

Court Limits Age Discrimination for Applicants

In *Villarreal v. R.J. Reynolds Tobacco Co.* the Eleventh Circuit held that the Age Discrimination in Employment Act (ADEA) does not permit an applicant for employment to sue under a disparate impact theory because the applicant does not have the status as an employee. Disparate impact occurs when employer's policies or practices disproportionately affect a protected class, such as age.

In this case, which was heard by the full panel of judges, a 49-year-old's application was screened out pursuant to defendant R.J. Reynolds' policy favoring candidates two to three years out of college "who adjusts easily to change" and disfavored applicants with eight to ten years of sales experience. Plaintiff Richard Villarreal brought suit on his own behalf and on behalf of a class of "all applicants who applied (for the) Territory Manager position who applied for the position since the date R.J. Reynolds began its pattern or practice of discriminating against applicants over the age of 40 ...; who were 40 years of age or older at the time of their application; and who were rejected for the position." The lawsuit claimed that R.J. Reynolds' policy guidelines violated the ADEA because they had a disparate impact on applicants over the age of 40.

The District Court dismissed the case finding that unsuccessful applicants cannot use the disparate impact theory to support an age discrimination case. A three judge panel disagreed and the case was set for consideration by the entire Eleventh Circuit (en banc). A majority of the en banc agreed with the District Court that the plaintiff's claims failed. There was a strong dissenting opinion and several concurring opinions.

The provision of ADEA at issue was section 4(a)(2), which states in part that the Act makes it "unlawful for the employer... to limit, segregate, or classify his employees in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee..." The majority held that applicants are not covered by this section, only employees. It based its decision in part because the inclusion of the phrase "or otherwise" limits the phrase "status as an employee," thus requiring the section to be applied only to individuals presently employed. This interpretation is at odds with the EEOC's interpretation of the statute.

The majority refused to give deference to the EEOC interpretation since it found the statutory language to be clear.

Comment: While complicated, this decision is a clear victory for employers. The holding that applicants cannot claim age discrimination where the qualifications as described by the employer may disproportionately affect applicants over the age 40 is significant. However, it is limited to the specific language in ADEA and would not apply to other protected classes, such as gender, race or religion. The plaintiff has already said he will seek further review from the Supreme Court. It is also unclear whether other circuit courts will follow the lead of the Eleventh Circuit which covers Alabama, Florida and Georgia.