

# **AGEISM AFFECTING THE HIRING AND EMPLOYMENT OF OLDER WORKERS**

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**V**ERMONT ADVISORY COMMITTEE  
TO THE UNITED STATES  
COMMISSION ON CIVIL RIGHTS

*This summary report of the Vermont Advisory Committee to the United States Commission on Civil Rights was prepared for the information and consideration of the Commission. Statements and viewpoints in the report should not be attributed to the Commission or to the Advisory Committee, but only to individual participants in the community forum where the information was gathered.*

**A SUMMARY REPORT**

**AUGUST 1990**

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### **THE UNITED STATES COMMISSION ON CIVIL RIGHTS**

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### **THE STATE ADVISORY COMMITTEES**

An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 States and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 and section 6(c) of the Civil Rights Commission Act of 1983. The Advisory Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective States on matters within the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters pertinent to inquiries conducted by the State Advisory Committee; initiate and forward advice and recommendations to the Commission upon matters in which the Commission shall request the assistance of the State Advisory Committee; and attend, as observers, any open hearing or conference which the Commission may hold within the State.

## LETTER OF TRANSMITTAL

Vermont Advisory Committee  
to the  
U.S. Commission on Civil Rights

### **Members of the Commission**

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Mary Frances Berry  
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Wilfredo J. Gonzalez, *Staff Director*

The Vermont Advisory Committee submits this summary report to advise the Commission about age discrimination in hiring and employment in Vermont. It summarizes information received at a community forum conducted by the Advisory Committee in Burlington on November 30, 1989, a separate interview with an area director of the U.S. Equal Employment Opportunity Commission, and documents collected to help update the project. Appropriate preparations for the forum were carried out to assure a balanced perspective.

As the U.S. birth rate declines, people are increasingly living longer, and the work force is in general growing older. One might, thus, expect that the complementary phenomena of fewer births and increased longevity would lead to less age discrimination than may have up to now existed. Whether or not such discrimination has lessened, ageism adversely affecting workers 40 and older persists in Vermont, according to the forum speakers and by other accounts.

The Advisory Committee heard from 14 speakers ranging from 6 older workers to representatives of 3 State agencies. A State Bar Association member who has served employers as well as older workers, heads of 2 voluntary agencies, a business school professor at the University of Vermont, and a spokesperson from the American Association of Retired Persons also appeared.

Problems were reportedly encountered by would-be older workers in the application and interview stages, workers seeking promotions, and those faced by high technology changes or layoffs. Employers themselves were said to admire older workers, but also rejected many as "overqualified." Some forum speakers agreed that workers wishing to file age discrimination complaints may not know where to go, or, if they discover the Vermont Attorney General's Office, they will find an overworked staff struggling with a 2-year backlog. Meanwhile, a practicing attorney stated that many other

attorneys may be discouraged from taking cases because their costs might not be fully compensated. Moreover, a reported paucity of age discrimination cases has left the judiciary in Vermont with relatively little experience in this specialized litigation.

The Committee unanimously voted to submit this report and trusts that the discussion and recommendations by the speakers will prove useful to you as you consider a national study.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Eloise R. Hedbor', with a long, sweeping horizontal line extending to the right.

Eloise R. Hedbor, *Chairperson*  
Vermont Advisory Committee

## **Vermont Advisory Committee to the U.S. Commission on Civil Rights**

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South Hero

**Louvenia D. Bright**  
South Burlington

**Samuel B. Hand**  
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**Kimberly B. Cheney**  
Montpelier

**Philip H. Hoff**  
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**Nathan B. Duthu**  
White River Junction

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**M. Jerome Diamond**  
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**A. Peter Woolfson**  
Burlington

### **Acknowledgments**

The Vermont Advisory Committee wishes to thank the staff of the Commission's Eastern Regional Division for its help in the preparation of this report. The forum and report were the principal assignment of Tino Calabia with support from Edna Y. Nicholson and Linda Raufu. The project was carried out under the overall supervision of John I. Binkley, Director of the Eastern Regional Division.



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*You don't find many early or primitive societies that treat old people as badly as civilized societies do.*

Anthropologist Margaret Mead  
Quoted in *The Age Discrimination Study*  
The U.S. Commission on Civil Rights  
December 1977

## BACKGROUND

The issue of age discrimination in employment--victimizing workers age 40 and over--in Vermont surfaced nationally last year with a suit brought by a State supreme court justice contesting Vermont's law that required him to retire at the age of 70.<sup>1</sup> The State judge filed an age discrimination complaint with the U.S. Equal Employment Opportunity Commission (EEOC) which supported his case in Federal court,<sup>2</sup> while two other States had arrayed themselves with the State of Vermont against the complainant's charge.<sup>3</sup> This spring, the case was decided in favor of the complainant.<sup>4</sup>

As widely publicized as this precedent-setting case has been, more customary kinds of age discrimination have been charged by less prominent residents of Vermont.<sup>5</sup> The Vermont Advisory Committee to the U.S. Commission on Civil Rights was told during the Committee's September 1986 forum on civil rights enforcement in Vermont that 18 percent of the discrimination complaints filed that year with the State attorney general's Office became age discrimination cases, as compared with 5 percent for complaints based on race, and 54 percent for those based on sex.<sup>6</sup>

For such reasons, the Vermont Advisory Committee decided to hold a

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<sup>1</sup>See, e.g., William Cockerham, "Judge in Vermont Fights Retirement Law," *Hartford Courant*, July 16, 1989, p. A-1; and Bob Hohler, "Vermont Judge Defies Retirement Law," *Boston Globe*, Jan. 14 1990, p. 33.

<sup>2</sup>Vera Haller, Associated Press, "Age-Bias Case Focuses on States' Right, Congress' Intent," *Burlington Free Press*, Jan. 6, 1990, p. 3-B. On this case and similar cases in other States, see also, "ADEA Protects Appointed State Judges, Court Rules," *Fair Employment Report*, Business Publishers, Inc., vol. 28, no. 1, Jan. 3, 1990.

<sup>3</sup>"Two States Join Vermont Suit on Age Discrimination," *New York Times*, Dec. 16, 1989, p. 14.

<sup>4</sup>Christopher Graff, "Justice Peck Wins Age Discrimination Suit in Federal Court," *Bernington Banner*, May 22, 1990, p. 16; "Editorial: Justice's Age Fight Should Help Elderly," *Newport Express*, May 24, 1990; and "Court Affirms State Judges May Not Be Forced to Retire," *Daily Labor Report* (Bureau of National Affairs), June 6, 1990, p. 1.

<sup>5</sup>See, e.g., Anne C. Averyt, "Older Workers: A Secret Resource or the Victims of Ageism," the Vermont Living section of the *Sunday Rutland Herald*, Feb. 26, 1989, p. 1 (hereafter cited as "Older Workers . . . Victims of Ageism").

<sup>6</sup>Vermont Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights Enforcement in Vermont* (September 1987), p. 17.

forum on age discrimination in employment.<sup>7</sup> The forum took place in Burlington on November 30, 1989. A representative of the Washington, D.C.-based American Association of Retired Persons (AARP) opened the forum with a brief national overview. She was followed by two speakers representing the Vermont Bar Association and Vermont Associates for Training and Development respectively, and a professor at the University of Vermont's school of business. In addition, six residents over 50 years of age, who experienced hardships while seeking employment, offered their views on age discrimination.<sup>8</sup>

These 10 speakers were followed by representatives of the Vermont Department of Employment and Training, the Vermont Office on Aging, the Vermont Attorney General's Office, and the Champlain Valley Agency on Aging. The executive director of the Vermont Commission on Human Rights submitted a statement through the representative of the Vermont Attorney General and updated her statement in July 1990. The day after the forum, the Committee's staff coordinator carried questions from the Committee down to Boston where he interviewed the director of the EEOC's New England office.

This summary report is based on the official transcript of the forum, the interview with the EEOC regional director, and other documents used to amplify upon issues described by the panelists or to update information in this report.<sup>9</sup>

## I. PRIVATE AGENCIES, PRIVATE CITIZENS

### American Association of Retired Persons

Shirley B. Waldrum, a senior program specialist in the workers equity department of AARP, explained that her department represented an initiative based on AARP's finding that millions of AARP members--perhaps a third of the membership--were working or wished to become employed. It has filed many *amicus curiae* briefs, initiated court suits on age discrimination, and given support to legislation intended to combat such discrimination. AARP has also filed recommendations with the EEOC on how better to facilitate ageism complaints and to collect statistics on such complaints.

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<sup>7</sup>A handy explanation of the Federal Age Discrimination in Employment Act (29 U.S.C. secs. 621-634, 81 Stat. 602 (1967) as amended) appears in *Older Americans in the Workforce: Challenges and Solutions* (Bureau of National Affairs, 1987) (hereafter cited as *Older Americans in the Workforce*). See esp. "The ADEA: the Employee's Perspectives," pp. 131-145, a chapter authored by Raymond C. Fay.

<sup>8</sup>The Coalition of Vermont Elders was also invited but was unable to be represented.

<sup>9</sup>The forum transcript and other supporting documents may be reviewed at the office of the Eastern Regional Division of the U.S. Commission on Civil Rights.

At the same time, her department receives approximately 100 letters a day, mostly about terminations perceived as related to age. Many who contact her department do not appear to know where else to go with their complaints, or, if they have consulted an attorney, may not understand something they have been told. Their terminations have usually accompanied the "downsizing" of businesses, resulting in early retirement offers being made to older workers who "don't know what their rights are. They don't know if they don't take early retirement offers, can they be let go? and, if they are let go, is there any . . . recourse [for getting] their jobs back?"<sup>10</sup> As for legal help, not many attorneys are involved, since they will not find it profitable to take an age discrimination case "if it doesn't have a lot of people to join in the suit." At the same time, said Ms. Waldrum, some employers contact the AARP for help while trying to prepare retirement and pension plans that will not be discriminatory.<sup>11</sup> Meanwhile, about 200 AARP volunteers contact other employers to share information on the Age Discrimination in Employment Act.

Ms. Waldrum estimated that, of the age discrimination claims which come to AARP's attention, 60 percent are dismissed. In comparison, of those that go to trial and are resolved, 60 percent are resolved in favor of the employee. None of the cases known to Ms. Waldrum, however, has involved complainants in Vermont. The AARP regional office in Boston, which serves Vermont, has only one attorney for all of New England and is, thus, not staffed for heavy litigation, and the number of AARP volunteers in Vermont is low. That office does circulate *Information Update*, a newsletter for Vermonters.

### **An Age Case in Vermont**

Anita R. Tuttle, an attorney with Downs, Rachlin, and Martin of Burlington--who acknowledged that she has represented plaintiffs and defendants in different age discrimination suits--appeared as a member of the Vermont Bar Association. She and Heather Briggs, a partner in the firm, had represented a 60-year-old who alleged discharge on the bases of age and retaliation for making a complaint. A jury found in favor of her client regarding his retaliation claim but not his age discrimination claim. However, the judge later granted the defendant's motion for "judgment notwithstanding the verdict," which was tantamount to taking away the jury's verdict upholding her client's charge of retaliation.

In July 1989, after an appeal to the U.S. Court of Appeals for the second circuit, her client won back the retaliation claim. Furthermore, the appeals court agreed with her client that the trial judge had given the jury mistaken instructions on the discrimination claim, so that her client had another opportunity to try the age claim once more. Because the law provides for liquidated damages when the conduct of the employer is intentional and can include double damages, her client planned to go back

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<sup>10</sup>This quote is taken from the transcript of the Advisory Committee's November 30, 1989, proceedings in Burlington. Unless otherwise noted, all quotes and statements in this summary report are from the transcript on file in the Commission's Eastern Regional Division office in Washington, D.C.

<sup>11</sup>See also "An ADEA Compliance Checklist" for employers in *Older Americans in the Workforce*, pp. 127-30.

to try to double the damages won in the first proceeding.<sup>12</sup>

### **Court Instructions and Kinds of Evidence**

Ms. Tuttle reported that an earlier case in which a different plaintiff won a favorable verdict on an age discrimination complaint also appeared to her to have involved mistaken instructions from the judge to the jury. She believed that judges may not be fully familiar with age discrimination cases because historically there have been few claims locally.<sup>13</sup>

One difficulty arises in distinguishing between cases with "direct evidence" as opposed to "circumstantial evidence" of discrimination. In many cases, a plaintiff may have only circumstantial evidence of discrimination. In these cases, if the plaintiff develops a *prima facie* case, the burden of production shifts to the employer to present a legitimate reason as to why an adverse action was taken. If the employer comes up with such a reason, the burden shifts back to the plaintiff. In circumstantial evidence cases, the burden of proof always remains with the plaintiff, Ms. Tuttle explained.

Where an employee has direct evidence of discrimination--such as a damning memorandum, letter, or statement--the burden of proof may shift to the employer to prove that any articulated legitimate reason for the adverse action is not "pretextual." Thus, different types of age cases may need different instructions depending on the type of evidence involved.<sup>14</sup>

### **Encouraging the Private Bar**

On whether such claims are profitable for attorneys to file, Ms. Tuttle noted that the law allows the prevailing plaintiff to apply for attorney fees from the defendant. But she emphasized that such cases take time; 2 years had elapsed on her client's case, and she estimated that it would require 2 more years to go through a second trial. After that it still could ultimately end up in the U.S. Supreme Court. Moreover, such cases may not be like:

big personal injury cases where the plaintiff is awarded a million dollars, and the attorney is taking a portion of that. [In many age discrimination cases,] you are talking about backpay, which may not be that significant. An award of front pay may bring it up some more. . . .

Ms. Tuttle mentioned that attorneys can ask for "enhancements," which she has seen add 25 percent to 350 percent of an attorney's basic rate. She believed that, if judges start awarding these sorts of enhancements,

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<sup>12</sup>Ms. Tuttle reports on the conclusion of the litigation in a July 13, 1990, letter to Tino Calabria, coordinator of staff services for the Vermont Advisory Committee. Her client was "awarded all front pay requested" and "all fees and costs were recovered plus a 25 percent enhancement." See appendix A.

<sup>13</sup>See also Howard C. Eglit, "Explanations for Judicial Insensitivity to Discrimination Claims," *Age Discrimination*, Shepard's/McGraw-Hill, August 1983, Vol. 1, sec. 2.17, pp. 2-40 to 2-44.

<sup>14</sup>See also Robert N. Brown, "How Do You Prove Age Discrimination?," *The Rights of Older Persons: an American Civil Liberties Union Handbook* (New York, Avon Books, 1979), pp. 143-145.

more attorneys will take these cases.<sup>15</sup>

### **Proving Discrimination in Hiring Even More Difficult**

On the question of proving age discrimination in hiring, Ms. Tuttle pointed out that she has also represented employers and advised employers about how to avoid lawsuits from the point of composing their application forms, to how to treat applicants, and on through the hiring process. But she does have one older worker client who believes he is not being hired because of his age. In the previous 10 months, this client sent out 42 applications and has gotten only 3 interviews.

Hiring cases may be harder to prove than discharge cases, "unless you have the smoking gun. Employers might avoid age discrimination in the hiring phase by omitting questions about an applicant's age, graduation dates, and the like," said Ms. Tuttle, adding that interviewers should be trained on what to ask and what not to ask.

### **Fashioning a Legislative Remedy**

Advisory Committee member Kimberly B. Cheney, a former Vermont Attorney General, noted that most burden-shifting rules are made by judges. In view of Ms. Tuttle's experience, he asked whether it might be expeditious to distill such experience, "put it in a State act and be done with it, so we don't have to litigate it." Ms. Tuttle replied that "One problem is . . . how are you going to define direct evidence? How are you going to define when the burden is shifting? It must be on a case-by-case analysis."

As to how pervasive age discrimination may be in Vermont, Ms. Tuttle stated that most of the civil rights cases handled by her firm are cases of sex discrimination and sexual harassment. However, age discrimination claims have started arriving with more frequency. As the workforce grows older,<sup>16</sup> and as the so-called baby boomers age, more discrimination cases appear in the offing, Ms. Tuttle speculated.

### **Statewide Survey on Attitudes of Employers**

Barbara R. McIntosh, a professor and researcher in the School of Business Administration of the University of Vermont, presented data from a survey of 256 employers throughout the State which was conducted in the spring of 1989 for Vermont Associates for Training and Development. These employers, representing a cross section of industries, agriculture, and other sectors in Vermont, were hiring personnel at the time of the survey.

In 1987 the average number of persons hired by an employer in the survey was 12, of whom 2.7 were over 45 years of age; in 1988 the average number hired was 9, of whom only 1.3 were over 45. When asked

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<sup>15</sup>Regarding the profitability of discrimination cases, see also Sharon Walsh, "The Vanishing Job-Bias Lawyers; Attorneys, Law Firms Say They Can't Afford to Try Rights Cases," *Washington Post*, July 6, 1990, p. C-1.

<sup>16</sup>The Commonwealth Fund recently released a study indicating that almost 2 million would-be workers, 50 to 64 years of age, are prepared to work more than three times the U.S. Bureau of Labor Statistics' estimate of 630,000. Their reasons for not working include "employer discrimination against older workers." Tamar Lewin, "For Work Force, 2 Million Who'd Quit Retirement," *New York Times*, Jan. 28, 1990, p. 18.



what factors influenced whether or not they hired an older worker, 69 percent of the employers answered that there were no factors one way or another, reported Dr. McIntosh, adding that 8 percent claimed that older workers had not applied for jobs.

### **Older Workers Outside of Hiring Networks**

Although the employers reported an "average amount of difficulty" recruiting required labor, they did acknowledge that they were not going to special sources to seek out older workers, which reflects a national trend whereby employers rely primarily on referrals and then on walk-in applicants. At the bottom of the source of applicants for employers in the survey were private and public employment agencies, leading Dr. McIntosh to state that:

The evidence again suggests, as it has with other minority groups, that the personal contacts and networks needed to be successful in the labor market do not exist for older workers.

When asked why older workers may not be suited for employment in their business, 65 percent of the employers answered that there were no reasons for unsuitability. However, 23 percent expressed concern about heavy lifting and other physical demands, while 4 percent mentioned stress and less than 1 percent cited health, attitude, adaptability, and resistance to change as reasons for not hiring older workers. Dr. McIntosh was confident that the design of the questionnaire minimized any deception on the part of the respondents and to that extent, the results appeared to reveal no overt discrimination.

### **Organizational Inflexibility Yields Discrimination**

Dr. McIntosh also reported that some employers had words of praise for older workers. These employers found them to perform better under pressure, be more conscientious, and less likely to be absent. Older workers were said to be willing to take jobs that are available, be adaptable, and have the required skills. Salary, benefits, and training costs were not an issue with the employers; productivity was. Dr. McIntosh said:

Now this all sounds terrific. Oh, we don't have any discrimination in the State. However, you have to come down to that next category and look at organizational structure. And here is where I think it is very blatant . . . . There is a startling lack of responsiveness to the increasing demand and need for flexibility in the work force when it comes to older workers. . . . What we find . . . is that this organizational inflexibility is really age discrimination.

When employers were asked the average age for an employee's final promotion, the response was age 42, noted Dr. McIntosh. "In other words, if you're 50, you can scratch off the promotion in all likelihood." Also, an average of only two older workers took part in training or retraining every year, and employers have not used job transfer or job redesign, which can

be critical as workers grow, develop differently, or change in their careers. For work to remain meaningful, it is essential for workers to know that they are valued and given the same opportunities as other younger employees. However, employers in Vermont have not instituted the policies and procedures necessary to retain or attract older workers, according to Dr. McIntosh.

### **Alternative Work Arrangements**

In terms of alternative work schemes, she stated that there are demonstration programs around the U.S. featuring transfers, job sharing, longer vacations, flexible work hours, reduced hours with reduced pay, and fewer workdays.<sup>17</sup> She noted that a nationwide poll by Louis Harris found that 80 percent of retirees wanted work, but part-time work. However, only 61 percent of the Vermont employers surveyed offer part-time work; 34 percent, seasonal work; 27 percent, reduced hours for reduced pay; 52 percent, flexible hours; 46 percent, fewer workdays; and just 16 percent, longer vacations, job sharing, or job transfers.

Dr. McIntosh concluded that Vermont employers have been "treating older workers in terms of business as usual. . . . As long as they are productive, it's fine." But as to the needs of older workers for flexibility in the workplace and fair treatment in performance appraisals, training, promotion, and compensation, "there is clear discrimination in these areas." Asked whether the discriminatory effects occurred while employers were unaware that they were discriminatory, Dr. McIntosh referred to stereotypes that operate in such a way that: "It's much harder to identify why [older workers were] turned down, just as women, just as blacks, [and] Hispanics are turned down at the door--there is the same stereotype." She added that ignorance is a factor and education is needed to eliminate the different forms of discrimination.

### **Business Professor's Recommendations**

In light of the above, Dr. McIntosh recommended that retraining funds be targeted toward older workers and that agencies such as Vermont Associates for Training and Development, which prepares older workers, receive increased funding and that these agencies become incorporated into the referral system or network used by employers. She also urged tax incentives for businesses or firms employing individuals beyond age 62 for women and 65 for men, and encouraged efforts to remove the earnings cap on social security so that older workers are not discriminated against with respect to hours of work. Private pension provisions need to be changed so that older workers are not similarly penalized by losing their pensions if they resume working.<sup>18</sup> Finally, programs should be developed to help employers recognize the need to retain older workers before it is too late.

Asked about the generally low-paying fastfood industry jobs once widely publicized as seeking older or retired workers, Dr. McIntosh said the

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<sup>17</sup>See also "Issue: Flexible Work Arrangements" in *Older Americans in the Workforce*, pp. 101-11.

<sup>18</sup>See also the discussion on p. 14, below. Since the forum, a study by a Social Security Administration researcher concludes that the earnings cap may not play the pivotal role ascribed to it in an older worker's decision to return to the workforce. Spencer Rich, "Up Against the Earnings Cap: Social Security Test Seen Having Little Impact on Work Decisions," *Washington Post*, June 4, 1990, p. A-13.

TV commercials cheerfully depicting older workers employed in that industry angered her. She did not want older workers to be exploited.<sup>19</sup> Yet she has spoken with people who are content with such jobs at \$6 an hour, several hours a week. At the same time, she stressed that many occupations exist in health care, computers, and computer-related technologies which offer desirable employment opportunities, though they may require some retraining for older workers.

### **Vermont Associates for Training and Development**

Pat Elmer, executive director of Vermont Associates for Training and Development (VATD), introduced Emile Lagrandeur, William Kelley, Phyllis Atwood, and Fern Leduc; each had experienced difficulties as older workers in search of jobs and each would supplement Ms. Elmer's presentation.<sup>20</sup> Her private, nonprofit agency, VATD, is supported by Federal funding from the Senior Community Service Employment Program<sup>21</sup> and by State funding from the State Department of Employment and Training.

VATD designs and operates services exclusively for the mature and older worker, 55 years of age and older, through a network of 11 training centers throughout Vermont, and VATD has been nationally recognized as a model program, said Ms. Elmer. It has been called upon by the U.S. Department of Labor, the National Council on Aging, the Coalition of Northeast Governors, and the New Jersey Department for the Aging, among others.

### **Profile of VATD's Service Population**

In Vermont itself, VATD oversees the training and employment needs of over 42,000 workers who constitute approximately 20 percent of the State's population and 14 percent of its labor force. Of those, over 500 persons enroll yearly in VATD's various programs, more than 2,500 in the previous 6 years. One-third are men, and in terms of education, one-third have not completed high school, a third have high school diplomas or the equivalent, and the last third claim more than high school education.

VATD helps them decide what they want to do at this point in their lives,<sup>22</sup> imparts basic job skills, and develops and subsidizes on-the-job training in both the public and private sectors. VATD also provides peer support and vocational counseling which includes work search seminars on how to look for jobs and effectively fill out job applications. Two subpopulations exist among enrollees, the "young-old," those 55 to 62, and the "senior" group, those 63 and over, a distinction which affects their eligibility for medicare, social security, pensions and, therefore, their needs. Two-thirds of those served by VATD are from the younger group, the other third from the older group.

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<sup>19</sup>See also "Opportunity or Exploitation?" in *Older Americans in the Workforce*, pp. 108-09, which similarly reacts to McDonald's employment of older workers.

<sup>20</sup>Ms. Elmer further supplemented her remarks with a July 19, 1990, letter to Tino Calabia who coordinates staff services for the Vermont Advisory Committee. See Appendix B.

<sup>21</sup>Pub. L. 100-175, 101 Stat. 926, 42 U.S.C. 3001.

<sup>22</sup>See also Richard N. Bolles, "The Decade of Decisions: How Will You Write the Last Chapter of Your Working Life?," *Modern Maturity* (AARP), February-March 1990, pp. 36-46.

Ms. Elmer pointed out that 75 percent of VATD's clients have been unemployed 15 weeks or longer or were otherwise out of the work force. Some of them were so-called "discouraged workers," those no longer seeking work because they do not expect to find it. Such persons may well have lost their self-esteem as well as income, Ms. Elmer speculated, and once their unemployment insurance benefits become exhausted, they are no longer counted as unemployed. For this reason, the unemployment rate and the data on the length of unemployment are understated for older workers.

### **Reasons for Working and Rate of Success in Job Search**

According to Ms. Elmer, the reasons that older persons are willing to work include the desire for immediate income and financial security, the need for self-respect and status, and the wish to be with others for a sense of belonging and/or to be involved in doing something meaningful. At the same time, some prefer part-time work with less pressure and responsibilities, while others "want just the opposite: full-time mainstream, pressure-cooker positions with high pay and promotional opportunities." Thus, the older worker cheerfully depicted in the McDonald's television commercial is not the typical older worker, Ms. Elmer stated.

Of VATD's placements, over 30 percent are in the public sector, and about 67 percent in the private sector. Regarding the job-finding success rate in the public sector, the national goal is to train and place 20 percent of the enrollees in government, but VATD places about 30 percent, while the national average placement is 24 percent. Enrollees placed in the public sector originally entered VATD's programs with no marketable skills.

Enrollees in training for the private sector tend to have basic job skills already and may only need to update or upgrade their skills, and so the programs are shorter. The positions they fill include office manager, well driller, machine maintenance worker, data processor, meat cutter, bricklayer, nurse and nurse aide, clerk, sales person, woodworker, teacher and teacher aide, engineer, cost accountant, and, "everything in between," Ms. Elmer emphasized. A national goal has not been set for placement, but the averages around the Nation range from 35 percent to 100 percent, with hourly pay rates ranging from \$3.65 to \$5.68.

VATD's trainees found jobs with an average hourly pay rate of \$6.64. She suggested that inherent in such average rates was the fact that many jobs pay much less but are masked by the few jobs that pay much more, \$10-\$18 an hour. Thus, the average pay rate appears "respectable" but may obscure a trend indicating "potential civil rights abuses."

### **Forms of Age Discrimination in Vermont**

Ms. Elmer then raised the question of whether age discrimination exists in Vermont. Stating that the answer is difficult because age discrimination is difficult to prove, she asserted that "From our vantage point, it is a very real problem," but that a better question to pose is "What types of discrimination exist and what forms does it take? At each step in the employment process we see different types of attitudes and behaviors."

Some people feel they have been screened out at the initial application stage. Though they have the required qualifications, their applications for job after job go

unacknowledged. . . . Is it because of dates given on the application, or is it because the resume had too much work history? How does one substantiate a complaint so that the attorney general's office could even consider pursuing it? Others make it to the interview only to see the interviewer's eyes glaze over at the sight of a mature person.

Ms. Elmer mentioned the case of a mature, white-haired woman whose "skills, dress, and demeanor . . . are up to date yet she has not been successful in getting beyond first base." Ms. Elmer wondered if any Vermont employer bases a hiring decision on a person's hair, and then implied that, if so, "It's irrational. Little wonder why the woman is reluctant to discuss her problem with any of the authorities."

She added that a man was told that a position for which he applied was filled, but, when the man had his son apply, an interview was set up for the son. Though the father developed some degree of evidence of ageism, he decided against registering a complaint, reasoning that: "It's a waste of time and energy. There is such a backlog that they will never get to my case, and besides, I would not work for that type of company anyway." Ms. Elmer decried the lost opportunity for the filing of a complaint but at the same time characterized the father as "a real Vermonter, very proud and independent, typical of the people we see."

### **Ageism in Promotion, Training, Layoffs**

Ms. Elmer also mentioned the phenomenon of employers' turning older applicants away on the claim that they are "overqualified" without any supporting reasons legitimizing the claim. She said that age discrimination practices occur in selections made for promotion, work assignment, training and retraining, layoffs, and termination. As in other parts of the country, Vermont has been hit by corporate downsizing which "often goes hand-in-hand with the early retirement incentives, the buyoffs, the so-called 'golden handshake,'" with the last-named phenomenon being "more appropriately called the 'golden boot,'" by her VATD staff.

Ms. Elmer then told the Advisory Committee: "we need to have you maintain your focus and pursue this issue. . . . Ageism manifests itself in too many ways." She also said that most older workers have the impression that there is "simply no place to go [with a complaint], and no one is going to listen, and there is not going to be action taken. . . . When you call the attorney general's office, there is a part-time person there 2 days a week. It is just not sufficient."

### **Case History One: Dietitian to Administrative Assistant**

Phyllis Atwood explained that for the past 35 months she has been employed in her second career as an administrative assistant in one of Vermont's regional weatherization program offices. However, she earlier worked as a dietitian for 35 years. With a bachelor's degree in food nutrition and a master's in public health, Ms. Atwood was an American Dietetic Association member who had interned in a Boston hospital and practiced in several States from California to New York. In Vermont in 1981, she headed a staff that under her had grown from 5 to 20 employees, but she then asked to step down from management to a staff position working directly with patients again. For 5 years afterwards, she was "rewarded with the lowest status assignments" and eventually she left.

At the age of 57, she unsuccessfully attempted to find new work in Burlington until she enrolled at VATD and completed its job-seeking skills workshop. In January 1987 the VATD job counselor informed her about the weatherization program opening, and she was hired as a part-time administrative assistant the same day that she was interviewed, although at half her salary as a registered dietitian. Now working full-time, she described herself as a "most fortunate person."

### **Case History Two: Former Classroom Educator**

Emile Lagrandeur had been a classroom educator for 20 years, then administered Federal programs and educational programs when his last position was terminated. Undaunted, he filed some 60 applications from November 1987 until March 1989. However, he remained unemployed even though he is bilingual and bicultural and has 60 credits beyond the bachelor's degree. He was invited to only four interviews. The most frequent response to his resume was that he was overqualified, although a few employers said that he was not qualified.

In some instances, if he received no response, Mr. Lagrandeur telephoned, only to be told that his resume or application could not be found and that the closing date for the position had passed. As part of his followup, he discovered that in many instances the job had been filled by a considerably younger person who often may have been from out of State. Such was true of both the public and the private sectors, leading Mr. Lagrandeur to conclude that even the State government "may not be as open to age as they want us to believe." Ultimately, he was interviewed twice at VATD and began working with VATD in March 1989.

In general, Mr. Lagrandeur believed that:

[M]ost of the experiences that I have had are really based in some form on age discrimination. But again, how do you prove it? How do you take the fact that the individual company . . . says to you that you are "overqualified" and how do you take that and go to an attorney and say, hey, look, you know that I am as capable as anybody else. . . . There's no proof beyond the point of your word against the employer's word for the most part.<sup>23</sup>

### **Case History Three: Displaced by Computer**

Fern Leduc had been a pharmacy billing clerk for 14 years when her job was phased out as the billing work became computerized. The pharmacist simply keyed in the billing as he filled each prescription "so that left [her] either to go back to clerking or to look for something else." Hired as a receptionist at a sports distribution company, she learned new skills over 4 years--switchboard operation, telex, and word processing. In her present job at VATD, she is in charge of payroll for approximately 200 employees.

VATD provided Ms. Leduc training in data processing, and she is now

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<sup>23</sup>For some assistance with such questions, see also William R. Wishard, "Facts Tending to Show Discrimination," *Rights of the Elderly & Retired: a Peoples' Handbook* (San Francisco, Cragmont Publications, 1978), pp. 13/8-13/9.

responsible for computerized office operations proving, she said, "that an older person who is interested can learn new skills and continue to be productive in the workplace. . . . My recommendation is that lifelong skills training should be available to senior citizens, as well as to the younger population, in the classroom as well as on the job."

#### **Case History Four: In Search of a New Career**

William Kelley is a 60-year-old college graduate presently holding a managerial position supervising 5 of VATD's 11 offices. He had previously coached and taught grades 3 through 12 in New Jersey and Massachusetts schools. In Connecticut, Massachusetts, and New York, he worked for the YMCA for 26 years in positions ranging from physical education director to chief executive officer. Over the years, he developed a wide variety of skills, and after 26 years with the YMCA, he moved to Vermont for a midcareer change. He told the Advisory Committee:

I certainly was in for a great surprise. I quickly found out I was not such a hot item and was considered old at then-56. . . . Very rapidly I became bitter, ashamed of my age, lost my self-respect, developed doubts of my ability and finally I was intimidated in many sly ways [and led to believe] that it would be very difficult for me to learn new concepts of business procedures.

Despite becoming intimidated by young personnel managers, Mr. Kelley persisted, however, and was hired by VATD where he has been able to utilize his old skills, and, like Ms. Leduc, learned new skills. He recommended that job applications be studied, redesigned by some older workers, and considered by the Advisory Committee.

#### **Case History Five: No Deliberate Discrimination**

In an op-ed article appearing in the *Burlington Free Press* 2 days before the Advisory Committee's forum,<sup>24</sup> Frederick G. Hill described himself as "an over-50 professional trying to change careers and too long unemployed." Mr. Hill reported that the article prompted several calls, the first call offering him a job doing phone work, possibly in financial services, a field that did not interest him.

In answer to a question from Advisory Committee Chairperson Eloise R. Hedbor, Mr. Hill responded that employers do not deliberately discriminate against older workers. He related the one experience he had as a photographer helping to hire his replacement for an ad agency in Boston. His supervisor and he had received about 30 applications which they weeded through with "no thought given to whether it is fair to the applicants." He believed that now in his own job search his resumes or applications are "culled out by a lot of secretaries who really have no say in the matter."

#### **The "Overqualified/Underqualified" Syndrome**

Nevertheless, according to Mr. Hill's op-ed article, his present job

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<sup>24</sup>Frederick G. Hill, "Perspective: There's More to Solving Unemployment Than Reading Want Ads," *Burlington Free Press*, Nov. 28, 1989, p. 9-A.

search attempts have helped him "to understand discrimination: what has long been known by blacks, Hispanics, Jews, Irish, women--altogether the great majority, not minority, of the population." In his *Burlington Free Press* article, Mr. Hill also focused upon:

the "Overqualified/Underqualified syndrome": regardless of the job you apply for and your qualifications for it, you are never qualified at just the right level to be hired. In fact, ostensible qualification has little to do with it. "O/U" happens only with older job-seekers, and age is the factor. Young people, new to the job market, are underqualified but still get hired.

Mr. Hill said that he does not favor legislation, believing that too many laws aimed at social change already exist. He "would rather, if possible, just raise everybody's consciousness and rely on their good will. . . ."

### **Case History Six: Draftsman Versus Computer**

Louis E. Krieg, Sr., stated that 40 years ago the worker "with 30 years experience was highly respected in the world and that [the worker's] experience was valued." As someone with 40 years of experience in his profession, he then explained that computers put him out of work as a draftsman. In search of new work, he mailed out perhaps 100 resumes in one period. Only about 10 percent of the companies to whom he sent resumes were unknown to him; when he contacted acquaintances among the 90 percent he knew, he learned that no one over half his own age had gotten the jobs he sought.

In his field, companies hire young people who may have only 2 years of training if they are versed in computer applications. Mr. Krieg said that they are hired "because they can run the computer. They will not hire me and teach me to run the computer." At the same time, he did not think that retraining alone is the key because the technology changes so quickly; a person has to be on the job using the computer and software daily.

Mr. Krieg further noted that some employers did recognize that his experience would be worth two or three times the \$6.50 an hour pay offered for particular jobs. Although Mr. Krieg was willing to accept such offers, employers declined to hire him, describing him as overqualified for the position and speculating that he would desert them once someone else offered \$20 an hour. Mr. Krieg pointed out to the employers that younger draftsmen may well leave for higher pay also, but he still was not hired.

## **II. State Agencies, State Contract-Agency**

### **Vermont Department of Employment and Training**

Phillipa Maloney, the human resources administrator of the Vermont



Department of Employment and Training, explained that Federal Job Training Partnership Act (JTPA)<sup>25</sup> funds received by the State designate 3 percent for training older workers, and her department allots about \$150,000 to VATD for that purpose. To a lesser extent, her department also cooperates with the Vermont's Office on Aging, which in turn places trainees in public agencies.

She added that her agency works with the Vermont Attorney General's Office and the Vermont Human Rights Commission on discrimination complaints, but not many complainants allege age discrimination. She was not sure why there have been so few such complaints, but speculated that, since Vermont is a small State, "a lot of people feel that if I cause a problem [by filing a charge], it precludes my [finding] employment somewhere else."

### **Stereotyped Views About Older Workers**

Ms. Maloney stated that employers need to learn to appreciate the advantages in hiring older workers. She thought that employers may view a worker who had previously been at one company for 2 decades as being "too narrow in focus." They also may see older workers as opinionated and even prejudiced. As an older worker herself, Ms. Maloney suggested that:

[T]he most opinionated are the younger ones, because they immediately look at an individual and say, oh, well, they are going to feel as though they know more than I do, and they are not going to have the tolerance. And it usually works the other way around, because that older person has lived a little bit. They have a little more tolerance and understanding, especially the understanding that is needed to get along with the rest of their coworkers.

Additional problems affecting the older worker relate to the social security cap and insurance and pension plans. The social security cap or earnings limitation restricts the amount a person can earn without reducing the social security annuity.<sup>26</sup> Ms. Maloney also noted that flextime and jobsharing are available to younger workers but are not as available for older workers.

### **Vermont Department of Rehabilitation and Aging**

Barbara Leitenberg, formerly the assistant director of the Vermont Office on Aging, pointed out that the office on aging no longer exists but is now part of the State Department of Rehabilitation and Aging; she serves as director of the General Services Division of that Department.

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<sup>25</sup>P.L. 97-300, 29 U.S.C. 1731 and 1733.

<sup>26</sup>For a brief recent explanation of the earnings limitation, see John Cunruff, Associated Press, "Business Mirror: Elderly Penalized for Working," *Daytona News-Journal*, Dec. 27, 1989, p. 5-A. Mr. Cunruff writes that "workers between 65 and 70 can earn up to \$8,880 without losing any Social Security income, and up to \$8,480 if they're under 65 and collecting benefits. Beyond those dollar limits, beneficiaries lose 50 cents on the dollar. . . . [In 1990,] the maximum that beneficiaries can earn will go up to \$9,360, with benefits reduced by \$1 for every \$3 earned beyond the limit. But that still amounts to a 33 percent tax, often on relatively low wages."

She then reported<sup>27</sup> that the population of Vermonters age 60 and older has increased from 55,000 in 1950 to almost 85,000 in 1985, an increase of 55 percent in 35 years. The proportion represented by that age group has also increased; in 1950, 10.5 percent of Vermonters were age 65 and older; by 1980, they had increased to 11.4 percent and by 2000, are estimated to constitute 12.3 percent of the State's population and 21 percent by 2040.

With the burgeoning of that age group, the composition of the work force will be forced to change, said Ms. Leitenberg.

whether employers like it or not. They are going to be hiring older people because there are not going to be young ones around. . . . [and] in all of these [older subgroups], women vastly outnumber men. When we talk about older people, we are really talking about women, and . . . sex discrimination gets totally mixed in here when you talk about discrimination in terms of aging.<sup>28</sup>

### **Older Vermonters Not Rich**

She further pointed out that, contrary to some media discussions, older Vermonters as a group are not living in luxury: the average monthly income for households inhabited by persons 60 and over is about \$1,100, with one-half of those 26,000 people without spouses having annual incomes of \$7,000 or less. In addition, 30 percent of female Vermonters 75 or older have incomes below the poverty line, and almost 65 percent of all Vermonters 65 or older rely on social security as their primary source of income.

The attitudes of older workers toward employment were learned in 1987, when the Vermont Office on Aging took a survey which indicated that 7.5 percent of persons 60 and older were unemployed but desired to work; of those between 60 and 64, 13.6 were not working and wanted to work. In addition, 12.9 percent of older Vermonters offer their services as volunteers. On the other hand, Ms. Leitenberg asserted that the social security cap, as mentioned earlier, represents a disincentive to continuing to work or to getting a job.

### **Not Simply a Matter of Evil Employers**

From the point of view of an employer, Ms. Leitenberg noted that she has hired or been instrumental in hiring 8 of the 20 current staff in her unit who were 32 years old, 2 at 35, and 1 at 37, 43, 48, and 68. The most recent hire had been a candidate for the unit's position of business manager. About 15 individuals applied including in-State workers, some from outside of Vermont, as well as several older people with 20 or 30 years of financial management experience. All possessed impressive work records, but not one had made an effort to discover what the job entailed. Since she needed someone interested in that specific job and not just in

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<sup>27</sup>This section on the Vermont Department of Rehabilitation and Aging uses data from both the forum transcript and *Characteristics and Needs of Older Vermonters*, which was published by the Vermont Office on Aging in 1988 and was submitted by Ms. Leitenberg for the record.

<sup>28</sup>For a differing viewpoint, see "Few Age Cases 'Overlap' Other Types of Discrimination," p. 22 below.

describing what they had accomplished over the decades:

... we wound up hiring somebody who is 35, who ... made it his business to find out what the nature of the job was. ... He was very well experienced also, but he did not have 20 years. He had about 5 or so, but he did homework, and, as an employer, I find that very significant.

Thus, Ms. Leitenberg concurred with earlier speakers like Mr. Hill who hesitated to blame employers. "This is not a simple issue of evil employers discriminating against unsuspecting older people," she said, "There are too many things going on here." Looking at the department's unit for the aging, she noted that the average age of the 20 people in that unit was 46, with none under 35.

Like the Vermont Department of Employment and Training, her unit in the department of rehabilitation and aging has not received many complaints of age discrimination in the 10 years that she has been with it. She speculated that one reason may be that the unit is "too far away from working directly with older people." She also agreed with earlier speakers that "For all sorts of reasons, people cannot prove [discrimination or] do not want to bring it up."

### **Vermont Attorney General's Office**

Robert Appel, the assistant attorney general in charge of the civil rights unit of the Vermont Attorney General's Office, explained that his unit includes five full-time staff: three investigators, a secretary, and himself. He regretted having only one part-time intake worker, since "the need to have somebody respond immediately to persons with potential complaints and referrals is critical." Telephoning a government office and being told that it would take 2 or 3 days before the call would be returned is a frustration both to the caller and to him. Moreover, because of a 40 percent increase in his unit's overall caseload over the last 2 years, he also stressed that additional investigators are needed as well.<sup>22</sup> Still, his most immediate need is for a full-time intake worker, but filling that staffing gap seemed unlikely to occur because of the financial status of the State.

At any rate, for the past 14 years, his unit has served as the deferral agency for the U.S. Equal Employment Opportunity Commission on Title VII claims based on race, color, religion, national origin, or sex, and on age claims under the 1967 Age Discrimination in Employment Act (ADEA). In 1981 the Vermont Legislature passed amendments to the State Fair Employment Practice Act (FEPA) outlawing age discrimination, defining "age as over the age of 18, with no upper cap." Thus, since 1981, the unit has had concurrent jurisdiction with the EEOC on age complaints alleging violations of the ADEA and also, from 1982 to the present, a contract with EEOC to process these complaints.

### **Number and Percentage of Age Cases**

In fiscal year 1982, the first fiscal year following the passage of the

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<sup>22</sup>See also Michael Tighe, "Discrimination Complaints Rising: 220 Cases Overwhelm Investigators," *Burlington Free Press*, July 15, 1990, p. 1-B. Speaking of his general caseload, Mr. Appel is reported as saying that "[I]t would take up to 15 months of work exclusively on these [220] cases to erase the backlog."

age amendments to the FEPA, the unit had 120 cases, and it has been anticipated that in fiscal year 1990, approximately 250 cases will be received. "Unfortunately," Mr. Appel added, "our resources have not increased in kind." At the same time, the percentage of age complaints, compared to other discrimination complaints, decreased over the period from fiscal year 1982 to the present, dropping from approximately 30 percent to 18 percent. He stated that he had no explanation for the percentage decrease other than the anecdotal information given by earlier panelists.

The difficulty in proving any discrimination claim is considerable, but when you are talking about age, it is even more difficult, because age differentials are not as obvious as sex or race or, in some cases, national origin or handicap claims. . . . The most common types of complaints are . . . failure to hire, and we are seeing a radical increase in involuntary layoffs and terminations, with the recent economic downturn. Those cases are even more difficult to prove in certain circumstances, because there is a legitimate business reason for reducing the work force.

Moreover, explained Mr. Appel, the analyses for a case may require comparing "persons within the protected category of 40 and over with those who are not. The statistical analyses are difficult, because the numbers involved are relatively small, and you do not end up with stark statistical disparities." Cases in which such analyses are less difficult tend to be the "exception rather than the rule." He also mentioned that under both Federal and State laws it is against the law for an employer to retaliate against an employee filing a charge or, under State law, an employee even thinking about filing a charge. He also said that it is unlawful to discriminate against or discharge an employee for cooperating with an investigation by his unit, which gives retaliation charges a high priority.

### **A Third of Cases Settled; 50 Percent of the Rest Show Cause**

Mr. Appel reported that his unit's current caseload was about 200 cases of which approximately 10 percent were based on age. Of the 20 based on age, 16 were Federal/State claims and 4 were State claims only. He pointed out that Federal law covers employers with 20 or more employees, while Vermont's law even covers an employer who has only 1 employee. Age complaints which are filed against State agencies are handled by the Vermont Human Rights Commission,<sup>30</sup> but all other age complaints are handled by Mr. Appel's unit. He estimated that his caseload was divided between three-quarters based on complaints of discharge and one-quarter based on failure to hire.

Furthermore, approximately one-third of all charges settled come to a resolution prior to a formal determination. Of those reaching a formal determination, about 50 percent are determined to have insufficient evidence to support a finding that the law had been violated, and the other 50 percent show sufficient evidence. Regarding age discrimination complaints, the "insufficient evidence" findings are probably slightly more than the findings of sufficient evidence due to the difficulty in proving cause, said Mr. Appel.

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<sup>30</sup>See section on Vermont Human Rights Commission, p. 18 below.

## **Vermont Human Rights Commission**

Submitted for the record was a statement from Susan M. Sussman, the executive director of the five-member Vermont Human Rights Commission. She explained that her State commission "has been in full operation since January of 1989" and has accepted 67 charges of discrimination in housing, 20 charges of discrimination in public accommodations, and 19 charges by State employees of employment discrimination.

Of the 106 charges, only 2 charges of employment discrimination on the basis of age have been filed. One of the 2 was determined by the State commission not to have "reasonable grounds to believe discrimination occurred," and the other case still remained under investigation.<sup>31</sup> Consequently, Ms. Sussman asserted that there have not been enough charges to date to have a basis from which to draw any conclusions. She also emphasized that her commission only has jurisdiction "when the employer complained against is the State of Vermont"; Mr. Appel's unit in the Vermont Attorney General's Office handles all other employment discrimination complaints.

Nevertheless, Ms. Sussman pledged that her commission will continue "to educate itself to the subtle ways in which older workers may be exposed to discrimination in recruitment and hiring due to prejudice and stereotyping."

## **Champlain Valley Agency on Aging**

John Barbour is executive director of the Champlain Valley Agency on Aging (CVAA), a private, nonprofit agency, one of five similar agencies under contract with the State of Vermont. It serves four counties in the northwestern sector of the State. Focusing on those with the greatest social and economic needs, CVAA is in contact with 5,000 older persons through a variety of programs and with thousands more through a statewide access-for-elders telephone network. The most regular contact is with the 1,000 or so clients of CVAA's meals-on-wheels program and 2,000 others served by a team of CVAA's advocacy staff.

He observed that some of the older people have less ability than some younger people, but that the reverse is also true. He said, "Far and away, older people are active, independent, able to drive, and able to work. Whether they want to work is another matter, but they are able." He stated that Vermont has already been affected by a tight labor market and mentioned that the State secretary of administration has suggested that an economic slowdown appears inevitable, partly as a result of a slowing in the rate of growth of the labor force.

In light of lower birthrates, Mr. Barbour said that there could be a labor shortage, on the one hand, and increased participation of women in the labor force, on the other hand. He gave an estimate that:

women will constitute two-thirds of new entries into the work force between 1985

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<sup>31</sup>Regarding the charge pending at the time of the forum, the State Commission has determined there to be reasonable grounds to believe age discrimination in employment occurred and has commenced litigation against the State of Vermont, Agency of Transportation, Department of Motor Vehicles. In addition, one new charge of age discrimination against the State has been filed. Letter to Tino Calabia from Susan M. Sussman, Executive Director, Vermont Human Rights Commission, July 3, 1990, p. 1.

and 2000. The proportion that is male will decline by 15 percent, while the portion that is female will increase by 15 percent. Some companies, such as IBM, estimate that women will triple as a percentage of their work force, and men will decline by 25 percent . . . . I would suggest that another way to deal with the labor shortage is to make better use of older workers and people with disabilities. . . . There is a substantial overlap between these three groups of people: women, older people, and people with disabilities. Most older people are women, and many older people have disabilities of some degree, sometimes slight, sometimes more severe.

### **Illegal Mandatory Retirement Policies**

Mr. Barbour described an older worker in his early sixties who claimed that he was forced to retire because of age. The older worker acknowledged that he suffered back problems, and, when asked, stated that the cause for his retirement was 50 percent for age and 50 percent for the ailment, but emphasized that his employer followed a longstanding policy of mandatory retirement in some departments. Mr. Barbour informed the older worker that such a policy is illegal and that the State's civil rights unit would be interested in receiving a complaint.

However, the older worker did not wish to file a complaint. He believed that his employer would hire him into another department and felt loyal to his employer of many years. Mr. Barbour mentioned the situation as an indication that the availability of a complaint procedure is not sufficient, because many people are reluctant to avail themselves of it, particularly older people. At the same time, he stated that, if the employer does have a mandatory retirement policy, which is illegal, "I think it is more out of ignorance than evil intent." Mr. Barbour called for more public awareness and public education regarding the law and said that it could have the effect of both increasing the number of complaints and reducing the number of incidents that might lead to complaints.

### **Disincentives In Fringe Benefits**

On a related issue, Mr. Barbour said that a nonprofit agency was reported to have been shopping for health insurance coverage. The representative of one insurance company asked what the nonprofit agency's policy was on the hiring of women of childbearing age and of people over 60. From that, Mr. Barbour deduced that employers--who may have to pay higher costs for fringe benefits if they obey the fair employment practices law and hire women of child-birth age and older workers--may find that it pays to do otherwise in terms of health insurance coverage.<sup>32</sup> In any case, he added that "virtually all employers that offer life insurance offer a reduced benefit for workers who are over the age of 65."

He also said that employers can encourage participation in the labor force by people not now represented in it. Opportunities for leave to cope with family duties involving child care and elder care call for flexible schedules or part-time jobs that would allow younger workers to enter and

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<sup>32</sup>Syndicated columnist Mike Royko recently wrote that an older worker claimed that "The closest any [employer] came to admitting [age was a factor was when I was told] 'You'd fracture our insurance program.' I told him I'm in excellent health, but that doesn't matter." Mike Royko, "Cannibalistic Firms Swallow Elderly," *Burlington Free Press*, July 19, 1990, p. 12-A. See also "Large Group of Americans Over Age 50 Ready to Get Back to Work Found to Be Healthy, Insured, Flexible, Skilled, and Educated," a press release by The Commonwealth Fund (New York), March 8, 1990.

leave employment several times during a career. So, too, will employers have to arrange for flexible and part-time schedules for older workers, if older people are to be encouraged or permitted to enjoy leisure and also to continue some level of work.

Mr. Barbour closed by observing that an AARP futurist cautioned against looking at today's elderly population and projecting a dire situation where large numbers of very old people are frail and chronically ill. The theory of this futurist is that there have been significant changes in life style, particularly in terms of smoking and diet. By 2030 these changes may result in persons 85 years old and over who will be much more able than those 85 and over today. He then speculated that "Perhaps in 20 or 30 or 40 years, we will chuckle at the thought that we were once concerned about discrimination against people in their sixties," concluding that:

[We cannot afford to discriminate against prospective employees. Lack of access to the work force today by a woman means one more future older worker who lacks job skills. Lack of access by a person with disability means one person who will have greater need for financial assistance in the future. Lack of access by anybody means a less skilled work force, less opportunity for economic growth.

### III. INTERVIEW WITH EEOC AREA DIRECTOR

#### Questions for EEOC

Charles L. Looney, area director of the EEOC's Boston office, was unable to travel to the Advisory Committee's forum but agreed to be interviewed the following afternoon in Boston by the Advisory Committee's representative, Tino Calabia. Before adjourning the forum, some panelists joined with the Advisory Committee members in listing questions to be posed to Mr. Looney.

AARP's representative, Ms. Waldrum, spoke of the ageism complaints filed with the EEOC which encountered problems in EEOC's processing and which in some cases expired after the statute of limitations had run out.<sup>33</sup> She suggested that Mr. Looney be asked about any problems of this nature that affected Vermonters. Mr. Appel noted that Congress passed the Age Discrimination Claims Assistance Act<sup>34</sup> in 1988 to restore certain cases, allowing complainants to file lawsuits, but he did not know

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<sup>33</sup>See also, Roy Hoopes, Washington bureau chief, "Working Late: the Case of the Myopic Watchdog," *Modern Maturity* (AARP), April-May 1989. Hoopes reports that the U.S. Senate Committee on Aging compelled the EEOC to acknowledge it had to inform 7,500 complainants that the statute of limitations on the cases which they had filed with the EEOC had run out. See pp. 22-23 below.

<sup>34</sup>29 U.S.C.A. sec. 626.

whether any of EEOC's problem cases had been filed by Vermont residents.

Ms. Elmer asked if EEOC could be questioned about resources for helping in training programs in Vermont. Dr. McIntosh said that in the early 1970s, EEOC was effective in helping employers improve their employment tests, which had previously been discriminatory in terms of race and the like; she wondered whether EEOC could begin to move on to the employer's performance appraisals, which virtually function as tests when it comes to promotions. Mr. Appel observed that such appraisals also determine who becomes promoted as well as who is involuntarily laid off.

Advisory Committee Chairperson Hedbor said that she was concerned about discrimination at the point of hiring and urged that EEOC be asked whether consideration was given to requiring that data on age be omitted from job applications. Dr. McIntosh remarked that "On any applications that are sent through private industry, the age question [or date of birth] is not there."

Ms. Maloney added that "Federal guidelines on employment practices are very specific that you do not put age in applications," and that even regarding school graduation dates, employers "ask how many years you completed. They do not ask the year that you graduated, and, if they do, then you ought to be very careful about whether you make that decision to fill that in."<sup>35</sup> Mr. Appel noted that "A lot of people design their resumes in such a way as to reveal that data, though," and Ms. Maloney agreed.

### **Interview With Director of EEOC's Boston Area Office**

Mr. Looney said that about 5 years ago he assumed the direction of the Boston area office; it is a satellite of the New York district office, one of 27 district offices nationwide.<sup>36</sup> Until 1988 there was a lawyer working in the Boston office, but functions such as legal and personnel functions are currently managed in the New York office. Eight of his staff handle investigations, with most cases coming from Massachusetts, the most populated State, and the least coming from Vermont, one of the least populated.

He explained that the Vermont Attorney General's Office has served as a deferral agency for the EEOC for perhaps 15 years and estimated that the State unit may receive about \$40,000 per year from the EEOC. His own office handled about 300 charges or complaints filed in New England last year plus another 400 charges which he himself brought in under his discretionary authority. One-half of those were charges based on age discrimination. Of about 100 cases then pursued in Vermont, approximately a third were age discrimination charges.

In both New England, in general, and Vermont, in particular, about 25 percent of the cases are settled, and about half are settled in favor of the employers, and 25 percent in favor of the employees or complainants. The remaining 25 percent result in administrative closures for reasons such as

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<sup>35</sup>See also Robert N. Brown, "Is Any Type of Age-Discriminatory 'Help-Wanted' Advertising Permissible?," *The Rights of Older Persons: an American Civil Liberties Union Handbook* (New York, Avon Books, 1979), pp. 153-4.

<sup>36</sup>Mr. Looney's remarks are taken from the audio cassette record of the December 1, 1989, interview which took place in his Boston area office. The cassette is on file in the Eastern Regional Division office in Washington, D.C.



an employee's filing too late or an employee's hiring a private attorney to pursue the case, Mr. Looney explained. He also stated that 50 percent or more of the cases in Vermont are discharge cases, cases in which the employees had been fired.

### **Few Age Cases "Overlap" Other Types of Discrimination**

As to age discrimination cases that "overlap" other kinds of discrimination, Mr. Looney estimated that 1 percent may overlap sex discrimination and less than 1 percent, race discrimination. At the EEOC, none overlaps disability discrimination, since the EEOC does not have jurisdiction over disability cases. He noted that complainants generally appear to believe that their cases are based on age discrimination and not also on some other factor.

Told that the Advisory Committee and other participants in the forum found it difficult to ascertain whether an employer had discriminated in the hiring phase, Mr. Looney said that the EEOC has no handy guide to help laypersons spot discrimination in hiring nor does it have funds for training individuals who are not EEOC personnel. However, the EEOC uses an investigative manual that might be made available for the Advisory Committee and its staff to review.<sup>37</sup>

At the same time, he added that identifying age discrimination can sometimes be relatively simple. One starts by looking at the ages of the job applicants and seeing whether they were generally in the protected age group, that is, 40 years of age and older; if there were many in that age group, but very few were hired compared to those under 40, then one has a *prima facie* case. It is then up to the employer to demonstrate that there had been a legitimate, non-discriminatory reason for not hiring the older applicants. He also observed that when an employer uses "the buzzword 'overqualified'" to characterize an older worker, the employer in most instances considers the older worker to be too old.

### **No Prohibitions in Ads or Against Asking About Age**

Asked if a telltale sign of age discrimination in hiring may be found in the classified ads when an employer advertises for "Recent College Grads," Mr. Looney pointed out that the EEOC does not prohibit any kind of advertising, nor does it prohibit employers from asking about an applicant's age. If the Advisory Committee itself wanted to gauge the extent to which local employers are generally attempting to overcome ageism, members might visit the personnel offices of businesses or agencies and check to see if a required equal employment opportunity poster--Federal or State--is readily visible.

Regarding whether the EEOC has focused on how to guard against age discrimination in performance evaluations, Mr. Looney answered that there have been cases in which evaluation systems were found to be improper. He recalled a specific situation in which a firm's process was extremely subjective, and it turned out that younger workers would be rated very highly, but the older a worker was, the lower he or she would be rated. An older worker was viewed as on the way to retirement, and so was not

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<sup>37</sup>The EEOC also circulates a free one-sheet, 8 1/2" X 11" pamphlet entitled "Persons Age 40 or Older, Note! Age Discrimination Is Against the Law," April 1988. (See Appendix C.)

to be promoted, allowing a younger worker to be moved up. While this was a glaring example, said Mr. Looney, many evaluation systems are highly subjective with "more chance for discrimination--be it age, race, whatever."

### **Cases Exceeding Statute of Limitations**

As to the age discrimination cases that had exceeded the statute of limitations while at the EEOC, Mr. Looney recalled that there were only five such cases in New England and none in Vermont. At the same time, there were 1,200 to 1,500 similar cases nationwide, and so Congress passed legislation restoring the right to private action, thereby allowing the complainants to file charges in Federal court.<sup>38</sup>

Regarding Dr. McIntosh's question about studies by the EEOC on employer attitudes, Mr. Looney stated that he knew of none, but suggested that the research division in Washington, D.C., be asked. He further explained that the EEOC's dwindling resources have had to be dedicated to its increasing caseload.

Concerning the problem of the cap on earnings of older workers receiving social security benefits, Mr. Looney expressed the belief that the cap was imposed by Congress at a time when it wished to discourage older workers from coming back into the workplace after they had already retired. This seemed intended to help maintain opportunities for younger workers of the so-called "baby-boom" generation. He conjectured that the pendulum has now begun to swing the other way, since many employers are finding themselves short on skilled younger employees.

### **Additional Resources Needed, Not New Laws**

On what new legislation might prove useful to combat ageism, Mr. Looney stated that the legislation already available is adequate. What is needed, he emphasized, is additional resources to enforce that legislation and to expand educational programs. Many stereotypes and myths about older workers need to be eliminated. For example, it may be true that an older worker may be out a longer time than a younger worker for the same sickness; but the older worker is likely to take fewer sick days overall than the younger worker, he said.

Mr. Looney noted that, though he would prefer to educate employers through a positive approach, his role calls for him to educate people through the negative means of administering the laws prohibiting discrimination. Nevertheless, he also believed that:

One good law suit on age discrimination probably educates more people than all the voluntary assistance programs that we can put together in a year. That is because it hits [employers] in their pocketbooks.

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<sup>38</sup>In February 1990 former EEOC Chairman Clarence Thomas "conceded he had erred by allowing numerous age-discrimination cases to lapse without action. . . . But he disputed how many cases expired after a 2-year statute of limitations." Bill McAllister, "Approval of Thomas Seems Likely: Judicial Nominee Appears to Have Eased Liberals' Concerns," *Washington Post*, Feb. 7, 1990, p. A-4.

## SUMMARY

Fourteen speakers addressed the Advisory Committee ranging from six older workers, who described the hardships they encountered while seeking employment, to representatives of three State agencies. A spokesperson from the American Association of Retired Persons and the top executives of two voluntary agencies serving older workers also offered views, as did a member of the Vermont Bar Association and a business administration professor from the University of Vermont. The Vermont Human Rights Commission's executive director submitted a statement for the record, and a separate interview was held with the area director of the Boston office of the U.S. Equal Employment Opportunity Commission.

An age discrimination case brought by a State supreme court justice against the State of Vermont captured headlines around the U.S. last year and early this year. But problems facing older workers existed before that case and continue in Vermont, as was suggested by all of the speakers. During the forum, much attention was given to frustrations experienced in the application and/or interview phases where the question of whether age discrimination occurred could not easily be answered definitively. The different problem of nonpromotion or of termination of employment was also discussed, along with the difficulties older workers have in knowing where to turn for assistance in filing complaints.

If an older worker became aware of the role of public agencies, the worker might find an understaffed unit in the office of the State attorney general, private attorneys who may be discouraged from taking cases because their costs may not be fully compensated, or a local judiciary not broadly experienced in litigation associated with age discrimination complaints.

The attitudes of employers were also touched upon, and employers were generally reported to act without overt discrimination. When asked, some employers will apparently say that older workers have demonstrated qualities highly desirable in a work force. The assistant attorney general who supervises age discrimination cases for the State reported that age cases, when compared with other kinds of discrimination cases, had decreased from about 30 percent during fiscal year 1982 to 18 percent at the time of the forum.

On the other hand, the assistant attorney general asserted that age discrimination is more difficult to prove than discrimination on the basis of race or sex, and all speakers were in agreement that older workers continue to encounter obstacles in the job market. Several called for increased education directed toward employers about the problems of older workers. Others discussed issues ranging from how job applications and some resumes composed by older workers may betray a worker's age to the earnings cap on social security and the disincentive that it exerts on employment of older workers.

A few speakers believed that Federal law or regulations prohibited employers from asking for an applicant's age on a job application; however, the EEOC area director stated that no Federal prohibition exists. The area

director expressed the wish that he could be more positively involved, as in efforts to educate employers about the issue. On the other hand, he speculated that his work on a single law suit may do more good than all of the other approaches combined over the course of a year.

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Courthouse Plaza  
199 Main Street  
Post Office Box 190  
Burlington, Vermont 05402-0190

Telephone (802) 863-2375  
Facsimile (802) 862-7512  
Telex 92-1857

ST. JOHNSBURY OFFICE  
9 Prospect Street  
Post Office Box 99  
St. Johnsbury, Vermont 05819-0099

Telephone (802) 748-8324  
Facsimile (802) 748-4394  
Telex 88-8659

REPLY TO: Burlington Office

**DOWNES RACHLIN & MARTIN**  
PROFESSIONAL CORPORATION

Gary H. Barnes  
Leo A. Bisson, Jr.  
Heather Briggs  
Gregory S. Clayton\*  
Kathleen H. Davis  
Patricia Gabel  
James C. Gallagher\*  
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Bruce C. Palmer\*  
Dale A. Rocheleau  
Anita R. Tuttle  
Peter D. Van Oort\*  
\* Also Admitted in NH  
\*\* MA Bar Only

July 13, 1990

Mr. Tino Calabia  
United States Commission  
on Civil Rights  
Eastern Regional Division  
1121 Vermont Avenue, N.W. Rm. 710  
Washington, D.C. 20425

Dear Mr. Calabia:

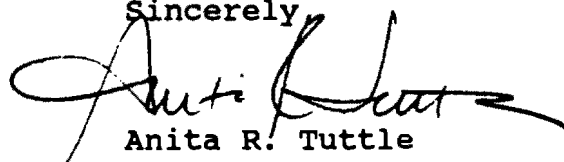
Enclosed is an edited version of remarks made during the November 30, 1989 forum on ageism. We have concluded the case I described on that date, with happy results for our client.

The second trial was waived and the trial court conducted a front pay hearing to determine the plaintiff's losses from the time of trial to his retirement age. At the time of the front pay hearing, the plaintiff had not been able to obtain replacement employment. The trial judge awarded all front pay requested.

At a later date, our motion for the payment of our attorney fees by the defendant was granted. All fees and costs were recovered, plus a 25% enhancement.

Thank you for the opportunity to participate in this project.

Sincerely,

  
Anita R. Tuttle



Tel. 802/524-3200  
P.O. Box 107 St. Albans, Vt. 05478

APPENDIX B

[27]

# *Vermont Associates*

for Training and Development, Inc.

July 19, 1990

Tino Calabia  
U.S. Commission on Civil Rights  
Eastern Regional Division  
1121 Vermont Avenue N.W. Rm. 710  
Washington, D.C. 20425

Dear Mr. Calabia:

I appreciated the opportunity to testify before you and the Vermont Advisory Committee to the U.S. Commission on Civil Rights. The work being done by the commission is very important especially to older Americans who frequently are unaware of their rights and or unable to pursue perceived injustices as they relate to hiring and employment.

A recent article (July 15, 1990) in the Burlington Free Press indicates that Vermonters are becoming more aware of their rights and less willing to accept infringements of these rights. Though the cases stated do not specifically relate to hiring and employment of older Americans, they do indicate a change in attitudes. (See enclosed article.)

Another case involves a Vermont Supreme Court Justice, Louis P. Peck, who fought mandatory retirement as written into the Vermont Constitution and won his case. (See enclosed article.)

However, on the negative side of this issue, the State of Vermont has recently implemented spending cuts by offering early retirement to state employees over age 55 who have more than 15 years of service. According to the article: "The Kunin administration had offered to administratively add three years to workers' ages and length of employment as a way of coaxing staffers into retiring early". If the State of Vermont uses this method to reduce its workforce, what message is it sending to other Vermont Employers? (See enclosed article.)

Also enclosed are materials from the Commonwealth Fund's, Louis Harris & Associates survey: "Older Americans, Ready and Able To Work". The survey reported on older Americans' work history, retirement, and desires and abilities to return to the workforce. "They (older Americans) express a deeper commitment about returning to work and far more flexibility about the nature and conditions of the work they're looking for than any other surveys have suggested."

If I can be of further assistance, please feel free to contact me.

Sincerely,

Pat Elmer  
Executive Director

**PERSONS  
AGE 40 OR OLDER  
NOTE!**

**AGE DISCRIMINATION  
IS AGAINST THE LAW**

# AGE

The U.S. Equal Employment Opportunity Commission  
2401 E Street, N.W., Washington, D.C. 20507  
800-USA-EEOC

**AGE DISCRIMINATION IS  
AGAINST THE LAW**

Persons 40 years of age or older are protected by the Age Discrimination in Employment Act. The law prohibits arbitrary age discrimination in hiring, discharge, pay, promotions, fringe benefits and other aspects of employment.

Retaliation against a person who files a charge of age discrimination, participates in an investigation or opposes an unlawful practice is also illegal.

The law applies to private employers of 20 or more workers, federal, state and local governments, employment agencies and labor organizations with 25 or more members. Labor organizations that operate a hiring hall or office which recruits potential employees or obtains job opportunities also must abide by the law.

**HEALTH INSURANCE BENEFITS:**

Employers must offer all employees and their spouses 65 years of age and older the same group health coverage, under the same conditions, as is offered to employees and their spouses under age 65.

**PENSION ACCRUALS:** For pension plan years beginning on or after Jan. 1, 1988, for employees who have at least one hour of service in such plan years, it shall be unlawful to cease or reduce the rate of pension benefit accruals or allocations because of age. Limitations on the amount of benefits, years of service or years of participation may be permissible, if the limits are imposed without regard to age.

**HOW TO FILE A CHARGE:** To file a charge of age discrimination, contact the nearest EEOC field office. If there is not an EEOC office in the immediate area, call

toll-free 800-USA-EEOC for more information. A person can file a charge or complaint of age discrimination on behalf of another.

If a *charge* is filed, the charging party's name will be given to the employer. Filing a charge protects the right to file a private suit.

If a *complaint* is filed, the identity of the complainant ordinarily will not be disclosed without prior written consent. As explained below, the right to file a private lawsuit is not protected unless a timely *charge* is filed.

There are strict time frames in which charges of discrimination must be filed.

To protect the right to file a private suit, a charge must be filed with EEOC within 180 days of the alleged discriminatory act.

In states where there is a law prohibiting age discrimination in employment and establishing or authorizing a state authority to grant or seek relief, a charge must be filed with EEOC within 300 days of the act, or 30 days after receiving notice that the state terminated its processing of the charge, whichever is earlier.

In any case, a lawsuit must be filed within two years of the discriminatory act (or three years in cases of a willful violation). EEOC will accept a charge of age discrimination up to three years after the alleged discriminatory act, but to preserve the ability of EEOC to act on your behalf, or the right to file a private lawsuit, it is advisable to contact EEOC promptly when age discrimination is suspected.

#### **REMEDIES FOR VIOLATIONS OF**

**THE LAW:** A lawsuit may be brought by EEOC or individuals may file suit on their

own behalf 60 days after filing a charge with EEOC and the appropriate state agency. Should EEOC take legal action first, a private suit may not be filed.

Remedies for violations of the ADEA include payment of lost wages and benefits, interest, liquidated damages, attorney's fees and court costs. Damages may be recovered for a period up to two years prior to the filing of the suit, except in cases of willful violations, where damages up to three years prior to the filing of the suit may be recovered.

The Commission's policy is to seek full and effective relief for each and every victim of employment discrimination, whether it is sought in court or in conciliation agreements reached before litigation. In pursuing its mission of eradicating discrimination in the workplace, the Commission intends that its enforcement be predictable, provide effective relief for those affected by discrimination, allow remedies designed to correct the source of discrimination and prevent its recurrence.

**EXEMPTIONS:** The law does not bar age discrimination where age is a *bona fide* occupational qualification. It also does not bar employers from differentiating among employees based on reasonable factors other than age. Employers may observe the terms of a *bona fide* seniority system or any *bona fide* employee benefit plan, such as retirement, pension or insurance plans, which is not a subterfuge to evade the purposes of the Act, except that no such seniority system or benefit plan shall excuse mandatory retirement on account of age or a refusal to hire because of age.

State and local governments may make age-based hiring and retirement decisions



for firefighters and law enforcement officers if the particular age limitation was in effect on March 3, 1983, and the action taken is pursuant to a *bona fide* hiring or retirement plan that is not a subterfuge to evade the purposes of the Act.

Institutions of higher education may involuntarily retire at age 70 an employee who is serving under a contract of unlimited tenure or a similar arrangement.

The ADEA does not prohibit the compulsory retirement of certain *bona fide* executives or high policymaking personnel as discussed in section 12(c)(1) of the Act.\*

**ADDITIONAL INFORMATION:** If you need further information, you may call EEOC toll free on 800-USA-EEOC. EEOC's TDD number for the hearing impaired is (202) 634-7057.

The information contained in this pamphlet is intended as a general overview and does not carry the force of legal opinion.

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*\*EEOC enforces Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963 and Section 501 of the Rehabilitation Act of 1973. The text of these laws is contained in the booklet "Laws Enforced by EEOC," available from the Office of Communications and Legislative Affairs, 2401 E St. N.W., Room 412, Washington, D.C. 20507.*

Office of Communications and Legislative Affairs  
April 1988