Chicago Daily Law Bulletin®

Volume 165, No. 24 Serving Chicago's legal community for 164 years

Terminology puts end to age bias suit

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Section 623(a)(1) of the Age Discrimination in Employment Act contains protections against employment practices that are facially discriminatory when applied to "individuals" who are 40 years of age or older — practices that result in disparate treatment.

And, Section 623(a)(2) of the age discrimination act (29 U.S.C.S. Section 623(a)(2)) contains protections against employment practices that are fair in form but discriminatory in practice when applied to "employees" who are 40 years of age or older — practices having a "disparate impact."

Since the U.S. Supreme Court issued its decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), it has been well-settled that the ADEA prohibits employment practices that have a disparate impact upon current employees who are 40 years of age or older.

However, a less litigated issue concerns whether the ADEA recognizes disparate impact claims that are brought by "individuals" who have not been employed by the defendant, i.e., applicants who are 40 years of age or older.

In *Kleber v. CareFusion Corp.*, No. 17-1206, – F. 3d –, 2019 U.S. App. LEXIS 2192, 2019 WL 290241 (7th Cir. Jan. 23, 2019), an en banc session of the 7th U.S. Circuit Court of Appeals answered this legal question in the negative.

In *Kleber v. CareFusion Corp.*, Dale Kleber sought to have the 7th Circuit overturn the U.S. District Court's order that granted San Diego-based CareFusion's motion to dismiss Kleber's disparate impact claim brought pursuant to the ADEA.

By way of background, CareFusion is a medical technology company that provides various health-care products and services. In March 2014, Kleber applied for the position of senior counsel, procedural solutions in CareFusion's in-house legal department.

The online job description for the position listed as one of the position's qualifications: "[three to seven] years (no more than [seven] years) of relevant legal experience." During this same time frame, CareFusion also advertised the position of senior counsel, labor and employment, which was open to applicants with between "[three to five] years (no more than [five] years) of legal experience."

Kleber, who was 58 years old at the time, had previously served as the CEO of a national dairy trade association, as the general counsel of a Fortune 500 company and as the chairman and interim CEO of a medical device manufacturer.

Despite his legal background, Kleber, who was one of the 180 applicants vying for the procedural solutions position, was not among the 10 applicants selected for interviews. All 10 of the interviewees had seven or fewer years of legal experience and a 29-year-old applicant was ultimately selected to fill the position.

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At the district court level, the court dismissed Kleber's disparate impact claim without reaching the merits of his allegations because the ADEA did not recognize disparate impact claims brought by applicants. Citing *EEOC v. Francis W. Parker School,* 41 F.3d 1073, 1077 (7th Cir. 1994), the district court concluded that Congress' decision to not amend Section 623(a)(2) of the ADEA in a manner similar to Congress' amendment of Section 2000e-2(a)(2) of Title VII, which expressly recognizes disparate impact claims for applicants covered by Title VII, must be presumed as an intentional act by Congress.

In April 2018, the 7th Circuit reversed the district court after concluding that the plain text of the ADEA's retaliation provision, which covers employees and applicants, is the best indicator for understanding the scope of 29 U.S.C.S. Section 623(a)(2).

Viewed through that lens, and in the absence of an apparent policy rationale for allowing current employees to bring disparate impact claims while simultaneously barring outside job applicants from raising such claims, the panel rejected CareFusion's argument that Congress' use of the broad term "individual" in certain sections of federal equal employment opportunity law while using the more narrow term "employee" in other sections of federal equal employment opportunity law was intentional and, therefore, barred Kleber's disparate impact claim under the ADEA.

CareFusion filed a petition for rehearing en banc, which was granted in June 2018. On Jan. 23, an en banc session of the 7th Circuit affirmed the district court's dismissal of Kleber's disparate impact claim.

In doing so, the 7th Circuit, relying on long-standing rules of statutory construction, i.e., that the court must enforce a statute according to its terms if the statutory language is clear, concluded that Congress' choice to add "'applicants' to [Section] 703(a)(2) of Title VII but not to amend [29 U.S.C.S. Section 623(a)(2)] in the same way is meaningful."

The 7th Circuit further supported its decision by citing U.S. Supreme Court precedent in concluding that when "Congress includes particular language in one section of a statute but omits it in another — let alone in the very next provision — the [c]ourt presumes that Congress intended a difference in meaning." Here, as the 7th Circuit explained, this different meaning "leaves room for only one interpretation: Congress authorized only employees to bring disparate impact claims."

Finally, the 7th Circuit, en banc, also rejected Kleber's argument that an expansive reading of 29 U.S.C.S. Section 623(a)(2) was required in order to effectuate Congress' clear objective of broadly prohibiting age discrimination.

While recognizing Congress' intent behind its passage of the ADEA, the 7th Circuit was also mindful of its role in interpreting, not creating, the law: "Congress, of course, remains free to do what the judiciary cannot — extend [29 U.S.C.S. Section 623(a)(2)] to outside job applicants, as it did in amending Title VII."