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Unlocking Innovation & Opportunity

College Campus Job Recruiting and Age Discrimination

Labor & Employment Working Group

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Executive Summary

The Equal Employment Opportunity Commission (EEOC) contends that campus recruiting programs and other hiring programs that focus on recent graduates are presumptively illegal. These kinds of hiring programs have been part of the American economy for several decades, and no court has ever declared them unlawful, nor has any law. And, the EEOC itself has sponsored hiring programs that prefer recent graduates. The U.S. Department of Justice likewise maintains an 'honors program that it limits to recent graduates. So, why does the EEOC maintain such an unsupported position? The EEOC says that a regulation it issued under the Age Discrimination Employment Act (ADEA) properly interprets the ADEA and makes such programs presumptively illegal age discrimination.

Fortunately, the U.S. Courts of Appeals for the Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits and three Supreme Court justices have rejected the EEOC's position, and no court of appeals or Supreme Court justice has endorsed it. Despite this uniform authority, the EEOC continues to pursue investigations and litigation against such hiring programs.

Most recently, in *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016) (en banc), the Eleventh Circuit held that unsuccessful "applicants for employment" may not bring disparate-impact claims under the ADEA. In so holding, the court rejected the EEOC's position. Writing for the majority, the court found the text unambiguous: "The plain text of [§ 623(a)(2), the ADEA disparate-impact provision,] covers discrimination against employees. It does not cover applicants for employment." *Id.* at 963. Judge Robin Rosenbaum, an appointee of President Obama, wrote a concurring opinion in which she explained: "I have examined and reexamined the statutory language for ambiguity. Despite my best efforts, I am unable to find any. Since the statute is, in my view, susceptible of only a single interpretation . . . we must abide by its plain meaning, without resorting to the [EEOC's] construction." *Id.* at 975. Overall, the eight-member majority of the Eleventh Circuit consisted of five Democratic appointees and three Republican appointees. This broad consensus illustrates the bizarre and extreme nature of the EEOC's regulatory claim. And, importantly, both workers and employers should take comfort in the fact that the courts continue to protect them against the EEOC's position.

I. Background

The ADEA's prohibitions are modeled word-for-word on Title VII, except that the ADEA substitutes age as a protected category. Like Title VII, the ADEA contains both disparate-treatment and disparate-impact protections.[1] But unlike Title VII, the ADEA's disparate-impact provision does not include "applicants for employment." In 1972, Congress amended Title VII's disparate-impact provision to include "applicants for employment," while pointedly excluding that phrase from the ADEA counterpart. As a result, the two provisions now read as follows:

[1] Title VII's employer prohibitions are codified at 42 U.S.C. §2000e-2(a)(1) and (a)(2). The parallel provisions of the ADEA are 29 U.S.C. § 623(a)(1) and (a)(2).

Title VII, 42 U.S.C. §2000e-2(a)(2):

> It shall be unlawful for an employer . . . to limit, segregate, or classify his *employees* or *applicants for employment* 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 race, color, religion, sex, or national origin.

ADEA, 29 U.S.C. § 623(a)(2):

> It shall be 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.

This striking textual difference provides strong support for the conclusion that, unlike Title VII, the ADEA does not authorize disparate-impact claims by "applicants for employment."

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), a bare majority of the Supreme Court held that *existing employees* may bring disparate-impact claims under § 623(a)(2) of the ADEA. The court did not directly consider whether § 623(a)(2) also covers "applicants for employment," but the four-justice plurality "agree[d] that the differences between age and the classes protected in Title VII are relevant, and that Congress might well have intended to treat the two differently." Id. at 236 n.7. The plurality also stressed that textual differences matter, as the inherent differences between age and the classes protected in Title VII, "*coupled with a difference in the text of the statute* . . . may warrant addressing disparate-impact claims in the two statutes differently." *Id.*

In a separate concurring opinion in *Smith*, Justice O'Connor (joined by Justices Kennedy and Thomas) directly addressed the "applicants for employment" issue. In particular, Justice O'Connor wrote that, "of course," the ADEA's disparate-impact provision, § 623(a)(2), "does not apply to 'applicants for employment' at all," since applicants are covered solely under the ADEA's disparate-*treatment* provision, 29 U.S.C. § 623(a)(1). See 544 U.S. at 266. Justice Scalia likewise noted in his separate concurring opinion that "perhaps the [EEOC's] attempt to sweep employment applications into the disparate-impact prohibition is mistaken." *Id.* at 246 n.3. And while the plurality did not focus on the question, it used language to suggest that the ADEA disparate-impact claims are limited solely to employees, noting that § 623(a)(2) "focuses on the effects of the action *on the employee*." 544 U.S. at 236 n.6 (emphasis added).

II. The *Villarreal* Decision

In his majority opinion for the en banc Eleventh Circuit, Judge William Pryor did not rely on the textual difference between Title VII and the ADEA with respect to the phrase "applicants for employment." Instead, he relied on a different feature of the text to find the ADEA unambiguously excludes job applicants from bringing disparate-impact claims. In particular, he focused on the language prohibiting actions that "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." 29 U.S.C. § 623(a)(2) (emphasis added). Judge Pryor explained his textual analysis in the following way:

> The key phrase . . . is "or otherwise adversely affect his status as an employee." By using "or otherwise" to join the verbs in this section, Congress made "depriv[ing] or tend[ing] to deprive any individual of employment opportunities" a subset of "adversely affect[ing] [the individual's] status as an employee." In other words, [§ 623(a)(2)] protects an individual only if he has a "status as an employee."

Villarreal, 839 F.3d at 963. In short, Judge Pryor reasoned, "[t]he phrase 'or otherwise' operates as a catchall: the specific items that precede it are meant to be subsumed by what comes after the 'or otherwise.'" Thus, because "applicants for employment" do not have any "status as an employee," they do not qualify for protection under § 623(a)(2).

Judge Pryor's majority opinion rejected the dissent's argument that § 623(a)(2) should be read more broadly because it refers to deprivation of employment opportunities of "any individual." Judge Pryor explained: "The words 'any individual' . . . are limited by the phrase 'or otherwise affect his status as an employee,' so the 'individuals' that the statute covers are those with a 'status as an employee.'" *Id.* at 965. Thus, while the dissent insists that "any individual" means "any individual," "the whole text makes clear that 'any individual' with a 'status as an employee' means 'any employee.'" *Id.* Moreover, while "the dissent also contends that someone can have a 'status as an employee' without being an employee," the majority rejected that argument as well: The term "status' connotes a present fact . . . based on the plain meaning of the phrase." *Id.*

Judge Pryor found further support for his interpretation based on the immediate statutory context of the ADEA. In particular, he noted that 29 U.S.C. § 623(c) prohibits labor unions from taking certain actions that "adversely affect [an individual's] status as an employee *or as an applicant for employment*." *Id.* at 966. And the while the ADEA's disparate-impact provision, § 623(a)(2), makes no reference to hiring or "applicants," the neighboring disparate-*treatment* provision, § 623(a)(1), expressly makes it unlawful for employers "to fail or refuse to hire" on the basis of age.

Finally, Judge Pryor's majority opinion rejected the dissent's argument that the Supreme Court had previously interpreted identical language of Title VII to authorize disparate-claims by "applicants for employment" in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). As Judge Pryor explained, *Griggs* itself stated that "[a]ll the petitioners [were] employed at the Company." *Id.* at 426. Thus, "[t]he plaintiffs in *Griggs* were employees . . . and the opinion nowhere states that a non-employee applying for a job would be covered by the language in Title VII." *Villarreal*, 839 F.3d at 968. The only "condition of employment" that the Supreme Court considered in *Griggs* was 'a condition of employment *in or transfer to jobs'* — that is, a condition that employees graduate high school or pass a test before they could be promoted or transferred to a new position. *Id.* (quoting *Griggs*, 401 U.S. at 425–26 (emphasis added)). Moreover, "on remand the district court [in *Griggs*] entered an injunction in favor of present and future employees, not applicants," and expressly stated that "[t]he class of persons entitled to relief under this Order" includes only "persons employed" or "who may subsequently be

employed." *Id.* (quoting *Griggs v. Duke Power Co.*, No. C–210–G–66, 1972 WL 215, at *1 (M.D.N.C. Sept. 25, 1972)).

The court in *Villarreal* noted that while later Supreme Court cases have recognized that Title VII authorizes disparate-impact claims by "applicants for employment," that is only because Congress specifically added the phrase "applicants for employment" to the Title VII disparate-impact provision in 1972. *See id.* at 968. Of course, Congress pointedly chose *not* to add that language to the ADEA's disparate-impact provision.

While the majority rested solely on its textual analysis and refused to consider the legislative history, Judge Rosenbaum's concurrence explained that "[t]he historical chronology of events relating to the enactment and amendments of the ADEA and Title VII further demonstrates that [the ADEA] does not cover disparate-impact hiring claims." *Id.* at 978. Her summary of the relevant history is worth quoting in substantial part:

> [I]n February 1967 — ten months before Congress enacted the ADEA — it considered Senate Bill 1026, which sought to amend § 703(a)(2) of the Civil Rights Act of 1964 to "[a]dd the phrase 'or applicants for employment' after the phrase 'his employees in section 703(a)(2)." 113 CONG. REC. 3951 (1967). While the amendment did not pass in 1967, Congress considered similar bills proposing the same amendment until it ultimately [passed] on March 24, 1972. . . .
>
> In stark contrast, Congress has never similarly amended the ADEA's parallel [§ 623(a)(2)]. Instead, to this day, unlike § 703(a)(2), [§ 623(a)(2)] continues to lack the phrase "or applicants for employment." That Congress had considered amending the very same language in Title VII that appears in [§ 623(a)(2)] of the ADEA, to add the phrase "or applicants for employment" — even before Congress enacted the ADEA — and that it ultimately did amend that same language in Title VII but did not so amend [§ 623(a)(2)], again strongly suggests that Congress did not intend to cover disparate-impact hiring claims in [§ 623(a)(2)] of the ADEA.
>
> This historical fact takes on even more significance, in light of amendments to the ADEA that Congress enacted two years after it amended Title VII to include "applicants for employment." In 1974, Congress amended the ADEA to make it applicable to federal-government employment. . . . Notably, Congress expressly made the new provisions . . . applicable to both employees and "applicants for employment." See, e.g., 29 U.S.C. § 633a(a). Yet while Congress amended the ADEA, in part to add coverage for "applicants for employment" in federal-government employment, it made no amendment to [§ 623(a)(2)] to add "applicants for employment," despite having amended the parallel language of § 703(a)(2) of Title VII to add "applicants for employment" just two years earlier.
>
> So to recap, the "applicants for employment" issue was on Congress's radar screen at the time that it enacted the ADEA without that language in [§ 623(a)(2)]; at the time that it amended the parallel provision of Title VII, after the ADEA had already been enacted; and

> at the time that Congress amended the ADEA itself, in part to provide coverage to "applicants for employment" in federal-government employment. At any one of these times, Congress easily could have chosen to add the "applicants for employment" language to [§ 623(a)(2)] of the ADEA. It did not. We can't ignore that fact.

Id. at 979-80.

As illustrated by Judge Pryor's majority opinion and Judge Rosenbaum's concurrence, the statutory text, context, and legislative history all strongly support the conclusion that the ADEA does not authorize applicants for employment to bring disparate-impact claims.[2]

III. Other Circuits

No circuit court has disagreed with the Eleventh Circuit's conclusion in *Villarreal* that job applicants cannot bring ADEA disparate-impact claims, while four circuits have agreed. In *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996), the Eighth Circuit held that § 623(a)(2) "governs employer conduct with respect to 'employees' only, while the parallel provision of Title VII protects 'employees or applicants for employment;'" accordingly, under the ADEA, "applicants for employment" are "limited to relying on §[§ 623(a)(1)], which covers employees and applicants," whereas employees "may rely on either subsection." *Id.* at 1470 n.2. In *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996), the Tenth Circuit held that job applicants may sue only under § 623(a)(1) of the ADEA, but not under § 623(a)(2). *See id.* at 1007 n.12 ("We need not dwell on Section § 623(a)(2) because it does not appear to address refusals to hire at all."). In so ruling, the court explained that the disparate-impact provision of Title VII "expressly" applies to applicants, whereas § 623(a)(2) does not. Id. The Fifth Circuit explained that "Title VII extends protection also to 'applicants' for employment, while the ADEA does not." *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 188 (5th Cir. 2003), *aff'd on other grounds*, 544 U.S. 228 (2005). Finally, in *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994), the Seventh Circuit similarly concluded that § 623(a)(2) "omits from its coverage, 'applicants for employment'" — which is particularly "noteworthy" given the coverage of applicants in the "nearly verbatim" disparate-impact provision in Title VII. *Id.* at 1077-78. At least three district courts have reached the same conclusion. *See Mays v. BNSF Ry. Co.*, 974 F. Supp. 2d 1166, 1176-77 (N.D. Ill. 2013); *EEOC v. Allstate Ins. Co.*, 458 F. Supp. 2d 980, 989 (E.D. Mo. 2006), *aff'd*, 528 F.3d 1042 (8th Cir. 2008), *reh'g en banc granted, opinion vacated* (Sept. 8, 2008); *Kleber v. Carefusion, Corp.*, No. 15-CV-1994, 2015 WL 7423778 (N.D. Ill. Nov. 23, 2015), *appeal pending*.

While the appellate court cases were decided before the Supreme Court's decision in *Smith*, their reasoning with respect to "applicants for employment" remains perfectly intact.[3] The only

[2] The plaintiff in *Villarreal* has filed a petition for certiorari with the Supreme Court.

[3] *Ellis*, 73 F.3d at 1009-10 and *Francis W. Parker*, 41 F.3d at 1076-77, also determined that the ADEA does not authorize disparate-impact claims at all. The Supreme Court's decision in *Smith* overruled that portion of those decisions but, as explained above, reinforced their conclusion that § 623(a)(2) does not authorize claims by applicants. Moreover, *City of Des Moines* agreed that § 623(a)(2) does not authorize claims by applicants and also held, consistent with *Smith*, that § 623(a)(2) authorizes employees to file disparate-impact claims. 99 F.3d at 1470.

disagreement comes from a federal district court in the Northern District of California, which recently rejected a motion to dismiss a disparate-impact hiring claim under the ADEA, and expressly endorsed the reasoning of the dissent in *Villarreal*. See *Rabin v. PricewaterhouseCoopers LLP*, No. 16-CV-02276-JST, 2017 WL 661354 (N.D. Cal. Feb. 17, 2017).

IV. The EEOC's Unorthodox Quest for *Chevron* Deference

Because courts have generally read the text of the ADEA to unambiguously preclude disparate-impact hiring claims, they have not addressed whether the EEOC's contrary assertion could be entitled to *Chevron* deference if the statute were ambiguous. If a court were to consider the issue, the answer would be a resounding no, for a simple reason: Outside of litigation, the EEOC has never engaged in any proper exercise of its authority to interpret § 623(a)(2) to address whether it includes "applicants for employment." As the Supreme Court has made clear, *Chevron* deference does not apply when the EEOC tries to interpret a provision through an amicus brief. Courts do not defer "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

The EEOC has never sought any public comment, engaged in any rulemaking, or promulgated any other public guidance addressing whether the text of § 623(a)(2) can be read to include "applicants for employment." The U.S. Department of Labor issued ADEA regulations in 1968, and the EEOC promulgated ADEA regulations in 1981 and 2012, but in none of these rulemakings has either agency said anything about whether § 623(a)(2) covers job applicants. The federal government has never made any reference to the scope or text of § 623(a)(2) anywhere in the federal register, in the preamble to any regulation, or in the text of the regulations themselves.

In litigation, the EEOC has claimed that it has addressed the issue of disparate-impact hiring claims in the course of a rulemaking under § 623(f) of the ADEA. But in fact, §623(f) does not address who may bring disparate-impact claims under the ADEA, but provides only that a disparate impact may be lawful if caused by "reasonable factors other than age [RFOA]." 29 U.S.C. §623(f)(1). The RFOA regulations arguably can be read to assume that job applicants can bring disparate-impact ADEA claims, but the regulations have never actually addressed the text of § 623(a)(2). Indeed, the preamble to the current rule and the final rule do not even cite § 623(a)(2), much less consider whether it can be read to cover applicants for employment. See 77 Fed Reg. 19080.

In light of this reality, there is no plausible basis for the EEOC's claim that its reading of §623(a)(2) merits any deference whatsoever. As the Supreme Court explained in a recent case, "*Chevron* deference is not warranted" on an issue of statutory interpretation where the agency "fail[ed] to follow the correct procedures in issuing the regulation." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). In particular, the agency must follow "the basic procedural requirement[]"of "giv[ing] adequate reasons" to support its interpretation. *Id.* Accordingly, "where the agency has failed to provide even [a] minimal level of analysis," and has "said almost nothing" to support its interpretation in the course of notice-and-comment rulemaking, its interpretation "is arbitrary and capricious and so cannot carry the force of law." *Id.* Accordingly, given that the EEOC has never

engaged in any rulemaking or other formal procedure to even *consider* how the text of §623(a)(2) might be read to authorize disparate-impact hiring claims, much less to offer any explanation, its view on the matter cannot be entitled to *Chevron* deference.

V. Policy Implications

Contrary to the position of the EEOC, the interpretive conclusion reached by the majority in *Villarreal* and endorsed by several other circuits reflects an eminently sensible policy choice by Congress. As the Supreme Court recognized in *Smith*, "the differences between age and the classes protected in Title VII are relevant," and "Congress might well have intended to treat the two differently." 544 U.S. at 237 n.7. Indeed, there is far less need for a broad anti-discrimination law in the context of age because "discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII." *Id.* at 241. *Smith* likewise recognized that "age, unlike Title VII's protected classifications, not uncommonly has relevance to an individual's capacity to engage in certain types of employment." 544 U.S. at 229. In particular, the hiring of *new* employees is uniquely correlated with age because many entry-level jobs are suited for applicants who have recently completed their education or other job training.

In light of these facts, allowing age-based disparate-impact *hiring* claims would declare open season on many hiring practices that are entirely common and entirely benign, thus imposing far greater costs on employers for the sake of far fewer meritorious claims. For example, many employers seek to limit their recruiting to college campuses, while others seek to fill particular positions — particularly entry-level positions — with recent college graduates. App. Vol. I, Dkt. No. 1 ¶ 33. Indeed, for over a generation, the Justice Department has proudly advertised its Honors Program — a hiring program limited to "graduating law students" and "recent law school graduates" (http://www.justice.gov/legal-careers/entry-level-attorneys). Likewise, even the EEOC advertises similar hiring programs for "recent graduates" (https://www.eeoc.gov/eeoc/jobs/honorprogram.cfm), as do many federal judges in their own law-clerk hiring. Such programs obviously produce a disparate impact based on age, as relatively few individuals graduate from college or law school after age 40. Indeed, many legitimate "employment criteria that are routinely used" in hiring have an "adverse impact on older workers as a group," *Smith*, 544 U.S. at 241, because legitimate factors such as experience levels are "empirically correlated with age," unlike race or sex. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608-11 (1993).

Such programs have long been immune from ADEA scrutiny (assuming no intentional age discrimination), and it would impose enormous costs on employers to make such programs susceptible to disparate-impact liability. While many such programs may be upheld based on "reasonable factors other than age," *see Smith*, 544 U.S. at 233, employers will bear the burden of proving that defense, not on a motion to dismiss, but typically after protracted discovery. See *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 93 (2008). Moreover, because disparate-impact claims are inevitably alleged as class actions, they multiply both the costs of discovery and the likelihood of coercive *in terrorem* settlements. Accordingly, allowing age-based disparate-impact claims in the hiring context would subject employers to a Hobson's choice of either abandoning

settled and legitimate employment practices, paying large sums to settle dubious or extortionate claims, or enduring years of costly discovery and the vagaries of litigation.

Congress did not intend that result. On the contrary, just as in *Smith*, the differences between age and the Title VII categories, "*coupled with a difference in the text of the statute*," establish that the "scope of disparate-impact liability under ADEA is narrower than under Title VII." *Smith*, 544 U.S. at 237 n.7, 240 (emphasis in original). Here the textual difference could hardly be clearer, as Congress expressly added "applicants for employment" to the disparate-impact provision of Title VII but not the ADEA.

The limited scope of § 623(a)(2) is consistent with several other ways in which the ADEA's protections are narrower than Title VII's. For example, the ADEA does not authorize mixed-motive claims but Title VII does. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009). The ADEA does not bar discrimination against all people over the age of 40, but Title VII bars discrimination against people of *all* races and both sexes. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584, 592, 611 n.5 (2004). The ADEA creates defenses for "bona fide occupational qualification[s]" ("BFOQ") and "reasonable factors other than age" ("RFOA"), 29 U.S.C. §623(f)(1), whereas Title VII contains no RFOA-like defense and no BFOQ defense for race claims, 42 U.S.C. §2000e-2(e). The ADEA is subject to the narrowing construction of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), but Title VII is not. *See Smith*, 544 U.S. at 240. The *Villarreal* case presents yet another example: Congress chose to make disparate-impact hiring claims available under Title VII but not the ADEA.