

Employment Best Practices

EEOC Guidance:

“Age discrimination involves treating an applicant or employee less favorably because of his or her age.”

“The Age Discrimination in Employment Act (ADEA) forbids age discrimination against people who are age 40 or older. It does not protect workers under the age of 40, although some states have laws that protect younger workers from age discrimination. It is not illegal for an employer or other covered entity to favor an older worker over a younger one, even if both workers are age 40 or older.”

“Discrimination can occur when the victim and the person who inflicted the discrimination are both over 40.”

“The law prohibits discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, benefits, and any other term or condition of employment.”

“An employment policy or practice that applies to everyone, regardless of age, can be illegal if it has a negative impact on applicants or employees age 40 or older and is not based on a reasonable factor other than age (RFOA).”

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ADEA

Age and Employment



What Would You Do?

Q. How would you respond?

The owner of your company orders a manager to fire the 54-year-old office manager because she “looks old, sounds old on the telephone,” and is “like a bag of bones.” The office manager comes to you asking for advice. (This is based on an EEOC case against [Hawaii Healthcare Professionals, Inc.](#), that settled for nearly \$200,000).

Q. What would you do?

An older employee comes to you in tears, claiming that he is being bullied and harassed because of his age. He alleges his coworkers in the design firm refer to him as a “design-o-saurus” and tease him about being forgetful and unable to “keep up.” Even though these comments don’t explicitly mention his age, he believes they are code for ageism and age-based harassment.

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In *Gross v. FBL Financial Services, Inc.*, the Supreme Court considered the claim by Petitioner Gross that his employer demoted him due to his age. The Court held that lower courts had improperly instructed the jury to evaluate whether age was a motivating factor in Gross's demotion. Importantly, the Supreme Court held that in an age case under the ADEA, age must be the *but for* cause of the challenged adverse employment action. Unlike the burden-shifting framework found in a Title VII analysis under *Price Waterhouse*, for example, in an age case under the ADEA, it is solely the employee's burden to show that, but for their age, the employer would not have taken the adverse action against the employee. Thus, the Court established that age cannot simply be a motivating factor in an adverse employment action; it must be the *but for* cause of that action in order to be illegal under the ADEA.

Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009).

The Bottom Line:

Age discrimination is illegal under the ADEA for employees over 40 years of age. However, age cannot simply be a motivating factor in an adverse employment action. An employee must show that, *but for* their age, the employer would not have taken the adverse employment action in question. Thus, age must be the primary, *but for* cause of the adverse action to show a violation of the ADEA. Unlike the Title VII burden shifting analysis under *Price Waterhouse*, the ADEA contains no burden shifting analysis. The employee has the sole burden to prove that age was not simply a motivating factor, but rather the *but for* cause of the adverse employment action.

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