

Older and Out: Age Discrimination in the Workplace

By Amy Engeler



We've witnessed the rise of civil rights, women's rights, animal rights. Now, with a recession looming, we're going to get nudged out of our jobs because of our age? We don't think so. MORE reports.

Women and Age Discrimination

At 52, you're one of the oldest employees in the office and among the best paid. Your evaluations have been glowing; in fact, you just won a productivity award. Then one day you meet the new division head, who appears to be some 20 years your junior. He asks how long you've worked at the firm and if there's anything you still hope to accomplish there. And are you getting enough time to visit with your grandchildren?

Your bias detector -- the one you honed back when bosses still dared to call you "honey" -- is twitching. And it should, because, after decades of climbing the ladder and playing the game and perhaps paying a personal price, it turns out that seniority and a big salary can endanger your job security. Especially if you're a woman.

Age discrimination used to be more blatant than it is now. Airline "stewardesses" were forced to retire at 32. And help-wanted ads blithely sought "applicants between the ages of 25 and 35." The Age Discrimination in Employment Act of 1967 (ADEA), which protects the rights of workers 40 and older, helped to end the most barefaced bias. But we live in a culture where beauty is youth and change trumps experience (a culture, some would argue, that the upper tier of our own demographic helped to foster decades earlier with slogans like "Don't trust anyone over 30"). As the massive baby boomer generation grows older, age-based complaints to the federal government's Equal Employment Opportunity Commission have increased; they're up nearly 21 percent from 10 years ago and now comprise nearly a quarter of the commission's workload. "People are living longer and wanting to work longer," says Elizabeth Grossman, an attorney in the EEOC's busy New York office, "and quite a few employers resist keeping these employees on the payroll past a certain point." Or hiring them in the first place: Job candidates ages 35 to 45 were 40 percent more likely to be called for an interview than candidates with similar backgrounds -- and more years of experience -- who were 50-plus, according to a study published this year by

Joanna Lahey, an assistant professor of economics at the Bush School at Texas A&M who specializes in age discrimination. For each decade of age, job seekers needed to apply for four and a half more positions just to get an interview.

"Search consultants have told me their clients say, 'Don't bring me anyone over 50,'" says Peter Cappelli, director of the Center for Human Resources at the University of Pennsylvania. "The clients don't say why; the implicit suggestion seems to be that older workers don't have the energy to do the job." Or that we're inflexible, or unsociable, or unused to new technologies, or any one of a number of other maddening stereotypes. And often the bottom line is, simply, the bottom line: They think we cost too much.

"As companies want to cut back, they do that by getting rid of people who have been there for 20 to 25 years and hiring younger people for far less money," says Trish Bangert, a Denver-based attorney specializing in civil rights, constitutional law, and discrimination. And then there is that other elephant in the corner office: health insurance. "It's not exclusive to age, but I think it's an unspoken thing, looking at potential employees and wondering how they will impact healthcare costs," says Terri Swain, a former EEOC investigator who now does human resources consulting in Fort Worth, Texas.

Bangert began noticing an increase in age-discrimination clients about eight years ago, when the first of the boomers hit their mid 50s. Until recently, most complaints about age bias came from white male middle managers, who were "especially dumbfounded," she says, because they had never experienced discrimination before. **Now older women are filing nearly as many EEOC complaints as older men. Some allege both age and sex discrimination.** In these "age-plus" (or "gender-plus") cases, sex discrimination -- typically in such male-dominated fields as finance and law -- worsens with age. Older women, she says, "are probably the least valued persons in the workforce -- after having given the most."

"These women who broke the mold and got the positions now seem to be more easily disposable than the men in the same age group," says Wendi Lazar, a partner in the New York employment law firm Outten & Golden. "I think the reality is that most of the women who achieve success are excluded from the boys' clubs that continue to exist at the highest levels. As a result, when there are layoffs, many of these women -- particularly older women -- are the first to go. They have no rabbis and little political protection."

Of all the employment biases, age discrimination can be the hardest to prove. That's because "age is an area where stereotyping is somewhat acceptable," says Susan Coler, a partner at Sprenger & Lang in Minneapolis, where she's handling a class-action age discrimination suit against 3M. "It can be hard to persuade a jury or judge that those age stereotypes are prohibited by law the way race and gender stereotypes are."

Think about what is socially acceptable today -- and what isn't -- in terms of office banter. "We know now that sexual jokes are bad," Swain says. "Racial and ethnic jokes -- not a good idea. But it's still okay when someone turns 50 to bring in those black balloons or to call someone the grandma of the group ... [If you're older], you're supposed to have a thick skin and take it."

One Worker Fights Back

Karin Tilley, now 54, of Littleton, Colorado, was determined not to take it. By 1999, in her late 40s, she was one of the top salespeople at the *Denver Business Journal*; at her peak, Tilley earned almost \$190,000, pumped up by the commission rate she received: 15 percent, compared with the 10 percent that new hires typically earned. Tilley was also, according to the complaint in a lawsuit she would later file against the paper's parent company, the oldest rep in her division (display ad sales).

In employment reviews and depositions from coworkers, she was described as likable and professional. Even with a 4-year-old son and a husband busy with his real estate business, she often went to the office on weekends to finish paperwork.

Tilley said in her complaint that after she sold more than a million dollars in advertising for two consecutive years, the publisher, Scott Bemis, told her that she made more money than anyone else except two men. (In its response to the complaint, the paper denied this allegation.) According to a determination from the Colorado Civil Rights

Division (CCRD), in 2001 she learned that the sales categories were unevenly distributed among the staff; in spite of her success, Tilley felt that her earnings potential was severely limited by this disparity -- she could bring in only nine percent of the paper's total ad revenue, as opposed to, for example, the 20 percent allotted to 39-year-old Brad Segura, another sales rep at the paper. The CCRD also said that Tilley complained to her immediate supervisor, Denise Jendrusch, a woman in her late 30s, who reassured her that her concerns would be addressed.

But Tilley would not have been reassured had she heard the remarks coworkers later testified Jendrusch had made. They alleged that she expressed amazement at Tilley's ability to keep up with a young child "at her age"; that **she joked about how a male sales rep in his 40s wore his pants high on his waist "like an old man"; and that she described another employee as "an old, washed-up woman" and "an old biddy."**

According to the CCRD, some of the sales categories were redistributed, but Tilley felt that the changes were not enough to redress the imbalance in earnings potential. She testified that she tried making a chart, and suggested redistributing categories based on seniority. But according to Tilley's complaint, Bemis said that he would "not be bogged down with this minutiae." Tilley also alleged that Bemis responded to her complaints by pointing out that Segura "had a family to support." (In its response to Tilley's complaint, the paper denied these allegations.)

By the summer of 2002, according to her deposition, Tilley was shocked to hear coworkers ask when she would be "leaving the company." She alleged that, in a meeting, Jendrusch berated her for all kinds of shortcomings (lateness, sloppy paperwork), criticisms Tilley disputed. She called the *Journal's* corporate headquarters in North Carolina and explained to human resources that she felt she was being subjected to discriminatory treatment. The HR representative promised to look into the situation and, according to Tilley's deposition, assured her Bemis would not be in charge of the investigation. But he was. Jendrusch was subsequently reprimanded in a written warning about her management style, Bemis said in his deposition. That, apparently, is as far as it went.

In February 2003, Tilley faced the end game -- a performance improvement plan consisting of a list of sales goals she had to achieve to keep her job. But the goals were unrealistic, she claimed in her deposition, and in October, she was fired. Tilley filed a complaint with the EEOC, which enforces most of the federal laws regarding job discrimination, and with the CCRD in April 2004.

Most of the laws (including the ADEA) in the EEOC's bailiwick require a plaintiff to file a charge with the agency before pursuing a private lawsuit in federal court. If the EEOC is unable to conclude that there is evidence of discrimination, it closes the case and gives you 90 days in which to file a private lawsuit on your own behalf. If it finds probable cause that discrimination *has* occurred, it will send its findings to both you and the company involved and attempt to find an out-of-court remedy. If that fails, the EEOC then grants you a "right to sue" notice. (Again, the private lawsuit must be filed within 90 days.)

Sometimes the agency itself will take on a case, filing a suit on a complainant's behalf, but that's rare. "We are looking for policy cases," the EEOC's Grossman says. "Ones that involve large numbers of people or disputed applications of the law." Many cities, states, and counties have their own antidiscrimination laws and their own agencies, such as the CCRD, for enforcing them; "work-sharing" agreements between the EEOC and state civil rights offices prevent duplication of efforts.

After a 14-month investigation, the CCRD found probable cause for Tilley's allegations, laying out its reasons in an 11-page, single-spaced determination. The agency noted that although the *Journal* had fired Tilley for poor performance, "the record substantially demonstrates this reason to be a pretext for unlawful discrimination." The EEOC issued her a right to sue notice. In early January 2006, Tilley went to the federal courthouse in downtown Denver, where, in her precise handwriting, she filled out the paperwork for a lawsuit and paid the \$250 filing fee. Then she went to look for a lawyer and landed in Bangert's office.

Because Tilley had already filed, "I didn't get the chance to give her my usual 30-minute 'this is why you don't want to litigate' lecture," Bangert says. But she took the case, and Tilley proved to be a uniquely motivated and well-organized client. While Bangert expected the usual box jammed with random documents, Tilley arrived at the office with neat files indexed and tabbed (she kept her own copies spread across her dining room table for quick reference). And she promised that several managers and coworkers still on the job would testify on her behalf, but Bangert was skeptical: When the choice comes down to helping an old friend or keeping their jobs, most workers end up making poor witnesses for the plaintiff. In Tilley's case, however, an HR director, Pam Guntle, delivered a

damning deposition against the *Journal* in which she apologized for having lied previously about whether she had witnessed any discrimination, harassment, or retaliation against Tilley. "I was very fearful of losing my job," Guntle explained at the time. "It was only to protect myself. I have two kids, [and I'm a] single parent." In addition, several current and former coworkers gave depositions helpful to Tilley's case. Guntle and another coworker, Dee Marsh, told **MORE** that they were fired two months after giving their testimony. Each says that the reason they were given was misuse of parking privileges. Both women say they filed EEOC retaliation claims against the *Journal*, but they decided not to pursue the matter further since it would be too difficult to prove. "I didn't have the time or the money," Guntle says. "But I don't regret testifying in the Tilley case. What they did was wrong. I'd do it again in a heartbeat." (Repeated calls to Bemis and Jendrusch went unreturned; Jeffrey Johnson, the lawyer who handled the suit for the paper, said his client did not wish to comment.)

Lilly Ledbetter and the Supreme Court

But despite the confirming testimony of coworkers, Tilley's case soon hit a judicial wall. In June 2007, the Supreme Court issued a landmark decision in a gender discrimination case that pulled the rug out from under plaintiffs alleging all kinds of job discrimination. Lilly Ledbetter, 70, had sued the Goodyear Tire and Rubber Company under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin; she was awarded \$360,000 as compensation for receiving at least 15 percent less pay than her male counterparts throughout her career as a plant supervisor in Gadsden, Alabama. Ledbetter had sensed her paychecks were smaller, she said, but had no proof until she received an anonymous letter, just before she retired, listing her salary and that of three male employees with the same job description. Goodyear appealed the decision, and the case made its way to the Supreme Court, which ruled that Ledbetter was not entitled to the money. Writing for the majority, Justice Samuel Alito said that Ledbetter's claim was "untimely" because an EEOC claim must be filed no more than 180 days after a discriminatory act has occurred.

To civil rights advocates and others, the ruling didn't make sense. Not only had Ledbetter been in the dark about the pay difference for most of her career, but the disparity also continues to this day, because she draws smaller pension checks than her male counterparts. In a vigorous dissent, Justice Ruth Bader Ginsburg wrote that "the ball is in Congress's court," urging lawmakers "to correct this parsimonious reading of Title VII."

For its part, the *Denver Business Journal* had already been arguing that some of the alleged acts of discrimination against Tilley had taken place too long before she made her filing to the EEOC. On November 6, 2007, federal district Judge Lewis T. Babcock granted the paper's motion for summary judgment and dismissed Tilley's case. Neither Babcock nor the paper's lawyers cited the Ledbetter case specifically, but the timing of that highly publicized ruling could not have been worse, Bangert says. "Ledbetter came up exactly when this was going to summary judgment. It did affect my client, and it's affecting lots of other cases."

Tilley appealed in February of this year, then settled for an amount she cannot disclose. (She cannot speak about the case at all.) Bangert calls the case's resolution an "unjust result and a failure of the legal system to remedy the real-life wrongs suffered every day by older women."

With the settlement money in her bank account this past spring, Tilley paid her son, now 11, to shred the piles of documents, some a foot high, that cluttered her dining room for almost four years. It took him several weeks to fill several dozen large plastic garbage bags, which he carried out to the curb for recycling. Free to move on with her life, Tilley recently switched careers, finding more satisfaction and freedom in selling houses for her husband's real estate business. The timing was unfortunate, of course, given this year's housing meltdown. But Tilley is hopeful. "Real estate is cyclical," she says. "It will cycle back."

Congress Steps In

"When women come to our office, they know they have been treated unfairly," attorney Lazar says. "But many of them can't conceive, after the sacrifices they have made, that they will be cast aside -- not promoted, or worse: terminated and given very little in terms of severance for their lifetime of dedication and loyalty." **Often an employee's first reaction, Bangert notes, is to blame herself: "If only I had done this or that better. If I had been more polite..."**

For a generation of women who witnessed historic strides in abolishing discrimination based on race, religion, disability, sexual orientation and, yes, gender, it can be almost impossible to fathom that they might now be getting pushed out simply because they have reached a certain age. But recognizing an inequity is always the first step in resolving it, and by filing an increased number of complaints with the EEOC, women may have set the stage for the judiciary to take a second look at "age-plus" cases.

In a somewhat surprising change of course, the Supreme Court handed down several rulings this year favoring workers over employers. Perhaps the most important was a seven-to-one decision on June 19 that said, in effect, companies must prove that workforce reductions are based on "reasonable factors other than age." The case involved layoffs at the Knolls Atomic Power Laboratory, a federal research center in upstate New York where 31 people were let go, 30 of whom were over 40. Although Justice David Souter, in writing for the majority, acknowledged that the decision would make it more difficult for employers to defend themselves, he said the court had to follow the law -- ADEA -- "the way Congress wrote it."

The Lilly Ledbetter decision, with its ramifications for workplace discrimination of all types, touched off a firestorm. Congress did, as Ginsburg urged, "take up the matter," in a bill sponsored by Representative George Miller, a Democrat from California. The Lilly Ledbetter Fair Pay Act states that each discriminatory paycheck is a separate act of bias, triggering a new 180-day window for filing. The bill passed the House in July 2007 but fell four votes short in the Senate in late April 2008. Both Hillary Clinton and Barack Obama returned to Washington from the campaign trail to vote in the bill's favor; John McCain did not but told reporters that if he had, he would have voted against the legislation because it "opens us up for lawsuits, for all kinds of problems and difficulties."

As **MORE** went to press, the bill was expected to be reintroduced in the Senate; if it hasn't come up for a vote before the new Congress in January, it will have to be reintroduced in the House as well. Meanwhile, the barbs against older Americans keep coming -- many now aimed squarely at McCain himself, who, at 72, may end up being the oldest person ever to be inaugurated as president. (A new book, *72 Things Younger than John McCain*, lists six dozen familiar things -- duct tape, the Jefferson Memorial, statehood for Alaska, area codes -- that came into existence after his birth.)

A Public Apology

Judy Yates says she knows all about unfair assumptions -- she was specifically trained to avoid making them. During her 23 years as director of the Pinellas County Extension Office in Largo, Florida, Yates says she attended frequent seminars on employment law given by the county's human rights division. Good anti-bias training, she learned, acknowledges that everybody uses stereotypes about others to sort out and understand the world. These stereotypes, however, can be unfair or untrue. (Not all older workers are inflexible or computerphobic, for example; not all members of Generation X or Y are tech-savvy.) And operating from those prejudices on the job can run afoul of civil rights laws.

With that in mind, Yates stresses, she made sure to look carefully at each of her employees, noting their individual strengths, skills, education, and interests as she made decisions on hiring, job assignments, and promotions. But according to the complaint she later filed in federal court against the Pinellas County Board of Commissioners, when Yates herself was up for a promotion at age 55, the job went to "a younger person with less seniority and [fewer] qualifications."

When she interviewed for the position, Yates says, her supervisor asked about her retirement plans. She also contends that soon after the other candidate was hired, she heard the woman playfully call the supervisor "Daddy." (When **MORE** contacted the woman who won the promotion and asked if she'd ever done this, she replied, "Absolutely not. That's absurd." The supervisor did not return calls for comment.)

Yates filed an age discrimination charge with the EEOC in 2003 but then decided not to pursue the matter, hoping the filing itself might prompt an improvement. But then, according to the complaint in Yates's suit, two of her supervisors "engaged in a pattern of harassing and retaliatory conduct": Her responsibilities were "taken away or reduced"; "false rumors were spread"; she was told that her job was in jeopardy "because she filed a charge of discrimination"; and she was "threatened with baseless legal action." Yates received no performance evaluation or cost-of-living raise in 2004. On January 19, 2005, she filed a second EEOC charge, this time alleging both age

discrimination and retaliation. **Her complaint said, in part, that she believed that "after 23 years of excellent service to the county, I will be fired or my duties will continue to be reduced to the point [where] I have no authority to perform my job."** Later that month, she was let go. A county official arrived at her office, she says, and told her she had less than two hours to leave the premises; meantime, a sheriff's deputy waited. "I'd never been terminated in my life until then," Yates adds.

In October of that year, after once again obtaining a right to sue notice from the EEOC, Yates filed a federal lawsuit claiming age discrimination, harassment, and retaliation. A spokeswoman for Pinellas County said officials there did not wish to speak for this article, but in response to the suit, the Pinellas County Board of Commissioners denied engaging in the unlawful employment practices that Yates alleged. Tracey Jaensch, the lawyer hired by the county to defend the suit, told **MORE** that the woman who won the promotion was "also over 40, if not by much," as was Yates's replacement. In the summer of 2006, after depositions had begun, the county offered a settlement of \$60,000. The money was enough to cover Yates's deposition and attorney fees, with about \$20,000 left over. And although she didn't get exactly what she wanted -- an admission of guilt and an apology -- Yates did receive a measure of satisfaction from another concession in the settlement. In a small, fragrant rose garden within the rambling, 160-acre Florida Botanical Gardens, an illuminated bronze plaque reads: DR. JUDY YATES ROSE GARDEN . . . EVERY GARDEN BEGINS WITH A DREAM. Dedicating the space to her was the county's idea, she says: "They knew the garden would be a very enticing thing for me." Yates now works part-time as an environmental consultant. And because she lives just two miles from the garden, she visits several times a week to work as a volunteer. Each glance at the plaque gives her a sense of vindication, as if she's received a public apology for what she says was her forced early retirement.

"This was never about money," she says. "It was about what was right and what was wrong."

Amy Engeler is a freelance writer in New York City. After looking into cases of workplace bias, she says she feels fortunate to be self-employed.

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