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Third Circuit Recognizes Disparate Impact Age Claim for 50-and-Older Subgroup of Employees

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The U.S. Court of Appeals for the Third Circuit recently issued a decision that creates a circuit split on an issue involving disparate impact age discrimination claims under the Age Discrimination in Employment Act ("ADEA"). In *Karlo v. Pittsburgh Glass Works,* the Third Circuit overturned the district court's entry of summary judgment on plaintiffs' disparate impact claims, which were based on a subgroup of older workers age 50 and older who claimed that their employer's reduction in force discriminated against them as compared to younger workers who were also over age 40. [1] In doing so, the court held that so-called "subgroup" disparate impact claims are cognizable under the ADEA.

Under the disparate impact theory of liability, an employer may be liable when a facially neutral employment action or policy results in a disproportionately adverse effect on employees within a protected class. These claims are often built around complex statistical evidence. In the Title VII context, disparate impact claims are typically limited to comparisons between workers inside the protected class and outside the protected class. Before the Third Circuit's precedential decision in*Karlo*, the Second, Sixth, and Eighth Circuits had all previously ruled that "subgroup" claims are not allowed under the ADEA. [2] In those circuits, disparate impact claims under the ADEA were limited to evaluating the effect of a policy or decision on allemployees who are at least 40 years old as compared to all employees who are under 40 years old.

After the Third Circuit's ruling, federal appeals courts are now split on whether the ADEA allows disparate impact claims by workers within the 40-and-older protected class when an employment decision disproportionately affects only a subgroup of workers within the protected class. Writing for the Third Circuit, Chief Judge Smith explained that the plain language of the ADEA prohibits *any* action which has a significantly disproportionate adverse impact based on the age of employees, not merely disparate impact based on "forty-and-older identity." In reaching its decision, the court looked to precedent established in *O'Connor v. Consolidated Coin Caterers Corp.*, where the U.S. Supreme Court found that "the fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age."[3]

The Third Circuit's ruling creates several practical concerns for employers. First, when an employer is planning a reduction in force or "RIF," it will now be more difficult to define groups of protected

employees under the ADEA for purposes of evaluating the impact of the RIF on a protected class. Rather than merely comparing the impact on workers under age 40 to workers age 40 and older, employers will need to carefully analyze the impact of a new policy or a reduction in force across multiple different employees within the 40-and-older class, including a comparison of those employees against each other and against all younger workers. Second, defending against ADEA claims will now be more challenging for employers since a statistical expert may have an easier time finding evidence of alleged bias by creatively using numbers within the 40-and-older group.

The circuit split created by *Karlo* may lead to Supreme Court review of this issue. In the meantime, employers should be vigilant regarding any policy or reduction in force which may disproportionately affect older workers as compared to their younger counterparts within the 40-and-older group. As the labor force continues to grow older due to the aging baby-boomer generation, these ADEA "subgroup" claims may pose a mounting risk of potential liability for employers.

[1] *Karlo v. Pittsburgh Glass Works, LLC*, No. 15-3435, __ F. 3d __, 2017 WL 83385 (3d Cir. Jan. 10, 2017).

[2] *See Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989);*Smith v. Tenn. Valley Auth.*, 924 F.2d 1059 (6th Cir. 1991) (table opinion); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999).

[3] *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

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