

A generation lost: the reality of age discrimination in today's hiring practices

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ABSTRACT

The purpose of this paper is to expose a dilemma in today's workplace; that is, employers are overlooking well qualified applicants for open positions based upon age and/or unemployment status choosing instead to hire younger applicants with a history of continued employment who may be less qualified for the position. The economy remains fragile and its rebound has not occurred as quickly as projected which has resulted in little movement and job growth and the unemployed remaining unemployed for even longer periods of time. Additionally, potential employers are exercising pre-employment methodologies that raise questions about professional ethics and fair employment practices. The recent Sony Ericsson case brought to focus a new form of alleged discrimination - refusing to consider any unemployed applicant and contributing even more frustration to the challenges facing the long-term unemployed, many of whom are over the age of 40. The long-term unemployed, while not a protected legal class according to federal and most state laws, may pose an ethical crossroads for employers when considering someone for hire. This paper presents an historical perspective of age discrimination in employment and investigates the plight of the long-term unemployed. A practical approach for employers and human resource management educators is presented to ensure that all employment decisions are handled in a fair, consistent, and ethical manner.

Keywords: age discrimination, unemployed, long term unemployed, ethics in hiring, historical perspective of age discrimination

INTRODUCTION

With the current economy showing signs of a sluggish recovery, employers are cautiously optimistic about what the future holds. Mixed indicators in the unemployment rate, depending on location, may mean an increase in job growth for certain industries. A recent economic report released by *USA Today* shows the strongest 12-month national job growth in Construction (3.9%), Leisure and Hospitality (3.4%), Education and Health Services (2.9%), and Professional and Business Services (2.9%) while traditionally strong and stable sectors such as Government (-0.3%) and Utilities (0.3%) are showing slower growth rates (Job Growth Forecast, 2011). In any case, employers are facing an interesting situation; an abundance of well-qualified individuals eager to rejoin the labor force as active participants. Although this could be considered a strategic advantage for employers two groups are often overlooked ... those over the age of forty and experiencing recent unemployment and the newest group, those over the age of forty experiencing extended unemployment. As a result of the recent Sony Ericsson case, this new category of discrimination, the long-term unemployed, has been added to the concerns of the human resource practitioner.

Human resource practitioners have an allegiant obligation to ensure that all employment decisions are handled in a fair, consistent, and ethical manner. Conventional wisdom would suggest that the elements of fairness and consistency are applied to all employment decisions. As such, human resources has taken on a greater role as the organizational watch dog necessitating the need for highly-educated, skilled, and trained practitioners; but all too often practitioners are placed into these roles without the requisite knowledge, skills, and abilities resulting in making decisions solely on a gut feeling (Roach & Warner, 2000). This article supports the contention that practitioners now more than ever require training in interviewing techniques, job analysis skills, and a working knowledge of applicable fair employment practices especially given the combination of age and long-term unemployment of applicants.

AMERICA IS GETTING OLDER AND WORKING LONGER

The first wave of the baby-boomer generation (1946 -1964) has hit 65 (Grossman, 2003). Reports issued by the U.S. Census Bureau (2011) and the Centers for Disease Control (2010) estimate this population to be 77.3 million with a life expectancy of 83 years. Boomers have changed society in ways never imagined such as the element of diversity in dealing with the older worker. Advances in medical technology have created a shift from disease prevention and treatment in the early stages of life to the successful disease treatment and management at the end stages of life (Santora & Seaton, 2008). People are living longer, healthier, and productive lives and the population growth projections for the next 50 years indicate that this trend will continue at an alarming rate (Turner, 2008).

Americans are also working longer. Thirty years ago, the ideal goal in employment for older workers was early retirement. Conditions changed since the mid-1980s as the number of older males continuing to work has increased slightly, even more so for older women, and the average age of retirement has steadily risen. The reversal of the early retirement trend can be attributed to such factors as the strong economy of the 1980s and 1990s, the end of mandatory retirement, the decline in defined benefit retirement plans, and advances in technology and medicine (Harvard School of Public Health, 2004). Should this trend continue, boomers will be

more likely to continue working longer, either electing a gradual retirement program or, in the extreme, choosing not to retire at all unless they are incapable of working.

The baby boomer segment of the population will most likely want to remain productive and contribute to the economic base meaning employers will face the reality that older workers will be an integral part of the participating labor force. The U. S. Census Bureau in the study titled *Age & Sex Composition* (2011) reports the segment of the population age 40 and over accounts for approximately 142.6 million people, roughly 46% of the U. S. population.

HISTORICAL PERSPECTIVES AND SOCIAL ACTION: HITTING AND MISSING THE MARK

Early public awareness of age discrimination and the American worker can be traced to the Civil War (Segrave, 2001, p.7). However, it was not until the administration of President John F. Kennedy that the country began to observe and witness dramatic, sweeping changes tackling discrimination in America. Taking office after the Kennedy assassination, Lyndon Johnson was determined to secure the measures that Kennedy had sought, specifically bills to reduce taxes and guarantee civil rights (King & Riddlesperger, 1993). Johnson succeeded in gaining passage of the Civil Rights Bill in 1964, becoming the most far-reaching piece of civil rights legislation enacted since Reconstruction (The Civil Rights Act of 1964, 1965).

On July 2, 1964, the Civil Rights Act of 1964 was approved by the House of Representatives and the Senate and stands as the most comprehensive legislative measure ever to attempt to eliminate racial discrimination in America, setting the stage for a dramatic societal change (Bohlander & Snell, 2010). Title VII of the Civil Rights Act specifically addressed the issues of equal employment opportunity. This was the first major step taken by federal lawmakers to bar employers from discriminating against employees by prohibiting any form of discrimination in the workplace based on race, color, religion, sex, or national origin (The Civil Rights Act of 1964, 1965).

Originally envisioned to protect the rights of African Americans the Civil Rights Act of 1964 was amended prior to passage to protect the civil rights of all people, and for the first time included women (King & Marshall, 1974). Initially, Congress also included age under Title VII's protections, but after a lengthy debate, the protection against age discrimination was deemed "too controversial" and removed before passage (Rothenberg & Gardner, p. 14). It was decided that discrimination based on gender, race, or even religion can be derived from individual or genetic traits unlike discrimination based on age which is the one form of discrimination that can affect everyone. The focus at this point in time was on individual civil rights and the plight of the African American populous and not on the older worker (King & Marshall, 1974).

An outcome of the passage of the Civil Rights Act of 1964 was the Congressional directive, Section 715 of the Civil Rights Act, to the Secretary of Labor W. Willard Wirtz mandating that, "The Secretary of Labor shall 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" (Civil Rights Act, 1964). As Segrave (2001) so eloquently phrased it, "Racial bias targets people for what they are. Age bias targets people for what they become" (p. 1).

Within a year following the directives set forth in the Civil Rights Act, Secretary Wirtz presented his report, *The Older American Worker*, to Congress with his findings and

recommendations on the issue of age discrimination in America (U.S. Department of Labor, 1965). The motivating factor in this case was President Johnson's personal concern for the problem of age discrimination (Reed, 1978). Wirtz's report to Congress concluded the following five basic characteristics about age discrimination in employment (U.S. Department of Labor, 1965):

1. Many employers adopt specific age limits upon those they will employ.
2. These age limitations markedly affect the rights and opportunities of older workers.
3. Although age discrimination is based on the sort of animus that motivates racial, national origin, or religious discrimination, it is based on stereotypical assumptions on the abilities of the aged, unsupported by objective facts.
4. The evidence available at the time showed that the arbitrary removal of older workers from the workplace was generally unfounded, and that, the performance of the older worker was at least as good as the younger worker.
5. Age discrimination is profoundly harmful in that it deprives the national economy of the productive labor of millions of workers and substantially increases the costs of both unemployment insurance and Social Security benefits, and it inflicts economic and psychological injury upon workers deprived of the opportunity to engage in productive and satisfying occupations).

Wirtz's report to Congress focused on the common practice of employer-set age limits on hiring and proved to be the catalyst for the enactment of a federal statute barring age discrimination (U.S. Department of Labor, 1965).

The Age Discrimination in Employment Act of 1967 was the first of age-based, broad-sweeping legislation that continues to evolve setting legal precedent 45 years after its passage (Rothenberg & Gardner, 2011). It prohibits employers from discriminating against persons aged 40 years or older in hiring, discharge, compensation, and/or terms, conditions or privileges of employment, including limiting, segregating or classifying an employee in a way that could deprive an employee of an employment opportunity. Additionally, the Age Discrimination in Employment Act also sets standards for pensions and benefits provided by employers, and, requires that information about the needs of older workers be readily available to the general public (U. S. Equal Employment Opportunity Commission, 2011).

The Age Discrimination in Employment Act has addressed a considerable number of issues surrounding age discrimination in employment, but significant areas of improvement remain. Gregory (2001) summarizes the Age Discrimination in Employment Act in this manner:

The Age Discrimination in Employment Act, enacted by Congress in 1967, was intended to eradicate age discrimination from the American workplace. Congress's intent has not been fulfilled. The law has accomplished much, but age discrimination remains a scourge in the workplace. Ultimately, age discrimination will be eradicated only if American workers steadfastly challenge their employers' acts of age discrimination (p. 4).

Since its inception, the Age Discrimination in Employment Act has been amended on three occasions (Feder, 2010). First, in 1978 when Congress prohibited mandatory retirements and extended protection through age 70. That same year President Jimmy Carter transferred enforcement of the Age Discrimination in Employment Act to the Equal Employment Opportunity Commission. In 1986 it was amended again to eliminate the upper age limit and most recently in 1990 with the enactment of the Older Workers Benefit Protection Act (Feder, 2010).

THE AGE DISCRIMINATION IN EMPLOYMENT ACT FORTY-FIVE YEARS LATER

Gregory (2001) contends that “Although negative age stereotypes abound and employers continue to view age, not in terms of experience and stability, but as mental and physical deterioration as well as inflexibility and lack of enthusiasm, data supporting these stereotypes are nonexistent” (p. 29). Still, older workers are forced to dispel such negative stereotyping and accept responsibility for keeping their knowledge, skills, and abilities current and up-to-date, for maintaining a high level of productivity, and for preserving a high degree of flexibility and adaptability. Although the Age Discrimination in Employment Act failed to resolve negative stereotyping, the responsibility rests with employers to prevent such assumptions being made about the older workers’ capabilities (Rothenberg & Gardner, 2011).

By design, the Age Discrimination in Employment Act prohibits employers from discriminating against persons aged 40 years or older and has successfully eradicated age-based employment advertising although the refusal to hire older workers remains as much of a concern today as in 1967 (Kohl, Stephens & Chang, 1997). With nearly 75 percent of age discrimination claims filed with the Equal Employment Opportunity Commission involving termination of employment, and a mere 9 percent dealing with refusal to hire, the Age Discrimination in Employment Act has accomplished very little in addressing the challenges of the older worker seeking employment (Segrave, 2001).

Secretary Wirtz’s report to Congress concluded that the prevalence of age stereotypes in the workplace was mainly due to ignorance (U.S. Department of Labor, 1965). However, in the forty-five year existence of the Age Discrimination in Employment Act, age discrimination has transformed from a product of ignorance to a product of corporate economy. Some economists concur, relying on the life-cycle model of career development that holds that worker salaries generally exceed worker productivity at the beginning and at the end of an employee’s work life, but that salaries are generally lower and productivity higher during the middle years of the work cycle (Gregory, 2001). Unfortunately, this position may be grounded on the false assumption that worker productivity will decrease with age. However, in *The New York Times* on-line opinion page, Peter Cappelli, Director of the Center for Human Resources at the Wharton School commented, “Older workers perform better across the range of relevant performance indicators — better skills, especially interpersonal skills, better attendance, more conscientious, and so on” (Room for Debate, 2009).

THE METHODS AND MEANS OF AGE DISCRIMINATION IN EMPLOYMENT

Bohlander & Snell (2010) write, “There is perhaps no more important topic in human resources management than employee selection” (p. 254). In order for human resource practitioners to effectively recruit for and staff operations, federal, state, and in some cases local

laws and fair employment practices have to be followed ensuring impartiality in all human resource decisions. This impartiality extends to persons over the age of 40 for any employment action. In recent years, a number of employer actions have emerged setting the stage for charges of aged-based discrimination. Although human resource practitioners should be well-versed and well aware of the consequences for violating, intentional or otherwise, the rights of individuals over 40, employers could be committing acts of discrimination, but may not be aware of it. In support of this concept Roscigno, et al (2002), acknowledged that “Discriminatory behaviors, however, need not be necessarily conscious ones driven by explicit biases against older workers” (p. 317).

For the older worker, engaging in a job search can be a daunting task (Rothenberg & Gardner, 2011). This issue is compounded further by sociological trends that favor youth over older people even though there is overwhelming evidence that older people are now living more active and longer lives, mainly due to advances in medicine, healthcare, and lifestyle choices (Santora & Seaton, 2008). Although employers should be aware of these trends, there are those who continue to carry out acts of ageism, “discriminatory beliefs, attitudes, and practices regarding older adults as part of their way of doing business” (Rothenberg & Gardner, p. 11). The way these actions are conveyed to the older worker begin in the early stages of the staffing and recruiting process (Bohlander & Snell, 2010). Consider the following employment practices:

You are Overqualified for the Job

With the country’s economy shifting from a manufacturing to a services base, older workers find themselves in search of employment, many of whom having worked for one employer for their entire career. As these workers face prospective employers, a new and subtle form of discrimination has surfaced suggesting age discrimination – being classified as overqualified for a particular job (Wells, 2004). Comments about background and/or experience by untrained or inexperienced interviewers may lead one to conclude that they will not be hired due to their age (Erdogan & Bauer, 2007). Consider for example the following questions:

- Why would you want this job? With your experience, you’ll probably be bored in no time.
- What’s going to prevent you from taking a more senior level job with another company that would be commensurate with your experience?
- We like what we see, but we feel you’re overqualified for this position.
- With all of your years of experience, I am not sure you will be able to perform the duties of the job since you probably had others do them for you.

In reality, questions about a candidate’s qualifications become a conditional argument. That is, any prospective candidate has to be objectively considered based on a simple two-pronged test; either the candidate is qualified for the position, or they are not. Nothing more. Wells (2004) aptly phrased it, “If they meet the qualification of the job, take two minutes to ask why they’re seeking this job” (p. 52).

Possessing skills and abilities that surpass the requirements of a job cannot, and should not, be used as the primary means of denying employment to an otherwise qualified candidate. This should also extend to internal job posting systems in addition to external recruiting processes (Wells, 2004).

Andrew O'Connell (2010) of the *Harvard Business Review* wrote, "New research shows that overqualified workers tend to perform better than other employees, and they don't quit any sooner" (p. 30). These are encouraging words that should send a wake-up call to American business to take notice. In many instances, there seems to be a stigma attached to the older worker of being too good and the ingrained thought that these workers will be more expensive in the long-run. O'Connell's (2010) writings go even further and make the suggestion that, "If managers can get beyond the conventional wisdom, the growing pool of too-good applicants is a great opportunity" (p. 30).

Internet / On-line Applications for Employment

Technology can be a truly marvelous thing when it comes to improving efficiencies with business processes. It has been used in human resources for many years dating back to the early GeneSys HRIS platforms but has advanced even more so in recent years as many companies are now using internet technology as a means, in many cases the primary means, of obtaining résumés and applications for employment. But the on-line application format may be unfair and discriminatory in specifically requiring information about an applicant's years of experience. According to Hogler, Henle, & Bemus (1998), "An organizational economics framework suggests that electronic recruiting will make up an important dimension of human resource management activity in the future. The technology, however, may have a disparate impact on certain groups of workers, particularly ethnic minorities" (p. 149).

Consider a mid-Atlantic food company that requires all on-line job applicants to disclose total years of experience. There is no way around this requirement as this is one of many questions on the application that is bound by the notation, Note: All fields in red are required. Three years ago, the company required applicants to provide the actual number of years of experience, but today the criterion has changed. Under the heading Years of Experience, candidates are now required to select the field best representing actual experience: Less than 1, 1 – 3, 4 – 7, 8 – 10, 11 – 15, 16 – 20, 21 – 25, or 25+. By selecting either 16 – 20, 21 – 25, or 25+ for years of experience, an applicant has disclosed that they are most likely over the age of 40.

Essential Job Functions

One of the most important components of the Americans with Disabilities Act are the Title I stipulations addressing reasonable accommodations in the workplace. One key element of Title I is the establishment of essential functions of the job. Essential functions are the fundamental job duties performed in a position and do not include the marginal functions of the position (Postol & Kadue, 1991). This opens employment opportunities for any qualified individual capable of performing the essential functions, with or without reasonable accommodation. Essential functions have now been integrated into most job description formats, and should set the stage for the unbiased and objective personnel selection.

THE PLIGHT OF THE LONG-TERM UNEMPLOYED

With the current economic conditions hampering job growth where labor supply is far greater than labor demand, a recent and disturbing employment practice that has surfaced is the intentional rejection of any applicant because of being unemployed. Even more troubling is that with the exception of the State of New Jersey (Claiborne, 2011), this form of employment discrimination is not protected by any state or federal statutes. Adam Cohen of *Time Magazine* (2010) wrote, "Refusing to hire people on the basis of race, religion, age, or disability-among other categories-is illegal. But companies that turn away jobless people as a group are generally not breaking the law-at least for now." Will the long-term unemployed become the next protected class? Will the older, long-term unemployed trump that category?

This issue came to the public's attention in June 2010 when Sony Ericsson, a global phone manufacturer, announced that it would be bringing 180 new jobs to the Buckhead, Georgia area. The company's Human Resource Department posted an ad for a marketing position on the internet job board of a Lake Mary, Florida-based recruiting firm, The People Place, which specified: "No Unemployed Candidates Will Be Considered At All" (Bassett, 2010). When asked about the job posting, a Sony Ericsson spokeswoman said, "This was a mistake, and once it was noticed it was removed" (Bassett, 2010).

The impetus for such employment practices center on the misconception of the unemployed person being a performance problem. Laura Bassett (2010) of the *Huffington Post* uncovered further exacerbation of this practice by exposing additional job postings by The People Place. In particular, a job posting placed by Benchmark Electronics for a Quality Engineer contained the following statement, "Client will not consider/review anyone NOT currently employed regardless of the reason" (Bassett, 2010). When questioned about the authenticity of the statement, a human resource representative for Benchmark confirmed that The People Place ad accurately reflected the company's position (Bassett, 2010). Creator of 20somethingfinance.com, G. E. Miller, further commented on Bassett's findings stating, "It's wrong to think that an employee who is unemployed is unemployed because of their performance. Entire divisions in companies have been cut, cuts are often based on seniority, and extenuating circumstances that otherwise has nothing to do with an employee's performance are all legit non-performance reasons for being unemployed" (Miller, 2010).

The effect on the older worker is even more devastating. Periods of unemployment are generally longer for older workers than younger workers (Rothenberg & Gardner, 2011). What was once considered a badge of honor, age and long-term experience, now infers the older worker is unemployable. As reported in the Pew Fiscal Analysis Initiative (2010), "Once older workers become unemployed, they are more likely than younger workers to stay unemployed for a long period of time. Among unemployed people between the ages of 20 and 24, only 18 percent had been out of work for a year or longer in December 2009" (p. 1). The report continues, "The percentage steadily increases with age: More than 20 percent of unemployed people older than 55 had been out of work for a year or more-a higher rate than any younger age group" (Pew Fiscal Analysis Initiative, p. 4). This length of unemployment sets a foundation for not only a detrimental effect on personal financial planning but also impacts the U.S. economy. According to the Pew Fiscal Analysis Initiative (2010) "Federal spending on unemployment benefits will total \$160 billion in fiscal year 2010, roughly five times more than spending in each of the years immediately preceding the recession" (p. 1).

WHAT CAN EMPLOYERS DO?

There is no place for age discrimination in any realm of the employment relationship (Santora & Seaton, 2008). It is clear that the costs associated with not considering the older worker are considerable and could be perceived as counterintuitive. Correcting the misconceptions of the older worker begins with human resource practitioners leading the charge as the champions of change (Stark, E. 2009). In keeping with this belief, employers can consider implementing the following:

- Executive leadership needs to endorse the support of the older worker that is reflective of the organization's mission, vision and values.
- Conduct mandatory training in what diversity in employment means.
- Review all hiring practices, including on-line applications.
- Break through stereotypes. Attend a local college/university seniors' college or class to experience firsthand an untapped source of talent.
- Recognize that working is not always a source of supplemental income and benefits for those 55+.
- Over qualified does not mean over-the-hill. Those 55+ can learn technology with the right instruction.

SUMMARY

From the perspectives of moral and business ethics, tapping into the talent pool of the older worker is the right thing to do. Excluding the older worker from the talent pool simply because of extended unemployment is not prudent for any number of reasons least of which is employer reputation.

The practice of excluding the long-term unemployed may well be the next group of classes protected by law to prevent discrimination. Unemployed workers have long suspected that breaks on their resumes have blocked them from consideration making them less attractive to employers (Rampell, 2010). The longer the period the applicant for a position is out of work, the less consideration for even an interview. Yet, the practice of excluding the unemployed is gaining headway as even higher education, the bastion of respect for the older employee regardless of employment status, has witnessed a recent employment announcement from the University of Phoenix stating the university will not consider anyone for hire who is unemployed (Rampell, 2010). Human Resource practitioners must apply economics to the equation to provide a rule of reason that many exceptionally well qualified applicants exist in the talent pool who are currently unemployed for various reasons. Surely, the unemployment rate has no chance of declining if employers consider for hire only those currently employed.

If employers were to find fault with being over regulated clearly the author's of the Age Discrimination Act in Employment Act never imagined a possible amendment or even a separate

piece of legislation to protect the older, unemployed applicant. Common sense employment practice is to hire the most qualified applicant regardless of age or employment status.

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