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COVER STORY

AGED OUT

Age discrimination cases against employers have risen locally over the past decade. Here's what it means for you.

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AGE BIAS CASES ON THE RISE

A 'perfect confluence of events' means discrimination suits are more common locally and nationally now than a decade ago

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Jack
Gerundo

Jack Gerundo worked as a customer service executive at AT&T and its predecessor, IBM, for almost 43 years when a supervisor informed him in 2013 that his position was being "surplused."

Soon after his termination, he said he was asked to train his successor, an employee 29 years his junior.

The news came a week before his 66th birthday, at a time when his daughter was in the middle of her freshman year of college and his son was still in need of financial assistance. Because of Gerundo's personal situation, he had planned on working into his 70s.

"It was really tough," Gerundo said. "The hardest part was the emotional aspect because I never saw this coming and I never had a performance issue. I felt like I'd let my kids down."

After more than 50 resumes were met with little response, Gerundo

took a \$10 per hour sales position at his local Home Depot – a far cry from the \$107,000 annual salary he earned at AT&T.

Gerundo filed an age discrimination lawsuit against AT&T and a federal jury in Reading awarded him \$370,000 (\$288,000 for back pay and \$82,000 for front pay) in January. Last month, AT&T asked the judge to scrap the verdict and could appeal to the 3rd Circuit Court of Appeals. The lawyer representing the telecommunications giant in the case did not respond for comment.

Age discrimination claims like Gerundo's have become more common since the recession. The Equal Employment Opportunity Commission (EEOC) shows that the number of age discrimination claims last year in Pennsylvania increased by 34 percent from 2008. While discrimination claims in many protected classes have also increased, age cases have risen more sharply than most.

Employment lawyers say a perfect confluence of events has contributed to the elevated number of age claims. Baby Boomers are the largest ever generation set for retirement. But they are living longer than preceding generations. And many that were considering retirement had those plans thwarted by economic losses incurred during the stock market collapse of September 2008, which crushed 401k and other savings plans that have gradually replaced pensions.

Employers, in turn, were forced to reduce their workforces to cope with declining economic performances, with a focus on higher paid workers who are usually older.

The recession and its residual effects have also made it much more difficult for older workers who lost their jobs to find new positions. And that can make them more litigious with their previous employers.

"That generation thought that they would put 30 to 35 years into a company and there was mutual loyalty," said employment lawyer Harold Goldner of Blue Bell's Kraut Harris. "So they look at it from

the perspective of 'I spent my whole career there. What's going on?'"

The Age Discrimination in Employment Act of 1967 (ADEA) made it illegal for employers to discriminate based on age. But there are two major thresholds to satisfy before the ADEA applies.

Accused employers must have 20 or more employees and the law only protects employees 40 years of age or older. Some local or state governments may have their own ordinances that affect smaller businesses. For example, the Pennsylvania Human Relations Act applies age discrimination claims to employers with four or more workers and Philadelphia's ordinance applies to those with just one employee.

The scope of age discrimination laws covers all significant employment decisions – hiring, firing, promoting, disciplining, and assigning work – as well as creating a hostile work environment or actions that have a disparate impact on older workers.

Once an age discrimination case passes through the EEOC and heads to federal court, Goldner said defense counsels almost always file for summary judgment to have the case dismissed. He estimated that two-thirds of those requests are granted, which means the remaining third most likely at least have some

pretext of discrimination to prove the claims. And that makes them harder to defend.

Michael L. Banks of Morgan Lewis & Bockius, who defends compa-



"If you are thinking of terminating an older worker, focus on the reason you want to make the change and make sure it's legitimate and not one I'll need to explain to a jury in a bias claim. You are not a social worker, you are an employer so focus on the work-related reasons for the decision."

HAROLD GOLDNER, Kraut Harris



"Whether you are thinking about terminating or disciplining an employee, make sure to get consent first from HR or a lawyer. Too often they come to us after the fact when they think they've done it right. I know it sounds self-serving, but you will spend less money if you get it right the first time."

HEATHER A. HERRINGTON, Jacobs Law Group

nies in a variety of employment cases, said there are two reasons why he finds age claims difficult to litigate.

Not everyone knows someone in a protected class with a unique disability or disadvantage. A juror might not be able to identify with a plaintiff in a race or gender discrimination case for example. But everyone knows someone who is older and they know one day that they will be older.

Jurors also view age discrimination more plausible that age factored into a personnel decision than other discrimination claims.

"If there are two candidates for a position who are 64 and 29," Banks said. "The employer might say they didn't consider age but the jurors won't be inclined to believe them."

According to a 2013 AARP study, 64 percent of surveyed workers stated they had experienced or witnessed age discrimination in their workplace.

During the Gerundo case, AT&T established a layoff program where employees would be terminated based on a ratings system in which supervisors provided grades based on four criteria: leadership, performance, skills, and experience.

Gerundo received relatively low scores from his supervisors, who said his chief client was unsatisfied with his availability on site and that he was unwilling to learn new skills or complete a training program within a required period of time.

But at trial, AT&T's case was undermined with evidence that the rating system was subjective, and the company could not explain why Gerundo had a lower rating than the employee replacing him. And a representative from his chief

client, financial services technology wholesale provider Fiserv, said the company was satisfied with the service Gerundo provided.

Gerundo's lawyer, Laura Mattiacci of Console Law Offices, said AT&T never asked her client to take a pay cut and did not argue that the cost of his salary factored into the decision.

"That's probably because they know older employees are more apt to take pay cuts," Mattiacci said.

That's a key distinction because employers can legally make personnel decisions based on financial issues. But older workers tend to make more money than their younger peers, so when businesses are cutting costs, veteran

employees are usually affected more significantly.



"There needs to be more educational training so people don't make decisions based on age. They need to know it's against the law. There's a big knowledge gap. Everyone knows you can't discriminate against people because of race or gender but not age."

DEBORAH WEINSTEIN,
The Weinstein Firm



Laura
Mattiacci

Employment lawyer Deborah Weinstein said from her experience, age doesn't come to mind when employers think about discrimination or harassment.

"So people don't hold back in treating older workers poorly or saying disparaging things," she said. "There is a blind spot in the workforce. Everyone knows you can't discriminate against people because of race or gender but not age."

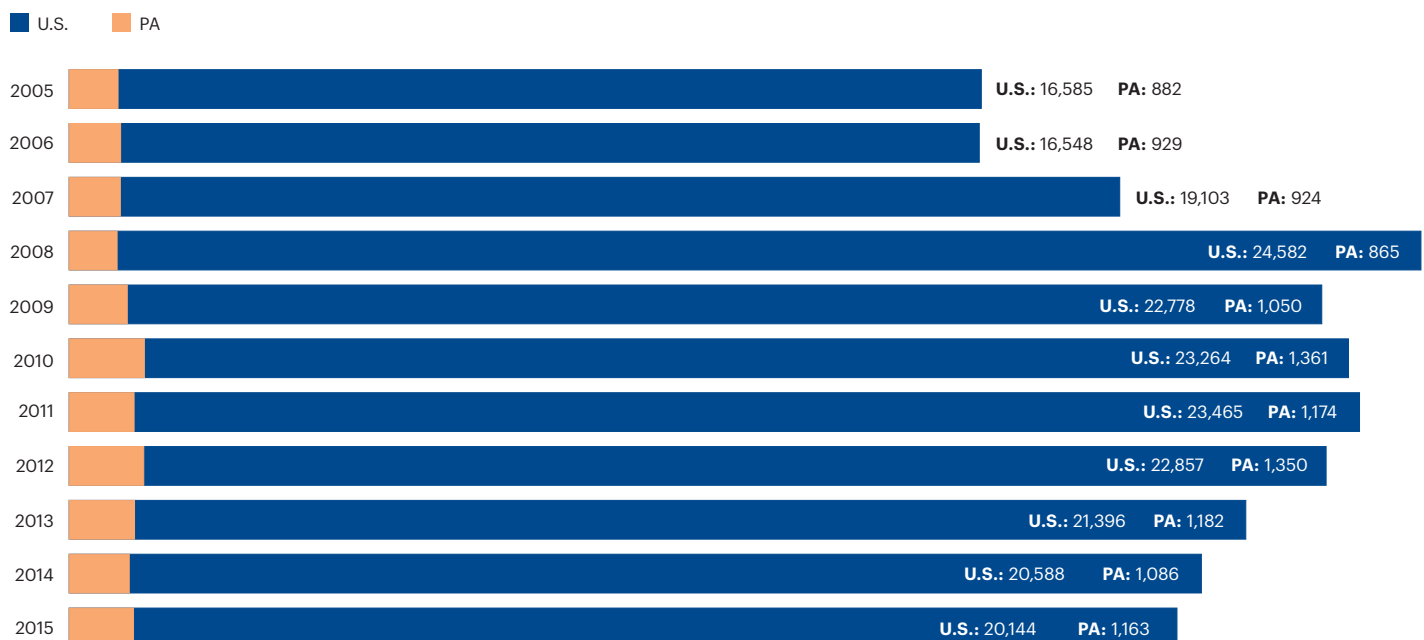
Weinstein, who counsels management on human resources issues, said more educational training would help narrow the knowledge gap regarding age discrimination.

Gerundo obtained some piece of mind from the jury's decision but hopes his case has a wider affect.

"The monetary reward is nice," Gerundo said. "But if this saves one person's job, I would feel like this had accomplished something."

EEOC AGE DISCRIMINATION CHARGES

The number of age-discrimination lawsuits filed across the United States and in Pennsylvania, year by year since 2005.



SOURCE: EEOC