

AGE-HARASSMENT: HOW HOSTILE DOES IT HAVE TO BE?

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Introduction

Age discrimination is covered by the Age Discrimination in Employment Act of 1967. Harassment was first made illegal under Title VII of the Civil Rights Act in 1980 when the Equal Employment Opportunity Commission (EEOC) issued its regulations on sexual harassment (29CFR1604.11). The Supreme Court upheld those regulation in its landmark *Meritor Savings v. Vinson* (1986) decision. The EEOC has since broadened its sexual harassment guidelines to include harassment based on race, color, religion, pregnancy, national origin, genetic information, and age (EEOC, 2013). While there have been no Supreme Court decisions related to age harassment, lower courts have been recognizing age harassment cases since the 1990's (Burke & Kinard, 2006; *Crawford v. Median*, 1996).

Age harassment is worthy of study for several reasons. First, U. S. population is aging- individuals over the age of 40 constitute 55.5% of the total population (Department of Labor, 2013). Second, 24% of those employed in the workforce are 54 and older and this number is expected to increase to at least 34% by the year 2020 (Department of Labor, 2013). Third, age discrimination charges are up 51% since 1999. Finally, age harassment charges presently represent 23.2% of the total chargers related to harassment (EEOC, 2013). Given the changing demographics age harassment charges are expected to rise significantly in the future.

There has been little research on case law pertaining to the harassment guidelines as it applies to age. Given its controversial nature, the complexity of regulations on the subject, and the sizable number of EEOC charges, it would be helpful to review recent case law. The review will focus the EEOC's definition of a hostile environment, which the courts tend to adopt when evaluating age harassment.

To that end, a LEXIS-NEXIS key word search over the last 10 years yielded over 40 cases. There were relatively few cases at the appeals court level where legal principles are more settled and accepted; therefore, district level cases were reviewed as well. Over 20 usable cases were identified and examined for guiding principles. Cases cited are representative or highlight special issues/circumstances that assist in determining conditions under which age harassment is actionable or exceeds the hostile environment threshold. This paper concludes by providing recommendations for management and legislators.

HOSTILE ENVIRONMENT

The current EEOC guidelines state that age harassment is unwelcome conduct which becomes unlawful when (1) endurance the offensive conduct becomes a condition of continued employment, or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive (EEOC, 2013). It is the second point that deals with hostile environment cases. In *Faragher v. City of Boca Raton*, the Supreme Court set forth the factors to be considered in interpreting the EEOC guidelines and determining hostile environment claims filed under Title VII (*Faragher v. City of Boca Raton*, 1998). First, it must “be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive” (*Faragher v. City of Boca Raton*, at 286). Second, all facets of the circumstances must be reviewed, including the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance” (*Faragher v. City of Boca Raton*, at 286).

The Supreme Court did note that Title VII does not prohibit genuine but innocuous differences in the ways people routinely interact with each other. “Simple teasing, offhand

comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment” (*Faragher v. City of Boca Raton*, at 286). The *Faragher* court went on to say that the guidelines when properly applied would filter out “the ordinary tribulations of the work place, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing” (*Faragher v. City of Boca Raton*, at 286).

Welcome Conduct

Welcome conduct is not actionable. For example, an older dock worker at an ice cream company filed an age harassment charge against his supervisor for repeatedly calling him an old man. However, there was a casual joking atmosphere at the dock, and the worker usually joined in himself. As a result, the case was dismissed (*Donald Snyder vs. Pierre’s French Ice Cream*, 2012). In the following sections, all harassment related conduct was shown to be unwelcomed by the victim, unless noted otherwise.

Severe Conduct

Generally speaking, the more severe the conduct, the fewer incidents that are required to create an abusive work environment (Findley, Walker, & Pappanastos, 2014). Often this entails some form of physical contact or threats. For example, in *Dediol v. Best Chevrolet* (2011), a 65 year old car salesman endured repeated threats daily (along with other verbal harassment) by his sales manager for two months. These threats included such statements as “I am going to kick your ass,” and “I am going to beat the F--- out of you,” which implied bodily harm, and on one occasion, the sales manager physically charged the salesman him” (*Dediol v. Best Chevrolet* at 439-440). The appeals court found that these threats were all age-related and met the legal definition of hostile work environment; therefore the case was sent to trial. (*Dediol v. Best Chevrolet* 2011).

This was the only age-related case found involving physical contact or threats. The remaining cases with a few exceptions were verbal in nature.

Verbal Conduct

Usually, verbal harassment is considered less severe by the courts and must be more repetitive and pervasive over time to create a hostile work environment (Findley, Walker, & Pappanastos, 2014). There were only a handful of cases that were ruled to meet the legal threshold of a hostile environment based on age. Each case is reviewed below in turn.

Dediol v. Best Chevrolet

In the case discussed above, *Dediol v. Best Chevrolet* (2011), the car salesman also endured less severe verbal harassment as well. He was never called by name but “referred to as “old mother*****,” “old man,” “pop,” and “get your old f*****g ass over here.” (*Dediol v. Best Chevrolet* at 439-440).” These comments occurred a half-dozen times a day until he left the dealership. Coupled with the threats discussed above, the Fifth Circuit Court of Appeals concluded that a hostile work environment could exist due to the pervasiveness and repetitiveness of the comments and allowed to case to go to trial.

Pamela Weyers v. Lear Operations Corporation

In *Weyers v. Lear Operations* (2004), an older shift worker was subjected to ageist comments many times over a 90-day period by her supervisor such as “I hate the old bitch,” “If you’re over 25, you’re out of here,” and “you don’t work for me” (*Pamela Weyers v. Lear Operations Corporation* at 1053). Management also treated her differently than younger employees in terms of training and work assignments, and the training she received was found to be inadequate; the jury found in her favor. The appeals court ruled that the conduct could be age harassment; however, the case was retried on technical grounds (*Pamela Weyers v. Lear Operations Corporation*, 2004).

Fernandez v. West Hills Hospital & Medical Center

In *Fernandez v. West Hills Hospital & Medical Center* (2008), a 51-year-old aid began having performance problems soon after she was hired. She was eventually terminated by the hospital. While the court found this action to be justified, it also determined that the work environment she endured while at the hospital was sufficient to constitute a hostile work environment.

The aid was told that she was too old by her superior and that he preferred younger people working in his department. It was also conveyed to her that she was a “f*****g old lady”; that she was too “old” and that she should “leave her job for younger people”; that she was a “f*****g broad who is much too old and should leave her job to some other person” (*Fernandez v. West Hills Hospital & Medical Center* at 3). Furthermore, her coworkers told her that she “was too damn old to work here and they should just get her out of here” (*Fernandez v. West Hills Hospital & Medical Center* at 3). These comments occurred at least twice per week for about a year.

Mary Worden v. Interbakę Foods

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

Eric Juell v. Forest Pharmaceuticals

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

Teasing, Offhand Comments, and Isolated incidents

More often than not, however, offensive age-related conduct does not give rise to a legal case of a hostile work environment. One of the first age-related cases is a good example (*Crawford v. Medina General Hospital*, 1996). A hospital department billing employee heard two comments that were objectively indicative of age-based bias: the supervisor stated that she did not “think women over 55 should be working” and that “old people should be seen and not heard.” The appeals court ruled that while age harassment was actionable the incidents in this case were minor and isolated and therefore did not create a hostile work environment (*Crawford v. Medina General Hospital*, 1996).

More recently, in *William Bennis v. Minnesota Hockey* (2013), the a district court found that four minor stray comments over a year directed at guest service manager were not enough to rise to

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

Debra Fletcher v. Gulfside Casino (2012) involved many age-biased comments over the course of two years. These comments included references to a 58-year old casino worker. She was asked regularly if she had her hearing aid on or needed glasses or had taken her geritol. When she and other older worker worked, it was referred to as "Seniors Day." Other comments such as "when I get to be as old as you...." were made by other managers on numerous occasions (*Debra Fletcher v. Gulfside Casino*, 2012). The district court determined that the comments were relatively minor, were not frequent enough, and were just good-natured humor.

Similarly, in *Charles Denver Baker v. Becton, Dickson and Company* (2011), an account business manager was told for more than a year that he was called too old and slow; he lacked energy and enthusiasm; and that the supervisor did not want anyone over the age of forty in sales. These were not enough to create a hostile work environment. In fact, the court found these to be basically "offensive utterances" that were not severe or frequent enough to change the conditions of the work environment (*Charles Denver Baker v. Becton, Dickson and Company*, 2011). Moreover, referring to someone as an "old man" on occasion does not create a hostile work environment (*Darryl L. Weber v. Mark One electric Company*, 2010).

Visual Conduct

In *Taylor Stone Witt v. Cable Ad Concepts* (2010), an older female sales person filed a charge of age harassment on the basis that she did not like her supervisor's tone when he talked to her and that he communicated reprimands in a harsh manner. In addition, he sent an email flyer outlining a "senior dress code" to her and two other employee over the age of 40. The court determined that the flyer was an isolated event and not severe. The court went on to say, "Workplaces are not always harmonious locales, and even incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard" (*Taylor Stone Witt v. Cable Ad Concepts*, at 9). Moreover, the verbal conduct must also be age-related.

Unprofessional, Bullying, and Vulgar Conduct

There are many cases that do not meet the legal threshold of age sex harassment because they are not actionable, or they do not create a hostile work environment. For example, a Wall-Mart associate in the seafood department was subjected to several vulgar comments over the 1 ½ years she worked there. She was called a "f-----ing bitch," as well as a "son of a bitch." Additionally comments were made about her "working at her age," and her ability to pick up the heavy boxes delivered to the store." (*Anne B. Racicot v. Wal-Mart Stores* at 677). The court ruled the comments were isolated and were neither severe nor pervasive enough to create an objectively hostile work environment but were rather examples of boorish behavior. (*Anne B. Racicot v. Wal-Mart Stores*, 2005).

Some of these cases are not so minor. In *John Delaney v. Lynwood Unified School District*, (2009), an over 40 school teacher had several confrontations with his supervisor (some in front of students or others) where the supervisor moved into his personal space to berate and angrily reprimand the plaintiff in a physically threatening manner. While these incidents may have been

severe enough to change the conditions of his work environment, the plaintiff could not establish that any of these incidents were based on age, and the case was dismissed. In another case (*Anthony Fabec v. Steris Corporation*, 2005), an older equipment operator was put on a performance improvement plan with constantly changing goals and time periods. In dismissing the case, the court pointed out that these actions could be considered harassment, but the victim failed to show that it was because of age.

CONCLUSIONS

Age harassment is on the rise in this country. The law can be complex and confusing. Some rules of thumb, however, can be gleaned. These cases are only actionable when conduct is unwelcome and unreasonably affects performance or creates an abusive work environment. Threats or unwanted physical contact is generally considered severe and only requires a few occurrences to create a hostile workplace. Conduct that is verbal or visual is usually viewed as less serious and must be more frequent and pervasive; additionally it must occur over an extended period, often six months or more (Findley, Vardaman, & He, 2013). Harassment is not actionable without these conditions no matter how abusive it may be.

More problematic is the issue of behavior, age-related harassment or not, that is often unprofessional, vulgar, and bullying that is not covered by state or federal law. As we have discussed, some of the actions are quite severe and abusive. In fact, 37% of all Americans have experienced some type of bullying on the job (Sileo, 2009). In fact, Drexler (2013) provided evidence that same-sex bullying among women will continue to rise as more women are promoted to higher levels of management within organizations. This is due to the perceived threat that younger women want their jobs.

Organizations are not required to withhold corrective actions until there is an illegal hostile environment. Nor are they expected to tolerate bullying, vulgar, abusive, or unprofessional behavior (age-related or not) in the workplace because harassment of any kind can affect productivity, morale, and retention long before the conduct is actionable. Organizations are well within their legal rights to formulate policies and procedures to deter this type of behavior (Findley, Vardaman, & He, 2013).

Harassment is a pernicious cancer that eats away at organizational productivity and morale. In a global competitive environment, there is no place for harassment (Findley, Vardaman, & He, 2013), and should be excised wherever and whenever it begins to fester. To that end, organizations should implement policies that prohibit any type of harassment (legal or not). This will not only reduce exposure to litigation but also promote a healthier work environment where employees can concentrate on the work at hand.

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