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Is Your Job Applicant "Overqualified" For The Job? The Seventh Circuit Takes Another Look at Employer Liability Under the ADEA

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Quite frequently employers will post job openings describing not just a minimum experience level but also a maximum one. Does this create employer liability for age discrimination under the Age Discrimination in Employment Act (ADEA)? In our firm newsletter of May 21, 2018, we discussed the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") decision in *Kleber v. CareFusion Corp.* that had allowed job applicants to claim a violation of the ADEA based solely upon the discriminatory impact of an employer's action (known as "disparate impact"). As we stated at that time, the Seventh Circuit's decision resulted in finding a job posting seeking an applicant with no more than seven years of relevant experience a violation of the ADEA insofar as older applicants are more likely to have experience that far exceeds the stated requirement of a job posting, thus making them in the eyes of a prospective employer to be "overqualified."

In a subsequent rehearing of this case before the entire court in January 2019, the Seventh Circuit reversed the Court's initial panel decision and ruled that the ADEA does not extend "disparate impact" protections to "outside" job applicants, that is, those who are not already employed by the job posting employer. In other words, employees of a job posting employer who apply internally for a new position can

sue for "disparate impact" treatment under the ADEA, but applicants who are not yet employed by the company cannot. The Seventh Circuit's ruling narrows application of the "disparate impact" basis for a claim of age discrimination, stating that "statutory interpretation requires reading a text as a whole." *Kleber v. CareFusion Corp.*, No. 17-1206, 2019 WL 290241, at *2 (7th Cir. Jan. 23, 2019).

When the two statutory provisions under the ADEA are read together and compared to each other, namely, one covering "disparate treatment" which addresses "intentional discrimination," and the other "disparate impact" which is meant to address neutral employer practices that have the effect of harming older workers more than younger ones, resulting in "unintentional" discrimination, it was clear to the Court that individuals who were not already employees, though covered by the "disparate treatment" provision, were not covered by the "disparate impact" provision of the statute. Therefore, an outside job applicant can bring an individual claim for discrimination based on "disparate treatment" but not one based on "disparate impact."

Practically speaking, what does this really mean for employers? It would be highly unusual for employers today to reject a job applicant for the stated reason that he or she was "too old" for the posted job. Such evidence of direct discrimination is rare these days. However, what is not uncommon is the practice of employers to state job requirements that have the effect of discouraging, and thus disqualifying, older workers from applying for the posted job due to stated requirements that include not just minimum job skills but also "maximum level of experience" for consideration of the applicant. Although employers who are willing to consider members of their existing workforce to fill new job postings may still be sued under a "disparate impact" theory of age discrimination (as well as under a "disparate treatment" theory), the Court's decision will have the effect of significantly reducing employer liability for individual claims brought by outside job applicants alleging age discrimination under the ADEA.

Although the Seventh Circuit's recent *en banc* decision has determined that the ADEA protections for outside job applicants do not include "disparate impact" claims, employers must also be mindful that the Equal Employment Opportunity Commission (EEOC), the federal agency that enforces the nation's anti-discrimination laws, including the ADEA, maintains its legal position that older outside job applicants have the right to challenge employer policies and practices

that disproportionately impact them. Consequently, an employer may still be faced with a potential lawsuit from the EEOC for an ADEA violation that is based upon a "disparate impact" form of age discrimination against outside job applicants.[1]

The key takeaway here for employers is that they should carefully review their hiring and recruiting practices to determine whether theirs pose an unreasonable risk of inviting a potential age discrimination claim. Please contact the attorneys at Holifield Janich Rachal Ferrera, PLLC for further guidance on this issue or for assistance conducting either a general employment audit, or a review of an employer's current hiring and recruiting practices.

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[1]As recently reported in the *Chicago Tribune*, the EEOC, which receives about 20,000 age discrimination charges every year, issued a report in June 2018 citing surveys that found 3 in 4 older workers believe their age is an obstacle in getting a job. Yet hiring discrimination is difficult to prove and often goes unreported. https://www.chicagotribune.com/business/ct-biz-age-discrimination-ruling-kleber-carefusion-20190124-story.html

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