

Southern Methodist University

SMU Scholar

Faculty Journal Articles and Book Chapters

Faculty Scholarship

Fall 2002

Age Discrimination by Employers

Grant M. Hayden

Southern Methodist University, Dedman School of Law

Recommended Citation

Grant M. Hayden, Age Discrimination by Employers, 5 *Regional Labor Rev.* 40 (Fall 2002) (book review)

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Age Discrimination by Employers

Kerry Segrave. Jefferson, NC: McFarland & Company. 2001. 220 pages.

reviewed by Grant Hayden

Legal historian Lawrence Friedman once pointed out that the unique thing about discrimination based on age is that, unlike that based on race or sex, we all age and eventually become part of the target group. Yet despite this shared feature of the human experience, age discrimination has been a persistent problem in industrialized countries. In his new book, Kerry Segrave has provided us with an illuminating glimpse into the history of the issue in the United States. Drawing upon a wide variety of sources, including media reports, survey data, and a range of information from other countries for comparison, he documents the extent of age bias, attitudes toward older workers, the rationales presented by businesses for refusing to hire older workers, and the responses of various levels of government. The result is a valuable contribution to the twentieth-century history of an important civil right.

Segrave is in step with other scholars in dating the rise of widespread age discrimination to the end of the nineteenth century, when the move from an agricultural economy to an industrial one began to put certain pressures on the workforce. Factory work in America was physically demanding, requiring long hours and a rapid pace. Employers, therefore, came to value stamina and good health, traits they associated with younger workers. At the same time, technological innovation and labor specialization reduced the skill level needed for many vocations. The type of work on factory production lines meant that those who spent a lifetime learning a craft had little advantage over recent hires since both could quickly become competent at their new positions. Thus, the very nature of industrial production led employers to discount the advantages that older workers had traditionally brought to the workplace.

Though age discrimination was firmly entrenched by 1900, it received little attention from governments, unions, or the press during the first quarter of the century. The one exception was the controversy created when a prominent physician, Dr. William Osler, made the following remarks in 1905 about the capabilities of the aged:

“Take the sum of human achievement in action, in science, in art, in literature; subtract the work of men above 40, and while we should miss great treasures, even priceless treasures, we would practically be where we are today. It is difficult to name a great and far-reaching conquest of the mind which has not been given to the world by a man on whose back the sun was still shining. The effective, moving, vitalizing work of the world is done between the ages of 25 and 40.”

Osler's comments generated significant attention in the popular press, and engendered some passionate responses by those who pointed to the late-in-life achievements of Dante, Milton, Titian, Kant, and Leibnitz. Osler (who was 55 at the time the remarks were made) was unrepentant, and later defended his views. Despite the debate, little effort was made in this period to measure or address the problem of age discrimination in employment, and the furor over “Oslerism” soon faded into obscurity.

The issue of age discrimination did not really come into the public consciousness again until 1927 with the arrival of a mysterious figure known as “Action.” Action, who later revealed himself as 48-year-old Clement Schwinges of Brooklyn, wrote a letter to the *New York Times* suggesting coordinated action to combat the “cruel” business practice of regarding people past a certain age as too old to work. He founded the Cooperative Action Membership Corporation, a cooperative employment agency designed to help those over 40 obtain jobs. More than two hundred people attended the CAMC's first meeting, which drew national media coverage. And although the organization had difficulty sustaining its momentum and funding, it did serve to cement the issue in the public's mind.

In the second quarter of the century, there was renewed interest in the issue of age discrimination with a focus on the maximum age limits used by most employers at the hiring stage. The limits used by federal and state governments received much of the attention. In 1937, for example, the New York Municipal Civil Service

Commission attempted to limit examinations for the position of clerk, Grade 2, to those 25 and younger. While that particular decision was challenged and later enjoined by the New York courts, most governmental and private employers continued to impose formal or informal age limits in their hiring decisions. The limits, which varied with occupation, could be as low as 25 (often lower for women), and would prove to be one of the most difficult species of age discrimination to identify and remedy.

The renewed interest in age discrimination also prompted public and private attempts to document the extent of the problem and explore some of the reasons behind it. In 1930, for example, the New York Commission on Old Age Security looked at data from twenty-one hundred manufacturing firms in the state and found that “the older jobseeker is definitely barred from 59 per cent of the available jobs and is discriminated against in 89 per cent of them.” Initial surveys found that the discrimination was prompted by widespread agreement that older workers were less productive and more expensive than their younger counterparts. They were said to lack the fitness and mental adaptability required in many positions. And older workers were thought to increase the cost of workers’ compensation, group insurance, and pension plans. Though studies at the time showed that such beliefs about older workers were not, in fact, true (they were often found, for example, to be more efficient and to have lower injury rates than younger workers), the attitudes, and the discrimination prompted by them, persisted throughout the depression years.

The tight labor market during World War II prompted many employers to hire older workers and raised hopes that the problem may have been overcome for good. As wartime ended, however, those hopes were dashed as age discrimination resurfaced and soon returned to its pre-war levels. In the postwar prosperity, surveys continued to reveal pervasive age discrimination, and studies confirmed that it was motivated by the same unfounded biases. In response, a handful of states, including New York in 1958, enacted statutes designed to combat age discrimination. Most of these statutes declared that employers could not discriminate against anyone in hiring, working conditions, or severance, solely on account of age. They also prohibited age preferences in help-wanted advertisements and questions about a person’s age on employer or employment agency application forms. But while these statutes did reduce the number of companies with formal, advertised age maximums, they had little effect on the overall problem.

The lack of effective private and state solutions finally prompted the federal government to act. In 1967, Congress passed the Age Discrimination in Employment Act. The ADEA, roughly patterned on Title VII of the Civil Rights Act of 1964 (which forbids discrimination on the basis of race, color, sex, religion, and national origin), prohibits employers over a certain size from discriminating on the basis of age in their employment decisions. The statute initially covered only those employees between 40 and 65 years old, but the upper limit was later increased to 70 and then, with a few exceptions, removed altogether.

While tens of thousands of plaintiffs have made use of the ADEA in the decades since its passage, it, like the state statutes before it, has done little other than remove the obvious signs of age discrimination. Though most age-related employment advertisements and application questions are a distant memory, the law has really only benefited a rather narrow group of workers: middle-aged white men who have been fired from managerial positions. The law has done little to help most older people facing age discrimination, and even less to help anyone over 40 discriminated against at the hiring stage.

Overall, *Segrave* provides an accessible look at the development of age discrimination in employment over the twentieth century. The book is at its best when driven by anecdotes that illustrate the widespread stereotypes about older workers and the periodic corporate experiments that disprove them. The early chapters are particularly compelling, anchored by extended discussions of some rather colorful historical figures. The storytelling slows a bit in the middle of the book when *Segrave* feels obliged to recount several series of somewhat repetitious studies of the causes and extent of the problem, many of which could have been relegated to footnotes. But the repetition does serve to drive home the most surprising thing about age discrimination: how little our views of older workers have evolved. The same specious beliefs about the diminished physical and mental capabilities of the aged that propelled *Osler* to fame in 1905 are still with us, and help explain the difficulty in combating age discrimination, especially at the more subjective hiring stage. And, in this regard, *Segrave* has provided compelling evidence for those who call for new approaches to an age-old problem.

Grant Hayden is an Associate Professor at Hofstra Law School.