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# Age discrimination at work: How to fight back

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**FORTUNE**

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**Age discrimination complaints at work have increased in the past few years, and it's only getting harder to prove that you've been wronged.**

By Stephenie Overman, contributor

FORTUNE -- If you think your age has cost you your job -- or fear it might -- you have plenty of company.

The Equal Employment Opportunity Commission (EEOC) reports that the number of age discrimination charges has increased over the past few years, rising from 16,548 charges (21.8% of all claims) in 2006 to 22,778 (24.4% of all claims) in 2009.

But that's just "the tip of the iceberg" in this tough economy, says Laurie McCann, senior attorney for AARP. Many people don't file complaints, she says, because age discrimination is "incredibly hard to prove" and a 2009 Supreme Court decision, *Gross v. FBL Financial Services, Inc.*, has made it even harder. (The **court decided** that plaintiffs claiming that they were victims of age discrimination under the federal Age Discrimination in Employment Act should be held to a more stringent standard of proof than plaintiffs pursuing claims under other anti-discrimination laws.)

Many often decide that their financial and emotional resources are better spent looking for another job than fighting to get their old one back, McCann says. It's especially difficult for individuals. With a group layoff, "there is strength in numbers. People can pool their money and work together to make phone calls and interview attorneys. With an individual, it takes a strong, determined person."

## Taking preemptive measures

Instead of waiting until you're laid off and filing a complaint, it may be better to protect yourself sooner, says McCann.

"Take advantage of any sort of training, especially in computer skills and technology. Make sure you're not getting behind. Maintain your professionalism, down to your dress and hairstyle."

And, if you haven't gotten feedback from your manager recently, you should seek it out, McCann says. "If your manager is glossing over [your performance appraisal] ask, 'Are there any areas where you think I should look to improve?' Force them to give you some sort of feedback."

That can pay off in the courtroom (if it comes to that) because she says neither judges nor juries "look favorably" on cases "where someone has had glowing reviews up until they were terminated."

It also doesn't hurt to let your employer know that you're aware of your rights. Talk to your manager or someone in the HR department if you are worried about what you consider unfair practices or discriminatory comments. Let them know "I'm not going to go quietly," says McCann.

## Before you file a complaint

If you do feel the need to file an age discrimination complaint, you should consider some numbers first. First, the ADEA forbids age discrimination against people who are age 40 or older. (Some states have laws that also protect younger workers.) Second, does the company have 20 or more employees? The ADEA does not apply to smaller firms.

If you were included in a group layoff, or series of layoffs, at your company, you may be able to find statistical evidence that supports your claim. In such cases, the Older Worker Benefit Protection Act, an amendment to the ADEA, requires employers "to supply people who are in the position of

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being let go with information so they can determine whether the layoffs are falling disproportionately on older workers. It makes the employer ... [specify] who is getting laid off by age," says New York attorney Eric M. Nelson.

Compiling anecdotal evidence that supports your case is another solid approach. There's rarely a smoking gun, says attorney and author Lori B. Rassas, but there may be subtle indications of discrimination.

"Keep in mind, it's not just age, but age-related factors. Saying you have too much experience could be age related. Or, [saying] that you make too much money," she says.

Rassas, who is the author of *Employment Law: A Guide to Hiring, Managing and Firing for Employers and Employees*, recommends starting a journal as soon as you believe you are being targeted. "You want to have specific examples. When you get fired, it's too late."

But make sure your journal is a personal account. Don't overstep legal bounds, she adds. "You don't want to be recording things, or stealing" data from the company.

Employers frequently say that they fired someone for performance-related reasons and that's where Eric Nelson sees an advantage for the plaintiff.

"With older workers, you're dealing with people who have been in a position for a longer period of time," says Nelson. "I'll say, 'He didn't just wake up one morning and forget how to do his job. The employer found his performance okay for years.'"

As hard as it is to win an age discrimination case after you've lost a job, claiming that you weren't hired for a job because of age discrimination is even more difficult.

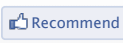
"It's harder to do," Rassas says, and usually "it's not worth it. The person doesn't have as much invested."

A big problem with failure-to-hire cases, Nelson says, is that "most people who are looking for work don't have the resources to litigate." Another is that they don't have a track record at the company to present to the jury.

With either type of age discrimination claim, the difficulty is that "proving you were discriminated against means showing what's in the mind of the person who fired you or who failed to hire you," he says.

That's no easy task, under any circumstances.

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luckysteg, 06/22/2011 11:04 AM

Article not really addressing everything. We take care of young women at work who get pregnant. They are protected. Don't know if you can ever totally take care of an aging population without screwing up businesses all together. I work in a factory. I am 53 years old right now. I am slowing just a little physically. I do see some sort of age discrimination in my opinion on a weekly basis. I see younger workers yelling at times at slower older workers. I see managers working with a couple of their older subordinates meaning they are getting coached for a sub par review. I work for one of the top companies in the world at what they do. I don't think they really have a policy to deal with an aging work force. All I ask is for consistency. Don't tout yourself as a great company and treat everyone equally. Just say the facts. We are in a business to make money and if you can't hack it get out. So what the government should do in my opinion is maybe give some companies bonus points (whatever they can do without subsidizing). Maybe recognize publicly companies that are valuing older folks. I think people though do have preconceived thoughts that older people won't be able to keep up with them and probably most of the time they are wrong. [show less](#)

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OldAtlantic, 06/22/2011 02:41 AM

As long as there is legal immigration including H-1b, age discrimination will be in the employer's interest. It will be impossible to fight this on an individual basis. Only restricting immigration will make employers want to treat workers well.

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