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IN THIS ISSUE

Larry Smith provides a review of how Courts have treated the issue of whether rejected applicants over the age of 40 can file disparate impact claims under the Age Discrimination in Employment Act of 1967.

Do Applicants Have a Disparate Impact Claim Under the ADEA?

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Studies reflect that older workers are currently twice as likely to work now as in 1985. As these older workers remain in the workforce, they will seek in increasing numbers to change jobs/careers in order to stay engaged in some form of employment due to questionable social safety nets, inadequate retirement and saving plans and increasing health costs. Baby boomers are expected to represent the strongest growth in the labor force through at least 2024.[1]

Employers frequently establish facially neutral policies related to who they will accept as applicants. Sometimes these requirements specify the range of experience that employers seek or the length of time desired applicants have been out of school. Employers impose these requirements as they seek to hire employees who can be trained in their particular system and brought through their employment ranks and culture. Some employers have allegedly utilized social media to target younger applicants.[2]

The intersection between the increasing number of mobile, older workers in the workforce and neutral hiring policies raises the very real question of whether an employer's facially neutral hiring policies have a disparate impact on the increasingly mobile older workforce applying for new positions. The purpose of this paper is to highlight how Courts to date have treated the legal question of whether applicants can assert a disparate impact claim under the Age Discrimination in Employment Act of 1967.

The Law

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination against individuals because of their age.[3] The ADEA protects individuals who are at least 40 years of age.[4] The prohibitions against age discrimination relate to employers, employment agencies and labor unions and include the refusal to hire any individual because of their age.[5] As it pertains to possible disparate impact claims, the ADEA specifically makes it unlawful for an employer:

> to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.[6]

The Supreme Court Recognizes Disparate Impact Claims Under the ADEA

In *Smith v. City of Jackson*[7] the Supreme Court for the first time considered whether

[1] America's Elderly Are Twice as Likely to Work Now Than in 1985, Daily Labor Report, Bloomberg Law, by Suzanne Woolley, April 22, 2019.
[2] Several U.S. Employers Are Being Accused Of Age Discrimination Over Ads Placed On Facebook, Fortune, December 21, 2017.
[3] 29 U.S.C. § 623.
[4] 29 U.S.C. § 631(a).
[5] 29 U.S.C. § 623(a), (b), (c).
[6] 29 U.S.C. § 623(a)(2) (hereinafter 4(a)(2)).
[7] *Smith v. City of Jackson,* 544 U.S. 228 (2005).

the disparate impact theory developed under *Griggs v. Duke Power Co.*,[8] applied to the ADEA.[9] The case involved a pay plan which granted raises to all city employees for the purpose of attracting and retaining qualified individuals, providing incentive for performance and maintaining competitiveness with other public sector agencies.[10] Under the plan, police officers with less than five years of tenure received proportionally greater raises when compared to the raises of those with more seniority.[11]

The Supreme Court determined that the ADEA authorized disparate impact claims.[12] In reaching this conclusion, the Court relied principally on two matters. First, the Court observed that the language contained in Title VII is the same as 4(a)(2) of the ADEA, and *Griggs* had interpreted that Title VII text as establishing a disparate impact claim under Title VII.[13] The Court reasoned that since Congress used the same language in both Title VII and the ADEA, that it intended the same result of recognizing a disparate impact claim.[14] Second, the Supreme Court relied on the fact that both the Department of Labor and the EEOC had interpreted the ADEA as authorizing disparate impact claims.[15]

Courts Consider Disparate Impact on Applicants Under ADEA

A. Villarreal v. R.J. Reynolds Tobacco Co.[16]

In *Villarreal*, the *en banc* Eleventh Circuit determined that the ADEA did not provide a disparate impact claim to applicants.[17] The underlying employment practice at issue involved guidelines provided by the employer to a contractor which screened out the application of Villarreal who was 49 years old at the time. The guidelines described the targeted candidate as someone two to three years out of college who adjusts easily to changes. The contractor was instructed to avoid applicants in sales for eight to ten years.[18]

The District Court dismissed Villarreal's disparate impact claim on the grounds that Section 4(a)(2) of the ADEA did not authorize such a claim.[19] The initial Eleventh Circuit panel reversed, finding that Section 4(a)(2) was ambiguous and deferring to the EEOC's interpretation which recognizing a disparate impact claim for applicants.[20]

The *en banc* Eleventh Court determined the disparate impact claim failed to state a claim under Section 4(a)(2). The majority opinion initially focused on the actual statutory language of Section 4(a)(2), noting that the plain text covers discrimination against employees, not applicants. The opinion

[8] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
[9] *Smith*, supra at 231.
[10] Id.
[11] Id.
[12] Id. at 232.
[13] Id. at 233-240.
[14] Id.
[15] Id. at 239-40
[16] 839 F.3rd 958 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017).
[17] Id. at 961, 970.
[18] Id. at 962.
[19] Id.
[20] Id. at 963.

observed that since the key phrase in 4(a)(2) "or otherwise adversely affects his status as an employee" used "otherwise" to join the phrase "deprive or tend to deprive", Congress made the initial prohibitory language after "depriving or tending to deprive any individual of employment opportunities" a subset of the individual's status as an employee.[21] The Court stated that the phrase "any individual" could not be read in isolation and is modified by the clause "status as an employee."[22] The Court concluded that Section 4(a)(2) only protects an individual if they have a status as an employee.[23]

Prohibited discrimination against applicants in other sections of the ADEA supported the *Villarreal* opinion that 4(a)(2) did not protect applicants. For example, Section 4(c)(2) of the ADEA applies to applicants as well as employees because it specifically contains the phrase "applicant for employment." Section 4(a)(1)'s prohibition also specifically encompasses applicants for employment.[24] The Court rejected the argument that *Griggs,* which interpreted the same language in Title VII, applied to applicants because *Griggs* itself did not involve applicants.[25] The Court also refused to defer to the EEOC's interpretation of the statute because the text of the statute was clear.[26] Based on these matters, the Court concluded that Section 4(a)(2) only provided a disparate impact claim to employees, not applicants.

B. *Kleber v. Care Fusion, Inc.*[27]

In *Kleber*, the *en banc* Seventh Circuit determined that the ADEA does not provide a disparate impact claim to applicants. The specific policy at issue required applicants to have three to seven years (no more than seven years) of relevant legal experience. Kleber was 58 at the time and had more than seven years of pertinent experience. A 29 year-old applicant who met but did not exceed the prescribed experience requirement was hired.[28] The District Court had dismissed the claim concluding that Section 4(a)(2) did not authorize a disparate impact claim for job applicants.[29] The original Seventh Circuit panel reversed the dismissal.[30]

The *en banc* opinion initially observed that the plain language of Section 4(a)(2) of the ADEA only applies to employees. The Court noted that the impact of the challenged employment practice must "befall an individual with status as an employee".[31] The majority opinion construed the statutory phrase "or otherwise adversely affect his status as an employee," and observed that the phrase "or otherwise" joined the prohibitions of conduct to the individual's status as an employee. Therefore, Congress intended 4(a)(2) to only prohibit discrimination against individuals

[21] Id. at 965.
[22] Id. at 971.
[23] Id. at 966-67.
[24] Id. at 968.
[25] Id. at 970.
[26] Id. at 970.
[27] 914 F.3rd 480 (7th Cir. 2019), *pet. for cert. filed,* No. 18-1346 (April 26, 2019).
[28] Id. at 481.
[29] Id.
[30] Id.
[31] Id. at 482.

with the status of an employee, not applicants.[32]

The Court cited other portions of the ADEA as support for the position that 4(a)(2) did not extend to applicants because the statutory language did not include applicants. The Court noted that Section 4(a)(1), the disparate treatment provision of the ADEA, specifically included both failing or refusing to hire any individual, which clearly contemplated that it covered both employees and applicants whereas 4(a)(2) contained no similar language. The Court also reviewed Section 4(c)(2) which prohibits labor unions from discriminating against applicants for employment based upon age. The ADEA's retaliation provision also extends to applicants. The Court concluded that the plain language of 4(a)(2) left no room but for one interpretation, that Congress authorized only employees to bring disparate impact claims under the ADEA.[33]

As in *Villarreal*, the *Kleber* opinion rejected the argument that *Griggs* compelled a different conclusion. The Court noted that the Supreme Court never stated in *Griggs* that its holding extended to job applicants.[34] Further, the majority reasoned that Congress's amendment of Title VII to expressly include applicants for employment further established that the similar language still contained in the ADEA did not cover applicants. The Court concluded that the Supreme Court's decision in *Gross v. FBL Financial Services*,[35] which held that the amendments to Title VII to include a motivating factor causation standard did not apply to the ADEA since it had not also been amended, compelled the conclusion that the changes to Title VII in 1972 to include applicants in the disparate impact section of Title VII did not apply to Section 4(a)(2) of the ADEA.[36]

C. *Rabin v. Price Waterhouse Coopers, LLP*[37]

In *Rabin*, the United States District Court for the Northern District of California held that Section 4(a)(2) permits applicants to assert a disparate impact claim under the ADEA.[38] The practice at issue concerned the general hiring practices for associate positions which allegedly screened out older workers because of a preference for younger workers. The employer sought to dismiss plaintiff's disparate impact claim through a motion for judgment on the pleadings because the ADEA did not permit job applicants to bring disparate impact claims.[39]

The District Court examined the same text in 4(a)(2) as did the *Villarreal* court. However, the District Court reached a different conclusion by reasoning that the use of the term "any individual" in the phrase "deprive or tend to deprive any individual of employment opportunities," established that 4(a)(2) was not limited to employees. The Court noted that in other parts of 4(a)(2), Congress chose the word

[32] Id. at 482-85.
[33] Id. at 483-85.
[34] Id. At 485.
[35] *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2019).
[36] Kleber, supra at 486-87.
[37] 236 F. Sup. 3d 1126 (N.D. Cal., 2017).
[38] Id. at 1133.
[39] Id. At 1127.

"employees" to refer to individuals who employers may not limit, segregate or classify because of age. The Court presumed that the differences in language and the use of the phrase "individual" was important and was intended to include applicants under 4(a)(2).[40]

The District Court rejected the *Villarreal* court's analysis of Section 4(a)(2) and read the *Griggs* decision as authorizing a disparate impact claim because the Supreme Court did not suggest that only employees were entitled to bring a disparate impact claim.[41] The Court also adopted the *Villarreal* dissent's rationale that the phrase "employee" does not have a temporal qualifier and therefore covers individuals other than current employees.[42] The Court rejected reliance on 4(c)(2) because such language only applied to labor organizations, not employers.[43] Finally, the Court deferred to the EEOC's interpretation in reaching the conclusion that 4(a)(2) permits applicants to bring disparate impact claims.[44]

D. *Champlin v. Manpower, Inc., et. al.*[45]

The employment policy at issue involved instructions to an employment agency reflecting that the employer did not seek anyone with overspecialization or candidates with more than ten to twelve years' experience. The job vacancy communication referenced that the employer was a "young, eager group" so that culturally one to five years experience was the best fit. The plaintiff was 56 years old at the time he received the publication regarding the job position.[46]

The employer moved to dismiss Champlin's disparate impact claim arguing that the ADEA did not recognize the disparate impact claim for non-employee job applicants. The Court refused to do so. The Court noted that no Fifth Circuit binding authority interpreted Section 4(a)(2) to only apply to employees. The Court noted that, as the *Rabin* court summarized, the EEOC has long interpreted the ADEA as permitting disparate impact claims. The Court concluded that since no binding authority restricted Section 4(a)(2) of the ADEA to employees, it should not dismiss the disparate impact claim at that time.[47]

These cases reflect that there is no complete judicial consensus as to whether a disparate impact claim for applicants exists under the ADEA. These cases turn on the particular court's views on interpretation of the actual language in 4(a)(2), the application of *Griggs'* interpretation of the same language in Title VII and how much deference the EEOC's interpretation deserves. Clearly, employers in the Seventh and Eleventh Circuits have a viable basis to dismiss applicants' disparate impact claims under the ADEA. However, all employers need to carefully evaluate any facially neutral policy that may tend to screen out individuals over 40. If employers

[40] Id. at 1128.
[41] Id. at 1128-29.
[42] Citing *Robinson v. Shell Oil Co.*, 519 U.S. 334, 342 (1997), which held that the prohibition of retaliation against employees also applied to former employees.
[43] *Rabin*, supra at 1129.
[44] Id. at 1132-33.
[45] 2018 WL 572997 (S.D. Tex. Jan. 24, 2018).
[46] Id. at *1.
[47] Id. at *7.

decide to use such a policy, they need to develop evidence at the time of implementation of such policy that such policy is supported by legitimate, non-discriminatory business reasons. Finally, employers should also remember that applicants can always assert a disparate treatment claim under 4(a)(1) of the ADEA in these situations.

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