

Seventh Circuit's Rejection of Applicant's Age Claim Does Not Mean Employers Are Off The Hook

Labor & Employment Law Update

on February 11, 2019

On January 23, 2019, an *en banc* panel of the 7th Circuit Court of Appeals held that the Age Discrimination in Employment Act's (ADEA) disparate impact protections do not apply to job applicants.

By way of background, 58-year-old Dale Kleber applied for CareFusion's posting seeking an attorney with "3 to 7 years (no more than 7 years) of relevant legal experience." Kleber had more experience than that, but instead of hiring Kleber, CareFusion hired a 29-year-old within the given experience range. There are a few key takeaways from this decision:

First, an *en banc* decision means that all of the circuit's judges that want to participate are able to consider the merits of the case. This is a sort of intermediary stage between the appellate court's typical review of a case and the Supreme Court, and here it signals that the Seventh Circuit determined that significant legal issues were at stake. It does not, however, mean that the judges all came to the same conclusion. Here, 12 of 14 judges participated in the *en banc* panel, and decided the case 8-to-4, reversing the initial 3-judge panel's decision (that was decided 2-1) and affirming the trial court's dismissal of the claim.

Second, the holding is only as to disparate impact (i.e., facially neutral policies or conduct that have a negative consequence) claims for job applicants under the federal ADEA. ADEA's disparate impact protections remain in place for current employees, and this does not eliminate any cause of action which may exist under state and local age discrimination laws!

Third, the court clearly stated that ADEA protects both applicants and employees from disparate treatment – e.g., intentional conduct based on age where the affected individual is 40-or-over. This means that advertising specifically seeking someone under the age of 40 (unless there is a *bona fide* occupational qualification ("BFOQ") – a lesson for another day) will still likely run afoul of the law.

To avoid potentially violating ADEA in the application phase of employment, employers should take a few proactive measures. First, audit job postings and descriptions to ensure they are age-neutral unless an actual BFOQ exists. Second, update application forms to eliminate requests for birthdays and graduation/degree years (which tend to give a strong indication of age). Third, train anyone involved in the interviewing process on unlawful inquiries – not solely limited to age. And of course, seek the advice of legal counsel to avoid responding to charges of discrimination and even “professional plaintiff job applicants” claims.

Seventh
Circuit's
Rejection of
Applicant's
Age Claim
Does Not
Mean
Employers
Are Off
The Hook