

Forge Ahead: Ageism in the Workplace

[Music: "Come Closer"]

Rachel Prost: Hi, my name is Rachel Prost and you're listening to "Forge Ahead" where we examine life's obstacles and learn how we can positively transform them by asking questions and listening to people's stories.

[Music interlude continues and fades]

Rachel Prost: Many companies make an effort to hire and maintain employees of various backgrounds and talents. In the age of globalization and technological advance, businesses have come to realize the social and economic value of diversity in the workplace, and recruitment managers make conscious efforts to stamp out unfair and outdated employment practices. However, age discrimination against older employees is still common in America's workforce

[Music: "The Grand Old Duke of York Piano"]

Sound Bite 1: OMG you look so good for your age.

Sound Bite 2: OK Boomer

Sound Bite 3: Say, when are you going to retire?

Sound Bite 4: Why do you want this job for in your late stage of life anyway?

[End music interlude]

Rachel Prost: Age discrimination involves treating an applicant or employee less favorably because of their age in any aspect of employment. According to a 2017 survey conducted by the AARP, the American Association of Retired Persons, "Nearly 1 in 4 workers age 45 and older have been subjected to negative comments about their age from supervisors or coworkers."

Although age discrimination may go unnoticed, some other signs of ageism are getting turned down for promotions that went to a less qualified or younger employee, being left out of meetings or decisions, experiencing layoffs, or noticing a pattern of hiring only younger employees. According to the Population Reference Bureau, "The number of Americans ages 65 and older is projected to nearly double from 52 million in 2018 to 95 million by 2060."

People are becoming better educated. They have an increased life expectancy than previous generations, and they desire to stay in the workforce longer. But, for those older employees who are job hunting or trying to climb the corporate ladder, their age may cost them a workplace opportunity. The same survey by the AARP also found that "76% of workers age 45 and older see age discrimination as a hurdle to finding a new job."

However, many people perceive our elders as being wise and experienced members of society.

[Music Interlude: "Pomp and Circumstance"]

Bethann Kemling Sound Bite: I have two masters degrees. The first one is in public administration and the second is in human resource management.

Rachel Prost: Most of us hope to retire and live long lives...

Bethan Kemling Sound Bite: And I am 61 years old.

[End music]

Rachel Prost: That was my mother, Bethann Kemling, who is the current Human Resources Generalist at Wayside Recovery House, a nonprofit organization, which provides substance abuse treatment for women in Minneapolis. Bethann recently graduated with her second master's degree in Human Resource Management from Saint Mary's University of Minnesota in 2019.

Rachel Prost: So first off, I just really appreciate you driving up to Superior to talk with me.

Bethann Kemling: Well you're welcome. It was really a nice day so it was fun to drive up here.

Rachel Prost: So I understand you earned your Bachelor's degree in 1980, your first Master's in 1996, and your second Master's degree in 2019. What motivated you to go back to school?

Bethann Kemling: Well the first time I went in '96 or before '96, I just really wanted to learn more about nonprofit and public administration and at that point in time I wanted to go into government, but that didn't really work out. And the second time recently it was because I really wanted to make myself more marketable, and I felt that if I had the Master's in Human Resource Management that would really expand my opportunities to get higher paying human resource jobs.

Rachel Prost: So, since you graduated in 2019, I understand you're now SHRM certified. Can you tell me more about how that benefits you and your professional goals?

Bethann Kemling: Well, SHRM, which stands for the Society of Human Resource Management is really a recognized professional organization for human resources. And many organizations really want professionals that have that certification. You can either get SHRM-CP, which means certified professional or SHRM-SCP which means senior certified professional. So it just is really one of those certification that makes you more marketable with organizations. Like if I have that certification the hope is that I will be chosen for an interview over someone that does not have that certification.

Rachel Prost: What would you say are some common misconceptions people may have about older employees?

Bethann Kemling: That we're one, not very tech-savvy. We are really stuck in the way that we do things or the way we approach our work. We're not as relatable to people that are younger than us.

Rachel Prost: So, what do you do to kind of challenge those preconceived notions that hiring managers may have about you while you're interviewing with them?

Bethann Kemling: Well, I really talk about the different technologies that I do know. There's human resource information systems so I'm familiar with those. I've worked on some of those and also basically implemented a HRIS system in the last two years and so I do have the ability and skills to do that. And I think I just really try to talk about my skills, how they can apply, and I just try to really be a relatable person. I think that's really important and really share how I'm open to new things and new experiences.

Rachel Prost: Yeah, cause definitely when the hiring managers look at your resume, they're really presented with that plethora of experiences. And so, it's been one year since you've graduated, how has the job hunt been?

Bethann Kemling: It's been difficult? I've sent out quite a few resumes. At this point in my career I say I am like on the down slope. I'm kind of heading toward the end of my career, so I'm being a little picky about where I apply, but I have sent out, I feel, a large number of resumes. Some I don't get any response to. Others I get the typical, "Although you had many great qualifications we're moving forward with people that better meet our needs."

I've had I feel like a good number of interviews and again, I still have not been chosen for like a second interview or even an in-person interview over the phone. It's been really just frustrating 'cause I feel like when I see the job posting, I see the skill set. I check all the boxes, but I'm just not getting in the door. There's something that's not making me as appealing to those employers.

Rachel Prost: In the past have you found much difficulty in the hiring process?

Bethann Kemling: Not at all. I think every time I've really gone out for a job I maybe, for all the jobs I've applied for, I've basically been able to find a job within three to four months. When you're talking about ageism or people not looking at older people, I think it's really an unconscious bias like a lot of other things. We gravitate towards people who are similar to ourselves. So, if hiring managers are maybe people in their thirties and forties, they maybe are going to gravitate towards people that are similar to them. We have to be aware of our unconscious bias. There are many different viewpoints. I've really learned this along the way. That maybe your viewpoint isn't the same as mine but it doesn't mean that it's wrong. It's just different.

Rachel Prost: Yeah, so I know you explained that it was really frustrating receiving all those rejections. What do you do to kind of stay positive throughout your search?

Bethann Kemling: First off, I always say that it's their loss. Um, but I just kind of keep looking and keep trying to find companies that I think that I would be a good fit for. For example, some organizations advertise things about themselves or about their company culture. And they'll say like, they maybe have like beer Fridays or this kind of thing, and I obviously don't think that I'd be a good fit for that culture so I really don't apply for those jobs. And um, I have a good network of friends and family that kind of keep encouraging me to keep trying that there will be something out there for me, I just have to keep at it.

Rachel Prost: Well, I mean, I believe that there is really a benefit in obstacles and that you will be able to surmount this difficulty. What have you learned about yourself since you made the determination to go back to school and pursue a more fulfilling career for yourself?

Bethann Kemling: I've learned that, you know, anybody can really go back to school. My second master's I chose to do an online course and I found that even in that online course there was a lot of diverse people going back to school. There was people maybe my age, in their forties, there was even some people that right after they got their bachelor's they went and decided to get a master's. And I just learned that, I mean anybody can do it, and I think it's just a matter you have to be persistent and keep at it. Especially when you maybe have a class that you don't like as much and you get discouraged, you just say, "You know, I can do it. I'm going to finish this one, the next one's gotta be better."

[Music interlude: "Communications"]

Rachel Prost: Bethann Kemling is the Human Resources Generalist at Wayside House.

[Music interlude continues and fades]

Rachel Prost: Even though older employees often have decades of relevant knowledge and can serve as mentors to help foster capable leaders, they are often overlooked in favor of younger and less experienced workers. Although an older employee can file an age discrimination lawsuit, it is difficult to legally prove age was the sole reason behind discrimination.

Nathan LaCoursiere spent seven years as an Assistant City Attorney for Duluth, Minnesota. He currently is a Senior Lecturer for the UW-Superior Legal Studies and Criminal Justice Department.

Nathan LaCoursiere: The disclaimer on the front end is that, as an assistant city attorney, I did litigate and handle a number of different discrimination claims, but not age discrimination. There are not a lot of plaintiff attorney's that do this work. And I think that's significant in the sense that it is a very complex area of the law, with a lot of potential twists and turns, and not a lot of attorneys really specializing in it.

Also, I'm a licensed Minnesota attorney, and also practice in the federal courts in Minnesota, but not a licensed Wisconsin attorney. I have to do the lawyer disclaimer on the front end that nothing that we talk about today should be construed as legal advice. And anyone with a question relating to their own legal rights, I just strongly encourage them to reach out to an attorney that could potentially assist. And I have brought for you some resources that I can pass along to you and that we can talk about here today.

Rachel Prost: In the workplace, people kind of tend to tease each other. And so, at what point should someone take legal action after talking to human resources first?

Nathan LaCoursiere: I think that there's two very different things that we're talking about. One being workplace conflict, but then two, what point does action on the part of an employer give rise to ability under either state or federal law. And I think what we've seen, what we've found is that age discrimination claims in particular are very difficult claims, especially since 2009 decision by the United States Supreme Court.

So I can give you some background based on my experience in Minnesota. And that is, I worked for the city attorney's office, and often times if there was a claim made, the city would normally be on the defense side. An employee had either gone through a union process or in both Minnesota and Wisconsin, and then at the federal government there are laws that would permit anyone that feels that they have been discriminated against on the basis of race, sex, religion, ethnic background, and then age as we're talking about today. There are state level and federal level administrative processes that people can first pursue long before you ever start talking to an attorney and filing a, potentially filing a claim in court. Although I think it's always good to talk to as many folks as possible when you're starting to think about difficult situations like this.

As an initial matter, most of the cases that I handled for the city, they would start with a claim being filed with either the Federal Equal Employment Opportunity Commission and the EOC has investigators and offices around the country that will look into complaints. And then on the state level, under the Minnesota Human Rights Act, the Minnesota Human Rights Office will also take charges and complaints and investigate them. That is similar in Wisconsin with the Wisconsin Department of Workforce

Development under the Wisconsin Fair Employment Act. There is also sort of a complaint process for those who feel they have been subjected to unlawful discrimination.

What we would see at the city is the EOC, for example, would perhaps issue a notice of determination as to whether or not a claim had some merit or whether there was a finding that in this instance, the EOC in this example, would not be pursuing any further remedies within sort of the administrative process. And then from there, an employee would have the option or choice, okay, "Are we going to then continue and proceed into a court setting. Will that be state court? Will it be federal court? Will we be filing both federal claims and state claims? Only one or another?" There's a lot of different considerations there, which is why I've also brought attorney referral services for folks if they're thinking about reaching out to attorneys.

Rachel Prost: As you said it's on the state level and also the federal level, because we have like the Age Discrimination in Employment Act of 1967, are you kind of familiar with that one?

Nathan LaCoursiere: Yeah, and so a bit of background there. In this country, most of our anti-discrimination in employment laws, they really are updated as part of Title VII of the 1964 Civil Rights Act, which made it very clear that discrimination on the basis of race, sex, is unlawful and applicable to not just federal government but to states and private employers. Age discrimination was not a part of Title VII. Age discrimination comes in roughly three years later with the act that you referenced, the ADEA, Age Discrimination in Employment Act. There are some really key differences there, which is one of the things I wanted to highlight for you and your listeners related to this 2009 Supreme Court decision.

There was a case in 2009, a very controversial, contentious case, called *Grosse vs. FBL Financial Services Inc.* And that is 557 United States Reporter 167 for anyone that wants to go look it up. It's a fascinating case and it was written by Justice Clarence Thomas, writing for a 5:4 majority opinion. And there was some very strongly worded dissent.

Why was it such a controversial case? It's controversial because the court ruled, in essence, that the ADEA is different than Title VII, and that to show, or to prove, an age discrimination claim as a matter of federal law, you need to show that but for age, as the factor. It's a very hard standard for employees to meet. A but for standard is essentially saying, "Look it's age. That's exactly why this happened to me."

And that's a very difficult thing to do because it's going to be very rare that an employer is going to come out and say, "I'm firing you because you're too old." It's just not going to happen. You're not going to have an email or a voicemail or some other hard evidence that proves your case for you. So it makes these claims difficult also when you keep in mind that a lot of these claims will happen where people maybe have been working together for years, maybe decades. There's a lot of shared history and as with a lot of workplaces there's good and there's bad in that history. And so it really made the federal standard very difficult for plaintiffs.

Rachel Prost: Kind of going off of that, it seems like America obsess over the young and kind of their ability to be really tech-savvy. And so it really seems that growing older is something to kind of feel bad about. And so, it seems that there are a lot of protections that are for older employees, but I know that age discrimination also would happen to younger workers. So, do you feel that less people who are younger are willing to like stand up and kind of file claims because that's more unusual to happen?

Nathan LaCoursiere: Well I think there are a couple things there. I think you hit on something really important, which is I think we also have to be careful never to generalize about the abilities of any employees regardless of age. Because there are a lot of young folks that maybe aren't as good with technology as they are assumed to be. And there are maybe older employees who have worked really hard to get quite savvy, and yet there's still that tension in the workplace between these two sort of competing great generations; the boomers and the millennials rising.

Now in terms of age discrimination going the other way, a couple of things. One, under federal law, the ADEA is only going to be clicking in at age forty or over. And that's the same, so far as I understand it, under Wisconsin law in the Fair Employment Act in Wisconsin. There's also restrictions based on size of employer. So for example, if you're a larger private employer, certain laws will apply, but if you're a very small business or very closely held business, certain laws may not apply.

So that's a little different in Minnesota. Minnesota's Human Rights Act is going to prohibit age discrimination for anyone over the age of majority, which is eighteen, with a few exceptions. But it is possible in Minnesota that a thirty-year-old could potentially feel as if maybe they are being discriminated against based on youth or age, and certainly there are some of these cases. On the federal side, and then in Wisconsin, until you hit forty, and I'm not even there yet myself, you're not yet within that protected class.

There's been some really interesting cases that have looked at a very sort of quiet version of age discrimination that favors youth in industries like the tech industry where perhaps posting for the job, you're only going to find it online. And the ability to apply for the job, it's going to be wholly online. And then maybe we're Zooming in for an interview from coast to coast and so there's been some interesting class actions that have tried to get at some of those practices that seem very targeted toward making it a little bit harder for older employees to even apply at the outset.

Rachel Prost: When people end up filing a lawsuit for age discrimination, what kind of outcome do they hope to have versus what usually happens?

Nathan LaCoursiere: Yeah, and here again I have to you know, plead some ignorance in that there's a lot of ways that this can go, and I have not specifically been a part of an age discrimination version of that type of litigation. But typically speaking, and this is something I used to tell a lot of clients, litigation is very taxing. Demanding. Emotionally, psychologically, physically, the whole nine yards. But, if someone has reached that point where they feel they have had their rights violated and have no other option, no other remedy, at that stage, then there's a number of potential outcomes here.

One, on the front-end, either a state level office or a federal level office. You know, if they find that there has been discrimination, there are administrative and civil penalties that are hanging out there for employers potentially. There was a significant case even here in Superior, Wisconsin, I think just within the last decade, a Stack Brothers case. I'm not sure that even ever got necessarily a court setting, although I don't know a lot about the case.

So, on the front end, there's potential penalties, which would include payment of attorney's fees that have been incurred seeking relief on the administrative side. When you click over to the court side, there again there's a range of potential damages, which can include certainly back-pay, front-pay, interest, all those kind of actual damages.

The plaintiffs attorney's that do, do this work because there is the potential for recovery of attorney's fees, often times you will be able to contact a number of attorneys, have usually a free initial consultation. And then if an attorney decides to take your case, often times there will be a variety of different potential fee arrangements. But if there's a contingency available that means you're not going to be paying necessarily for that attorney unless you recover, at which case an attorney will take a certain percentage of the final judgement. There are plaintiff attorneys that are willing to do that because there is the potential to recover attorney's fees and costs under a number of different state and federal statutes.

Rachel Prost: Do you have any advice for someone who is really trying to advance their career but they are really facing these obstacles because of their age?

Nathan LaCoursiere: Start connecting with state or local workforce development offices. Public offices with trained personnel that really are dedicated to helping sort of continue training and empowering our existing workforce. You know, working to be ready for this current and rapidly changing economy. It is critically important for those who feel as if they are being treated unfairly, unjustly, discriminated against based on a protected class. That does great damage within our economy, within our environment, and just within our civic culture and communities. The law does not always do a very good job of correcting or addressing that. Does that mean nevertheless that it's not important for people to speak up and to really pursue greater fairness? Collaborative fairness in their work organizations? No.

I think that's very important, and yet I think that's the most challenging thing that employees face because they're often times such a fear of retaliation if you speak out. To the extent that perhaps you can join forces with others around you that are feeling similarly situated, feeling as if they are being treated similarly. I think that that is very important because the ramifications of discrimination in the workplace, they far exceed often times what the law is able to sort of correct by way of actual damages or attorney's fees.

It hurts employers, it hurts employees, it hurts communities, and so this is something to keep thinking about and being very actively engaged in. I just always caution folks, if you feel like you may have a claim, encourage you to speak to a lot of different specialists in the area. But even if you get the answer that, "Yeah, I don't know." You think you're going to have a real hard time correcting this through legal action, that should not necessarily mean that the conversation ends there. Because inequity and unfairness should continually be addressed, notwithstanding.

[Music: "Calculation Marimbas"]

Rachel Prost: Nathan LaCoursiere was a public attorney for the City of Duluth, Minnesota and currently teaches students majoring or minoring in legal studies and criminal justice at the University of Wisconsin-Superior.

[Music interlude continues]

Rachel Prost: Age discrimination can be devastating to the careers and well-being of those impacted, but it can also have adverse effects on organizations. Growing older is something people should not feel ashamed of because it's a part of the human experience. Everyone has the potential to positively contribute to the workplace. When dealing with ageism, one can take action to fight stereotypes by committing to continuous learning and showcasing to their peers the consistent good work they

perform using their individual skillset. Fostering dialogue between generations of employees and respecting the dignity of all life regardless of the stage they're in, will allow each person to grow in vitality wisdom, as well as add value to society.

[Music interlude continues]

Rachel Prost: "Forge Ahead" was produced in the Department of Communicating Arts at the University of Wisconsin-Superior. A special thanks to the KUWS radio station for allowing me to use their equipment and record in their studio. I'm Rachel Prost.

[Music fades out]