

# **Value Proposition or Verdict Risk:**

## **Perceptions and Misperceptions of the Legal Rights and Risks Of Older Workers For the Human Resources Professional**

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As labor and employment lawyers, we often receive telephone calls from employers seeking advice concerning how best to manage legal risks associated with problematic employees – those who routinely fail to meet employer expectations; are chronically absent or abuse leave policies; misappropriate confidential business information to open competing businesses; disparage employer operations on Facebook or other social media outlets; or threaten workplace violence, among other issues.<sup>1</sup> Employers see that “company loyalty” is a disappearing trait and understand that employees increasingly perceive their employers as sources of paychecks rather than as providers of valuable career opportunities.

Counter to the above concerns and perceptions, in August 2012, Braun Research, Inc., on behalf of Adecco, surveyed 501 hiring managers regarding their perceptions of and concerns about hiring mature workers.<sup>2</sup> While seventy-two percent (72%) of hiring managers reported that mature workers needed to develop more technological know-how, as compared to fewer than five percent (5%) of hiring managers sharing such concerns as to Millennials, hiring managers also reported that they were three times more likely to hire a mature worker (60%) than they were to hire a Millennial (20%).<sup>3</sup> In support of this preference, hiring managers conveyed that they were more likely to attribute the following positive traits, among others, to older workers as compared to Millennials: (1) reliable (91%) and professional (88%); (2) good

listeners (77%); (3) organized (77%); (4) positive work ethic (75%); (5) good problem solvers (61%); and (6) productive (53%).<sup>4</sup>

In a joint Society for Human Resource Management (SHRM)-AARP study conducted in April 2012 to evaluate companies' workforce planning activities in preparation for the numerical decline in younger workers in the workforce,<sup>5</sup> seventy-three percent (73%) of human resources professionals identified the loss of older workers from their organization as a "crisis," "problem," or "potential problem" for the coming decade.<sup>6</sup> Further, fifty-one percent (51%) of human resources professionals surveyed indicated that "writing in English was the top basic skills gap observed between younger and older workers," and fifty-two percent (52%) of human resources professional "reported professionalism/work ethic as the top applied skills gap between younger and older workers."<sup>7</sup>

These recent surveys echo prior studies similarly finding that employers value older workers' knowledge, skills and abilities. A 2003 survey by SHRM reported that seventy-two percent (72%) of human resources professionals perceived older workers as a hiring advantage because older workers: (1) were more willing to work different schedules; (2) had invaluable experience; and (3) had the skills and were willing to act as mentors.<sup>8</sup> Employers' concerns about employee loyalty and performance juxtaposed alongside the above-referenced studies of older workers' value would indicate that employers likely focus recruiting and retention efforts on older workers. The facts, however, do not so clearly support such a conclusion.

According to a U.S. Government Accountability Office (GAO) report released by the Senate Special Committee on Aging in 2012, "the number of long-term unemployed workers aged fifty-five (55) and older has more than doubled since the recession began in late 2007."<sup>9</sup> About fifty-five percent (55%) of unemployed older workers, or 1.1 million, have been

unemployed for more than six (6) months, up from twenty-three percent (23%), or less than 200,000, in 2007.”<sup>10</sup> As recently as February 13, 2013, the U.S. Department of Labor (DOL) reported that “the age group most impacted by long-term unemployment – that is, 27 weeks or longer – is workers 55 and older.”<sup>11</sup> Because of the decreasing availability of younger workers and the substantial impact the recession has had on older workers, among other factors, increasing attention is being directed to the recruitment, hiring, and retention of older workers. This monograph furthers the conversation by identifying and analyzing some of the common perceptions and misperceptions employers might have about the legal rights and risks associated with older workers.

### **Point I**

#### **(Mis)Perceptions 1 and 2: Older Workers Will Sue for Age Discrimination And Will Involve the Equal Employment Opportunity Commission.**

Some employers are hesitant to hire older workers because of concerns that the employer is likely to suffer an age discrimination lawsuit if the older worker is subjected to discipline, demotion, or, even worse, lay off, or termination.<sup>12</sup> In 2009, however, the U.S. Supreme Court held that the burden of proof applicable to federal age discrimination claims is heavier for an employee to meet than the burden of proof applicable to other types of discrimination claims, including race and gender claims, thereby rendering federal age discrimination claims a more difficult proposition for employees. Further, as discussed below, statistics demonstrate that older workers are not as likely to assert claims as workers in other protected categories. With a full and accurate understanding of the legal risks associated with age discrimination claims, employers can fairly assess the exposures attendant to older workers as compared against the reported value of hiring and retaining such workers.

A. U.S. Supreme Court Makes Age Discrimination Claims More Difficult to Prove.

In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the United States Supreme Court held that an employee who asserts a disparate-treatment claim under the Age Discrimination in Employment Act (ADEA), the federal statute making age discrimination in employment unlawful, has the burden of proving “that age was the ‘but-for’ cause of the employer’s adverse decision.”<sup>13</sup> That is, an employee in an age discrimination case carries the heavy burden of demonstrating that his or her age was “the reason” for the employer’s adverse action against the employee about which the employee is complaining. Conversely, employees asserting claims for race or gender discrimination under Title VII of the Civil Rights Act of 1964<sup>14</sup> (Title VII) or claims for disability discrimination under the American with Disabilities Act (ADA) must prove only that the protected characteristic (i.e., race, gender, or religion under Title VII or disability under the ADA) was “a motivating factor” in the employer’s adverse decision, even if other considerations also motivated the decision.<sup>15</sup> If an employee establishes under Title VII or the ADA that his or her protected characteristic was “a factor” that motivated the employer’s adverse decision, the burden of proof shifts to the employer to prove that it would have made the same decision even in the absence of the impermissible consideration.<sup>16</sup>

Unlike Title VII and the ADA, the ADEA does not allow an employee to “establish discrimination by showing that age was simply a motivating factor.”<sup>17</sup> Under the ADEA, “the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when [an employee] has produced some evidence that age was one motivating factor in that decision.”<sup>18</sup> Instead, the employee always retains the burden of proving that age was “the reason” for the employer’s adverse decision.<sup>19</sup>

It is also useful to note that the remedies available under the ADEA are different than those available under Title VII and the ADA.<sup>20</sup> In this regard, in cases involving intentional age discrimination, successful employees cannot recover compensatory (i.e., emotional distress)<sup>21</sup> or punitive<sup>22</sup> damages. *In lieu* of such damages, the ADEA provides for “liquidated damages.”<sup>23</sup> On the other hand, compensatory and punitive damages may be awarded in cases involving intentional discrimination based on a person’s race, color, national origin, sex (including pregnancy), religion, disability, or genetic information (all cases where an employee need not prove that the protected characteristic was “the reason” for the adverse action). Damages under Title VII and the ADA, however, are subject to maximum limits in relation to the number of persons employed by the employer.<sup>24</sup> The ADEA, however, imposes no corresponding limit on the damages.

**B. Age Discrimination Charge Filings With the Equal Employment Opportunity Commission Lag Other Claims and Have Been Decreasing.**

In 2012, as reported by the U.S. Equal Employment Opportunity Commission (EEOC), the five most commonly-filed claims under the major federal employment civil rights laws (Title VII, the ADA, and the ADEA) were retaliation (includes all statutes), race, gender, disability, and age. Notably, as of 2012, age discrimination filings (22,857) lagged in fifth place behind claims for retaliation (37,836), race discrimination (33,512), gender discrimination (30,356), and disability discrimination (26,379).<sup>25</sup> Further, while age discrimination claims spiked to a record high in 2008, the number of age discrimination claims filed with the EEOC has declined each year since 2008 despite the fact that the total number of charges (covering retaliation and all protected categories) filed with the EEOC in 2008 (95,402) versus 2012 (99,412) has increased.<sup>26</sup>

The recent decline in age discrimination claims may be attributable, in part, to the *Gross* opinion discussed above and, in part, to the recession, among other factors. In any event, the decline in EEOC age discrimination charges, whether as the result of *Gross*, the economy, or a combination of multiple factors is welcome relief for employers. Indeed, in 2009, just following the 2008 height of age discrimination claim filings with the EEOC, Jury Verdict Research, as reported by Manpower Group, concluded that of all discrimination lawsuits, age discrimination lawsuits: (1) resulted in the largest verdicts against employers; and (2) were the least likely to be won by employers (31% success rate).<sup>27</sup>

Arguably, however, the decline in claims by older workers may be short-lived. As the U.S. workforce ages, resulting in ever-increasing numbers of workers falling within the protected age class, and as older workers continue to suffer significant unemployment and under-employment rates, as indicated by the DOL, it seems likely that age claims will also increase.<sup>28</sup> Further, it is important to note that the EEOC has included as an enforcement priority in its current Strategic Enforcement Plan the elimination of barriers in recruitment and hiring for older workers.<sup>29</sup> In this regard, the EEOC has noted its intent to focus on “*class-based* recruitment and hiring practices that discriminate against . . . older workers,” among other workers.<sup>30</sup> In light of these dynamics, employers are well-advised to audit their current recruiting and hiring practices as well as their employment policies and procedures to ensure that each is aligned with future hiring and retention needs and is in compliance with federal, state, and local age discrimination laws.

## Point II

### (Mis)Perception 3: Older Workers Take More Medical Leave.

Under the Family and Medical Leave Act (FMLA), eligible employees<sup>31</sup> of covered employers are entitled to take unpaid, job-protected leave for certain family and medical reasons. Specifically, eligible employees may take up to twelve workweeks of leave in a twelve-month period:

- For the birth, adoption, or placement for foster care of a child (to be taken within one year after the birth, adoption, or placement);
- To care for the serious health condition of the employee's spouse, child, or parent;
- To care for the employee's own serious health condition; or
- To address any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty."<sup>32</sup>

Further, an eligible employee is entitled to 26 workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness.<sup>33</sup> As part of FMLA leave generally, employees are entitled to the continuation of certain group benefits under the same terms and conditions as if the employee had not taken leave.

Some employers shy away from hiring older workers because the employers perceive that older workers have more health issues requiring more frequent medical leaves. Very recent data made available by DOL, however, suggests that, at least as concerns documented FMLA leave, such perceptions are inaccurate. In 2012, DOL conducted an extensive survey on the use of FMLA leave. Based on the survey results, released in February 2013, an average of thirteen percent (13%) of all employees surveyed (aged 18-82) took leave for an FMLA reason (*whether the employee was eligible for FMLA leave or not*) during the 12-month period preceding the

survey.<sup>34</sup> Within this overall average, DOL determined that approximately fourteen percent (14%) of employees aged 50-82 took leave for an FMLA reason in the 12 months prior to the survey, a percentage only slightly higher than the percentage of employees aged 34-49 (13.3%) and employees aged 18-33 (approximately 13%) taking leave for an FMLA reason in the 12 months prior to the survey.<sup>35</sup> Accordingly, based on the DOL's statistics measuring FMLA usage by age group, it is clear that older workers (ages 50+) do not require leave on a significantly greater basis than workers aged 18-33 or 34-49.

### **Point III**

#### **(Mis)perceptions 4 and 5: Older Workers Have More Work-Related Injuries And Require More ADA Accommodations.**

Another commonly-held belief about workers is that, as they age, the ability to handle both mental and physical demands of a job declines.<sup>36</sup> Such perceptions implicate employer concerns about both workers' compensation exposures and claims under the ADA.

##### **A. Research Shows that Workers Compensation Costs for Workers Ages 35 and Older Do Not Differ Significantly Within that Age Group.**

Research reveals that while it is accurate that both physical and mental decline begin by age 30, the rate of decline, particularly as concerns mental tasks, is much slower than initially believed.<sup>37</sup> In 2011, NCCI Holdings, Inc., issued a report finding that "an aging workforce appear[ed] to have a far less negative impact on workers compensation claim costs than might have been thought."<sup>38</sup> In October 2012, NCCI extended its research and reported findings that there was little statistical distinction in workers compensation costs among workers aged 35 and their older cohorts.

NCCI's research finds that, while workers compensation costs for workers aged 35 and older are certainly greater than for workers ages 16-34, workers aged 35 and older have similar workers compensation costs when compared among others in the 35+ age group.



Correspondingly, DOL's research shows comparable rates of medical leave usage among all workers ages 18-82. *See* Part II above. Insofar as research shows that older workers do not impose greater workers compensation costs on employers or use notably more medical leave than their younger co-workers, one might assume that older workers also do not have substantially *more* on-the-job injuries. Such an assumption would be accurate: older workers do not, in fact, have more injuries on-the-job than younger workers,<sup>39</sup> though the injuries incurred by older workers tend to be more expensive. This distinction, however, is also becoming less significant as workers ages 18-34 begin to incur more of the costlier injuries (i.e., rotator cuff sprains, knee injuries) as compared to the less-expensive injuries (i.e., lower back sprains).<sup>40</sup>

**B. The Americans With Disabilities Act Protects Persons With Disabilities.**

The ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.<sup>41</sup> The ADA generally applies to any employer having 15 or more employees.<sup>42</sup>

In order to be entitled to the protections of the ADA, an employee must be a “qualified individual with a disability.” The ADA defines a “disability” as: (1) a physical or mental impairment that substantially limits one or more of the major life activities; (2) having a record of such impairment; or (3) being regarded as having such impairment.<sup>43</sup> Even if a person has a disability, however, that person must also be “qualified” for the position to obtain the protections of the ADA.

A “qualified individual” is one who satisfies the “requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires,”

and who can perform the essential functions of a job with or without a reasonable accommodation.<sup>44</sup> The “essential functions” of a job are “the fundamental job duties of the employment position the individual with a disability holds or desires,” but does not include marginal functions of the position. An employee whose disability is so severe that it poses a “direct threat,” which is defined as a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation,” is not qualified for the job.<sup>45</sup>

C. The ADA Requires an Interactive Process to Determine a Reasonable Accommodation.

An employer covered by the ADA is required to make an accommodation to the “known” physical or mental limitations of an otherwise qualified individual with a disability.<sup>46</sup> “Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities.”<sup>47</sup>

An employer is not required to make an accommodation if it would impose an “undue hardship” on the employer. “Undue hardship” is defined as an “action requiring significant difficulty or expense” when considered in light of the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer’s operation. Whether an accommodation would impose an undue hardship is determined on a case-by-case basis. “In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.”<sup>48</sup>

A study published in December 2010 reported on the occupational rehabilitation implications of combined age and disability discrimination (“Age-Disability Study”). The Age-Disability Study provides useful guidance in assessing the role of the ADA in recruiting and retaining older workers. In this regard, the Age-Disability Study indicated that “[t]he prevalence of disability increases substantially with age. While 10% of adults younger than 40 report a work limiting disability, this grows to one-quarter of 60 year-olds and one-third of 65 year-olds. Research . . . indicates that by the age of 50, a person’s first serious medical problem will occur, with a 25% chance that it will be a life-long condition.”<sup>49</sup> Thus, while older persons have a “substantially increased” likelihood of disability in comparison to younger persons, when evaluated in conjunction with DOL’s report on medical leave usage and NCCI’s findings on workers’ compensation costs, it is clear that older persons with disabilities either : (1) do not enter the workforce at a high enough rate to impact workers compensation injuries and costs or medical leave usage; or (2) the older workers disabilities simply do not result in increased workers compensation injuries and costs and do not result in greater medical leave usage.

This outcome may be explained, at least in part, by an additional conclusion reached in the Age- Disability Study. In this regard, the researchers found that “employment discrimination claims that originate from older workers and those with disabilities appear to be concentrated within a subset of issues that include reasonable accommodation, termination, and also workplace retaliation as a basis.”<sup>50</sup> Insofar as older workers’ disability-related claims have been identified as falling into these three categories, certain recommendations concerning older workers may provide useful guidance to employers as the business need to recruit and retain such workers increases going forward.

**D. Best Practices for Accommodating Older Workers.**

It should go without saying that a person's age, or the fact of aging itself, is not a disability. Like all workers, some older workers may have health conditions that require reasonable accommodation. Other older workers, however, might not have any disability at all or might have a disability that does not affect the worker's ability to perform the essential functions of the job at issue.

As discussed above, a reasonable accommodation is a change in the workplace or the way in which a job is performed which will allow an otherwise qualified employee to perform the essential functions of a job. While an employer is never required to remove an essential job function as a reasonable accommodation or to incur an undue hardship, an employer is required to be creative and work diligently with the employee (or applicant) to find an accommodation that will enable the performance of the job.<sup>51</sup> This process of the employer working with the employee is referred to as the "interactive process."

The EEOC identifies multiple possible reasonable accommodations for consideration during the interactive process:

- (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.<sup>52</sup>

Because of the indisputable increase in older workers that will occur over the foreseeable future, the Age-Disability Study specifically focused on the need for businesses to "identify proven strategies for encouraging employees to return to a productive role at work as soon as is

reasonable.”<sup>53</sup> The researchers found, however, that “commonly provided workplace accommodations often target younger employees, while older employees may not receive the accommodations that they need to be productive.”

Specifically, the study found that a majority of older workers require accommodations for visual and hearing impairments, while human resources professionals reported that “employers were much less familiar with accommodations for visual and hearing impairments than for other types of disabilities, felt such accommodations were more difficult to make, and had made such accommodations less frequently.”<sup>54</sup> Notably, the most commonly-cited bases of discrimination by older workers who filed joint ADA/ADEA charges involved orthopedic/structural back impairment, nonparalytic orthopedic impairment, and heart conditions, as well as diabetes and cancer.<sup>55</sup> As noted in the Age-Disability Study, “with special attention to the more common conditions . . . among older workers, employers can be more proactive regarding interventions and/or accommodations.” By way of example, employers could “do an ergonomic assessment of positions requiring heavy lifting”; implement wellness programs that focus on nutritional, exercise, and other life style changes to lower the risk of heart disease; have employee assistance programs that provide depression support services, “perhaps targeting the issues of older workers”; and having in place effective flex-time policies.<sup>56</sup>

The Age-Disability Study also found that 60-70% of ADA and/or ADEA charges cited a “termination-related issue.”<sup>57</sup> This statistic indicates that older workers are leaving (or being forced out) of the workforce before they want to do so. One explanation for older workers’ premature departure from the workforce is that employers may be incentivized to terminate older workers because of increased healthcare costs and higher salaries. Another underlying cause may be a perceived skills gap between what employers need and what older workers are trained

to do. “Targeted workplace training and development efforts may assist in heightening the likelihood that senior workers will receive requisite updates to skills and new processes.”<sup>58</sup>

An additional recommendation, supported by the EEOC and the Age-Disability Study, is for an employer to have in place a return-to-work or disability management program to assist human resources professionals in creating an organizational structure that supports accommodations and to assist supervisors in managing employees with disabilities within the requirements of the law. Return-to-work programs and appropriate anti-discrimination policies also assist employees in articulating accommodation needs. In this regard, employees who are knowledgeable about their rights are better able to articulate their needs, and, in turn, employers are better able to vet possible accommodations.

The point of the ADA is not, however, to force employers to reduce or lower performance expectations for employees who are physically or mentally incapable of performing the essential functions of the position. Thus, if a 65-year old woman who uses a cane for mobility is hired for a warehouse position and later states she is having trouble keeping up with the physical demands of the job, dropping boxes, and failing to meet the productivity requirements for her position, the employer should rely on the ADA’s interactive process to determine the best way to accommodate those issues, if possible. The same is true if the 65-year old warehouse employee begins to exhibit behavior indicative of cognitive decline – i.e., regularly forgets where her work station is, insists that it is 1983 instead of 2013, or asks each day for instructions on how to perform her job. If the employer can reasonably accommodate the impairment(s), it must do so. If the employer cannot, the employer retains the right to terminate the worker’s employment.

One highly useful resource available to employers is the “Job Accommodation Network (JAN).” JAN is a service of the Office of Disability Employment Policy of the DOL. Employers can anonymously (or not) contact JAN to request assistance in identifying appropriate accommodations for most any disability. JAN has substantial resources and research available that it utilizes in providing guidance to employers and even proposing possible accommodations.<sup>59</sup> If JAN is unable to identify a viable accommodation, JAN will send the employer a statement to that effect. As such, JAN is helpful not only as a practical resource for accommodating employees, but also as a legal resource to support an employer’s claim that it engaged in good faith in the interactive process.<sup>60</sup>

## **CONCLUSION**

As much of the available data discussed above demonstrates, an employer is not typically faced with significantly greater legal risk by hiring older workers. Indeed, research indicates that many of the health and life concerns facing older workers (and that may otherwise impede their hiring (i.e., potential need for medical leave, workers’ compensation costs)) are not noticeably different than those facing younger workers. Moreover, older workers are generally perceived to have many characteristics that employers prefer employees to have. In light of the increasing business need to hire older workers, employers should take a fresh look at their policies and programs affecting the recruitment, hiring, and retention of older workers.

## NOTES & BIBLIOGRAPHY

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<sup>1</sup> For purposes of this monograph, references to “older” or “mature” workers refer to persons who are 50 years of age or older as much of the research focused on this demographic similarly defines “older” or “mature” worker.

<sup>2</sup> Adecco Staffing (research by Braun Research, Inc.), “Adecco Staffing Mature Worker Survey,” conducted August 23-30, 2012, <http://www.adeccousa.com/articles/Adecco-Staffing-Mature-Worker-Survey.html?id=204&url=/pressroom/pressreleases/pages/forms/allitems.aspx&templateurl=/AboutUs/pressroom/Pages/Press-release.aspx>, (last accessed April 7, 2013).

<sup>3</sup> “Adecco Staffing Mature Worker Survey,” conducted August 23-30, 2012.

<sup>4</sup> “Adecco Staffing Mature Worker Survey,” conducted August 23-30, 2012.

<sup>5</sup> Christina Lee, SHRM Research Project Manager, “SHRM-AARP Strategic Workforce Planning,” PowerPoint Presentation, April 9, 2012, <http://www.slideshare.net/shrm/shrm-aarp-2012-strategic-wpfinal-12326551>, (last accessed April 7, 2013).

<sup>6</sup> Lee, “SHRM-AARP Strategic Workforce Planning,” PowerPoint Presentation, Slide 9.

<sup>7</sup> Lee, “SHRM-AARP Strategic Workforce Planning,” PowerPoint Presentation, Slides 10 & 12.

<sup>8</sup> Jessica Collison, SHRM Survey Program Manager, “SHRM/NOWCC/CED Older Workers Survey,” p. 2, Chart 2 (Society for Human Resource Management 2003), <http://www.shrm.org/Research/SurveyFindings/Documents/SHRM%20NOWCC%20CED%20Older%20Workers%20Survey.pdf>, (last accessed April 7, 2013).

<sup>9</sup> United States Senate Special Committee on Aging. *Press Room: Aging Committee Hearing Focuses on Reducing Long-Term Unemployment Among Older Workers*. May 15, 2012, <http://www.aging.senate.gov/record.cfm?id=336801>, (last accessed on April 7, 2013) (emphasis added).

<sup>10</sup> *Press Room: Aging Committee Hearing Focuses on Reducing Long-Term Unemployment Among Older Workers*. May 15, 2012.

<sup>11</sup> Seigel, Ben, *Work in Progress* (Official Blog of the U.S. Department of Labor), “Connecting Older Workers, Long-Term Unemployed With Jobs,” February 19, 2013, <http://social.dol.gov/blog/connecting-older-workers-long-term-unemployed-with-jobs/>, (last accessed April 7, 2013).

<sup>12</sup> Under the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. § 621, *et seq.* (and similarly patterned state and local laws), it is “unlawful for an employer—

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or
- (3) to reduce the wage rate of any employee in order to comply with” the ADEA.

29 U.S.C. § 623(a).

<sup>13</sup> *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009).



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<sup>14</sup> Under Title VII, 42 U.S.C. § 2000e-2(a), it is unlawful “for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

<sup>15</sup> *Gross*, 557 U.S. at 174.

<sup>16</sup> *Id.* at 180.

<sup>17</sup> *Id.* at 174.

<sup>18</sup> *Id.* at 180.

<sup>19</sup> *Id.* at 176.

<sup>20</sup> Successful plaintiffs in most any retaliation or discrimination case— regardless of the protected characteristic — may recover attorneys’ fees, expert fees, and court fees. See U.S. Equal Employment Opportunity Commission, “Remedies for Discrimination” <http://www.eeoc.gov/employers/remedies.cfm>, (last accessed March 14, 2013).

<sup>21</sup> “Compensatory damages pay victims for out-of-pocket expenses caused by the discrimination (such as costs associated with a job search or medical expenses) and compensate them for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life).” See EEOC, “Remedies for Discrimination.”

<sup>22</sup> “Punitive damages may be awarded to punish an employer who has committed an especially malicious or reckless act of discrimination.” See EEOC, “Remedies for Discrimination.”

<sup>23</sup> 29 U.S.C. § 626(b).

<sup>24</sup> 42 U.S.C. §§ 1981a and 2000e-5(g).

<sup>25</sup> U.S. Equal Employment Opportunity Commission, “Charge Statistics FY 1997 Through FY 2012”, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last accessed on February 28, 2013).

<sup>26</sup> EEOC, “Charge Statistics FY 1997 Through FY 2012.”

<sup>27</sup> Jury Verdict Research by Thompson Reuters, as reported by Manpower Group at [http://manpowergroupblogs.us/employment\\_blawg/2009/11/16/latest-jury-verdict-research/](http://manpowergroupblogs.us/employment_blawg/2009/11/16/latest-jury-verdict-research/), November 2009 (last accessed April 7, 2013).

<sup>28</sup> Senate Committee, *Press Room: Aging Committee Hearing Focuses on Reducing Long-Term Unemployment Among Older Workers*. May 15, 2012.

<sup>29</sup> U.S. Equal Employment Opportunity Commission, “Strategic Enforcement Plan, FY 2013-2016” <http://www.eeoc.gov/eeoc/plan/sep.cfm> (last accessed March 14, 2013).

<sup>30</sup> EEOC, “Strategic Enforcement Plan, FY 2013-2016.”

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<sup>31</sup> Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601, *et seq.* In order to be eligible to take leave under the FMLA, generally, an employee must: work for a covered employer; have worked 1,250 hours during the 12 consecutive months prior to the start of leave; work at a location where the employer has 50 or more employees within 75 miles; and have worked for the employer for 12 months. (The latter-referenced 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave. In general, only employment within seven years is counted unless the break in service is: (1) due to an employee’s fulfillment of military obligations; or (2) governed by a collective bargaining agreement or other written agreement). 29 U.S.C. § 2601, *et seq.*

<sup>32</sup> 29 U.S.C. § 2612(1,2).

<sup>33</sup> 29 U.S.C. § 2612(3,4).

<sup>34</sup> Abt Associates, Inc., conducted for and released by the U.S. Department of Labor, “Family and Medical Leave in 2012: Technical Report,” Sept. 7, 2012 (updated Feb. 4, 2013), <http://www.dol.gov/asp/evaluation/fmla/FMLATEchnicalReport.pdf>, p. 64 (last accessed April 7, 2013).

<sup>35</sup> Abt Assocs., “Family and Medical Leave in 2012: Technical Report,” Sept. 7, 2012 (updated Feb. 4, 2013).

<sup>36</sup> Bjelland, Melissa J.; Bruyere, Suzanne M.; von Schrader, Sarah; Houtenville, Andrew J.; Ruiz-Quintanilla, Antonio; Webber, Douglas A. *Journal of Occupational Rehabilitation*, “Age and Employment Discrimination: Occupational Rehabilitation Implications.” 2010 December; 20(4): 456-471. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2980632/>, (last accessed April 7, 2013).

<sup>37</sup> Restrepo, Tracy, and Shuford, Harry, NCCI Research Brief, “Workers Compensation and the Aging Workforce: Is 35 the New ‘Older Worker?’” October 2012, [https://www.ncci.com/documents/Research\\_Brief\\_Aging\\_Workforce-2012.pdf](https://www.ncci.com/documents/Research_Brief_Aging_Workforce-2012.pdf), (last accessed April 7, 2013) *citing* Ray C. Fair, “Estimated Age Effects in Athletics Events and Chess,” *Experimental Aging Research*, 33:37-57, 2007.

<sup>38</sup> Restrepo, “Workers Compensation and the Aging Workforce: Is 35 the New ‘Older Worker?’” October 2012, p. 2.

<sup>39</sup> Restrepo, “Workers Compensation and the Aging Workforce: Is 35 the New ‘Older Worker?’” October 2012, p. 21.

<sup>40</sup> Restrepo, “Workers Compensation and the Aging Workforce: Is 35 the New ‘Older Worker?’” October 2012, p. 3, 21.

<sup>41</sup> U.S. Equal Employment Opportunity Commission (EEOC), “Americans with Disabilities Act: Questions and Answers,” <http://www.ada.gov/q%26aeng02.htm>, (last accessed April 8, 2013).

<sup>42</sup> 42 U.S.C. §12111(5)(A).

<sup>43</sup> 42 U.S.C. §12102(2). The Code of Federal Regulations further defines the terms “physical or mental impairment,” “substantially limits,” and “major life activities.” “Physical or Mental Impairment” is defined as:

- (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

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(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

An impairment “substantially limits” an individual if it “substantially limits the ability of [the] individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.” Finally, “major life activities” are defined to include functions such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, speaking, breathing, learning, and working. *See* 29 C.F.R. § 1630.2 (h), (i), (j).

<sup>44</sup> 29 C.F.R. § 1630.2(m).

<sup>45</sup> 29 C.F.R. § 1630.2(r).

<sup>46</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>47</sup> EEOC, “Americans with Disabilities Act: Questions and Answers.” *See also* 29 C.F.R. § 1630.2(o).

<sup>48</sup> EEOC, “Americans with Disabilities Act: Questions and Answers.” *See also* 29 C.F.R. § 1630.2(p).

<sup>49</sup> Bjelland, “Age and Employment Discrimination: Occupational Rehabilitation Implications.” 2010 December; 20(4): 456-471.

<sup>50</sup> Bjelland, “Age and Employment Discrimination: Occupational Rehabilitation Implications.” 2010 December; 20(4): 456-471.

<sup>51</sup> U.S. Equal Employment Opportunity Commission (EEOC), “Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,” <http://www.eeoc.gov/policy/docs/accommodation.html>, (last accessed April 8, 2013). Sometimes, too, there are no such accommodations and the employee’s employment must (and may be lawfully) terminated. This is true irrespective of the employee’s age.

<sup>52</sup> 29 C.F.R. § 1630.2(o)(2).

<sup>53</sup> Bjelland, “Age and Employment Discrimination: Occupational Rehabilitation Implications.” 2010 December; 20(4): 456-471.

<sup>54</sup> Bjelland, “Age and Employment Discrimination: Occupational Rehabilitation Implications.” 2010 December; 20(4): 456-471.

<sup>55</sup> Bjelland, “Age and Employment Discrimination: Occupational Rehabilitation Implications.” 2010 December; 20(4): 456-471.

<sup>56</sup> Bjelland, “Age and Employment Discrimination: Occupational Rehabilitation Implications.” 2010 December; 20(4): 456-471.

<sup>57</sup> Bjelland, “Age and Employment Discrimination: Occupational Rehabilitation Implications.” 2010 December; 20(4): 456-471.

<sup>58</sup> Bjelland, “Age and Employment Discrimination: Occupational Rehabilitation Implications.” 2010 December; 20(4): 456-471.

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<sup>59</sup> The Job Accommodation Network is a comprehensive, free job accommodation resource that is available to employers to assist with determining the appropriate job accommodation when it is determined that such accommodation is necessary. *See* <http://askjan.org/index.html>.

<sup>60</sup> *See* <http://askjan.org/index.html>.