

How Not to Write a Job Posting

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Employers should keep an eye on a case in the U.S. Court of Appeals for the Seventh Circuit holding that the Age Discrimination in Employment Act (ADEA) covers both current employees *and* job applicants. In April 2018, the court in *Kleber v. CareFusion Corp.* found that a job posting stating that applicants must have "3 to 7 years (no more than 7 years)" of relevant experience may have violated the ADEA. But in late June 2018, the court decided to rehear the case *en banc*.

Dale Kleber was 58 years old – and had far more than seven years of relevant legal experience – when he applied for a staff attorney position at CareFusion after seeing the corporation's job posting. When he was not offered the job, he sued, alleging an ADEA violation based upon CareFusion's refusal to hire him because he had more than seven years of relevant experience.

The trial court granted CareFusion's motion to dismiss, holding that the ADEA only covered current employees, not job applicants such as Kleber. Kleber appealed.

On appeal, the Seventh Circuit held on April 26, 2018 that CareFusion's job posting for an attorney with "3 to 7 years (no more than 7 years) of relevant legal experience" violated the ADEA because it had the effect of excluding from consideration older lawyers with more than seven years of experience.

After a long study of the ADEA's legislative history and Congress's intent in passing the ADEA, the Seventh Circuit held that the ADEA prohibits discrimination against both job applicants and current employees. The court held that the ADEA's language and legislative history supported a finding that the statute prohibits discrimination against job applicants as well as current employees because the statute makes it unlawful for an employer to "fail or *refuse to hire* or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." The "refuse to hire" language compelled the court's conclusion that the ADEA applied to both job applicants and current employees. The Seventh Circuit's decision therefore remanded the case for trial.

But in late June 2018, the Seventh Circuit granted CareFusion's motion for a rehearing *en banc*. Such *en banc* rehearings occur when a federal appellate court determines that 1) further consideration is necessary to secure or maintain uniformity of the court's decisions or 2) when the case involves a question of exceptional importance.

Employers should therefore be on the lookout for the Seventh Circuit's next ruling, which should be issued later this year. In the interim, employers should avoid getting themselves in hot water in the first place by writing job postings that do not set a cap on the amount of experience an applicant may have to be considered for a job.

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