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Seventh Circuit Denies Right of Outside Job Applicants to Claim Disparate Impact Discrimination Under ADEA

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The decision insulates employers in Illinois, Wisconsin and Indiana from certain challenges to hiring practices by prospective job applicants over 40 years of age that are not also current employees.

The Facts

Dale Kleber, a 58-year-old attorney with substantial experience, applied for the position of Senior Counsel at CareFusion. The job posting sought applicants with 3-7 years of experience. CareFusion did not offer Kleber an interview but offered the position to a 29-year-old applicant with significantly less experience than Kleber.

Kleber filed a complaint alleging the maximum experience cap automatically removed his application from consideration resulting in a disparate impact on workers over the age of 40 and a violation of §623(a)(2) of the ADEA. CareFusion filed a motion to dismiss for failure to state a claim and further asserted the defense that the maximum experience cap was an "objective criterion" that addressed concerns related to non-complex job responsibilities and retention issues. The district court affirmed CareFusion's motion to dismiss. A divided panel of the 7th Circuit with Judge Barrow sitting by designation reversed the district court decision, and a petition for rehearing en banc was granted.

The 7th Circuit en Banc Decision

The 7th Circuit's majority opinion was based largely on the text and grammatical structure of §623(a)(2) of the ADEA which states:

> It shall be unlawful for an employer:
> (2) 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…

At issue, was the clause "to deprive any individual of employment opportunities," which Kleber argued included job applicants. The majority, however, disagreed. The reference to "employees" in the preceding and subsequent portions of §623(a)(2), as well as Congress' specific reference to job "applicants" in §§623(a)(1), 623(c)(2) and 623(d) convinced the majority that Congress' omission of a reference to job applicants in §623(a)(2) was intentional. Under §623(a)(2), Congress authorized only employees to bring disparate impact claims against employers.

Importantly, Kleber also argued that the 1971 SCOTUS decision, *Griggs v. Duke Power Co.*, settled the issue because SCOTUS interpreted identical language under §703(a)(2) of Title VII and held that it included protections for job applicants and employees. The majority disagreed that *Griggs* extended protections to job applicants and asserted instead that it was Congress' "swift and clear" amendment to Title VII after the *Griggs* decision that provided Title VII protections to job applicants. Judge Hamilton delivered a withering dissent, methodically recounting the legislative and factual history leading up to the *Griggs* decision and the amendment to Title VII. In doing so, he characterized the majority's decision as "wrong," as containing "glib and unsupported theories," as "ignoring precedent and legislative history" and guilty of repeating the same interpretational error as it did in the 1994 decision of *EEOC v. Francis W. Parker School.*

But the split on this issue is not limited to the judges of the 7th Circuit. It extends to the federal circuits. While the 11th Circuit also has held that the ADEA does not permit job applicants to pursue disparate impact claims against prospective employers, the 9th Circuit arrived at the opposite conclusion. With the circuit courts squaring off against one another on this narrow issue, it's only a matter of time before the U.S. Supreme Court grants cert to a petition on this issue, unless of course, Congress acts swiftly to clarify the ADEA.

What This Means for You

The 7th Circuit decision does not abrogate all protections for older job applicants in Illinois, Wisconsin and Indiana under the ADEA. Rather, it eliminates only one theory on which job applicants over age 40 years may pursue claims of discrimination against a prospective employer. The holding does not extend to internal job applicants, to employment agency practices, to labor organization practices, or to claims of disparate treatment against employers or prospective

employers. As such, employers must continue to enforce their anti-discrimination policies with respect to their employees as well as job applicants.

Contact Us

If you have questions about your responsibilities under Illinois state and federal discrimination laws, contact Anne Mayette, Erik Eisenmann or your Husch Blackwell attorney.

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