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*VILLARREAL V. R.J. REYNOLDS TOBACCO CO.*

***NO DISPARATE IMPACT UNDER THE ADEA IN FAILURE TO HIRE***

A recent en banc opinion by the Eleventh Circuit addressed two issues: (1) whether the disparate impact theory under the Age Discrimination in Employment Act (ADEA) applied in a failure to hire case; and (2) whether equitable tolling applied to an applicant who was turned down for a job three years before filing a Charge of Discrimination.<sup>1</sup>

The job applicant was Mr. Villarreal, a 49-year-old who applied online for a territory manager position with R.J. Reynolds Tobacco in 2007. Mr. Villarreal never interviewed, never heard from the company and did not follow up after the initial application. Although the company used a contractor to screen applicants, and the company screened out Mr. Villarreal, it provided guidelines describing a “target candidate” as someone who is “2–3 years out of college” and “adjusts easily to changes” and instructed the contractor to “stay away from [applicants] in sales for 8–10 years.” After Mr. Villarreal filed with the Equal Employment Opportunity Commission (EEOC) in 2010, he also reapplied with the company five more times and was never hired.<sup>2</sup>

Originally, the district court dismissed the disparate impact count, explaining that the ADEA did not create such a cause of action in a failure to hire case. Additionally, the district court dismissed the disparate treatment allegations as untimely and because the “continuing violation” doctrine did not apply. A divided panel of the Eleventh Circuit reversed the district court’s decisions, explaining that the ADEA’s language was ambiguous as to whether it created a disparate impact cause of action in a failure to hire case. The Eleventh Circuit also found that equitable tolling applied.<sup>3</sup>

On rehearing, the en banc court affirmed the district court’s rulings but remanded as to the continuing violation doctrine. The majority determined that § 623(a)(2), the disparate impact provision of the ADEA, creates a cause of action only for employees not job applicants,<sup>4</sup> citing this language:

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.<sup>5</sup>

The majority reasoned that the statutory text was clear<sup>6</sup> and noted that the phrase “or as an applicant for employment” was excluded from the statutory language at issue but was included in the equivalent disparate impact provision found in other sections.<sup>7</sup>

As to the issue of equitable tolling, the “general test” for equitable tolling was applied. It was determined that Mr. Villarreal did not diligently pursue his rights and that there was no extraordinary circumstance barring him from timely filing (Mr. Villarreal had admitted that he never inquired of the company after applying and that he had not done anything to pursue his rights until a lawyer contacted him two years later.). The issue of a continuing violation was remanded.

The en banc panel reversed the prior appellate ruling in *Villarreal v. R.J. Reynolds Tobacco Co.*, which held that applicants for employment could bring a disparate impact claim under the ADEA and that the plaintiff stated a claim for equitable tolling.<sup>8</sup>

~ Alberto Naranjo, AN Law Firm, P.A.

Endnotes

- 1 *Villarreal v. R.J. Reynolds Tobacco Co.*, --F.3d--, 2016 WL 5800001 (11th Cir. 2016).
- 2 *Id.* at \*1.
- 3 *Id.* at \*2.
- 4 *Id.* at \*2-3.
- 5 *Id.* at \*2.
- 6 *Id.* at \*1.
- 7 *Id.* at \*5.
- 8 *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288 (11th Cir. 2015).

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