

Revival of Age Discrimination Lawsuit a Warning to Employers

Labor & Employment Law Update

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At age 58, Dale Kleber was an out of work experienced attorney searching for full-time employment. He applied for a position as a “Senior Counsel, Procedural Solutions” that required the ability to assume complex business projects. The position description also stated that applicants must have at least 3 years but no more than 7 years of relevant legal experience. Kleber had more than 7 years of experience and he was not selected for the position. The employer filled the position with a 29-year-old applicant.

Kleber sued under the Age Discrimination in Employment Act (ADEA) alleging the 7-year experience cap had a disparate impact on qualified applicants over the age of 40. The district court dismissed the claim finding that the ADEA's disparate impact provision does not cover job applicants, relying on the Seventh Circuit's holding in *E.E.O.C. v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994). However, a divided three-judge panel of the Seventh Circuit reversed the dismissal finding that its decision in *Francis Parker School* had been abrogated by the Supreme Court in *Smith v. City of Jackson*, 544 U.S. 228 (2005). Circuit Judge William J. Bauer dissented finding the plain language of the ADEA made it clear the disparate impact provision did not apply to outside job applicants.

The Seventh Circuit recognized its holding could be seen as creating a circuit split, but a majority of the judges in active service declined to rehear the case en banc. For now, the case has been directed back to the district court for Kleber to pursue the merits of his case.

Employers frequently use hiring programs that cater to “recent graduates” to fill entry level positions. These programs have been addressed by the courts as generally permissible under the ADEA provided there is no implication that persons older than the normal “recent graduate” are disfavored. In other words, “recent graduate” programs are not, alone, evidence of discriminatory treatment based on age. However, under a disparate impact theory, “recent graduate” hiring programs are risky, as there is likely a disparate impact on older applicants. Moreover, some states frown upon such job ads and make it discriminatory under state comparable ADEA laws (e.g., New York Human Rights Law).

Employers should use caution with hiring programs that might disparately favor younger applicants – at least until the Supreme Court or Congress determines job applicants are not protected by the disparate impact provision of the ADEA.

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