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Age Discrimination in the US Higher Education and Employment

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ABSTRACT

The need to ensure equal rights to different age groups without discrimination in our country necessitates the study of international experience. One of the traditional and at the same time, urgent problems in the USA is the problem of age equality and the overcoming of discriminatory theory and practice. The goal of the study is to analyze the genesis of the system of legal safeguards against age discrimination in the U.S. legislation and the practice of the United States Supreme Court. Methodological potential includes methods of comparative historical and legal analysis. The development of the United States Supreme Court and other federal courts on age discrimination was investigated, the grounds for the institute emergence were analyzed, and its discriminatory nature, causes and conditions of its assessment in the decisions of the US Supreme Court were revealed.

KEYWORDS

Constitutional principle of equality, US Supreme Court, age discrimination, employment, US higher education

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Introduction

The problem of age discrimination in various areas of public life is becoming increasingly important and practical significant in the Russian Federation. The main spheres of the most frequent and flagrant violations of the equality principle on age grounds in our country are employment, education, and public service. In our country mechanisms to protect and restore the rights of discrimination victims, courts of law are not effective enough (Vasilieva, 2013). The specialists note that "the problem of ageism appeared only recently and presented in a very small number of articles in the Russian scientific discourse" (Kolpina, 2005). At the same time Russian researchers recognize social (Miklyaeva, 2009) and legal (Okulich, 2015; Yakupov, 2012) aspects of ageism and their growing importance in recent years. Studying the American experience to counter age discrimination is relevant and scientifically significant. There are not many special studies to the question (Nikolaev, 2012).

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One of the most important groups involved, in the words of the famous American researcher L.M. Friedman (2005), in "the revolt of different", was the "Gray Lobby" which subsequently met with considerable success concerning both ideological and demographic factors. If in 1900, the life expectancy was 49 years old and only four percent of the US population was aged 65 years and over, by 1995, the average life expectancy had increased to 75-80 years, and the number of citizens aged 65 and over comprised 12.5 percent; by 2030 the projected number will have increased to 20 percent (Shrestha & Heisler, 2011). The student population is also gradually becoming older. More than 43.3 percent of students are those aged 24 years and over, including 13.7 percent older than 30 years, and 12.3 percent are over 40 years (Almanac, 2006, p. 18). According to the National Center for Education Statistics (2015) more than 9,4 percent of students are those aged 40 years and over, 30 years and over – 13,2 percent, 25-29 years – 14 percent (Kena et al., 2015). Teachers above the age of 55 years working on a regular basis comprise 35 percent (Almanac, 2006). It is not surprising that the problem of age discrimination in general is increasingly important and even central to the political and legal life in the USA.

The term "ageism" was coined in 1968 by Robert Neil Butler to describe discrimination against seniors, and patterned on sexism and racism. Butler defined "ageism" as a combination of connected elements such as prejudicial attitudes towards older people, old age, and the aging process; discriminatory practices against older people; and institutional practices and policies that perpetuate stereotypes about older people (Ageism in America, 2006).

Despite the increase in numbers of older people and their role in contemporary American society, they continue to be the object of prejudice and discrimination: about 80 percent of respondents older than 60 years noted that they faced with various forms of "ageism" (Taormina-Weiss, 2012).

Age discrimination has become a hallmark of modern American reality. "Age discrimination is so prevalent today that it is almost invisible" (Barnes, 2016). Nearly every middle-aged and older workers, at some time during his or her career, will suffer age discrimination in the workplace (Raymond, 2001). The situation in the field of age discrimination in America is characterized as "epidemic and unaddressed" (Barnes, 2016).

At the same time more stringent legal regulation does not ensure a real improvement in the situation of citizens. For experts the impact of such legislative efforts seems contradictory (Neumark & Song, 2013), and in some cases lead to the opposite result. "Some anti-discrimination laws have the perverse effect of harming the very class they were meant to protect" (Lahey, 2008).

The situation is worsening in the conditions of unfavorable economic situation. Experts describe the situation as "a perfect storm". "A confluence of circumstances have made the problem of age discrimination in employment more severe today than in our parents′ generation" (Barnes, 2016).

Materials and Methods

The objective is to analyze the legislative basis and law enforcement practice of the US Supreme Court and other federal courts in the area of ensuring rights of elderly people in employment and higher education, to

analyze trends in the state policy, legislation and judicial practice in this area in the USA.

Implementation of the research objectives was achieved on the basis of the analysis of the main laws against age discrimination (Older Americans Act of 1965, Age Discrimination in Employment Act (ADEA) of 1967, Age Discrimination Act of 1975) and the main decisions of the Supreme Court of the USA. A special place in the framework of this study have the case Rehor v. Case Western Reserve University, Linn v. Andover-Newton Theological School, Johnson v. University of Wisconsin-Milwaukee, Gregory v. Ashcroft Gregory v. Ashcroft, Gross v. FBL Financial Ink.

Methodology includes the methods of comparative and historical legal analysis, which allows to compare the contents and implications for the development of theory and practice of legal regulation of landmark decisions of the Supreme Court of the USA based on the specific historical circumstances of their adoption.

Results and Discussion

Federal Legislation

Amendment XIV to the US Constitution contains a provision on equal protection under the law. But such a claim in the court is unlikely to be successful. "Because the Equal Protection Clause applies only to governmental entities, a plaintiff must show state action in order to establish such a claim. Moreover, the courts generally review legislation involving age classifications under a deferential standard of review, meaning that such legislation is highly likely to survive judicial scrutiny" (Feder, 2010).

Federal Legislation ensuring the rights of older Americans has a number of laws of a General Nature, the most significant of which is the "Older Americans Act of 1965" (Public Law 89-73). The law was amended by the Act 2006 (Public Law 109-365, Oct. 17, 2006; 120 Stat. 2522), and significant changes were made to the text of the original document, providing additional guarantees of the rights of older people, including recognizing their educational needs, as well as creating conditions to support voluntary youth organizations in higher education institutions, aimed at helping elderly people.

The most important law in this area is the Age Discrimination in Employment Act (ADEA) of 1967 (Public Law 90-202), supplemented provisions of which are included as they appear in volume 29 of the United States Code (U.S.C. 29, 621 etc). This law is most often used for age discrimination protection against University's faculty and staff members.

While developing Title VII of the Civil Rights Act of 1964, the deputies decided not to include age as a discriminatory basis, but instructed the Secretary of the Department of Labour on studying the issue of age discrimination and making appropriate proposals. That resulted in the adoption of the Age Discrimination in Employment Act (ADEA) of 1967 (Landsberg, 2004).

The Act of 1967 prohibits infringement of the rights of citizens aged older than 40 years. Prior to the adoption of the amendments of 1978 the maximum age limit for persons obtaining protection in accordance with the law was 60 years, in January 1, 1979, this threshold was increased to 70 years, and the

1986 amendments completely abolished all the restrictions, with the exception of some professions.

The law, in particular, does not prohibit (§ 631 (d) U.S.C, §12(d)) mandatory retirement for 70 year old tenured members of the academic workforce and this is determined in accordance with the provisions of the Higher Education Act of 1965, the last provision of which was administered twice: from 1978 to 1982 and from 1986 to December, 31 1993 (Kaplin & Lee, 2007).

The expulsion of professors from the total number of employees protected by the legislation was based on the fact that "young teachers are able to maintain a modern day, innovative and creative atmosphere in which students will acquire the most complete education".

On the other hand, there appeared a concern that universities may be tempted to limit and even destroy the system of tenure, thus threatening academic freedom. But the introduction of the age-based limits should eliminate such a threat (Faust, 2003). However, these arguments do not deny the discriminatory nature of the relevant statutory provisions.

The law makes it an unlawful employment practice for an employer: "(1) to refuse to hire or restrict the rights of individuals in relation to the terms of the agreement relating to the privileges and rights of the employee on the basis of age; (2) to limit the scope of activities or divide employees into groups in such a way that would deprive them of the right to equal opportunities in employment or otherwise restrict their employment status because of the age requirement; (3) to reduce their salary in accordance with the terms of this Chapter" (§ 623 (a) U.S.C., §3(a) of the Act).

The law does not consider these cases as cases of discrimination: 1) age is a bona fide occupational qualification necessary to conduct a given type of activity; 2) discrimination is based on the bona fide seniority system or privileges of employees; 3) cases of disciplinary sanctions or dismissal take place only in cases when there is "a just cause" for those, and 4) employers found that the employment decision was based on a different factor than age. The Equal Employment Opportunity Commission shall submit annually in January a report to the Congress.

In 1987 in response to the decision of the Supreme Court (Grove City College v. Bell, 465 U.S. 555 (1984)) significantly limiting the application of human rights laws, including the Age Discrimination in Employment Act (ADEA) of 1967 the American Congress adopted the Civil Rights Restoration Act of 1987 (Pub. L. 100-259, 102 Stat. 28). President R. Reagan's veto power was overridden by a two-thirds vote of both houses of Congress. Although this act does not make any significant changes to the laws on the civil rights protection, it expands human rights understanding of the relevant statutory provisions, thus, requiring courts to take into account a broader interpretation.

The continuation of this legislative trend could be the inclusion of age among the protected attributes against discrimination under the Civil Rights Act (Ageism in America, 2006). Another anti-discrimination directive may be the development, adoption and subsequent ratification of the UN Convention on the rights of older persons (Resolution 106C. American Bar Association. Commission on law and aging. 6/8/2011), which, however, seems hardly possible

due to the American policy of minimalism regarding the international legal framework on human rights.

The Older Workers Benefit Protection Act of 1990 (OWBPA) (Public Law 101-433) complements the provisions of the Act 1967, specifically forbidding employers to refuse older employees social security benefits.

The Age Discrimination Act of 1975 (Pub. L. 94-135, Nov. 28, 1975, 89 Stat. 728, as amended, U.S.C. §§ 6101-6107) prohibits discrimination against persons participating in programs or activities that receive federal financial assistance. Due to the large number of reservations and exceptions it had limited value (Landsberg, 2004). In particular, § 6103 (b) recognizes the action as lawful if, "it (A) reasonably takes into account age as a factor necessary to legally run the program or perform activities successfully, or (B) the corresponding differentiation is based on other than age reasonable factors".

Federal Rules and Regulations

The legislation is implemented through its administrative rules and regulations. The most important are regulatory rules of the Age Discrimination in Employment Act of 1967 (§§ 1625-1627 Title 29 - Labor. Subtitle B - Regulations Relating to Labor of the Code of Federal Regulations), as well as the Age Discrimination Act of 1975 (34 C.F.R. § 110). "According to the EEOC's regulations, advertisements that contain phrases such as, "age 25 to 35," "young", "college student", "recent college graduate", "boy", "girl", or similar terms are prohibited under the act, unless an exception applies". But the requirement to indicate the date of birth or the age of an applicant on an employment is not automatically a violation because there may be legitimate reasons for requesting the age or date of birth of an applicant. On the other hand, "the EEOC will closely scrutinize the application to assure that the request is for a permissible purpose and not for purposes proscribed by the Act" (Feder, 2010).

According to US Equal Employment Opportunity Commission an employer may ask an employee to waive his/her rights or claims under the ADEA. Such waivers are common in settling ADEA discrimination claims or in connection with exit incentive or other employment termination programs. However, the ADEA, as amended by the OWBPA, sets out specific minimum standards that must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver must: be in writing and be understandable; specifically refer to ADEA rights or claims; not waive rights or claims that may arise in the future; be in exchange for valuable consideration in addition to anything of value to which the individual already is entitled; advise the individual in writing to consult an attorney before signing the waiver; and provide the individual with a certain amount of time to consider the agreement before signing: for individual agreements, at least 21 days, for "group" waiver agreements, at least 45 days, for settlements of ADEA discrimination claims, a "reasonable" amount of time (Age Discrimination, 1967).

The Executive Order 13445 "Strengthening Adult Education" (September 27, 2007, 72 FR 56165, October 2, 2007) issued on September 27, 2007 by President George W. Bush expanded opportunities for getting further higher

education, taking advantage of employment opportunities and participating actively in American society.

The Interagency working group on adult education was originally produced by the Department of Education and headed by its Secretary. The Department of Education Office for Civil Rights noted that from 2009 to 2012 they dealt with more than 1700 age discrimination complaints (which accounted for 6 percent of the total cases) (Helping to Ensure Equal access to Education, 2012).

To an even greater extent the problem of ensuring the rights of older Americans and combating age discrimination manifested itself during recessionary periods. One of the most important aspects to improve the situation is to deliver effective education for employment.

Recent surveys show that more than 50 percent of Americans over the age of 50 are interested in taking various training courses, primarily computer ones, however, the high costs of those have proved too big an obstacle to allow for its wide-spread use. In this connection, it is time to develop guidelines to inform older Americans about free and low-cost courses provided by community colleges and universities that they can take to get started. Providing government assistance in the form of tax deductions, co-financing programs or concessional loans are also part of the initiative (Modernizing the Older Americans Act, 2011). The Equal Employment Opportunity Commission had 20 144 complaints about age discrimination in labour relations received over the period of 2015 (which accounted for about 22.5 percent of their total number).

Court Decisions

Courts are actively developing jurisprudence in this area. The US Supreme Court recognized the constitutionality of the Act 1967 in accordance with the regulations of the "freedom of interstate trade and commerce", but at the same time, refused to recognize its compliance with § 5 of the Fourteenth amendment, which gives Congress power to enforce constitutional provisions on non-discrimination so as age is not a discriminatory basis under this provision. The last decision (Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)) prevents individuals from filing claims against the states and their agencies on the basis of the Law 1967.

In *Rehor v. Case Western Reserve University* (331 N.E.2d 416 (1975)) the Supreme Court recognized the rules established by the University (lowering the retirement age from 70 to 65 years, then the 68 year compromise was established) as part of the annual employment contract between the plaintiff and the defendant, and the plaintiff, in the Court's opinion, had actually agreed to the contract terms and did not terminate the contract with the defendant.

In *Linn v. Andover-Newton Theological School* (638 F. Supp. 1114 (D. Mass, 1986)) the plaintiff Dr. E. Lynn, a tenured teacher, retired at the age of 62 with 31 years of university service as he believed on discriminatory age grounds. While examining the case the court declared the contract between the parties valid and procedural rules regarding dismissal as provided properly. However, the School did not provide the plaintiff participation in Faculty or Executive Committees, as stipulated in institutional regulations on academic freedom and the American Association of University professors' regulations on tenure which the court recognized as part of the employment contract. The court ruled in favor of the plaintiff.

In *Johnson v. University of Wisconsin-Milwaukee* (783 F.2d59 (7 Cir.1986)) the court took the side of the University claiming that the dismissal of the plaintiff was justified by discrepancies between work requirements and duties performed.

More significant was the description of the court the two main methods of proof in cases of this kind. The direct method involves proof by the plaintiff of the availability of data about what age was the determining factor in layoffs. However, more common is the indirect method.

Initially, the plaintiff must prove that he belongs to a protected group and he did his job effectively and efficiently to meet employment requirements. But despite that he was dismissed and the employer seeks a replacement with qualifications similar to those of the plaintiff. Once the employee has presented such evidence the burden of proof then shifts to the employer who has to articulate a legitimate, nondiscriminatory basis for the dismissal of the plaintiff.

And the plaintiff has to prove that the employer was motivated by discriminatory motives, or the grounds for the dismissal cannot be trusted.

In *Gregory v. Ashcroft Gregory v. Ashcroft* (501 U.S. 452 (1991)) the Supreme Court considered the claim that Missouri Constitution's mandatory retirement provision for judges at age 70 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. According the Court′s opinion "age is not a suspect classification under the Equal Protection Clause", the Court reviewed the claim under the deferential rational basis standard. Ultimately, the Court held that "the people of Missouri have established a qualification for those who would be their judges. It is their prerogative as citizens of a sovereign State to do so. Neither the ADEA nor the Equal Protection Clause prohibits the choice they have made".

Gross v. FBL Financial Ink. (557 U.S. 74 (2009)) is quite controversial from the viewpoint of protecting the rights of older employees. The court stated the need of the plaintiff to prove that age acted as a decisive factor for the dismissal. Before that the employee had demonstrated his age only as "a motivating factor" in the employment. The Court's decision caused an immediate response from the MPs (the Democratic Party members in the Senate and in the House of Representatives) who initiated the bill which sets the previous legal standard as the acting law.

Thus, the two main judicial doctrines are used within the judicial protection of employee rights: "disparate treatment" and "disparate impact". "Disparate treatment" require proof that the employer intended to discriminate against the employee to treat him differently from others because of the employee′s age. "Disparate impact" takes place when the employer′s acts are neutral, but have an adverse impact on a class of employees and are not otherwise reasonable. Thus, disparate impact claims may be established without proof of discriminatory intent. It is more favorable to victims of discrimination. Although the ADEA clearly allows disparate treatment claims, the Supreme Court held in Smith v. City of Jackson (544 U.S. 228 (2005)), that the ADEA does indeed authorize disparate impact claims (Feder, 2010).

Conclusion

The age discrimination covers almost all categories of the population. First, age is a dynamic category, so age discrimination becomes universally significant.

Secondly, age discrimination is becoming younger, embracing employees aged 35 years, and in education there is "youth" age discrimination. The age discrimination is against the following sub-groups: 1) young people aged 16 to 24 years; 2) middle-aged people from 25 to 49 years; 3) older people from 50 years to retirement age; 4) elderly people (retirement age and older) (Sargeant, 2006). American legislation and judicial practice have created a more reliable system of guarantees of older people' rights and, simultaneously, prevent age discrimination (Gover & McClure, 2004). The most important laws in this area are Older Americans Act of 1965, Age Discrimination in Employment Act (ADEA) of 1967, Age Discrimination Act of 1975. At the same time we can point out a non-systemized nature of this legislation.

In many ways, the issue is caused by the imperfection of the legal framework and insufficient analysis of legal issues. The most appropriate legislation is provided by the Civil Rights Act which, however, does not contain provisions on the protection against age discrimination. The Act 1967 protects against age discrimination in employment and has significant limitations in the safeguards system in comparison with the Civil Rights Act. It allows employers to rely on an age limit unless employers can show substantial grounds to justify their decision.

The best solution would be to legally define age along with race, ethnicity, gender and religion as a discriminatory basis in accordance with the Civil Rights Act. Such legislative harmonization would facilitate the unification of judicial practice, as well as significant expansion of judicial guarantees into a wider area of combating age discrimination.

Absence of specific constitutional provisions and nonsystematic legislation makes inconsistent practice of the Supreme Court of the USA. In particular, this is evident in the contradictory use of two doctrines in cases of age discrimination in employment: "disparate treatment" and "disparate impact". At the same time, the USA has a developed and complex system of legislative and judicial guarantees to counter age discrimination. Studying the American experience will help to improve Russia's legal policy in this important field of human rights and freedoms.

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