

Client Alert

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Rehiring Policies May Subject Employers to Disparate Impact Age Discrimination Claims

An employer's obligation to carefully consider the legal minefields associated with the Age Discrimination in Employment Act ("ADEA") does not end after the employer has successfully implemented a massive force reduction, particularly if the employer plans to rehire some of the laid off employees. In an October 19, 2006 ruling, a Missouri federal judge allowed a case to proceed to trial where the U.S. Equal Employment Opportunity Commission ("EEOC") asserted that the employer's rehiring plan had a disparate impact on older workers in violation of the ADEA. *EEOC v. Allstate Insur. Co.*, No. 04-01359 (E.D. Mo., Oct. 19, 2006).

Background

In November 1999, Allstate Insurance Company announced a Reorganization Plan ("Plan") which would terminate the employment contracts of approximately 6,300 employee-agents who sold Allstate property and casualty insurance. The Plan provided various options to employee-agents in connection with their termination, such as allowing them to work as independent contractors for Allstate or providing enhanced severance benefits in exchange for a release of claims. Allstate subsequently adopted a rehire policy ("Policy"), which was the basis for the EEOC's suit. The Policy provided that former employee-agents subject to the Plan would be ineligible for rehire either: (1) for a period of one year after their termination, or (2) after all payments of any severance benefits had been received.

Although the Policy applied to all former employee-agents regardless of age and was facially neutral in its treatment of them, the EEOC claimed that the

Policy had a disparate impact on employees over the age of 40.

The Court's Decision

On the heels of last year's U.S. Supreme Court decision in *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005), which formally recognized disparate impact claims under the ADEA, the first issue addressed by the Court was whether the dispute challenged a hiring policy, which by definition would pertain to "applicants" and not "employees." This issue was critical because the Court interpreted the *City of Jackson* case as limiting the viability of disparate impact age discrimination claims to employees. The Court found that "the most logical approach is to treat the rehire policy as a part of the Reorganization Plan which [affected] all employee-agents" and thus the disparate impact claim was deemed technically viable.

The second issue addressed the framework for a proper disparate impact analysis. The Court accepted the EEOC's suggested analysis of "comparing the total number of Allstate employees within the protected group that were affected by the policy, with the number of Allstate employees not in the protected group that were affected by the policy." Using this analysis, the EEOC demonstrated that over 90% of the employees subjected to the Plan, and subsequently disqualified from rehire, were over 40 years old. Further, "out of the total number of Allstate employees . . . affected by the rehire policy, 23 percent were over age 40, compared with 2.7 percent of those not within the protected group."

The third and fourth issues, respectively, pertained to whether Allstate had asserted reasonable factors other than age for its rehire policy and, if so, whether the EEOC had raised a question of fact as to whether those factors were reasonable. The Court ruled that Allstate had satisfied its burden of production by asserting a myriad of reasons for its policy, including (i) to avoid confusion and conflict by consumers who would see former employee-agents working in

different job positions; (ii) to avoid “double-dipping” by receiving severance while being on the payroll; and (iii) to encourage participation in the force reduction program.

The EEOC provided evidence that some of Allstate’s asserted reasons were “unreasonable.” For example, the “double-dipping” rationale was irrelevant as Allstate had a separate policy that required the repayment of unused portions of severance pay at the time of rehire. The EEOC also demonstrated that the rehire policy was implemented months after the deadline for employees to accept the severance and thus it could not have encouraged employees to join the program. The Court also noted that no one at Allstate had made any effort to assess (i) the age demographics of former employees subject to the rehire policy and (ii) how the rehire policy benefited Allstate.

Because the EEOC was able to sufficiently question the reasonableness of some of the proffered reasons offered by Allstate, Judge Webber stated the Court “is not in a position to decide on summary judgment whether these factors were reasonable.” Therefore, it will ultimately be up to a jury to decide whether the scope of Allstate’s Rehire Policy was reasonable.

Implication for Employers

Employers that implement rehire policies after force reductions must take into account the age demographics of the former employees who would be subject to the policy. Even if the policy does have a disparate impact on former employees over the age of 40, this does not mean the employer cannot implement it. Rather, in such circumstances it is essential that employers clearly explain and document the reasonable rationale(s) for the rehire policy. These steps can help to refute later challenges that improper reasons contributed to, or influenced, the adoption and implementation of the policy.

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