significant milestone in the history of the ADEA because of the court's recognition of the common statutory objective the ADEA shares with Title VII. On the basis of the *Crawford*

decision, the standards, methods, and manner of proof established in Title VII case law have been recognized as persuasive authority in cases arising under the ADEA, and courts routinely employ Title VII and ADEA case law interchangeably in analyzing hostile work environment claims. (Wallace v. Dunn Construction Co., Inc.,1995).

The *Crawford* decision not only defined the standard for determining whether a hostile work environment exists, as circumstances which have the effect of "…unreasonably interfering with the employee's work performance and creating an objectively intimidating, hostile, or offensive work environment", but it also held that the analysis of this standard should be based on the standard set by the U.S. Supreme Court in *Harris v. Forklift Systems,* a sex discrimination case. In *Harris,* the Court held

> "[W]e can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."
> (Harris v. Forklift Systems, 1993).

In *Gross v. FBL Financial Services,* the U.S. Supreme Court further refined the standard that employee-plaintiffs in ADEA cases must no longer prevail under the ADEA by proving that the employer acted on the basis of "mixed motives," only one of which was the individual's age. Rather, the employee-plaintiff must prove "but for" age considerations, employers are relieved from the burden of proving they would have taken an adverse action regardless of age and makes it easier for management to defend against age discrimination claims. (Gross v. FBL Financial Services, 2009).

HOSTILE ENVIRONMENT

The current EEOC guidelines provide that age harassment is unwelcome conduct which becomes unlawful when (1) endurance the offensive conduct becomes a condition of continued employment, or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive (EEOC, 2013). It is the second point that deals with hostile environment cases. In *Faragher v. City of Boca Raton* (1998), the Supreme Court set forth the factors to be considered in interpreting the EEOC guidelines and determining hostile environment claims filed under Title VII (Faragher v. City of Boca Raton, 1998). First, it must "be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive" (Faragher v. City of Boca Raton, at 286). Second, all facets of the circumstances

must be reviewed, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Additional case law provides other standards to consider when evaluating whether a workplace is hostile. For example, a hostile workplace exists when it is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the conditions of the victim's employment." (*Alaniz v. Zamora–Quezada,* 2009). Furthermore, alleged hostility must be both objectively and subjectively offensive. (*EEOC v. WC&M Enterprises, Inc., 2007).* This means that not only must a plaintiff perceive the environment to be hostile, but it must appear hostile or abusive to a reasonable person.

Unlike Title VII, the ADEA "does not authorize an alleged mixed-motives age discrimination claim." (Gross v. FBL Financial Services, Inc., 2009). It is therefore insufficient under the ADEA for a plaintiff to show that age was a motivating factor. Instead, a plaintiff bringing a disparate-treatment claim under the ADEA must prove that age was the "but-for" cause of the challenged adverse employment action. The case of *Alzuraqi v. Group 1 Automotive, Inc.,* (2013) illustrates this point.

In this case, Mr. Alzuraqi was a 51-year old employee in a car dealership's finance department and a Muslim American of Palestinian descent. He was also the oldest employee of the car dealership. Alzuraqi's supervisor referred to him as a "towelhead", "raghead", "rock thrower", "sand nigger", "terrorist", "f***ing Palestinian" and "f***-ing Muslim" and other similar epithets three to four times a week, On one occasion, the supervisor told the employee that he was glad that the employee wasn't going to have any more kids, because that meant "fewer Palestinian children in the world." Another time, the supervisor stood in the hall outside the employee's office and complained that the Persian food purchased by a coworker of the employee for lunch smelled like "f***ing camel s**t." The supervisor also referred to Alzuraqi as "old man" or "old fart" and would state that Alzuraqi was unable to remember something because he was "old." Such incidents occurred approximately one to two times per week. Alzuraqi was eventually fired and he brought an action under the ADEA and Title VII for hostile work environment, discrimination based on age, religion, and national origin. The court held that, with regard to the employee's ADEA claims, Alzuraqi had not proved a hostile work environment existed under the ADEA because unlike Title VII, the ADEA does not recognize mixed-motives age discrimination claims. In order for the employee to prevail in his ADEA claim, he would have had to prove that that his age was the "but-for" cause of the challenged adverse employment action. (Alzuraqi v. Group 1 Automotive, Inc., 2013).

The Supreme Court did note that Title VII does not prohibit genuine but innocuous differences in the ways people routinely interact with each other. “Simple teasing, off-hand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment” (Faragher v. City of Boca Raton, at 286). The Faragher court went on to say that the guidelines when properly applied would filter out “the ordinary tribulations of the work place, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing” (Faragher v. City of Boca Raton, at 286).

The following case law illustrates conduct that, although uncouth, offensive or cruel, does *not* constitute age discrimination; conduct that rises to the level of hostility that *does* constitute age discrimination under the ADEA, and the often “gray area” that can make subjective determinations about the existence of age discrimination difficult.

CONDUCT NOT DEEMED TO BE HOSTILE UNDER THE ADEA

Welcome Conduct and Teasing: Welcome conduct is not actionable. For example, an older dock worker at an ice cream company filed an age harassment charge against his supervisor for repeatedly calling him an old man. However, there was a casual joking atmosphere at the dock, and the worker usually joined in himself. As a result, the case was dismissed (Snyder vs. Pierre’s French Ice Cream Co., 2012).Similarly, an employee cannot complain about age-related teasing by a supervisor while engaging in such teasing herself. For example, a supervisor's comments to a female employee over 60 years old concerning her lassitude, hot flashes and senility, and referring to the employee as an “old lady,” did not amount to hostile work environment cognizable as the court noted the employee engaged in bantering with supervisor and also made age-related comments of her own about him. (MacKenzie v. City and County of Denver, 2005).

Offhand Comments, and Isolated Incidents: It should be recognized that not all verbal abuse constitutes sufficient hostility to constitute discrimination under the ADEA. Many employees pursuing age discrimination claims discover that much offensive age-related conduct does not constitute a hostile work environment. Incidental or occasional age-based comments, discourtesy, rudeness, or isolated incidents (unless extremely serious) are not discriminatory changes in the terms and conditions of a worker's employment. (*Butler v. Ysleta Independent School District,* 1998).

A hospital department billing employee heard two comments that were objectively indicative of age-based bias: the supervisor stated that she did not “think women over 55 should be working” and that “old people should be seen and not heard.” The Appeals Court ruled that while age harassment was actionable the incidents in this case were minor and isolated and therefore did not create a hostile work environment (Crawford v. Medina General Hospital, 1996).

Isolated insulting age-related comments may also be insufficient to support a claim of hostile conduct. There are many cases that do not meet the legal threshold of age harassment because they do not create the legal requirements to establish the existence of a hostile work environment. For example, a Wal-Mart associate in the seafood department was subjected to several vulgar comments over the 1½ years she worked there. She was called a "f***-ing bitch," as well as a "son of a bitch." Additionally comments were made about her "working at her age," and her ability to pick up the heavy boxes delivered to the store." The court ruled the comments were isolated and were neither severe nor pervasive enough to create an objectively hostile work environment but were rather examples of boorish behavior. (Racicot v. Wal-Mart Stores, Inc., 2005).

The conduct in some of these cases are not so minor, and an employee's subjective view that he or she has been a victim of age discrimination is not enough for the employee's ADEA claim to prevail. For example, in *Delaney v. Lynwood Unified School District* (2009) an over-40 school teacher had several confrontations with his supervisor, some in front of students, where the supervisor moved into his personal space to berate and angrily reprimand the plaintiff in a physically threatening manner to such an extent that the teacher feared for his personal safety. (Delaney v. Lynwood Unified School District, 2009). While these incidents may have been severe enough to change the conditions of his work environment, the plaintiff could not establish that any of these incidents were based on age, and the case was dismissed. The court noted that the teacher's only evidence of age discrimination was in a pretrial declaration, where he stated that it is his "information and belief" that he was replaced by a younger worker. In another case (Fabec v. STERIS Corporation, 2005), an older equipment operator was put on a performance improvement plan with constantly changing goals and time periods. In dismissing the case, the court pointed out that these actions could be considered harassment, but the victim failed to show that it was because of age.

In *Witt v. Cable Ad Concepts* (2010), an older female sales person filed a charge of age harassment on the basis that she did not like her supervisor's tone when he talked to her and that he communicated reprimands in a harsh manner. In addition, he sent an email flyer outlining a "senior dress code" to her and two other employees over the age of 40. The court determined that the flyer was an isolated event and not severe. The court went on the say, "Workplaces are not always harmonious locales, and even incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard" (Witt v. Cable Ad Concepts, at 5), Moreover, the verbal conduct must also be age-related.

The case of *Fletcher v. Gulfside Casino, Inc.,* (2012) involved many age-biased comments by several casino managers over the course of two years. These comments included references to a 58-year old casino worker. She was asked regularly if she had her hearing aid, or needed glasses, or had taken her Geritol.

When she and other older workers worked, it was referred to as "Seniors Day." Other comments such as "when I get to be as old as you…." were made by other managers on numerous occasions. (Fletcher v. Gulfside Casino, Inc., 2012). The court determined that the comments were relatively minor, were not frequent enough, and were just good-natured humor.

A similar result occurred in *Bennis v. Minnesota Hockey* (2013), for example, the court found that four minor stray comments over a year directed at a guest service manager were not enough to rise to the level of harassment. He was told by supervision that "your eyes get worse as you get older," he was "old-fashion" for ordering ice cream, he liked Classic Rock because he was from that era, he did not need a job like a younger employee since he was retired, and that he had no social life because his kids were grown (Bennis v. Minnesota Hockey at 18). This case also reviewed/ruled on charges of unequal treatment because the plaintiff felt that he was held to different standards and modes of conduct than other employees. While the court agreed that unequal treatment could be harassment, there was no evidence to support the plaintiff's allegations in this case.

In *Baker v. Becton, Dickinson and Company* (2011), an account business manager was told for more than a year that he was called too old and slow; he lacked energy and enthusiasm; and that the supervisor did not want anyone over the age of forty in sales. These were not enough to create a hostile work environment. In fact, the court found these to be basically "offensive utterances" that were not severe or frequent enough to change the conditions of the work environment (Baker v. Becton, Dickinson and Company, 2011).

CONDUCT THAT MAY OR MAY NOT CONSTITUTE A HOSTILE WORK ENVIRONMENT

Passive Conduct: A school teacher filed a claim that she was a victim of a hostile work environment based on complaints about her chair, lack of a budget and lack of a job description was found not to have been subjected to a hostile work environment. These inconveniences were soon remedied subsequent to her reassignment to teaching academic intervention services in a hallway, and locating her in a hallway. Furthermore, her reassignment and "hall duty" was found not to constitute discriminatory intimidation, ridicule, and insult sufficiently pervasive to alter the conditions of her employment. (Francis v. Elmsford School District, 2008).

Disparate Treatment: Disparate treatment can constitute hostile work environment under the ADEA. However, in order to prevail, an employee's claim of disparate treatment must be supported by evidence that age actually played a role and had a determinative influence in the allegedly wrongful conduct.

"Disparate treatment occurs when members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment

opportunities as have been available to other employees or applicants." (Kojornkiatpanich & Kleiner). The U.S. Supreme Court has held that disparate treatment occurs when an employer treats "[a] particular person less favorably than others because of a protected trait." (Watson v. Fort Worth Bank & Trust, 1988). It is worth noting that there is a distinction between "disparate treatment" and "disparate impact" theories of employment discrimination The U.S. Supreme Court distinguished between the two theories of discrimination:

> "Disparate treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment...."[C]laims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive ... is not required under a disparate-impact theory."
> (Teamsters v. United States, 1977)

It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. (Hazen Paper Co. v. Biggins, 1993). However, in order to prevail, an employee's claim of disparate treatment must be, for example, a lateral transfer to a position at the same salary as the employee's former position, and the employee's subjective belief that he had been set-up to fail because the new position required him to undergo additional training, did not constitute hostility. (Tyler v. Union Oil Company of California, 2002). Similarly, an employee's ADEA claim based on the fact that she was denied lateral transfers were not actionable adverse employment actions under the ADEA because the new positions all paid either the same or less than the employee was earning at the time, employee would have been doing the same work if transferred to new division, and nothing in record suggested that a transfer would have given employee better chances for career advancement or more opportunity to earn overtime. (McNealy v. Emerson Electric Co., 2005).

An example of where an employee *prevailed* in his claim of disparate treatment was in the case of *Terry v. Ashcroft* (2003). A former special agent with the Immigration and Naturalization Service who was over age of 40 at time of his non-selection for promotion to vacant supervisory position. The special agent he was qualified for position even though his name was not on Best Qualified List (he had

seventeen years of experience as compared to four years for the younger applicant who was selected) and twenty-seven citations for superior accomplishments and outstanding performance as compared to four for selected applicant. He also demonstrated his application was marked with his age-related comments by individual involved in promotion decisions. The court concluded these facts constituted age discrimination under the ADEA. (*Terry v. Ashcroft*, 2003).

CONDUCT DEEMED TO BE HOSTILE UNDER THE ADEA

In the following sections, all harassment-related conduct was shown to be hostile by the employer.

Severe Verbal Conduct: Generally speaking, the more severe the conduct, the fewer incidents that are required to create an abusive work environment (Findley, Walker, & Pappanastos, 2014). Often this entails some form of physical contact or threats. For example, in *Dediol v. Best Chevrolet, Inc.,* (2011), a 65-year old car salesman endured repeated verbal threats daily (along with other verbal harassment) by his sales manager, for two months. He was never called by name but "referred to as "old mother******," "old man," "pop," and "get your old f*****g ass over here." These threats included such statements as "I am going to kick your ass," and "I am going to beat the f--- out of you," which implied bodily harm, and on one occasion, the sales manager physically charged the salesman. The appeals court found that these threats were all age-related and met the legal definition of hostile work environment; therefore the case was sent to trial. (Dediol v. Best Chevrolet, Inc., 2011).

In *Weyers v. Lear Operations, Corp.*, (2004), an older shift worker was subjected to ageist comments many times over a 90-day period by her supervisor such as "I hate the old bitch," "If you're over 25, you're out of here," and "you don't work for me". Management also treated her differently than younger employees in terms of training and work assignments, and the training she received was found to be inadequate. The jury found in her favor. The Appeals Court ruled that the conduct could be age harassment; however, the case was retried on technical grounds (Weyers v. Lear Operations Corp., 2004).

Similarly, in *Fernandez v. West Hills Hospital & Medical Center* (2008), a 51-year old aide began having performance problems soon after she was hired. She was eventually terminated by the hospital. While the court found this action to be justified, it also determined that the work environment she endured while at the hospital was sufficient to constitute a hostile work environment. The aide was told that she was too old by her superior and that he preferred younger people working in his department. It was also conveyed to her that she was a "f*****g old lady"; that she was too "old" and that she should "leave her job for younger people"; that she was a "f*****g broad who is much too old and should leave her job to some other person" (Fernandez v. West Hills Hospital & Medical Center at 3). Furthermore, her co-workers told her that she "was too damn old to work here and

they should just get her out of here". These comments occurred at least twice per week for about a year.

In *Worden v. Interbake Foods, LLC, (*2012), a supervisor made age-related comments on a daily basis to a 53-year old production scheduler for about a year. The supervisor also made statements that the scheduler was old and forgetful, that she ought to retire, that she should be at home taking care of her husband. All of these comments were made frequently throughout the day in front of other employees. The employee objected and complained several times but to no avail. Given the length of time and frequency of occurrences, the court found that the conduct had risen to a sufficient level to support a hostile environment claim (Worden v. Interbake Foods, LLC, 2012).

In *Juell v. Forest Pharmaceuticals, Inc.*, (2006), District Court established that age-related comments, both written and oral, over a two-year period can create a hostile work environment. The court noted that supervision would address emails to the 49-year old pharmaceuticals sales representative as "very old", "Senior", "Sr." and "old manager of specialty markets"...."comments suggesting that that there was a question as to whether or not he could still "get the job done" at his age and whether the plaintiff's abilities were waning" (Juell v. Forest Pharmaceuticals, Inc. at 473). He was also belittled in front of other employees. In addition, he was forced to take a voluntary demotion because of "his age". Not only did his working conditions become abusive, he also had a nervous breakdown as a result of his adverse treatment. The court found that the abuse was frequent and pervasive, and his performance had been affected and the case was sent to trial (Juell v. Forest Pharmaceuticals, Inc., 2006).

A school system's chancellor's statements that the system needed "new blood" and that he intended to "clean house of the old ways and teachers wedded to old method " and that he wanted "to purge the system of veteran tenured teachers at the top of the pay scale" contributed to the 63-year old employee plaintiff being transferred to the "Teacher Reassignment Center" (mockingly referred to as a "rubber room)" , was held to violate the employee's rights under the ADEA. (Thomas v. New York City Board of Education, 2014).

CONCLUSION

Age harassment is on the rise in this country and, along with other forms of harassment in the workplace, is a pernicious cancer that eats away at organizational productivity and morale. In a global competitive environment, there is no place for harassment (Findley, Vardaman, & He, 2013), and should be excised wherever and whenever it begins to fester. Yet the ADEA's scope is much more narrow than other regulatory schemes providing "prohibited employer practices" regarding discrimination based on race, color, religion, sex, or national origin, the ADEA significantly narrows its coverage by permitting any "otherwise

prohibited" activity. The law can, therefore, be complex and confusing, making it more challenging to recognize or control by management.

Further complicating the challenges facing management is the fact that much unprofessional, vulgar, and bullying behavior is not addressed by state or federal law. At least with regard to age discrimination, offensive behavior must occur with regularity and be severe to fall under the aegis of the ADEA. As we have discussed, some of the fact situations cited in this article are quite severe and abusive – and more than management may recognize – yet do not rise to the level of actionable age discrimination. Organizations are, therefore, well within their legal rights to formulate policies and procedures to deter this type of behavior (Findley, Vardaman, & He, 2013).

To that end, organizations should implement policies that prohibit age harassment (and any other type of harassment) whether such harassment crosses the legal line or not. This will not only reduce exposure to litigation but also promote a healthier work environment where employees can concentrate on the work at hand. It is the authors' experience that greater attention is often paid to race and gender-based discrimination than to age-based discrimination. We believe the aging workforce in the United States may drive age-based claims to eclipse gender and sexual harassment claims over the next twenty years, so special attention should be devoted to at least the narrow scope of the ADEA. Organizations are certainly free to in such policies prohibitions that go beyond this narrow scope. For example, an organization's policies may define age-based discrimination prohibitions that are broader than those incorporated in the ADEA. This may mean that employees may face sanctions – including termination of employment for offensive conduct not illegal under the ADEA. In other words, an employer can require a higher standard of conduct by its employees than is required by law. This may mean that a victim of discriminatory conduct may not have grounds to sustain an ADEA claim, but may find relief from future discrimination when the source of the wrongful conduct is disciplined or terminated, thereby solving the victim's problem.

These policies should be reinforced by educational sessions with all new employees, regardless of an employee's rank in the organization, and through refresher training conducted at least annually for all employees. An important component of anti-discrimination policies and education should be a clear communication of how employees can discuss their concerns or complaints regarding possible discriminatory conduct in the workplace with decision makers on a confidential basis when they believe they have been the victims of age discrimination.

Employers should strive to avoid stereotyping employees based on age. One way of leveling the playing field is through the drafting of well-considered job descriptions and honest evaluation measures used to make decisions regarding promotions, layoffs, terminations, etc. An employee's age or seniority within the

organization should never be considerations in any adverse personnel consideration.

If a reduction in force is considered, employers should carefully analyze if the organization's plans will have a disparate impact on older workers (or any other protected group). Any disparate impact should compel the employer to reevaluate its planning process.

Careful planning in advance can significantly reduce the risk of employee moral issues and the threat of litigation. If, however, a claim is asserted by an employee for age discrimination, the employer will be in a much better position to defend itself from such claims.

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