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11th Circ.'s Stance On Disparate Impact For Job Applicants

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On Oct. 5, 2016, the Eleventh Circuit, sitting en banc, held that an unsuccessful job applicant "cannot sue an employer for disparate impact [under § 4(a)(2) of the Age Discrimination in Employment Act] because [an] applicant has no 'status as an employee.'" Villarreal v. R.J. Reynolds Tobacco Co., — F.3d —, No. 15-10602, 2016, at *1 (11th Cir. Oct. 5, 2016). Richard Villarreal, then 49 years old, applied for a position with R.J. Reynolds. A recruiting agency, using guidelines provided to it by R.J. Reynolds, rejected Villarreal's application. Under the guidelines, preferred candidates where those with little post-college work experience. The guidelines specifically instructed the agency to "stay away from" applicants with 8 to 10 years of sales experience. Neither R.J. Reynolds nor the recruiting agency informed Villarreal that his application had been rejected, and Villarreal did not follow up as to the status of his application.

More than two years later, Villarreal filed charges with and received a right to sue notice from the U.S. Equal Employment Opportunity Commission. In April of 2012, Villarreal filed an action against R.J. Reynolds and Pinstripe Inc. (another recruiting agency used by R.J. Reynolds), alleging disparate treatment and disparate impact under the ADEA. The defendants moved to dismiss the disparate impact claim on the grounds that § 4(a)(2) of the act does not apply to job applicants. The district court granted the defendants' motion. Villarreal appealed.

A divided panel of the Eleventh Circuit reversed. After noting that the issue presented — whether § 4(a)(2) authorizes disparate impact claims by job applicants — was one of first impression in the Circuit, the court held that § 4(a)(2) covers disparate impact claims by job applicants. The court found that the language of the statute was "unclear on th[e] question," and therefore, it was required to defer to the EEOC's interpretation of § 4(a)(2) because the EEOC had "reasonably and consistently interpreted the statute to cover claims like Villarreal's." Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1290 (11th Cir. 2015), reh'g en banc granted, opinion vacated, No. 15-10602, 2016 (11th Cir. Feb. 10, 2016), and on reh'g en banc sub nom. Villarreal v. R.J. Reynolds Tobacco Co., 2016.

The court (en banc), by a vote of 8 to 3, vacated the panel opinion and held that § 4(a)(2) does not permit an unsuccessful job applicant to sue a prospective employer for disparate impact because an applicant has "no status as an employee." Villarreal, 2016, at *1 (W. Pryor, J., for the court). Section 4(a)(2) makes it "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." 29 U.S.C. § 623(a)(2). The majority concluded that Congress used clear and unambiguous language when it drafted § 4(a)(2); therefore, deferring to the EEOC was improper:

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> The key phrase in section 4(a)(2) is 'or otherwise adversely affect his status as an employee.' 29 U.S.C. § 623(a)(2). 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.' Id. In other words, Section 4(a)(2) protects an individual only if he has a 'status as an employee.'

Villarreal, 2016, at *3. "Congress did not leave applicants without recourse. Section 4(a)(1) provides them with a cause of action for disparate treatment." Id. at *9.

Judge Beverly Martin (joined by Judges Charles Wilson and Jill Pryor) dissented. Judge Martin stressed, among other things, Congress' use of the phrase "any individual" in § 4(a)(2): "Villarreal is an 'individual' who was 'deprive[d]' 'of employment opportunities' and denied any 'status as an employee' because of something an employer did to 'limit ... his employees.'" Id. at *18 (Martin, J., dissenting). The majority countered by finding that "the whole text of [§ 4(a)(2)] makes clear that 'any individual' with a 'status as an employee' means 'any employee.'" Id. at *4. Judge Robin Rosenbaum agreed that the language of § 4(a)(2) is clear and accused the EEOC of "consistently constru[ing the statute] in a way that conflicts with what appears ... to be the objectively indisputable meaning of the statutory language." Id. at *13 (Rosenbaum, J., concurring in part and dissenting in part).

In his concurrence, Judge Jordan offered an alternative way of reading § 4(a)(2) — one which gives effect to all of the statute's terms:

> The statute uses 'individual' twice ('any individual' and 'such individual'), and it also uses 'employee' twice ('his employees' and 'employee'). If we are trying to give effect to both critical terms — 'his employees' and 'any individual' — the reading that makes the most sense to me is that a job applicant ('any individual') can bring an ADEA claim under a disparate impact theory, but only if something the employer has done vis-à-vis 'his employees' violates the ADEA by 'limit[ing], segregat[ing] or classify[ing]' those employees. So, if an employer's practice with respect to his employees violates the ADEA, and that same practice has a disparate impact on job applicants, those applicants can sue under § 623(a)(2).

Id. at *12 (Jordan, J., concurring in part and dissenting in part).

Villarreal forecloses the possibility of job applicants bringing disparate impact claims under § 4(a)(2) in the Eleventh Circuit. Employers must be mindful, however, that job applicants can bring a cause of action based on disparate treatment (intentional discrimination) under § 4(a)(1). Moreover, labor organizations should be aware that the ADEA allows job applicants to bring disparate impact claims. Section 4(c)(2) makes it unlawful for a labor organization to:

> limit, segregate or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age[.]

29 U.S.C. § 623(c)(2) (emphasis added).

We offer one final, but important, takeaway from Villarreal. In addition to deciding the main issue of whether an unsuccessful job applicant can bring a disparate impact claims under § 4(a)(2), the court also addressed the doctrine of equitable tolling within the context of claims brought under the statute.

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Villarreal alleged that he did not become aware of the facts necessary to bring his discrimination claims until April of 2010 — more than two years after he applied and after the statute of limitations had run. The court, by a narrow 6 to 5 vote, held that Villarreal was "not entitled to equitable tolling because he admitted facts that foreclose a finding of diligence." Villarreal, 2016, at *10. By alleging in his complaint and amended complaint that he "did nothing for more than two years between his initial application and the [time he learned about the alleged discrimination,]" id., Villarreal "plead himself out of court by alleging facts that foreclose a finding of diligence or extraordinary circumstances, both of which are required for equitable tolling." Id. at *9.

It is important to note that the court did not do away with the doctrine of equitable tolling; rather, it held that the doctrine did not apply within the context of the specific facts of this case. Equitable tolling remains a viable counter to the statute of limitations affirmative defense.

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