Can “Applicants for Employment” Bring Disparate-Impact Claims Under the ADEA?
By Eric Dreiband and Anthony Dick

Introduction

Congress enacted the Age Discrimination in Employment Act (ADEA) in 1967. The ADEA’s anti-discrimination provisions were modeled word-for-word on the original version of Title VII, which was enacted three years earlier, except that the ADEA established age as a protected category instead of the Title VII categories of race, color, national origin, sex, and religion.


Of these two neighboring provisions in each statute, subsection (a)(1) prohibits only disparate treatment, while subsection (a)(2) also prohibits disparate impact. See Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2517-2518 (2015) (discussing the history of Title VII and ADEA jurisprudence, and explaining that disparate-impact claims are available solely under subsection (a)(2) of each statute).

In 1967, shortly before the ADEA was enacted, Congress began considering an amendment that would modify Title VII’s disparate-impact provision, 42 U.S.C. § 2000e-2(a)(2), to include “applicants for employment.” The amendment was considered for nearly five years until it finally passed in 1972. Notably, however, Congress never made the same amendment to the ADEA’s parallel disparate-impact provision, § 623(a)(2). As a result, the two provisions now read as follows:


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.


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.
The lack of any reference to job applicants in §623(a)(2) is particularly notable in light of a change enacted in 1974, when Congress made the ADEA applicable to federal-government employment. In that amendment, Congress expressly indicated that the new federal anti-discrimination provision would apply to both employees and “applicants for employment.” 29 U.S.C. § 633a(a). Still, it chose to leave “applicants for employment” out of § 623(a)(2).

The lack of any reference to applicants for employment in § 623(a)(2) is also notable for its contrast to the immediately adjacent provision, which expressly makes it unlawful for an employer to “fail or refuse to hire” someone “because of such individual’s age.” Id. § 623(a)(1) (emphasis added).

I. Early Circuit Court Decisions

In 1982, an article appeared in the Stanford Law Review arguing that the ADEA does not authorize any disparate-impact claims at all. In the course of making that broader argument, the article also pointed out the textual difference between the ADEA and Title VII: namely, ADEA § 623(a)(2) “addresses only actions taken by an employer which affect ‘employees,’” and does not refer to “applicants for employment.” Pamela S. Krop, Age Discrimination and the Disparate Impact Doctrine, 34 STAN. L. REV. 837, 843 (1982).

Beginning in the 1990s, several circuit courts picked up on this textual difference and concluded that, unlike § 2000e-2(a)(2) of Title VII, § 623(a)(2) of the ADEA does not authorize claims by “applicants for employment.” In particular:

- In EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994), the Seventh Circuit cited the 1982 Stanford Law Review article and concluded that § 623(a)(2) of the ADEA “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.

- 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.*

- Finally, in *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 188 (5th Cir. 2003), the Fifth Circuit explained that “Title VII extends protection also to ‘applicants’ for employment, while the ADEA does not.”

II. The Supreme Court’s Decision in *Smith*

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 ADEA § 623(a)(2). The court did not directly consider whether § 623(a)(2) also covers “applicants for employment,” but Justice O’Connor wrote a separate concurring opinion (joined by Justices Kennedy and Thomas) that spoke directly to the 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 29 U.S.C. § 623(a)(1), the ADEA’s disparate-*treatment* provision. *See* 544 U.S. at 266.

None of the other justices disagreed with Justice O’Connor’s conclusion with respect to job applicants. Justice Scalia 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. The four-justice plurality did not directly consider the issue, but “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 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.*

As the plurality noted, there are indeed several 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.

In the aftermath of *Smith’s* holding that § 623(a)(2) authorizes disparate-impact claims by existing employees, federal district courts continued to hold that “applicants for employment” cannot bring claims under § 623(a)(2). See, e.g., *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); see also *Mays v. BNSF Ry. Co.*, 974 F. Supp. 2d 1166, 1176-77 (N.D. Ill. 2013) (explaining that “‘applicants for employment’ . . . are the only ‘individuals’ protected by subsection (a)(2)”).

**III. The Villarreal Decision**

In a case arising in Georgia in 2013, a federal district court continued the trend of holding that job applicants may not bring disparate-impact claims under the ADEA because § 623(a)(2) does not refer to “applicants for employment.” *Villarreal v. R.J. Reynolds Tobacco Co.*, No. 2:12-CV-0138-RWS, 2013 WL 823055, at *5 (N.D. Ga. Mar. 6, 2013). On appeal, however, a divided panel reversed in 2-1 decision, which “deferr[ed] to the EEOC’s view [as articulated in an amicus brief] on the scope of disparate impact liability under the ADEA.” 806 F.3d 1288, 1301. The full Eleventh Circuit then granted rehearing en banc and overturned the panel decision by a vote of 8-3. The Eleventh Circuit thus vindicated the district court’s decision and agreed with the earlier decisions of its sister circuits that the ADEA does not authorize disparate-impact claims by unsuccessful job applicants. See *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016).

In reaching this conclusion, the en banc majority in *Villarreal* refused to defer to the EEOC’s contrary interpretation because it 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.

In his majority opinion, Judge William Pryor did not rely primarily 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 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), which was decided before the phrase “applicants for employment” was added to the Title VII disparate-impact provision. As Judge Pryor explained, “[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. By contrast, Congress 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. In particular:

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.

IV. The EEOC’s Evolving Position

Until the EEOC filed its amicus brief in the Villarreal case, the agency had never before expressed the view that §623(a)(2) covered applicants for employment. Although the EEOC has taken the position that its interpretation is entitled to Chevron deference, that position remains uncertain began the agency 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 given any attention to whether § 623(a)(2) covers job applicants. Indeed, 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. Accordingly, as litigation on the issue continues to unfold, the time may be ripe for new administrative guidance to aid the courts and the parties in these cases.

V. The Future of Disparate-Impact Hiring Claims Under the ADEA

The Villarreal plaintiff has now filed a petition for certiorari to the Supreme Court, which should decide in the next few months whether to grant review. But in any event, the Eleventh Circuit’s decision is unlikely to be the last word on the issue. A federal district court in the Northern District of California recently rejected a motion to dismiss a disparate-impact hiring claim under the ADEA, expressly endorsing the reasoning of the Villarreal dissent. See Rabin v. PricewaterhouseCoopers LLP, No. 16-CV-02276-JST, 2017 WL 661354 (N.D. Cal. Feb. 17,
2017). The defendant there is currently seeking an interlocutory appeal to the Ninth Circuit, which has not yet addressed the issue.


As long as plaintiffs continue to bring disparate-impact hiring claims under the ADEA, it is likely that various circuit courts will continue to address the issue against the backdrop of Smith and Villareal. At the same time, due to the start of a new presidential administration, it is possible that the EEOC itself may revisit the issue.