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Age Discrimination in Employment

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Chapter 7

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Introduction

America is in the midst of a civil war in which the demographic forces of an aging population are pitted against a labor force composed of a declining number of older workers. Today one in nine Americans is age 65 or older and in 50 years that proportion will change to one in five. Along with the growth in the aging population comes, of course, an increased burden on those who are working. Unfortunately, the conflict arises because fewer and fewer of the burgeoning older population are remaining in the labor force to contribute to their own and to the larger society's well-being.

The factors contributing to the demographic trends—lower fertility and mortality—are largely beyond the control of public policy. But, the declining labor force rates of the elderly are in large part a direct result of public policies that have long encouraged early retirement and allowed (even created) obstacles to continued employment. In addition, eight major recessions or depressions since 1948 have wracked the economy, resulting in a dramatic decline in labor force participation rates among older workers.

One reason for the labor force declines among the older population is age discrimination, which creates greater difficulties for older workers as they seek and attempt to retain jobs. Many give up their job search after months of unemployment and then simply drop out of the labor force. They become discouraged because of employment obstacles created by persistent negative attitudes among employees

that older workers are less desirable, less productive, and less creative than younger workers.

The challenge for policymakers is to find ways of stemming the labor force exit of older workers. One option is to eradicate the age discrimination that older workers face. This paper examines the extent and nature of age discrimination and concludes with a review of recent legislative attempts to strengthen the federal statute barring age discrimination in employment.

I. The Extent of Age Discrimination

Age discrimination in employment is widespread. There is no agreement on the exact nature of the problem nor is there a consensus on how to solve it. But few would disagree that the problem is real and that it affects the lives of millions of Americans.

Perceptions of the Problem

Public attitudes. Despite federal legislation to ban age discrimination from the workplace, most Americans believe age discrimination remains a serious problem. Two nationwide surveys by Louis Harris and Associates—one in 1974, the other in 1981—found nearly identical results: eight of ten Americans believe that “most employers discriminate against older people and make it difficult for them to find work.”¹

The public is also in agreement that age discrimination should not be tolerated. When asked by Louis Harris in 1981 if age discrimination in the form of forced retirement is justified, nine out of ten Americans said no.² Moreover, between 1974 and 1981 the sentiment against forced retirement based on age grew stronger.³

Employer attitudes. The perception of widespread age discrimination held by the public is shared by a majority of business leaders. Most employers believe age discrimination exists, according to a 1981 survey of 552 employers nationwide conducted by William M. Mercer, Inc.⁴ The following key points summarize the survey's findings:

- 61 percent of employers believe older workers today are discriminated against in the employment marketplace;
- 22 percent claim it is unlikely that, without the present legal constraints, the company would hire someone over age 50 for a position other than senior management;
- 20 percent admit that older workers (other than senior executives) have less of an opportunity for promotions or training; and
- 12 percent admit that older workers' pay raises are not as large as those of younger workers in the same category.

Historical Perspective

A glance into history reveals that age discrimination has existed for a long time. According to historian William Graebner, age discrimination dates back to the last quarter of the 18th century and is a direct product of the industrial revolution.⁵ Industrialization brought with it increased market competition, advanced technology and demands for greater speed on the job. These forces, in combination with the increasing popularity of the shorter workday, placed a greater strain on the older worker to keep up. Older workers also had difficulty keeping abreast of the new and changing technologies. The real culprit, though, was the theory of scientific management which dominated American business shortly after the turn of the century. Scientific management

demanded efficiency and flexibility, both qualities that were considered lacking in the older worker. The result was a direct form of age discrimination that simply wore older workers down and pushed them out of the workforce.

After 1915, age discrimination, which prior to this had been limited to a "management strategy," began to diffuse into the larger society. The "youth cult" of the 1920s and the high unemployment of the depression era turned older workers into a convenient scapegoat. Societal and employer attitudes after 1915 characterized the older worker as dispensable in favor of younger workers, and the myth that productivity automatically declines with age gained a solid foothold in American culture. In terms of ability, older and younger workers were perceived to be substantially alike by employers, at least according to a 1938 survey of the National Association of Manufacturers.⁶ Nonetheless, a clear preference persisted for the younger worker.

There was one mediating factor in the bias against older workers. Many employers perceived the older worker, with all of his inefficiencies, to be a stable influence on the comparatively younger, more hot-headed workforce. The trade union movement was a source of great concern to most employers during the 1930s, and older workers were seen as a conservative force which could help check the excesses of the fledgling union movement. According to Graebner, "Excessive radicalism, associated in the public mind with youth and immaturity, could be countered with age."⁷ Despite this new "attractiveness" of the older workers, age discrimination did not diminish.

The first "official" study. Age discrimination festered just out of sight of the nation's attention until the early 1960s when, in the heat of the Civil Rights movement, the U.S. Congress focused briefly on the issue. Despite amendments offered by Congressman Dowdy of Texas and Senator

Smathers of Florida, age was left out of the 1964 Civil Rights Act, ostensibly because not enough was known about the nature and extent of the problem. Instead, the Department of Labor was instructed to carry out a study of age discrimination and report to Congress its findings by June 30, 1965.⁸ The study results were so compelling that Congress enacted the Age Discrimination in Employment Act in 1967.

The Labor Department study examined four major sources of age discrimination.⁹ The first type of discrimination was that arising from dislike or intolerance of older people. The study did not find this to be serious enough to warrant public concern. There was ample evidence of employers choosing youth over age, but the study concluded that this was the result of preferences *for* the younger group, rather than antagonism *against* the old.

The second form of age discrimination was termed “arbitrary” by the Labor Department’s analysts, and it involved specific employer policies which excluded people over a certain age for consideration in hiring, without concern for the individual applicant’s qualifications. The study found “substantial evidence” of this second type of discrimination. For example, a 1965 survey of employers disclosed that, “approximately half of all job openings which develop in the private economy each year are closed to applicants over 55 years of age, and a quarter of them are closed to applicants over 45.”¹⁰

Forces of circumstance caused by the impersonal factors, such as technological change or lower educational levels, constituted the third form of discrimination examined in the Labor Department study. Here the study concluded that there may or may not be arbitrary discrimination. The lower educational level of the cohort of older workers is a factor that could result in discrimination against most older

workers. But, only when such discrimination results from not assessing the individual's educational level and other qualifications for the job would it be considered arbitrary and thereby within the purview of Congressional action, according to the Labor Department study.

The fourth and final cause of age discrimination was considered to be the set of institutional arrangements that indirectly restrict employment of older workers. Employee benefits, seniority rules and personnel policies are included in this group. Here the Labor Department study concluded that age discrimination exists and offered specific ways to overcome it.

The recommendations by the Labor Department included statutory changes to address the arbitrary forms of discrimination, and public and educational efforts to reduce the more subtle forms of discrimination. The result was the Age Discrimination in Employment Act of 1967 (ADEA), which included measures to penalize offending employers as well as instructions to the federal enforcement agency (then the Department of Labor, now the Equal Employment Opportunity Commission) to provide technical assistance to employers and information to the public to break down the myths about older workers.¹¹ (For a summary of the ADEA, as Amended, see Appendix I.)

Age Discrimination as a Legal Problem

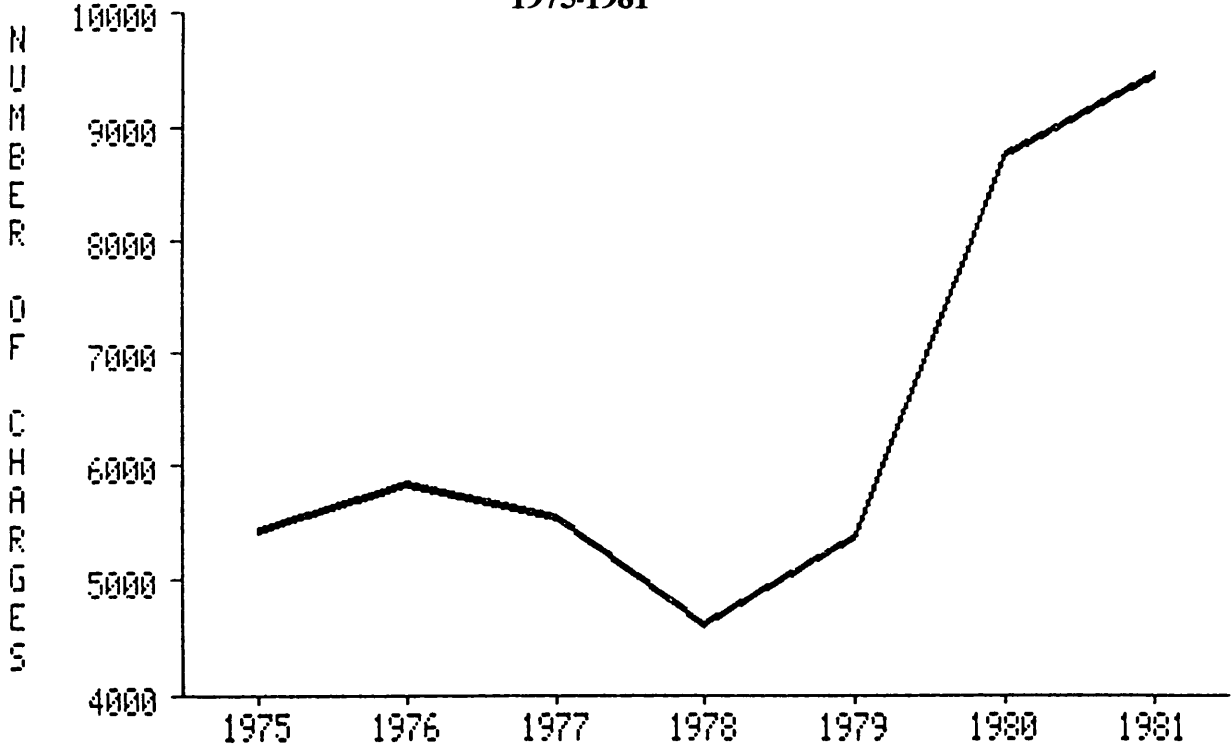
With enactment of the ADEA, the problem of age discrimination moved into clear public view as formal charges were filed by aggrieved individuals and eventual litigation ensued. As yet, there have been few systematic analyses of the characteristics of age discrimination victims who file charges or of the court cases brought under the ADEA. Recent data made available to the House Committee on Aging, however, offer valuable insights into the extent of age discrimination in employment.

Growth in age discrimination charges. According to data provided by the Equal Employment Opportunity Commission (EEOC) and the Department of Labor, the number of age discrimination charges has skyrocketed in recent years. (See Figure 1.) In 1969, two years after the ADEA was enacted, the Labor Department, then charged with enforcement responsibilities, reported 1,031 charges of age discrimination. This number grew through 1975 then leveled off until 1978, at which time the enforcement duties were transferred to the EEOC.¹² The most dramatic increase in age charges came between 1979 and 1981 when the annual number of age discrimination charges rose by 76 percent to 9,479.

This profound increase in age charges may be the result of intensified discriminatory activity by employers sparked by downturns in the economy, but no studies are available to document this. The transfer of enforcement to the EEOC also may have drawn some attention to the ADEA, and thereby increased the number of Americans who are aware of their rights under the Act. Again, however, no studies have been conducted to verify or refute this notion.

One likely explanation for the increased number of age charges may have been the Amendments to the ADEA, championed by Congressman Claude Pepper, chairman of the House Select Committee on Aging, and enacted with great public fanfare in 1978. The 1978 Amendments were widely debated and publicized, largely because they were to alter the institution of retirement, moving the permissible mandatory retirement age upward to 70 from 65. The public discussion of mandatory retirement issues served to increase the nation's awareness of age discrimination as a problem, while at the same time heightening older workers' knowledge of their rights under the ADEA. Even so, only two in five Americans are even aware of the ADEA, according to a 1981 nationwide Harris survey.¹³ Unless age discrimination is

Figure 1
Number of Age Discrimination Charges Per Year
1975-1981



significantly reduced, we will, no doubt, see a further rise in age discrimination charges as awareness of the federal age discrimination statute increases in the future.

Who files a charge of age discrimination? Only since late 1980 has the EEOC begun codifying characteristics of charging parties and making the data computer accessible. Data for FY 1981 provide a glimpse, albeit preliminary, into the typical person who files a charge of age discrimination with the federal enforcement agency.

As Table 1 indicates, the typical charging party is in late middle age and is male. Two-thirds of all age charges are filed by persons age 50-64 (nearly half are age 50-59) and 63 percent are filed by males. Only a small fraction (5 percent) of charges are filed by those over 65. Thus, age discrimination may affect a wide age band, but legal and administrative remedies are sought primarily by middle-aged males.

Table 1
Age Discrimination Charges Filed
with the EEOC in FY 1981, by Age

Age	Number of charges filed			Percent of total
	Men	Women	Both sexes	
40 - 44	663	459	1,122	12
45 - 49	968	626	1,594	18
50 - 54	1,219	786	2,005	22
55 - 59	1,501	808	2,309	25
60 - 64	1,121	477	1,598	18
65 - 69	312	139	451	5
70 +	13	7	20	0
Total	5,797	3,302	9,099*	100

*Total is less than 9,479 (the actual total for FY 1981) because of missing data on the sex of the charging party.

A 46 state survey of 550 alleged age discrimination victims conducted by the House Select Committee on Aging found in 1982 that 43 percent of respondents believed that supervisors and managers (especially middle-managers) were most frequently the targets of age discrimination.¹⁴ Non-union workers were also perceived to be targets.

What kinds of charges are typical? The most common basis for filing an age discrimination charge is "forced termination." (See table 2.) Nearly half of all charges filed with the EEOC in FY 1981 involved alleged discrimination in discharge, layoff or involuntary retirement. Hiring discrimination, which is much more difficult to substantiate, was the basis for only 12 percent of all charges. The least frequent charges were for discrimination in training, demotions, and promotions.

Table 2
Types of Age Discrimination Charges
Filed with the EEOC in FY 1981

Type of Charge	Number	Percent
Termination ^a	7,443	49
Hiring ^b	1,915	12
Terms and conditions	1,188	8
Wages/Benefits	1,134	7
Promotion	825	5
Demotion	540	4
Training	136	1
All other	2,130	14
Total	15,311 ^c	100

a. Discharge, layoff, involuntary retirement

b. Hiring, recall

c. Total adds to more than 9,479 because charging parties can file more than one type of charge.

The types of charges vary according to the age of the charging party. For example, hiring and training discrimination are more typical among the younger ages, presumably because it is the youngest of the protected individuals who have greater expectations in those areas. On the other hand, older individuals were most likely to allege discrimination in employee benefits, perhaps because benefits packages are more salient and more important to the oldest workers, and, at the same time, are perceived to be more expensive by some employers. Males and females exhibit similar patterns of charges, except that males are more likely to file a charge.

Age discrimination charges by industry. Charges of age discrimination are leveled by employees in every industry, but some industries produce more victims than others. Table 3 displays both the absolute and relative numbers of charges by industry. Public administration has the highest frequency, with 432 charges per 100,000 employees. Second is transportation, followed by mining and manufacturing. Those least likely to file age discrimination charges are employed in the construction industry (55 per 100,000), services (188 per 100,000) and retail trade (199 per 100,000).

One plausible explanation for these patterns of age discrimination charges is the growth (or lack thereof) of the industry in question. Public administration, transportation, mining, and manufacturing, each of which had a large number of age discrimination charges, all are facing major contractions caused by a sluggish economy and a shift in the demand for these goods and services. Moreover, these are declining industries which tend to employ a larger proportion of older workers than do expanding or stable industries. Services and retail trade, both expanding industries, experienced fewer age discrimination charges, in part because they employ larger numbers of younger workers who are not in the protected age category. Also, termination from a job in an expanding industry does not necessarily mean the end

Table 3
Proportion of Age Discrimination Charges by Industry, 1981
 (except Agriculture)

Industry	Number of employed persons age 40 + (A)* (000s)	Number of age discrimination charges (B)**	Proportion of age discrimination charges (B - A)	Rank order
Mining	382	124	.000325	3
Construction	2,354	129	.000055	9
Manufacturing	9,314	2,708	.000291	4
Transportation	2,792	946	.000339	2
Wholesale Trade	1,628	341	.000209	6
Retail Trade	5,410	1,076	.000199	7
Finance	2,446	578	.000236	5
Services	11,739	2,208	.000188	8
Public				
Administration	2,474	1,070	.000432	1
Other/Agriculture	--	868	--	
Total	38,539	10,048		

*Unpublished data from the Current Population Survey, Bureau of Labor Statistics, 1981 Annual Averages.

**Unpublished data, Equal Employment Opportunity Commission, FY 1981.

of one's working life as it might in a declining industry. This may also account for the smaller number of age discrimination charges in the expanding industries. Construction, the least affected by age discrimination charges, may be unique in that it offers no job security to speak of and fluctuates so wildly in terms of its demand for labor that members of that profession have low expectations of job security.

Which charges reach the stage of litigation? There is no reliable source of information regarding litigation activity under the ADEA because only a fraction of all litigation is initiated by the Government¹⁵ and decisions in private lawsuits are not always recorded. Some ADEA litigation, however, is recorded in LEXIS, a computerized information system, which provided the basis of a recent content analysis by Michael Schuster.¹⁶

The results of Schuster's analysis indicate that lawsuits brought under the ADEA closely parallel the charges filed with the EEOC, as described above. For example, the vast majority of litigants were males (79 percent); nearly half were age 50-59 (48 percent); most were drawn from professional and managerial occupations (52 percent); and the manufacturing industry produced the most lawsuits (48 percent), while the construction industry produced the fewest (2 percent). Termination of employment was the most common basis for litigation (81 percent). It is interesting to note that employers won two out of three cases.¹⁷

Again, the evidence suggests that the ADEA offers legal remedies that are typically utilized by middle-aged, managerial level males who have been terminated from their jobs, allegedly because of age. While provisions of the Act—such as those pertaining to the permissible mandatory retirement age—directly benefit older individuals of both sexes from a wide variety of occupations, the legal and administrative recourse is most often sought by a narrow group of younger males.

II. The Nature of Age Discrimination

The above analysis of age discrimination charges and litigation activity gives a numerical perspective on the problem but offers very little insight into the complex set of factors which come under the rubric of age discrimination. This section puts a face on the numbers and describes in more detail how age discrimination is justified and how it is practiced.

The Most Obvious Age Discrimination: Mandatory Retirement

The most clear-cut form of age discrimination is that which the Labor Department termed “arbitrary” in the 1965 study cited earlier. According to a more recent Labor Department study, 51 percent of the nation’s workforce faced an arbitrary mandatory retirement age in 1980, usually age 70, while 45 percent faced no mandatory retirement age.¹⁸ Mandatory retirement rules are subsiding, but they persist for a variety of reasons.

The most common arguments used by employers to justify a mandatory retirement age have not changed substantially over the years despite evidence refuting most of the stereotypes of aging.¹⁹ The most common negative beliefs about older workers which are used to justify compulsory retirement involve personal characteristics associated with aging.²⁰ Many employers perceive older workers as a group to be ill-suited for certain jobs because of declining mental and physical capacity, an inability to learn, a lack of creativity, and inflexibility.²¹ Vast amounts of research on the abilities of older workers, however, consistently refute these employer-held stereotypes. For example, studies of industrial workers,²² supervisory personnel,²³ and skilled and unskilled clerical workers,²⁴ disclosed that age was unrelated to performance appraisal ratings, efficiency and overall pro-

ductivity. Some studies show partial declines on some production line tasks among the oldest age groups,²⁵ but other studies show slight increases in productivity with age.²⁶ Similarly, learning ability does not decline significantly with advancing age and any decline which does appear is often more related to motivation and physiological condition than to learning capacity.²⁷

Employers continue to utilize mandatory retirement because of outmoded notions that age is equated with declining abilities. As performance assessment technology improves and more research findings are generated that destroy the negative stereotypes of aging, we are likely to see a reduction in rigid personnel policies that base important decisions on age rather than actual performance.

A favorite argument in support of mandatory retirement is that it provides order and predictability to the retirement decision, and it makes the retirement decision impersonal, thereby relieving the older worker of the burden of being told he or she is no longer productive. When older workers are asked their opinions about this matter they offer a very different story. Take, for example, Sarah Paz, a 69 year old school clerk in Chicago who was within several months of the school district's mandatory retirement age when she testified before the House Select Committee on Aging regarding her feelings about the impersonal nature of mandatory retirement ages:

The principals I have worked with through the years have marked me as being a superior clerk; I have always put my whole being into my job. . . . As for being sick or tardy I have the best attendance record of any staff member in the school, and this has been true for 27 years. I have been tardy perhaps once a year and have accumulated 135 unused sick days in the past 27 years. When it has

been 60 below zero I have arrived at school on time or ahead of time. . . . Who wants the pittance of Social Security when one is able to contribute to society and the working force. . . . Inaction has killed more people than action. Don't commit us to the death house while we are active and alive.²⁸

Mandatory retirement ages are rapidly dying out. Many large corporations (such as ALCOA, ARCO, Levi Strauss & Co., Mattel, Inc., Pepsico, Inc., Digital Equipment Co.) have already eliminated mandatory retirement, as have eight states (California, Florida, Iowa, Maine, New Hampshire, Tennessee, Utah, and Vermont). The federal government is likely to outlaw the practice in the near future. (See Section III.) When mandatory retirement is finally abolished it will be an important step toward the eventual elimination of all other forms of age discrimination in employment.

Subtle Discrimination: Job Harassment

Mandatory retirement may, in the words of Rep. Claude Pepper, “. . . engender dependency, foster ill-health and squander productive potential,”²⁹ but other more subtle forms of age discrimination can create greater havoc for older workers. Subtle discrimination can take a variety of forms, as summarized (albeit, somewhat tongue-in-cheek) by Michael Korda in a book entitled *Power: How to Get It, How to Use It*.

. . . the best way to *speed* an executive's retirement is to keep him involved in power decisions which no longer concern him, and can only cause him trouble and aggravation. . . . Other, more subtle, signs can indicate to a man that his time has come. Promoting his secretary is a move that never fails to indicate the erosion of power. It is also possible to produce anxiety by rapidly changing all forms and

procedures of the office, so that everything looks unfamiliar to him, including the labels and letterhead . . . and when all else fails, it is always possible to change everybody's telephone extension number so that he's always dialing the wrong one.

Exaggerated deference and extreme rudeness can both be useful in making a man think about retiring, and it is also possible to make him feel uncomfortable by constantly referring to pop music stars he has never heard of, dances he has never learned and restaurants he has never been to. . . . It is possible to talk in a very low voice in an effort to make him believe he is going deaf, though some prefer to shout in a loud voice as if they were already convinced of the victim's deafness.³⁰

The most effective techniques of subtle discrimination are those that demoralize the victim by reducing his or her self-image. Nonmanagement, blue-collar employees are repeatedly reminded, for example, that their age is an impediment, that they aren't what they used to be and that they are overpaid. In the words of one victim:

. . . my supervisors displayed animosity and made derogatory remarks about older employees by stating that they are over the hill, do not earn their pay, and that they take too much time in doing the job.³¹

Older executives are victimized by stripping them of their real sources of power. Very few executives are willing to become figureheads. "It's crazy, but a lot of quite smart guys would rather be kicked out than kicked upstairs," notes Michael Korda.³² Sometimes more drastic measures are taken to embarrass the executive into retirement. A prominent age discrimination attorney testified before the House Select Committee on Aging that the desk of one of his clients

was moved into the hallway by his client's employer as an attempt to humiliate his client and encourage a "voluntary" retirement.³³

Enforcing the ADEA against these subtle forms of age discrimination is, of course, very difficult. Many victims of such tactics are unaware of their plight. Most victims, as noted earlier, are middle-aged males who never dreamed they would be targets of discrimination. Those who are aware have great difficulty producing evidence substantial enough to convince a judge or a jury that age discrimination was the motive underlying their employer's actions. It is likely that employers will become increasingly sophisticated in these subtle tactics as the more blatant forms of discrimination disappear because of the prospects of high litigation costs.

Early Retirement Incentives: The Newest Discrimination

During periods of economic downturn employers seek ways of reducing the size of their workforces using techniques that will not result in undesirable litigation. A favorite technique for eliminating older workers is the early retirement incentive.

Early retirement options are blossoming during the recession of the 1980s. There are no reliable statistics on the number of firms using such options, but business consultants agree that they have "never seen as many early retirement windows open as in the last 12 months."³⁴ A recent survey conducted by the House Select Committee on Aging and the Public Broadcasting System's "Nightly Business Report" disclosed that many larger companies—such as Crown Zellerbach, Uniroyal, Continental, Firestone, Metropolitan Life, Mead, Sears, Xerox, Eastman Kodak, Travelers Insurance, Continental Group, IBM, A&P, and American

Can—have recently implemented early retirement options to entice older workers out of the workforce.

Most early retirement plans are not, on their face, discriminatory. Most offer a substantial bonus to employees who retire early, usually at age 55 with a specified number of service years. Most employers offer these benefits as a humane alternative to layoffs. But there are instances of discrimination which can creep into these early retirement plans.

A recent U.S. District Court decision, for example, found that the Chrysler Corporation's early retirement plan was discriminatory because, in the opinion of the court, the workers were coerced into accepting the company's offer under threat of layoff.³⁵ Sometimes the discrimination is more subtle, as when an employer misrepresents or exaggerates the long term economic benefits of an early retirement option, thus encouraging workers to retire when with better information they may have chosen to remain on the job.

Hiring Discrimination

One of the most important sources of age discrimination is the practice by employers of refusing to hire a person because of his or her age. This is also one of the most difficult forms of discrimination to document, which may account for the relatively small number of such charges filed with the EEOC. (See above.)

Hiring discrimination as expressed in age biased job announcements once was a greater problem than it is today. This is largely due to very stringent guidelines promulgated by the EEOC which place limits on the terms that can be used in job listings. Terms such as "age 25 to 35," "young," "college student," "recent college graduate," "boy,"

“girl,” or similar terms or phrases are considered to be violations of the ADEA.³⁶

Hiring discrimination is also fostered by job applications on which the applicant's age or date of birth is requested. The official position of the EEOC on this matter is that such requests do not automatically constitute a violation of the Act, but they will be scrutinized very carefully to assure that the request is for a permissible purpose. Employers can usually protect themselves if they include on the application a statement that reads: “The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 but less than 70 years of age.”³⁷

A consequence of hiring discrimination is the longer period of time older workers require to find a job compared to younger workers. On average, in 1982, an unemployed worker age 55 and over will remain jobless for 19 weeks, which is 23 percent longer than the 15.5 weeks average for all age groups.³⁸ Also, many older workers become discouraged and give up the job search. Workers 60 and over are three times as likely as all other adults (over 25) to give up and withdraw from the workforce.³⁹

Long term unemployment and discouragement are a direct result, though not exclusively so, of age discrimination. An unemployed machinist, age 56, summed it up best in testimony before a hearing of the House Aging Committee when he said:

During the time the rumors were flying around about the Torrington plant closing I wasn't too concerned. I am a skilled machinist and the feeling among most of the skilled workers in the plant was that we would have no problems finding jobs if we were laid off. I figured it might take a few weeks to

find another job. It never dawned on me that my age might be a problem in the job search.

I'm too young to retire, but apparently some employers think I'm too old to work. All of the younger machinists I know have jobs, but a number of us older guys are still unemployed 6 months after we lost our last job.⁴⁰

From the employers' point of view, older workers are sometimes considered to be less desirable because they have fewer work years remaining and, especially if training is involved, the employer is concerned about recouping his investment. Many older skilled workers, however, require little or no training and their lower rates of turnover often make them more dependable employees than younger workers. Similarly, employer concerns about higher benefit costs associated with older workers are realistic, but in many cases these may be offset by the more efficient work habits, lower turnover and lower absenteeism of older workers.

Salary Discrimination

One of the most complex forms of age discrimination involves salary or wages. It is generally held by the public that older workers are discriminated against because they are too costly and younger workers can replace them for much less money. Supporting this position are numerous stories about older workers who are discharged just a few days before they would have achieved vested rights in their pension, thereby saving the employer thousands of dollars in pension payments. Or, there are examples of older workers who are allegedly discharged and replaced by two younger workers for the same total salary. Certainly these stories are true and illustrate an important source of age discrimination. There is, however, another salary pattern which suggests a quite different view of age discrimination: salary deceleration.

Salary deceleration, in the form of smaller or fewer salary increments, often occurs among older workers. The former vice president of personnel and organization development for Abraham & Strauss, the largest division of the Federated Department Store conglomerate, described the process of salary deceleration at a Congressional hearing:

Then there is the deceleration process and the phenomenon of “pattern” increases. In salary management, salary increases are frequently decelerated for job holders who are at or above the top of the established salary range for a given job.

This process of deceleration is designated to relieve relative inequities, like where the subordinate is making more than the supervisor. . . . Unfortunately, this salary management technique has been subverted. In the case of Sam . . . because he was 62 he received an increase of \$1,500 every other year, far below the official guidelines of around 7 percent annually for his level of performance. But then the idea is that as age increases, job mobility decreases, and this factor is an invitation to decelerate, crop and deny increases simply because the employee has lost job mobility. The employee can’t or won’t leave.

This is especially true of older women, because they tend to have less self-confidence and experience in the job market and fewer possibilities in the job market due, in turn, to the traditional and historical roles of women in our society and because of sex discrimination.⁴¹

In contrast to the stories of older workers being replaced by less expensive younger workers, the process of salary deceleration described above suggests that it is the younger workers who may be more expensive. Certainly at the ex-

ecutive level this is often true. For example, testimony before the Select Committee on Aging by a former executive using confidential salary and age data on “key executives” of the Abraham & Strauss Department Store chain illustrate this point. Executives under 40 had average salaries in 1976 that were nearly \$10,000 higher than executives over 40; by 1979 the discrepancy was nearly \$30,000. (See Figure 2.) Thus, it was the younger executives who were more expensive than the older ones. Apparently, the company considered younger executives to be more valuable than the older executives.

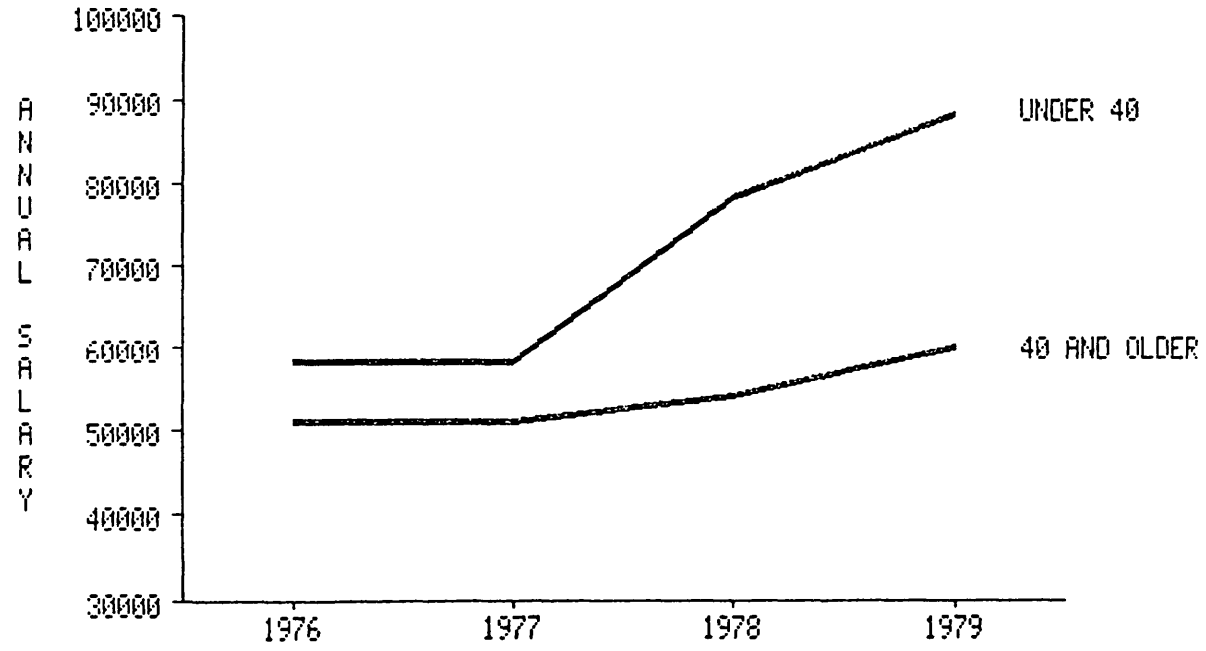
Salary discrimination, then, hits older workers in two very different ways. In some cases salaries rise “too high” and the employer replaces the older individual with less expensive younger workers. In contrast, other employers suppress the salary increases for older workers and inflate those of younger less experienced workers, presumably because older workers have less job mobility while younger workers are perceived to be more valuable. The net result is the same: older workers are discriminated against.

Freezing Pension Contributions: Legalized Discrimination

One of the most controversial provisions of the 1978 Amendments to the ADEA permits employers to stop contributing to a worker’s pension plan at age 65.⁴² Despite evidence that such a policy has no cost justification,⁴³ nearly half of all employers nationwide freeze pension benefits at age 65.⁴⁴ The net result is that many older workers choose to retire by age 65 rather than suffer the loss of benefit accruals associated with a later retirement age.

From a national policy perspective, allowing discontinuance of pension accrual is irrational. To the extent that such a policy discourages continued employment among older workers,⁴⁵ it runs counter to the overriding concern of Con-

Figure 2
Average Salary for Key Executives Employed Between 1976-1979
A & S Department Stores



gress which is to reduce the costs of retirement programs. Encouraging longer worklives should be the goal of public policy in the face of dramatic demographic trends which portend heavier and heavier financial burdens on young workers to care for the expanding retiree population. Nevertheless, the policy of discouraging employment among the old persists and will not be changed unless Congress specifically mandates it.

III. Recent Efforts to Modify the ADEA

The 97th Congress will be best remembered for its budget cutting activities, its dearth of social legislation and a reluctance to make major modifications in the troubled Social Security system. Buried deep in the dust of that Congress, however, are the remnants of a stillborn attempt to end once and for all the last vestiges of age discrimination in American society. This legislative effort to build on the 1978 ADEA Amendments, although thwarted by a variety of circumstances, reflects a growing awareness by national policymakers that age is a poor indicator of job ability; that the older members of society should be unshackled and allowed, even encouraged, to remain productive as long as possible. The following review of legislation to end age discrimination during the 97th Congress and of attempts by the business community to weaken the current act is not only an interesting lesson in American politics, but also reflects the competing interests, misplaced priorities and dashed hopes of the various actors involved in the debate over extending fundamental civil rights to America's older citizens.

Legislation to Amend the ADEA

Early in the 97th Congress, Rep. Claude Pepper introduced legislation (H.R. 3397) that would, among other things, amend the ADEA by removing the upper age limit of 70 and

by closing various loopholes which allowed age discrimination against older members of select occupations. This legislation received a boost when President Reagan announced on April 2, 1982 that he would, “. . . back legislation which eliminates mandatory retirement requirements in government and private industry based solely on age.”⁴⁶ The President’s announcement unleashed a flurry of activity in Congress.

Congressional negotiations. The Labor Department, designated by the Reagan Administration, initiated negotiations with key members of Congress to work out the details of a bill to abolish mandatory retirement and other remaining forms of age discrimination. At the outset there was wide disagreement in Congress about what issues should be included in legislation, but one issue was clear: the best means to end mandatory retirement was simply to remove the upper age limit of 70 from the Age Discrimination in Employment Act (ADEA). Other issues—such as requiring equitable pension treatment for workers over 65, eliminating discrimination against executives and removal of other loopholes in the ADEA—were discussed but eventually set aside by their proponents in exchange for commitments for swift enactment of a bill that would end age discrimination for workers age 70 and over.

Business and labor reactions. Immediately following the President’s April 2 statement, major business and labor organizations indicated that they had no problem with the elimination of mandatory retirement. According to an April 13 *Wall Street Journal* article, “Few business groups oppose the bill, and the AFL-CIO says it would ‘go along with it.’”⁴⁷ Within weeks, however, the major business groups began to reconsider their initial position on this issue and, at the urging of a small group of employers represented by a Washington law firm, they began to raise concerns about several of the protections offered by the ADEA. By early

May, business opposition began to crystalize and, according to a June 3 *Washington Post* article,⁴⁸ this opposition was felt in the White House.

Apparent switch in Administration position. On May 17, 1982 Undersecretary of Labor Lovell reported to Rep. Pepper that the Administration was no longer supporting a simple removal of the age 70 limit from the ADEA. According to Lovell, the President could only support extending job protections to workers over 70 who have jobs; those who were seeking jobs or who deserved promotions would be unprotected under the President's proposal. This proposal met with vigorous opposition from all major aging organizations, as well as from key members of Congress, but the Administration stood firm.

Compromise position worked out. A compromise was worked out between the Administration and House Aging Committee Chairman Claude Pepper. The terms of the compromise were that Pepper and other key House and Senate leaders would go along with the Administration's revised position in exchange for direct White House involvement in opposing any amendments (such as those being proposed by the business groups) to weaken the ADEA. Since support for the weakening amendments appeared to be stronger in the Republican controlled Senate, the strategy was to allow the Senate to act first on the legislation, thereby leaving the Democratic controlled House with the option of killing the bill if it contained any harmful or weakening amendments. Unfortunately, the Senate never acted.

Academics mobilize against the bill. One important reason for the Senate's failure to act on the bill was a late lobbying effort by college and university presidents and faculty. Representatives of both groups pressed for a special provision in the bill that would exempt tenured faculty. The argument was that eliminating mandatory retirement for tenured

faculty would threaten the tenure system and weaken the institution of higher education. This lobbying campaign was successful in muddying the waters and effectively stalling any legislative action on the bill during the regular session of the 97th Congress.

Business Objections to ADEA Enforcement Procedures

Some members of the business community have suggested that the right to a jury trial should be eliminated because older plaintiffs allegedly prevail more frequently in jury than judge trials in age discrimination cases. The argument is that because of the responsiveness of juries to emotional appeals, plaintiffs receive inflated damage awards from juries that are far higher than they would normally receive from a judge.

The right to a jury trial. The right to a jury trial was established by the Supreme Court in *Lorillard v. Pons*, 434 U.S. 575 (1978). The court was convinced that Congress had intended to include the right to a jury in the ADEA, since the ADEA was patterned after the Fair Labor Standards Act, which allowed jury trials. The 1978 Amendments to the ADEA reaffirmed congressional support for jury trials in ADEA actions.

No evidence that juries are biased toward older workers. Although no scientific data exist on jury trials and the ADEA, two surveys of personal injury cases (with are more emotional than ADEA cases) have produced conflicting results as to whether older plaintiffs prevail more frequently. In a 1974 study of personal injury cases based on 800 verdicts, the Jury Verdicts Research Company found the recovery rate was 59 percent for plaintiffs who are retired or are over 65, compared to a national average of 65 percent. A 1982 study of personal injury cases found the prevailing recovery rate for retired plaintiffs was 65 percent, which was

above the national rate of 52 percent. The only conclusion that can be drawn from these studies is that there is no clear-cut evidence of bias in favor of older plaintiffs in jury trials. In general, no documented evidence has indicated that older plaintiffs prevail more frequently with juries than with judges under the ADEA.

Damage awards under the ADEA. In addition to the jury trial provisions, business lobbyists also want to eliminate the liquidated damage provisions of the ADEA. The claim is that liquidated damages are punitive and therefore have no place in antidiscrimination legislation. The remedies available under the ADEA, however, are the same as remedies available under the Fair Labor Standards Act of 1938 (FLSA). Section 7(b) of the ADEA incorporates the powers, remedies and procedures provided in sections of the FLSA. The FLSA provides that employers who violate its provisions shall be liable for unpaid minimum wages, unpaid overtime compensation, and an equal amount of liquidated damages for willful violations. However, in order to show a willful violation of the ADEA, the litigant must establish a "knowing and voluntary violation of the Act."

The narrow interests of some business lobbyists and of the academic institutions have effectively stalled efforts to improve legal protections for workers based on age. We may be in the midst of a political climate in which business leaders are concentrating their efforts on reducing the effectiveness of federal legislation rather than attempting to comply with intent of the legislation. The result, if this new climate continues, may be counterproductive to the broader social goal of equal employment opportunities for all age groups.

Conclusion

Public and employer opinions reveal a widespread belief that age discrimination is real. And, the recent upsurge in

legal and administrative confrontations between older employees and their employers indicates that substantial numbers of older persons are acting on their beliefs.

The problem of age discrimination is not, however, confined to the oldest age groups (65+). Certainly, age discrimination increases by age, but for a variety of reasons the oldest workers are not the ones seeking retribution. Rather, the typical age discrimination victim pursuing legal and administrative remedies is middle-aged, male and often from a managerial position. These individuals represent a new group of civil rights activists. They are not poor, minorities or women. They are predominantly white, middle-class individuals who have the resources to pursue an age charge and who believe they deserve better than they are getting after a lifetime of dedication to their employer.

The forms of age discrimination range from the more obvious mandatory retirement ages, to more subtle job harassment and early retirement incentives. Each of these forms represents not only a threat to the well-being of older individuals, but also undermines the economic stability of the nation. Age discrimination reduces the work efforts of older people, encourages premature labor force withdrawal, and increases the burden on an already burdened Social Security system and on private pension systems. Without adequate solutions to the problems of age discrimination and without incentives to encourage more older workers to remain employed longer, the nation could be facing a serious economic and social crisis.

Ironically, recent legislative attempts to bolster the Age Discrimination in Employment Act have been thwarted by special interest groups. In particular, business lobbyists have pushed to weaken the protections afforded by the ADEA, at a time when, if anything, the statute needs strengthening. Unfortunately, business is seeking ways of reducing costs

during times of recession, an objective that is threatened in the view of some business leaders by civil rights legislation in general. Just as we should not tolerate weakening the Civil Rights Act, so we must also resist any attempt to undermine the ADEA. Rather, public policy efforts should strengthen protections for older workers, not only in the interests of individual rights but as a means of contributing to the nation's economic welfare.

Appendix I

Basic Protections of the Age Discrimination in Employment Act

The ADEA prohibits employers, employment agencies or labor organizations from discriminating on the basis of age in such matters as hiring, job retention, compensation and other terms, conditions and privileges of employment. The Act prohibits employment-related advertisements that show preference, limitation or discrimination based on age. And, labor organizations may not classify or refer persons based on their age.

In the 1978 Amendments, mandatory retirement was specifically outlawed for most federal workers at any age and for private sector and state and local employment before age 70. Furthermore, the 1978 Amendments to the ADEA specifically prevent employee benefit plans—such as retirement, pension or insurance plans—from including mandatory retirement provisions for protected workers.

Exemptions

The 1978 Amendments contained several important exemptions. First, executives and policymakers are protected only to age 65, if the individual has been employed in a “bona fide executive or a high policymaking position” for at least two years *and* is entitled to an annual retirement benefit provided by the employer of at least \$27,000. Such high-level executives and policymakers can, therefore, be mandatorily retired upon their 65th birthday.

A second exemption applies to employee benefits. The legislative history of the 1978 Amendments left room for a subsequent Labor Department interpretive bulletin allowing employers to reduce certain employee benefits for workers age 65 and over. For example, pension contributions can be

reduced or discontinued when an employee reaches age 65. Life insurance benefits may also be reduced if the employer can demonstrate that such benefits are more expensive for workers over age 65 than for those under 65. Employers were allowed to reduce health benefits until a 1982 Amendment required that workers between the ages of 65 and 69 be offered full coverage by the employer's health plan. Health benefits can be reduced and/or offset by Medicare after age 69.

Last, certain federal occupations were excluded from the Act—air traffic controllers, airline pilots, federal law enforcement officers, prison guards and firefighters, employees of the Alaska Railroad, Panama Canal Company, Canal Zone Government, Foreign Service and Central Intelligence Agency. These occupations are covered by provisions in separate statutes.

Procedural Issues

Several significant procedural changes were added to the ADEA in 1978, largely because of concern that the courts were dismissing lawsuits on procedural grounds, without consideration for the merits of the complaints.

Before going to court, an aggrieved individual must first file a "charge alleging unlawful discrimination" with the federal enforcement agency within 180 days of its occurrence (or 300 days if the alleged violation occurred in a state which has an agency empowered to grant or seek relief from age discrimination). After 60 days from the date of filing, or after conciliation efforts by the appropriate enforcement agency have failed, the charging party may file a private suit.

The statute of limitations—two years for nonwillful violations and three years for willful violations—may be tolled (extended) for up to one year, to allow the federal agency more flexibility to attempt conciliation. The tolling provision

was added to the ADEA in 1978 to prevent those employers who may have violated the law from delaying conciliation with the idea of avoiding back pay liabilities because of the statute of limitations.

One of the most important procedural amendments of 1978 was that providing for a jury trial option. A jury trial is available to individuals in cases when alleged discrimination involves potential monetary liabilities, usually in the form of back pay.

Enforcement of the Act

Until 1979, the Department of Labor had jurisdiction over all aspects of the ADEA. With "Reorganization Plan No. 1 of 1978" the responsibility for ADEA enforcement shifted to the Equal Employment Opportunity Commission (EEOC). Enforcement responsibility by the EEOC for the federal sector became effective on January 1, 1979, and for private sector and state and local government employment it became effective on July 1, 1979.

NOTES

1. Louis Harris and Associates, "The Myth and Reality of Aging in America," conducted for the National Council on the Aging, Inc., 1974, available from the National Council on the Aging, Inc., 600 Maryland Ave., S.W., Washington, DC 20024; Louis Harris and Associates, "Aging in the Eighties: America in Transition," conducted for the National Council on the Aging, Inc., 1981.
2. Harris, "Aging in the Eighties."
3. In 1974, the Harris survey found that 66 percent of the American public "strongly opposed" age-based forced retirement. By 1981 this had increased by 12 percentage points to 78 percent strongly opposed.
4. William M. Mercer, "Employer Attitudes: Implications of an Aging Workforce," William M. Mercer, Inc., 1211 Avenue of the Americas, New York, NY 10036, November 1981.

5. William Graebner, *A History of Retirement* (New Haven: Yale University Press, 1980).
6. *Ibid.*, p. 39.
7. *Ibid.*, p. 38.
8. Section 715 of the Civil Rights Act of 1964 stated 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." Public Law 88-352, 2 July 1964.
9. U.S. Department of Labor, *The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964, June 1965.
10. *Ibid.*, p. 6.
11. The Age Discrimination in Employment Act of 1967, Public Law 90-202, 81 Stat. 602-08.
12. Differences in reporting procedures between the Labor Department and the EEOC make problematic any comparisons pre- and post-1979, the point at which enforcement duties were shifted between the two agencies.
13. Harris, "Aging in the Eighties."
14. U.S. Congress, House, Select Committee on Aging, *Age Discrimination: A Growing Problem in America*, Report by Chairman Claude Pepper, 97th Cong., 2d sess., 22 February 1982.
15. The EEOC filed only 89 lawsuits in FY 1981, and this constituted a record number for the agency. In FY 1982, however, the EEOC filed only 24 lawsuits.
16. Michael Schuster, "Analyzing Age Discrimination Act Cases: Development of a Methodology," *Law and Policy Quarterly* 4, no. 3 (July 1982), pp. 339-351.
17. It should be noted that all cases analyzed by Schuster were pre-1978. The ADEA was amended in 1978 and a jury trial option was added, an important procedural change which some employers have recently argued gives a new advantage to the plaintiff.
18. U.S. Department of Labor, "Interim Report to Congress on Age Discrimination in Employment Act Studies," Report required by Section 5 of the Age Discrimination in Employment Act, submitted to Congress in 1981.

19. U.S. Congress, House, Select Committee on Aging, *Mandatory Retirement: The Social and Human Cost of Enforced Idleness*, 95th Cong., 1st sess., August 1977 (Out of print).

20. The arguments in favor of mandatory retirement include: (1) Older persons as a group are less well suited for some jobs than younger workers because they exhibit declining physical and mental capacity, an inability to learn, inflexibility and lower educational levels; (2) Individual assessments are not possible because of the absence of assessment technologies; (3) Mandatory retirement saves face for the individual; (4) Mandatory retirement provides a predictable situation allowing management and individuals to plan ahead; (5) Older workers are more expensive in terms of benefits and wages; and (6) Forced retirement opens opportunities for youth.

21. Benson Rosen and Thomas H. Jerdee, "Too Old or Not Too Old," *Harvard Business Review* 55 (1977), pp. 97-106; J. E. Haefner, "Race, Age, Sex and Competence as Factors in Employer Selection of the Disadvantaged," *Journal of Applied Psychology* 62, no. 2 (1977), pp. 199-202; J. O. Britton and K. R. Thomas, "Age and Sex as Employment Variables: Views of Employment Service Interviewers," *Journal of Employment Counseling* 10 (1973), pp. 180-186.

22. W. H. Bower, "An Appraisal of Worker Characteristics as Related to Age," *Journal of Applied Psychology* 36, no. 5 (1952), pp. 296-300.

23. H. Maher, "Age and Performance of Two Work Groups," *Journal of Gerontology* 10, no. 4 (1955), pp. 448-451.

24. N. W. Smith, "Older Worker Efficiency in Jobs of Various Types," *Personnel Journal* 32, no. 1 (1953), pp. 19-23.

25. J. A. Mark, "Measurement of Job Performance and Age," *Monthly Labor Review* 79, no. 12 (1956), pp. 1410-1414; H. M. Clay, "A Study of Performance in Relation to Age at Two Printing Works," *Journal of Gerontology* 11, no. 4 (1956), pp. 417-424.

26. W. H. Holley, Jr., H. S. Feild, and B. B. Holley, "Age and Reactions to Jobs: An Empirical Study of Paraprofessional Workers," *Aging and Work* 1 (1978), pp. 33-40; U.S. Department of Labor, Bureau of Labor Statistics, "Comparative Job Performance by Age: Office Workers," Bulletin No. 1273 (1960), p. 36.

27. James E. Birren, *The Psychology of Aging* (Englewood Cliffs: Prentice Hall, 1964); J. R. Sieman, "Programmed Material as a Training Tool for Older Persons," *Industrial Gerontology* 3, no. 3 (1976), pp. 183-190.

28. Sarah Paz, Testimony presented before the House Select Committee on Aging hearing on "The End of Mandatory Retirement," Washington, DC, 16 July 1982.
29. Rep. Claude Pepper, Opening statement before a hearing of the Select Committee on Aging on "The End of Mandatory Retirement," Washington, DC, 16 July 1982.
30. Michael Korda, *Power: How to Get It, How to Use It* (New York: Ballantine Books, 1975), pp. 201-204.
31. Cited in *Age Discrimination in Employment: A Growing Problem in America*, Report by Chairman Claude Pepper, Select Committee on Aging, U.S. Congress, House, 97th Cong., 2d sess., 22 February 1982, p. 7.
32. Korda, *Power*, p. 204.
33. V. Paul Donnelly, Testimony before the House Select Committee on Aging hearing on "Inside Views of Corporate Age Discrimination," Washington, DC, 24 February 1982.
34. Rose Darby, "More Firms Offer Early Retirement While Weighing Its Pros and Cons," *World of Work Report*, 7, no. 8 (August 1982).
35. Equal Employment Opportunity Commission v. Chrysler Corporation, U.S. District Court for Eastern District of Michigan, Docket No. 81-72347.
36. Equal Employment Opportunity Commission, "Final Interpretation: Age Discrimination in Employment Act," 29 CFR Part 1625.
37. Ibid.
38. U.S. Congress, House, Select Committee on Aging, *The Unemployment Crisis Facing Older Americans*, Report by Chairman Claude Pepper, 97th Cong., 2d sess., 8 October 1982.
39. Ibid.
40. Raymond Arnista, Testimony before the House Select Committee on Aging hearing on "The Unemployment Crisis Facing Older Americans," Washington, DC, 8 October 1982.
41. John Staley, Testimony before the House Select Committee on Aging hearing on "Inside Views of Corporate Age Discrimination," Washington, DC, 24 February 1982.
42. U.S. Department of Labor, "Employee Benefit Plans: Amendment to Interpretive Bulletin," 29 CFR Part 860.

43. U.S. Congress, House, Select Committee on Aging, *An Analysis of the Costs of Pension Accrual After Age 65*, 97th Cong., 2d sess., May 1982.

44. U.S. Department of Labor, "Interim Report on Age Discrimination in Employment Act," 1981.

45. Ibid. The Labor Department estimates that if pension accrual were required, 68,000 more older workers would remain in the labor force.

46. President Ronald Reagan, "Remarks of the President at the Signing Ceremony on Older Americans Month," 2 April 1982.

47. *Wall Street Journal*, Labor Letter Column, 13 April 1982.

48. Lawrence Meyer and Howie Kurtz, "Age Discrimination Opponents Suspect About-Face by Reagan," *Washington Post*, 3 June 1982.