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**TRACING THE CONCEPTION AND MEANING OF
THE AGE DISCRIMINATION IN EMPLOYMENT ACT:
WHERE ARE WE WITH MANDATORY RETIREMENT?**

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ABSTRACT

This paper addresses the political development of the Age Discrimination in Employment Act. The historical origin, amendments, and arguments for or against the act are also presented. The implications of social work practice with our vastly increasing retired and aging population is finally discussed.

Introduction

To secure against hiring discrimination, based on chronological age, a public law was enacted by Congress in 1967 known as the Age Discrimination in Employment Act (ADEA) P.L. 90-202. ADEA provided protection to older Americans, defined as those individuals who were 45 and older, from unjust and unfair hiring biases of employers. Statistics during this time indicated that many individuals of the 45 and older age range were receiving unemployment benefits unnecessarily. Many were able and willing to work, but were often denied employment because of their age. Thus, a concern for the employment of these "older Americans" became a legislative issue. As a result of ADEA, new hiring and employment policies were created to accommodate this older population, even though ADEA stipulated to which age an individual could remain in the work force. This "upper age limit" was determined to be age 65 for most employees, although retirement was possible at age 62, with accepted reduced pension benefits.

Since the enactment of ADEA, two amendments have been added, one in 1974, P.L. 93-259, and the other in 1978, P.L. 95-256. Through these amendments, several changes were made, the most significant of which raised the mandatory retirement age from 65 to 70. Critics of this age increase argued that too many older workers would be taking jobs away from younger workers.

In actuality, our population is progressively becoming older. The individuals born during the "baby boom" era, 1946-1964, have now matured and the number of births since this time has declined. Because of this shift, we need to rethink present aging policies, particularly regarding the effectiveness of mandatory retirement. The following is an outline beginning with the conception of ADEA, its development, including contributing factors and amendments to the law. Arguments for and against mandatory retirement are explored and finally implications for social work practice are discussed.

Historical Overview

The Age Discrimination in Employment Act of 1967, P.L. 90-202 (Final Report to Congress) resulted from the expressed need for older Americans to gain the opportunities for equal employment along with their younger competitors. Prior to this time, during the first part of the century, most individual occupations evolved around agriculture. Employment and retirement within this field were purely individual decisions. Once industrial work, "an activity performed for others in which an individual is rewarded monetarily" (Sheppard, 1976), began growing throughout the country, retirement existed as a shift in jobs. Once a person became incapable of performing the same type of work, a less strenuous position was assigned or the number of working hours was decreased.

As industry formalized during the 1940's, retirement and pension plans also expanded. The philosophy which spread among private industries was to discard older employees and promote the younger worker. As an incentive for older workers to choose an early retirement, these private pension plans were created by management. Through this strategy more positions would be accessible to younger individuals, at lower wages. In relation with this growing trend toward early retirement, employment discrimination became a concern in Title VII of the Civil Rights Act of 1964, P.L. 88-352 (U.S. Statutes, 88th Congress).

In 1965, the Secretary of Labor, W. Willard Wirtz, was commissioned by Section 715 of the Civil Rights Act to "make a full and complete study of the factors which might tend to result in discrimination on the economy and individuals affected" (Final Report to Congress, 1982). This study ascertained that the major reason older persons were

not being hired was due to the assumption that age affected work performance. The conclusions of this study by Secretary Wirtz, led to the creation of the Age Discrimination in Employment Act, which was approved in December, 1967 and became effective June 12, 1968 (Monthly Labor Review, 1968).

ADEA was primarily enacted to promote the employment of those between the ages of 45 to 65 and to legally protect this population against discrimination based on age. The idea of ADEA was to consider "individual ability" not "individual age." The act affected employers with 25 or more members and forbade them to:

"Fail or refuse to hire, or to discharge or otherwise discriminate against any individual as to compensation, terms, conditions, or privileges of employment because of age; Limit, segregate, or classify his employees so as to deprive any individual of employment opportunities, or adversely affect his status as an employee, because of age; Reduce the wage rate of any employee in order to comply with the act; Discriminate against a person for opposing practice made unlawful by the act, or for making a charge, assisting or participating in any investigation, proceeding, or litigation under it; Use printed or published notices or advertisements relating to employment indicating any preference, limitation, specification or discrimination based on age" (Banking, 1968).

As with most legislative decisions, ADEA did provide three "exceptions to the rule," which included:

"An employer may discharge or discipline an individual for good cause; The law's prohibitions does not apply where age is a bona fide occupational qualification (HFOQ) reasonably necessary to the normal operation of a particular business, or where differentiation is based on reasonable factors other than age; To facilitate the employment of older workers, employers are allowed to make some age distinctions in providing fringe benefits according to the terms of a bona fide employee benefit plan such as a retirement, pension or insurance plan" (final Report to Congress, 1982).

Employment termination for a "good cause" is the sole decision of the employer. Rationale for this decision is

most often based on the individual's overall work performance.

The responsibility for enforcement of the act, in private industry plus in state and local governments, was given to the Department of Labor. Federal workers were not yet covered under the new law.

The "upper age limit" of 65 was, for the most part, arbitrarily chosen, although it can be traced back to 1889 and Otto Von Bismark, who was the first Chancellor of the German Empire. Bismark enforced an Old Age Survivors Pension Act within his empire. This legislation was the first of its type in the Western world to assume any responsibility for the financial assistance of older citizens. This act defined "older citizens" as those individuals 65 and beyond (Select Committee on Aging, 1977). Continuing Bismark's lead, other countries, such as Great Britain, soon emphasized this type of policy. Consequently, the age of 65 remained as the unwritten law for defining older citizens in legislation.

Act Amendments

The Age Discrimination in Employment Act remained intact until 1974. This first amendment, P.L. 93-259, changed two areas (U.S. Statutes: 93rd Congress). The act now included federal workers, plus the number of employees in private and public employment was changed from 25 to 20 in order for an employer to be covered (Congressional Digest, 1982).

Four years later, in 1978, a strong degree of public persuasion influenced the second amendment to ADEA, P.L. 95-256 (Final Report to Congress, 1982). The upper age limit was raised from 65 to an arbitrarily chosen age of 70. Also, federal workers were no longer bound to a mandatory retirement age. Previously, when a federal worker reached age 70, with at least 15 years of service, retirement was required. Consequently, individuals age 70 or older were no longer banned from federal employment. The Civil Service Commission became responsible for enforcement of ADEA within the federal sector.

The 1978 amendment was not consistent for all federal workers because mandatory retirement for specific federal jobs, at age 65, was not repealed. Affected workers were air traffic controllers, law enforcement officers, fire fighters, plus employees of the Alaskan Railroad, the Panama Canal Company, the Canal Zone Government, the

Foreign Service and the Central Intelligence Agency (Congressional Digest, 1982). Military retirement was not affected by this amendment or the act since this system is based on years of service rather than age.

These new changes for federal workers became effective September 30, 1978. For those employed through private or public employers, covered by retirement, pension or insurance plans, the amendment became effective on April 6, 1978 for those under 65. January 1, 1979 was the effective date for those 65 to 70 (Monthly Labor Review, 1980). This time span, for both cases, was utilized as an adjustment period, specifically to prevent involuntary retirement enforced through a benefit plan (Final Report to Congress, 1982).

Two additional exemptions of the 1978 amendment involved tenured faculty members of higher education, "high-level" executives and policy-makers. "Heads of local, regional or national operations of a corporation, heads of major corporate divisions or immediate subordinates are considered to be "bona fide executives." "High policymakers" are persons having no line authority but who provide policy recommendations to top executives" (Final Report to Congress, 1982).

Until July 1, 1982, mandatory retirement was permitted for individuals between the ages of 65-69, who held unlimited tenure in higher educational institutions. After this date, the mandatory retirement age was raised to 70. This short term exemption was enacted to protect financial budgets from the added strain of retirement pensions. Also, to enhance the hiring of younger faculty members including women and minorities (Final Report to Congress, 1982). The provision involving high-level executives and high-level policy-makers in private industry maintained that forced retirement was allowed, and still remains viable for those in these positions between the ages of 65-70, provided the position was held two years prior to the company stated retirement age (defined through company retirement policies). Also, a retirement benefit of at least \$27,000 per year must be provided solely by the employer, thus excluding Social Security payments, retirement benefits from previous or other employers and contributions made by the employee (Final Report to Congress, 1982). This provision was extracted from corporate concerns regarding future management problems

because of irregular retirement patterns among company employees.

Three provisions were outlined in the 1978 amendment regarding the filing of charges, extending the statute of limitations and the right to a jury trial, stemming from a private lawsuit involving alleged age discrimination.

An individual must file a written statement, with the enforcing agency, determining the potential defendant and alleged discriminatory action. The statement must be in the form of "a charge alleging unlawful discrimination" which replaces "notification of intent to sue" (Monthly Labor Review, 1980). The statement must be filed within 180 days of the alleged violation or 300 days if a local fair employment agency had previously been notified (U.S. Government Manual, 1983).

Once the charge is filed, the enforcing agency must attempt to determine the alleged discrimination and then work toward eliminating the problem. An informal attempt must be made by the enforcing agency to reconcile the parties involved.

The extension of the statute of limitations provides a reasonable period of time for the parties to form an agreement before a court appearance is necessary, to protect against an overly extended negotiation period. The amendment provides an extension of up to one year provided reconciliation is attempted. The normal time period in the statute is two years for nonwillful violations and three years for willful violations (Monthly Labor Review, 1980).

Finally, the amendment provides the option for a jury trial if "there are factual issues regarding alleged discrimination involving potential monetary liabilities, such as back pay" (Monthly Labor Review, 1980).

Another provision of the 1978 amendment, asked for a study to determine the effects from raising the mandatory retirement age. This study was to be conducted through the Secretary of Labor, which was begun by Secretary Ray Marshall and completed by Secretary Ray Donovan. Part I, The Interim Report to Congress on Age Discrimination in Employment Act Studies, was submitted to Congress in 1981. Part II, The Final Report to Congress on Age Discrimination in Employment Act Studies was submitted to Congress one year later. One of the findings of this study ascertained that the majority of adults did not have the basic knowledge that such a law existed.

Continuing with the provisions, the 1978 amendment also involved transferring enforcement responsibilities. Again, prior to this time, the Department of Labor and the Civil Service Commission held responsibility. On July 1, 1979, the Equal Employment Opportunity Commission (EEOC), which was solely created by Title VII of the Civil Rights Act, became the enforcing agency for private, state and local government employment while the EEOC also assumed federal enforcement responsibility on January 1, 1979 (Final Report to Congress, 1982).

Finally, although appearing contradictory to ADEA, the 1978 amendment upheld the Employee Retirement Income Security Act (ERISA), P.L. 93-259 (U.S. Statutes, 1974), which was enacted September 2, 1974. According to ERISA, an employee may receive full retirement benefits under a private pension plan provided the employee has at least ten years of services. The employer is permitted to stop credit services and readjust pension benefits if the employee works past the "normal retirement age," which is defined through private retirement plans (Final Report to Congress, 1982).

Mandatory Retirement: Pros and Cons

Mandatory retirement has been viewed as unconstitutional because it violates the 5th and 14th amendments to the Constitution which involve "due process" and "equal protection."

In 1974, the case of Cleveland Board of Education v. La Fleur, 414 U.S. 632, reached the Supreme Court (Select Committee on Aging, 1977). The court voted against the school board policy requiring a pregnant teacher to take a leave from her job in the fifth or sixth month of pregnancy without pay. This case was voted in favor of La Fleur, thus withholding her right to the 5th amendment of due process. "The rules (of the school board) contain an irrebuttable presumption of physical incompetency and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary" (Committee on Aging, 1977).

The La Fleur case implies that an individual's physical condition may hinder both their work effectiveness and efficiency. In relation to older individuals, this idea also exists. Many supporters of mandatory retirement argue that an individual's physical ability to perform a job is hindered because of advanced age. Other arguments in favor of

forced retirement include: "Employment opportunities for younger individuals, women, minorities and promotional opportunities for mid-level employees are increased. The burden to management of evaluating older employees' work performance is decreased. Mandatory retirement provides a predictable situation for both management and employees to plan in advance. And mandatory retirement saves the older worker, who no longer performs his job adequately, from forced retirement by management" (Committee Hearings, 1977).

The case of Massachusetts Board of Retirement v. Robert D. Murgia, 1976, was decided by the Supreme Court in favor of Murgia. Murgia was a police officer, who was retired at age 50 in accordance with state law, although he remained capable of performing his job responsibilities and passed the required physical. He sued for declaratory and injunctive relief, arguing that his forced retirement violated the 14th amendment, that of equal protection under the law.

A U.S. District Court for the State of Massachusetts declared the law unconstitutional, although, through an appeal to the U.S. Supreme Court, the decision was reversed. The court backed its decision by stating "There is no fundamental right to government employment per se" (Committee on Aging, 1977).

In retrospect, those opposed to forced retirement believe that: "Mandatory retirement based on age alone is discriminatory and contrary to equal employment opportunities. Chronological age alone is a poor indicator of ability to perform a job, individual ability is not considered. Forced retirement causes an increased expense to government income maintenance programs such as Social Security. The economy will suffer from the withdrawal of highly skilled workers" (Committee Hearings, 1977).

Accordingly, several constructive debates have been presented for each opinion, although consequently, if mandatory retirement should be lifted, shall all age-limiting policies such as legal drinking age, voting and driving ages also be lifted to be consistent? This change could be too drastic to our political system, therefore changes would not be welcomed. On the other hand, with our current diminishing younger population, should each individual be responsible to provide financially for themselves, their families and an unproportional older population? If those 65 and over remained in the work force, this responsibility would be decreased.

Implication for Social Work Practice

Withholding or enforcing ADEA in the future will determine courses for the Social Security system, elderly health care costs, and aging policies in general. By the year 2000, the number of individuals 65 and older is predicted to be 32 million, 13% of the population. Fifty-five million or 22% of the population will be in this age category by 2030 and in 2050, 39% of the population will be 65 and over, according to the Department of Labor.

What role will/can social workers share with this population? First of all, social workers, through their profession, can become an advocate with pre-existing special interest groups of the aged, such as the Gray Panthers, The National Council of Senior Citizens (NCSC), or the American Association of Retired Persons (AARP). Through this advocacy, the profession may commit itself to generating an awareness of the needs and concerns which effect our elderly population. This awareness does not necessarily need to begin post-retirement, but may possess more benefits during the pre-retirement phase while the individual is still working. The first step could be educating employees about the mandatory retirement legislation. The findings of The Final Report to Congress on Age Discrimination in Employment Act Studies, which was previously mentioned, showed that the majority of adults did not have the basic knowledge regarding the existence of such a law. Increased awareness of this law furnishes social workers with the opportunity to provide pre-retirement planning and counseling services in both private and industrial settings.

Retirement planning involves not only insight into social adjustments, but also with regard to financial maintenance. At this point, the potential retiree needs to be reassured that financially, he or she will not fall into deprivation. Once an individual is retired, it is too late to begin building capital on which to live. This is something which should be a concern during one's working years. But who should be responsible for this planning? Should this be entirely an individual choice? Or should this be a corporate responsibility?

In 1974, the Employee Retirement Income Security Act determined standards for corporate administrators to follow regarding pension plans. Long term incentives, capital accumulation through stock options or deferred compensation are just a few types of plans presently offered

to employees. This act placed more responsibility on a corporation to maintain and improve available pension plans.

To what degree a corporation becomes involved in the "social" aspect of its employees is a decision of the management based on the company's philosophy. The traditional profit-growth ideology may be softened by such items as pre-retirement counseling, but the concept of pension planning was an incentive motivator used by management. The goal foreseen by management was increased employee performance, thus increasing corporate growth and profits. The goal for the employee was capital accumulation and financial stability upon retirement.

Presently, many corporations have expanded their interests and are experimenting with flexible retirement policies. Others have already implemented phasing adjustments to retirement by allowing extended vacations with pay, extended lunch breaks, shortened work week, or time off without pay to adjust to living on a lower income.

A corporation determines for itself how responsible it will act for its employees. The profession must not overlook, to any degree, the need for services to those retiring; thus, the need for industrial social workers is increasing.

Through direct practice, programs can be established to support family members, and friends of an individual in the retirement dilemma, so they can possibly be supportive and help make plans for a post-retirement lifestyle. Understanding the aged life-cycle will strengthen professional skills utilized during therapy with aged clients. Realizing to what extent a retirement decision and its effects, such as role changes, changes in financial status, revisions in social activities and contacts, and alterations in personal habits has for the elderly individual are imperative to follow through with the clinical skill of beginning where the client is.

Through service delivery, individual skills can be acknowledged to direct a retiree's experience and knowledge to be used in community services such as hospital volunteers or neighborhood support groups for less physically independent peers. Pre-existing services can be expanded and made more available to meet geographical needs.

Finally, research is needed to ascertain just what the needs of this growing population are. Through research, deficits in direct practice and service deliveries can be

improved. Most importantly, research is a means of expressing our concerns about the needs of this group.

Conclusion

The Age Discrimination in Employment Act, which became effective in 1967, was primarily adopted to prohibit hiring and employment discrimination based on age, from its conception in the 1964 Civil Rights Act.

Specifically, this law was passed to provide an equal opportunity for employment to individuals who were age 45 to 65. A concern existed throughout government that industries were emphasizing the hiring of younger workers. Incentive strategies were created by industries so that the older worker would choose to retire before the normal retirement age. This age, for most employment, was 65. At this time, retirement became mandatory although an individual could choose to retire at 62.

In 1974, an amendment to ADEA provided coverage to federal workers. In 1978, another amendment was added. The major change of this amendment raised the mandatory retirement age from 65 to age 70.

Mandatory retirement has been a dispute between both employers and employees. Advocates of this idea feel that age affects work performance. Forcing an employee to retire at a certain age creates available positions to be filled by the younger, more capable worker.

Arguments against mandatory retirement include that job performance should be based on individual ability and not individual age. A shift to an older population will leave an awesome financial burden for their care on younger individuals.

To facilitate a growing older population, social workers need to understand the changes, both financially and personally, caused through retirement. The skills of the retirees who are willing to redirect them should not go unnoticed, but be utilized through community services.

The ramifications of mandatory retirement are quite involved, but this issue cannot go untouched since so many will be effected in so little time.

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