

Click to print or Select 'Print' in your browser menu to print this document.

Page printed from: <https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2018/01/25/age-discrimination-and-facebook-micro-targeting-comes-under-fire/>

Age Discrimination and Facebook: Micro-Targeting Comes Under Fire

Fifty years ago, the Age Discrimination in Employment Act (ADEA) was enacted to prohibit and eradicate systemic age discrimination that aging workers faced in the workplace.

By **Jeffrey Campolongo and Emily Paige Wisniewski** | January 25, 2018

Fifty years ago, the Age Discrimination in Employment Act (ADEA) was enacted to prohibit and eradicate systemic age discrimination that aging workers faced in the workplace. Congress determined that older workers faced discrimination in hiring, and that the arbitrary setting of age limits led to higher unemployment rates for older workers, see 29 U.S.C. Section 621. In an effort to thwart such discrimination, Congress prohibited employers and employment agencies from discriminating based on age



Jeffrey Campolongo, left, and Emily Wisniewski, right.

prohibited employers and employment agencies from discriminating based on age

in employment, advertising, recruiting, hiring and other employment opportunities, and also made it unlawful to send or publish employment ads that discriminate or indicate a preference or limitation based on age.

The seldom used, but often-overlooked provision of the ADEA prohibiting a preference for age in advertising has come into sharp focus in the social media age and rightfully so, considering how much money is spent on ads. Advertising revenue on social media in 2017 was projected to be \$41 billion (<https://www.statista.com/statistics/271406/advertising-revenue-of-social-networks-worldwide/>). In 2016, ads seen on Facebook and Twitter alone made up about three-quarters of the social media ad market.

Advertisers, at their very core, have always tried to target certain consumers to buy their goods and wares. With an expected audience of over 100 million Americans, it is no surprise that advertising rates for a 30-second ad to watch our beloved Eagles during this year's Super Bowl will average over \$5 million. A big audience commands a big advertising budget. The difference between general TV ads, like those we will see during Super Bowl LII, and ads seen on your Facebook and Twitter feeds, is that social media can target you individually and specifically. While the Budweiser Clydesdales kicking a football may appeal to a small percentage of the overall viewing audience using traditional TV ads, a promoted product or service on your Twitter timeline can be designed in a way to appeal to any specific preferences you may have.

Based largely off the data collected about its users, tech companies can "micro-target" segments of the population through what you post, to what you read, to who you interact with on your devices, etc. This begs the question about the proper use of targeting when it does so to the exclusion of protected classes. In a federal class-action lawsuit filed on the heels of the 50th anniversary of the enactment of the ADEA, members of the Communications Workers of America allege that this micro-targeting by advertisers through the use of social media to deliver their message

disadvantages older workers (i.e., Facebook users 40 years old or older) who may have been denied the chance to learn about job openings, see *Bradley v. T-Mobile US*, Case No. 5:17-cv-07232 (N.D. Ca. filed Dec. 20, 2017).

The lawsuit alleges, *inter alia*, that Facebook ads have the ability to reach people based on factors such as age, gender, location, interests and behavior. According to the complaint, “employers not only sponsor ads on Facebook users’ news feeds to seek applicants for specific employment opportunities, but they also use Facebook as a main source of showcasing their brands to potential applicants. Enhancing a company’s brand increases the likelihood that a person will apply for employment opportunities with that company in the future.”

The lawsuit describes the offending conduct as follows: “When an employer or an employment agency creates, purchases, and sends a Facebook ad to make workers aware of job opportunities and encourage them to apply for various jobs, Facebook requires the employers or employment agencies to select the population of Facebook users who will be eligible to receive the ad, including the age range of the users who will receive the ad. Following Facebook’s encouragement to narrowly focus ad campaigns on the ‘right people,’ including by targeting younger people, upon information and belief, hundreds of major employers and employment agencies routinely focus their Facebook employment ads on users who are under 40 years old (and sometimes on users who are under higher age thresholds). This prevents workers who are above the selected age threshold from receiving employment ads and pursuing relevant job opportunities.” In essence, folks outside the targeted age group never even see the ad and thus, do not even know what employment opportunities they be missing out on.

In 2016, Facebook came under tremendous scrutiny for the same alleged practice which made it possible for advertisers to micro-target or exclude black, Hispanic, and other “ethnic affinities” from seeing ads for housing and employment (<https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race>). At that time, Facebook executives issued a statement saying that they “take a

strong stand against advertisers misusing our platform: Our policies prohibit using our targeting options to discriminate, and they require compliance with the law.” Nevertheless, the micro-targeting practice in advertising has persisted, according to the new lawsuit, with age-related parameters.

With respect to the current allegations, Facebook defended its practice by suggesting it is no different than running employment ads in magazines and on TV shows targeted at younger or older people. In a statement, Facebook contended that “used responsibly, age-based targeting for employment purposes is an accepted industry practice and for good reason: it helps employers recruit and people of all ages find work. (<https://newsroom.fb.com/news/h/addressing-targeting-in-recruitment-ads/>)”

The problem with this line of reasoning, as articulated before, is that the end users being excluded from seeing the ads are never given the opportunity to see or know of the opportunities in the first place. Yes, anyone can pick up a magazine or watch an ad during the Super Bowl, even if the ad or commercial does not appeal to him or her. But at least that consumer can process what he or she is seeing, in real time, and make a conscious decision on whether to partake in the goods or products being peddled. The difference with micro-targeting of social media users is that one can never know what one does not ever see. Moreover, if Facebook provides active encouragement to the filters used by advertisers which ultimately screen out older workers, as the lawsuit alleges, the company may be liable for aiding and abetting discrimination. As employment lawyers in Pennsylvania well know, liability exists for any person who aids or abets the discriminatory purpose of an employer under the Pennsylvania Human Relations Act.

It may be too soon to know the extent to which Facebook may be liable for age discrimination for its role in this practice. Ultimately, there may be immunity issues under Section 230 of the Communications Decency Act which would preclude

liability. Section 230 protects internet companies from liability for third-party content. Nevertheless, the micro-targeting practice is questionable and highlights a need for closer scrutiny.

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters.* **Emily Wisniewski** *is a rising law student at Villanova University's Charles Widger School of Law. She is the elected Student Bar Association representative for her class. Her interests include employment law, specifically workplace accommodations involving service animals.*