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In a First, Appeals Court Says Older Job Applicants Can Sue Over Indirect Age Bias

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Older job applicants can sue over hiring practices that indirectly hurt them instead of having to claim they were subject to intentional discrimination, a divided federal appeals court panel has ruled in a landmark decision.

At issue before the U.S. Court of Appeals for the Eleventh Circuit was whether the federal Age Discrimination in Employment Act (ADEA) permitted job applicants to bring so-called disparate impact claims. A disparate impact claim is based on a facially neutral practice that disproportionately hurts a protected group. By contrast, a disparate treatment claim must be backed with proof of intentional discrimination against a protected class.

In this case, the Eleventh Circuit panel focused on R.J. Reynolds Tobacco Co. employment guidelines that allegedly directed recruiters to seek sales job applicants who were less than a few years out of college—and to avoid applicants with eight to 10 years of experience.

Job applicants for years have been allowed to use disparate impact theories to make race and sex discrimination claims. And in the 2005 case *Smith v. City of Jackson*, 544 U.S. 228, the U.S. Supreme Court held that current employees may bring a disparate impact claim under the ADEA. But it has not been clear whether job applicants could bring such age discrimination claims under a disparate impact theory.

Prior to the U.S. Supreme Court's ruling in *Smith*, a few circuits had suggested the ADEA doesn't allow a disparate impact age discrimination claim by a job applicant. But writing for the Eleventh Circuit majority, Judge Beverly Martin debated with dissenting Senior U.S. District Judge C. Roger Vinson, visiting from Florida, the importance of those opinions. The judges also clashed over whether language from the various opinions that accompanied high court's 2005 plurality ruling supported or undermined the plaintiff's position.

The winning appellate argument was made by P. Casey Pitts of Altshuler Berzon in San Francisco, who called the Eleventh Circuit ruling an important civil rights decision. "Disparate impact causes of action are fundamental to achieving the purposes of the nation's anti-discrimination laws," he said.

Pitts said job applicant cases are rarer than other employment discrimination cases, because job applicants find it more difficult to know whether they've been a victim of discrimination than an employee who is let go or is still on the job. The Eleventh Circuit ruling paves the way for the plaintiff to test his theory that hiring guidelines used by R.J. Reynolds amounted to age discrimination.

The plaintiff, Richard Villarreal, applied for a sales job with R.J. Reynolds in 2007, when he was 49. The company never responded to his application. According to the Villarreal's suit, R.J. Reynolds uses recruiting services, who employ a set of "resume review guidelines" for the company's regional sales representative jobs. The guidelines tell hiring managers to target candidates who are "2-3 years out of college" but to "stay away from" candidates with "8-10 years" of prior sales experience.

The age discrimination statute requires a person to file a charge of discrimination within 180 days of the discriminatory act that is the basis for the claim. But Villarreal didn't submit his claim with the Equal Employment Opportunity Commission until about two-and-a-half years after submitting his application with R.J. Reynolds. (While the EEOC charge was pending, Villarreal applied for sales positions with R.J. Reynolds five more times, and was rejected each time.)

The EEOC eventually declined to take action, merely issuing Villarreal a notice that he had a right to sue R.J. Reynolds. Villarreal, who lives in Georgia, filed a collective action lawsuit against R.J. Reynolds in the Northern District of Georgia on behalf of a national group of applicants.

U.S. District Judge Richard Story dismissed Villarreal's disparate impact claim, saying the ADEA didn't permit such a claim by a job applicant. The judge also dismissed as untimely all claims related to hiring decisions made prior to Nov. 19, 2009—180 days before Villarreal filed his EEOC charge. Villarreal tried to amend his complaint to include allegations justifying his late filing—specifically, that he didn't know about R.J. Reynolds' resume review guidelines until he spoke with lawyers at Altshuler Berzon in April 2010—but Story would not allow it.

On Villarreal's appeal, Martin formed a majority with Judge Charles Wilson to reverse Story's ruling and reinstate the lawsuit. They ruled as a matter of first impression for the Eleventh Circuit that the ADEA supports disparate impact claims for job applicants.

Martin wrote that the statute was unclear as to disparate impact claims for job applicants. The ADEA 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."

Because the law was unclear, she said, the court should defer to the EEOC's reasonable, long-standing position that the ADEA allows disparate impact claims for job applicants.

Martin also wrote that Villarreal's claims should not be dismissed as filed too late, saying he might be able to prevail under the doctrine of equitable tolling. She said Villarreal did not need to allege, as Story had required, that R.J. Reynolds had concealed or misrepresented information about its hiring practices or that Villarreal had promptly asked the company why he had not been hired.

In dissent, Vinson said that the majority ruling "has the potential to create bad law in two important areas," both on the disparate impact issue and the equitable tolling issue. Despite the majority's holding to the contrary, Vinson said that the ADEA was clear: It applies only to "employees," rather than to people without an employment relationship with the company. Therefore, he said, the court should not defer to the EEOC's interpretation.

Vinson said Villarreal's allegations did not justify his late filing, saying a plaintiff must show "extraordinary circumstances" to take advantage of the equitable tolling doctrine. If the requirement that a plaintiff act diligently means anything, said Vinson, a plaintiff must have done something to pursue his rights, and Villarreal "did *nothing*" until about two-and-a-half years after his application was rejected, when he was contacted by lawyers investigating a possible suit against the company.

Eric Dreiband, a Jones Day partner in Washington who served as general counsel for the EEOC during the administration of President George W. Bush, argued at the Eleventh Circuit for R.J. Reynolds. He could not be reached for comment.

The case is *Villarreal v. R.J. Reynolds Tobacco Co.*, No. 15-10602.

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