



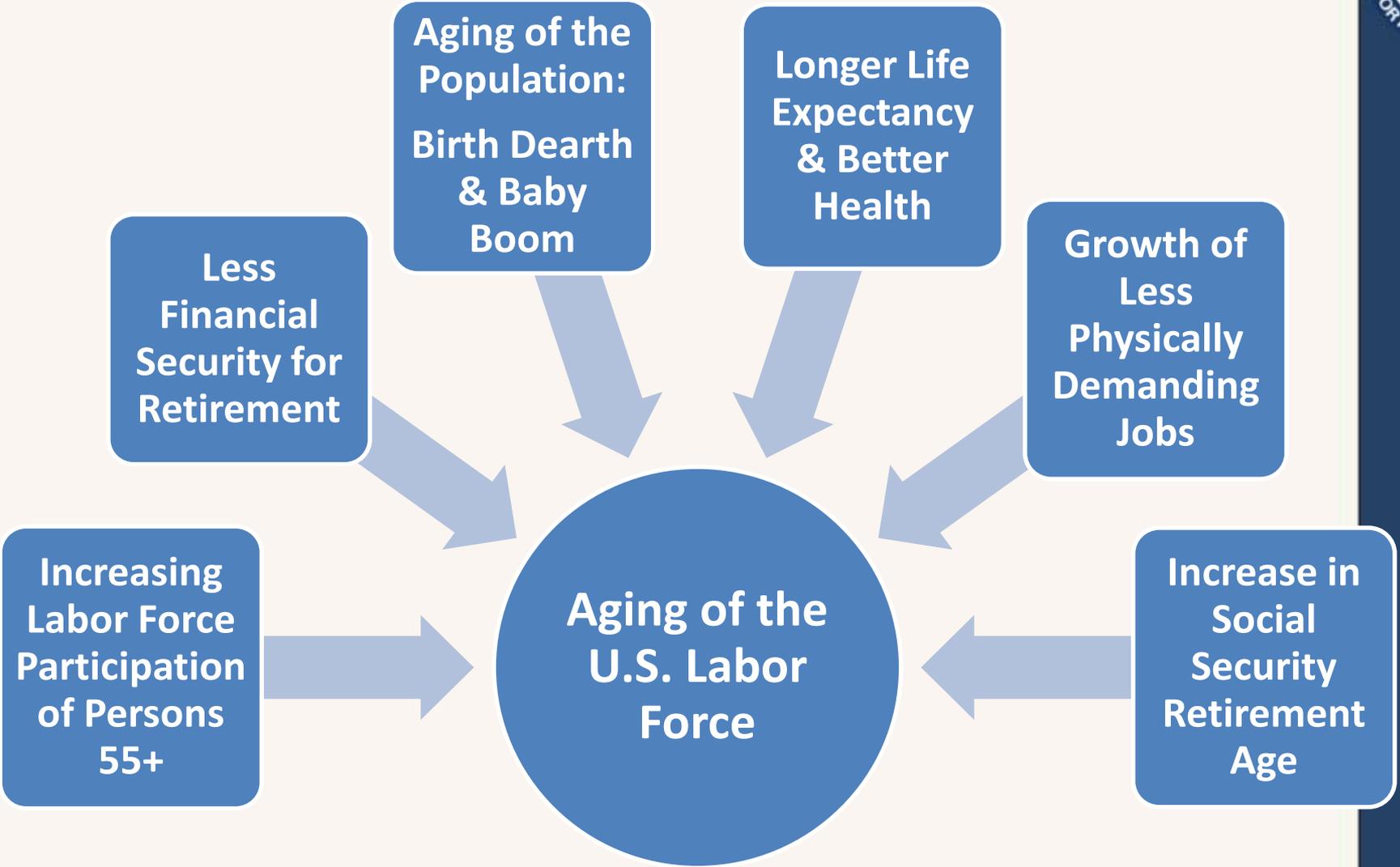
# **The Aging Workforce, Trends, & Cutting Edge Issues Under the ADEA**

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# Today's Issues:

- Aging Work Force
- Perceptions of Age and Discrimination
- Stereotypes about Older Workers
- Challenges in Proving Age Discrimination
- Trends:
  - ❖ EEOC's Enforcement Priorities – Hiring Discrimination
  - ❖ Older Women Facing Age Discrimination
  - ❖ Age Discrimination and Technology



# Aging of the U.S. Workforce: 2000-2020



- The number of workers age 55+ is increasing dramatically
- In 2000, workers age 55+ comprised 13.1% of the labor force
- By 2020, the percentage of workers age 55+ will nearly double to 25.2%.



# Effects of Economic Downturn

- Unemployment rates for older workers more than doubled between 2007 and 2010: 3.1% to 7.6%
- Older workers remain unemployed for the longest periods
- By 2011, the median duration of unemployment for older job seekers had increased to 35 weeks compared with 26 weeks for younger job seekers.
- By 2011 over one-third of all unemployed older workers had been unemployed for over a year
- Long term unemployment leads to earlier retirement and lower standard of living in retirement

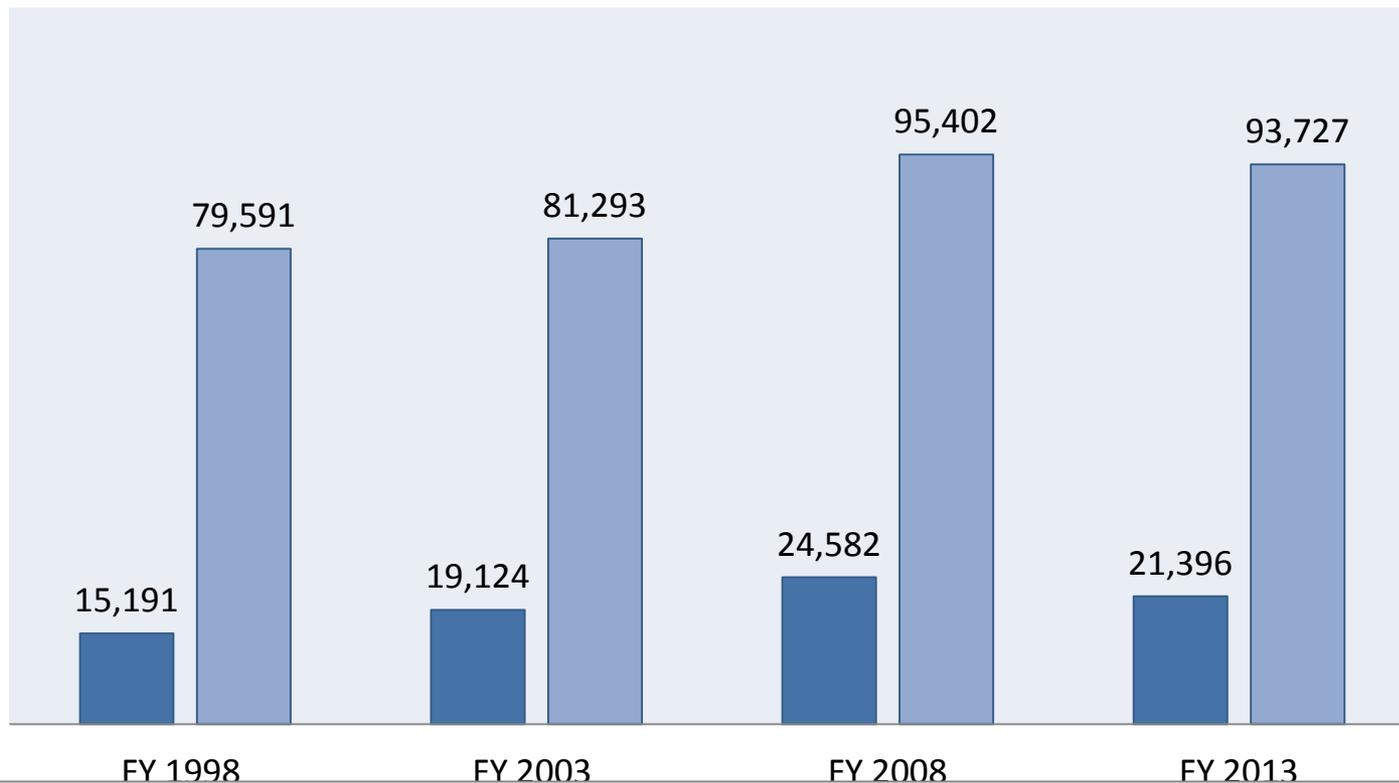
Source: GAO, *Unemployed Older Workers: Many Experience Challenges Regaining Employment and Face Reduced Retirement Security*, GAO-12-445 (Washington, D.C.: April 25, 2012).

# ADEA Charges

## FY 1998, 2003, 2008, 2013

### ADEA Charges Compared to Total Charges

■ ADEA Charges    ■ Total Charges



# Perceptions of Age

- “A person is always startled when he hears himself seriously called an old man for the first time.” ~ Oliver W. Holmes, Sr.
- “Anyone who stops learning is old, whether at 20 or 80. Anyone who keeps learning stays young.” ~ Henry Ford

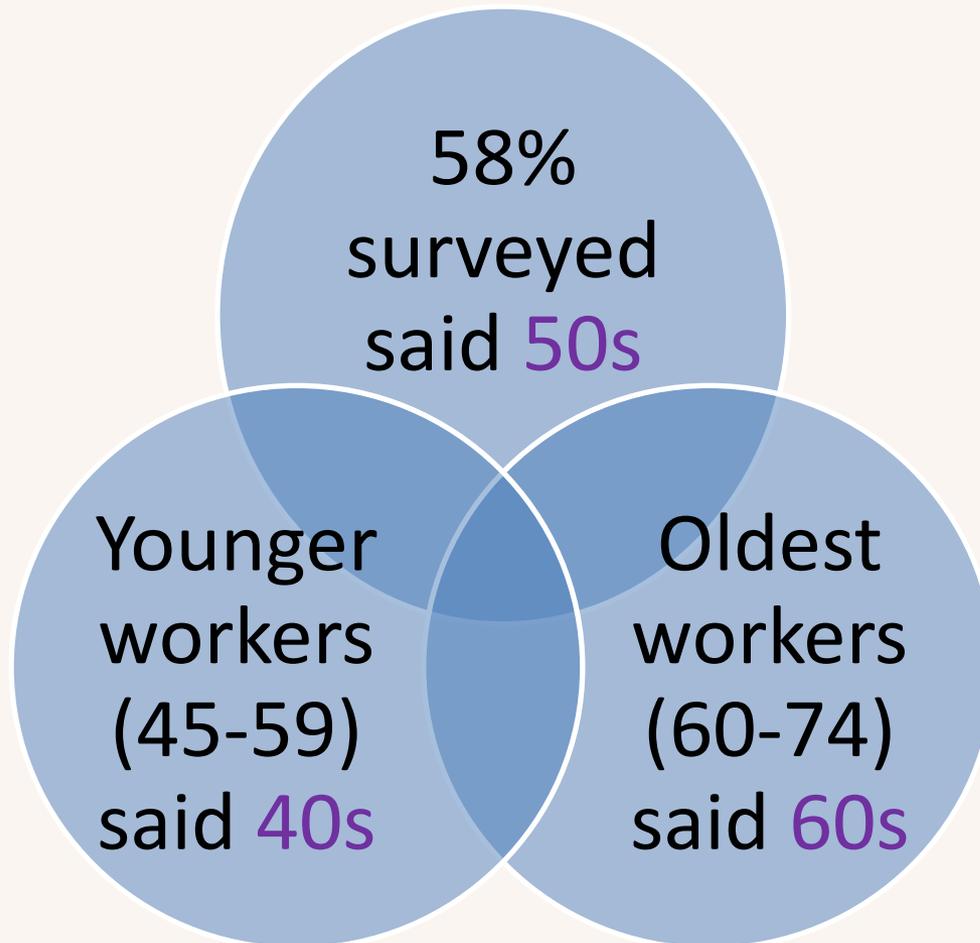
# Age is Relative

When asked “what age is old”-

- Average responses of 50+ population said 71.5 is “old”\*
- 6 out of 10 individuals age 50+ “feel younger than their age”
- 69% of those with \$50,000+ annual feel younger than their age, compared to 53% with lower incomes

\* (Source: [http://op.bna.com/dlrcases.nsf/id/smgk-9dmnl5/\\$File/AP-NORC%20Center Working%20Longer%20Report-FINAL.pdf](http://op.bna.com/dlrcases.nsf/id/smgk-9dmnl5/$File/AP-NORC%20Center%20Working%20Longer%20Report-FINAL.pdf))

# When does age discrimination begin?





# Perceptions of Age Discrimination\*

## How common is age discrimination:

- 64% report age discrimination in the workplace
- 92% say age discrimination is very or somewhat common.
- 75% say their age has not caused their employers to treat them differently than other workers.

\* Source: Staying Ahead of the Curve 2013, AARP Multicultural Work and Career Study; survey of 1502 adults age 45-74 conducted in Nov.-Dec. 2012.

# Ageist Stereotypes

- Costly to employ
- Less competent
- Less motivated
- Less adaptable and flexible
- Less energetic



# Research Refutes Ageist Stereotypes

- Performance improves with age
- Performance varies greater within age groups than between age groups.
- Return on Investment – Older workers less likely to quit
- Economic downturn has changed compensation norms

# Baby Boomers – Challenging Stereotypes

## Baby Boomers:

- healthier
- more active
- living and working longer
- age is relative

## *Changes in “Career”*

- *Compensation norms have changed*
- *No longer “company man” for life*
- *Many jobs; different careers*



# Is Age Discrimination Harder To Prove?

- Aftermath of Supreme Court's decision in *Gross v. FBL Financial Services* (2009)
- Cases relying on *Gross* to impose heightened standards of proof – that employees prove:
  - age is the “sole” reason, or
  - “the but-for” reason
- Cases are contrary to Supreme Court's admonitions in *Gross* decision



# Gross Did Not Heighten Proof of Age Discrimination

- “[t]here is no heightened evidentiary requirement for ADEA plaintiffs ... and we will imply none.”  
*Gross v. FBL Financial Services, Inc.*, 577 U.S. 178, n.4 (2009).
- Supreme Court has since clarified *Gross* to mean there can be more than one “but-for” cause;  
*Burrage v. United States*, 134 S.Ct. 881, 888-89 (2014) (“a plaintiff must prove that age was [a] ‘but for’ cause of the employer's adverse decision. *Gross v. FBL Financial Services, Inc.*”)
- Result: no requirement that age be the “sole” reason or “the but-for” reason.



# “But-For Cause” Means Age Made a Difference

- To prove unlawful age discrimination, a plaintiff must establish that age “played a role” and “had a determinative influence on the outcome.” *Gross*, 577 U.S. at 176.
- “an employer may be held liable under the ADEA if other factors contributed to its taking an adverse action, as long as ‘age was the factor that made a difference.’” *Jones v. Oklahoma City Public Schools*, 617 F.3d 1273, 1277-78 (10th Cir. 2010).



# Protecting Older Workers Against Discrimination Act

- A bill to overturn *Gross* was introduced in October 2009 in both the Senate and House. (S. 1756/H.R. 3721) (<http://www.thomas.gov/cgi-bin/query/z?c111:S.1756>). It died in Committee.
- The bill was reintroduced 2013. See S.1028 and H.R. 2852 at <http://thomas.loc.gov>



# Judge-made short-cuts to find no discrimination

- **Stray remarks** – only discriminatory if made within the context of the discriminatory act; **past statements are irrelevant**
- **Same actor** – presume the actor has no bias when he hired the employee, and continues to have no bias when he fired the employee years later; **past actions are relevant**
- **Older decisionmaker** – presume one doesn't discriminate against those in the same class – **contrary to S.Ct. precedent on race and gender**

# Ageist Comments vs. Stray Remarks

*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) sets the standard:

- Clarity/content of the remark (clearly age-related?)
- Authority of the speaker (responsible for the action?)
- **But** -- Courts have been overly strict in determining whether an ageist comment is relevant evidence of age discrimination
- **Different treatment of racist or sexist comments compared to ageist comments.** See *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 525 (6th Cir. 2007) (admits inconsistencies in analysis of ageist comments compared to racist or sexist comments)

# D.Ct: Stray Remark

## Appellate Court: Ageist Comment



*Baker v. Vecton, Dickinson and Co.*, 2013 WL 3779902  
(6<sup>th</sup> 2013)

- Supervisor (in his 30s) said to 58 year old Manager:
  - “[y]ou are too old and lack energy and eagerness. You are not the kind of sales rep that [Becton] want[s] to build its future on.”
  - “too old and too slow,” and that he “*did not want anyone over 40 in sales.*”
- D.Ct. dismissed comments as “stray remarks”
- 6<sup>th</sup> Circuit reversed: “Nugent's comments to Baker cannot be easily dismissed.”
  - Comments relevant because made by a supervisor, clearly age-related, and made at a time related to the adverse action (PIP)

# Ageist Comments

- ❖ So old that he “must have come over on the Mayflower.”
- ❖ “Building built around her”
- ❖ Dinosaurs
- ❖ “Edge,” “Energy,” “Excellence,” and “Energized”



# General Comments About Retirement

- General comments about retirement age or eligibility are not viewed by the courts as evidence of age discrimination
- Inquiries by supervisors about employee's retirement plans are generally not treated as evidence of age discrimination
- Employers may make reasonable inquiries into the retirement plans of its employees for purposes of succession planning or to address rumors concerning retirement for purposes of staffing.

# When Comments about Retirement Are Evidence of Age Discrimination

*Wargats v. Pittsburgh Technical Inst.*, 2007  
WL 81056, at \*2 (W.D.Pa.,2007)

- “Repeated retirement inquiries were so unnecessary and unreasonable as to constitute evidence of age discrimination, especially when viewed in conjunction with other evidence of record.”



# Ageist Comments Tied to Retirement

*Hale v. ABF Freight System, Inc.*, 2012 WL 5259156 \*7 (6th Cir. 2012)

- Supervisor said: *“He is going to leave here when he is 62. I am going to see to it. He has been here long enough, and he is going to go on his Social Security.”*
- Court held: direct evidence of age discrimination

# Comments Related to Retirement and the Adverse Action



*Bartlett v. Gates*, 2010 WL 4723786 \*7 (6th Cir. 2010)

- Supervisor said: “34 years on the job were ‘enough’” and suggested he retire when the plaintiff hadn’t broached or considered the subject.
- Plaintiff sued for denial of promotion based on age.

Court held: “these statements were made by decision-makers just weeks before the promotion decision, and because the ... motivation ... was to hasten Plaintiff’s departure from the agency, these remarks provide strong ‘probative evidence....’



# EEOC PRIORITIES

- ① Eliminating Barriers in Recruitment and Hiring
- ② Protecting Immigrant, Migrant and Other Vulnerable Workers
- ③ Addressing Emerging and Developing Issues
- ④ Enforcing Equal Pay Laws
- ⑤ Preserving Access to the Legal System
- ⑥ Preventing Harassment through Systemic Enforcement and Targeted Outreach

# EEOC ENFORCEMENT PRIORITY NO. 1:

## Barriers to Hiring and Recruitment



### JOB APPLICATION FORM

Please complete this accurately, giving as many details as possible of your skills and this job application.

Please either type directly in this form using or print out and complete the form in bla  
CAPITALS.

*POSITION APPLIED FOR:*

Job title:

Department/Region:



# Major EEOC ADEA Hiring Cases

*EEOC v. Cavalier* (E.D. Va. Settled 2011) - \$1,000,000 settlement

- account executive positions
- 3 year consent decree requiring:
  - an applicant tracking system for persons hired and applicants
  - specific information about its hiring of applicants by age
  - training of staff
  - reporting compliance to the EEOC

*EEOC v. Ruby Tuesday*, (W.D. Pa. Settled in 2013) - \$575,000 settlement

- 3.5 year consent decree requiring:
  - Implement numerical goals for hiring and recruitment of job applicants age 40 and older at the affected locations
  - Review its job advertisements to make certain they do not violate the ADEA
  - Conduct audits, including random reviews of hiring decisions
  - Evaluate the job performance of people with hiring authority



# Eliminating Barriers in Recruitment/Hiring

- Exclusionary Policies & Practices
- Restrictive Application Processes
- Restrictive Screening Tools
- Steering Particular Groups into Specific Job Types



# Major EEOC ADEA Hiring Cases

*EEOC v. Texas Roadhouse* (D. Mass.)  
(nationwide filed in 2011)

- Alleges failure to hire older workers for “front of the house” positions
- Alleges an ageist culture:
  - *"there are younger people here who can grow with the company;"*
  - *"you seem older to be applying for this job"*
  - *"do you think you would fit in?"*



# Increasing Number of ADEA Appeals Filed by Older Women

2013:

- 45% of cases (50 of 110) filed by women
  - 25 alleged age and sex discrimination

2007:

- 32% of cases (37 of 117) filed by women



# Sex Plus Age Claims – Trend: More Older Women Facing Age Discrimination

- *Good v. U.S. West Communications* – Woman age 45 replaced by man age 42; “her age, when combined with her sex, was a motivating factor”
- *Arnett v. Aspin* - all EEO specialists were older men or younger women; court relied on “sex plus” cases to recognize older women as a discrete subclass protected under Title VII
- *Sogg v. American Airlines* -Proper focus was on the combined factors of sex, age, and disability.



## Barnett v. PA Consulting Group, 715 F.3d 354 (D.C. Cir. 2013)

“The most important factual dispute is why PA fired the fifty-seven year-old female, Barnett, but retained the forty-one year-old male, Gao. ...The **most significant differences between the two are that Gao is male and younger than Barnett.** Those are differences a jury should be allowed to consider.”

Evidence: Barnett had highest performance ratings; was told she didn't “fit” the group's needs any more

# Age Discrimination in Tech Industry

- 42% of age 50+ in tech industry consider age a liability to their career = more than **double the rate of other industries.**
- Zuckerberg: *“Young people are just smarter”* (Stanford 2007)
- ServiceNow ad on its careers page: *“We Want People Who Have Their Best Work Ahead of Them, Not Behind Them.”*

(Source: [http://op.bna.com/dlrcases.nsf/id/smgk-9dmnl5/\\$File/AP-NORC%20Center Working%20Longer%20Report-FINAL.pdf](http://op.bna.com/dlrcases.nsf/id/smgk-9dmnl5/$File/AP-NORC%20Center%20Working%20Longer%20Report-FINAL.pdf))

## Digital Natives

- Tech Industry Job Ads Seeking “Digital Natives”
- born with technology; 2<sup>nd</sup> nature
- Presumed to be younger workers

## Digital Immigrants or Tourists

- unfamiliar with digital technology;
- struggle to make good use of technology
- Presumed to be older workers



## Trend:

# Online & Social Media Recruitment

- 77% of employers used social media for recruiting (SHRM 2013 survey)
- Many online job applications require DOB field or other info indicating age; cannot proceed if not complete

**ADEA:** Request for age on an employment application is not a per se violation of the ADEA, but EEOC will closely scrutinize such requests. (29 CFR §1625.4-5).



# Use of Social Media in Hiring

- 69% of recruiters rejected a candidate based on content found on social networks.\*
- 68% hired a candidate based on information found on social media profiles.\*
- Zappos announced it will conduct recruitment and hiring thru a dedicated social network (WSJ May 2014)

\*Source: How Recruiters Use Social Networks to Screen Candidates  
<http://mashable.com/2011/10/23/how-recruiters-use-social-networks-to-screen-candidates-infographic/>

# High Cost of Age Discrimination

\$26 million verdict for 64 –year old fired by Staples

- ✓ California law
- ✓ \$3.2 million compensatory damages
- ✓ \$22.8 million in punitive damages

## Common Facts:

- Hired at age 55 and had solid performance ratings
- Staples took over, he became the regular butt of jokes at staff meetings; referred to as “old coot” and “old goat.”
- Refused to resign voluntarily when prompted to by a manager.
- Subjected to a series of false accusations and increasing levels of harassment from co-workers and a manager.
- Suspended for “stealing,” after taking a bell pepper \$.68.
- Receptionist testified management ordered her to provide a false statement about Nickel’s conduct. She refused.



QUESTIONS???



**THANK YOU!!!**