

Daily Journal

Nov. 15, 2018

An Employment Lawyer's Take on Age Discrimination in Silicon Valley

Ageism is the leading basis for discrimination complaints in California's tech culture — 28 percent higher than race.



SCOTT EDWARD COLE

Founder, Scott Cole & Associates

[See more...](#)

Often with high salaries at their disposal, Silicon Valley's over-50 workforce can appreciate that fine wine gets better with age. And yet, nearly 90 percent of this age demographic worry about their personal job security and marketability.

Professionals in most industries -- medicine, law, education -- tend to wear their advanced years as badges of honor, equating age with wisdom, a reason to trust their judgment, grounds to feel safe with their financial affairs, sometimes even their lives. However, recent studies and a proliferation of age-bias lawsuits demonstrate that the pursuit of youthful exuberance and thinkers has dominated hiring and retention decision-making in the Valley for years, propelling it like an aircraft carrier through a vast sea of tech talent, leaving fear, job dissatisfaction, and countless older workers in its wake.

Under California's Fair Employment and Housing Act and the federal Age Discrimination in Employment Act, workers over the age of 40 are considered a "protected" category. Adverse employment decisions against this class of workers, whether based solely or even substantially on age, is unlawful and carries high potential consequences, including awards of back and future pay and benefits, damages for emotional distress, the recovery of legal fees and costs, sometimes even the imposition of punitive damages. Although rarer, when brought as class actions, as in the case of oft-suspect Reductions in Force ("RIFs"), the effect of joining numerous claims together can threaten the solvency of even the biggest tech sector players.

Studies such as ProPublica's analysis of elderly worker cuts at IBM (an estimated 20,000+ persons), ageism complaints against Google, Hewlett-Packard and other tech giants -- even director Shawn Levy's motion picture "The Internship" -- are suggestive of a troubling trend, and yet, are just a few bright points on a very long and spotted line. Indeed, since 2008, over 250 age discrimination charges were filed with California's Department of Fair Employment and Housing against the Valley's 150 largest tech companies, with dozens of those charges advancing to litigation in the courts. Beyond that, hundreds more never made their way into the public eye by virtue of severance packages and hush-money.

Related statistics are equally telling: Ageism is the leading basis for discrimination complaints in California's tech culture (28 percent higher than race); the average tech worker age is five years younger than in most other industries.

But just examining statistics doesn't fully capture the cancerous effects of this form of bias since its degeneration of the "spirit of innovation" is immeasurable. California's claim to tech fame was born out of a willingness to share ideas, a synergy that stretches imaginations, and not just those of a narrow segment of the work population. Broadcasting that what older workers offer won't be well-received is like saying ingenuity has a limited shelf life -- and that's a stifling message which makes for pretty boring in-house creative sessions. Then, sit with that visual for a moment and the ripples to employee morale and productivity, the uptick in stress-related claims, even the reluctance by some to pursue careers within an industry seemingly-relegated to the young, become obvious.

Viewed in this way, one might even argue that whether age discrimination is thriving in the Valley is secondary to the *perception* that it is. And it is so perceived. According to a 2018 Dice Diversity and Inclusion report, nearly two-thirds of tech workers between the ages of 40-45 worry their age will hurt their continuing career, a number that skyrockets to nearly 90 percent for those over the age of 50. From a workforce productivity standpoint, the effect thereof may not be immediately obvious, but equally damaging, as are all forms of discrimination: all workers yearn to feel employment opportunities are merit-based, that hard work pays off. As the countless industrial psychologists who've studied this will tell you, the mere *belief* that bias is an impediment to job security breeds conservatism, a reluctance to "stick one's neck out." That squelches innovation at a cost that is enormous.

So, moving forward, what's the plan? Well, understanding the hidden effects of discrimination is only a start, followed closely by strict enforcement of workplace anti-discrimination policies -- all great bandages, but not terribly effective on a gaping wound. Arguably, a better return on worker investment, and a better deterrent to litigation for tech employers, would be a forced reboot of attitudes, with reminders that imagination is not synonymous with adolescence.

Indeed, when sexual harassment lawsuits started appearing on front pages with regularity, nearly every major employer sent its management teams to anti-discrimination seminars and enrolled their offenders in "sensitivity training" programs. Valley employers can surely mirror those efforts to combat the perceptions that promote ageism.

And, while tech employers are beefing up these messages of equality vis-a-vis third party educators, shouldn't more be done to facilitate communication between workers of diverse age groups? Silicon Valley is full of business incubators, think tanks and hives, and some are excellent generators of ideas through the use of facilitators. For those that aren't, rethink what you might consider as a frivolous expense; teasing out everyone's ideas, no matter what you presume they can offer, is essential to the lively discourse that leads to profitable invention. And it curbs a lot of protracted litigation.

Finally, tech employers would be smart to recognize that the application of experiential knowledge -- the kind only derived through trial and error -- doesn't have to stifle the creative process. It actually serves as an excellent cross check against chasing impractical ideas that can otherwise cost businesses dearly. Shareholders of all ages appreciate that.

© Daily Journal 2018