No. 15-10602

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD M. VILLARREAL,
on behalf of himself and all others similarly situated,
Plaintiff-Appellant

v.

R.J. REYNOLDS TOBACCO CO., et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia (Gainesville Division)
Case No. 2:12-cv-00138-RWS (Hon. Richard W. Story)

BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF THE PLAINTIFF-APPELLANT

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Villarreal v. R.J. Reynolds Tobacco Co., No. 15-10602

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and AARP Insurance Plan, also known as the AARP Health Trust.

AARP has no parent corporation, nor has it issued shares or securities.

Undersigned counsel further certifies to the belief that the certificate of interested persons filed by the appellant is complete.

March 30, 2015

/s/ Daniel B. Kohrman
Daniel B. Kohrman

Counsel for Amicus Curiae AARP

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

AARP is a nonprofit, nonpartisan organization, with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

One of AARP's primary objectives is to achieve dignity and equity in the workplace. AARP seeks to encourage employers to hire and retain older workers, and help older workers overcome obstacles in the workplace, including discrimination. About one third of AARP members work or are seeking work, and thus, are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (2012).

Vigorous enforcement of the ADEA is critically important to AARP, its working members, and millions of older workers who rely on it to deter and remedy ageism in the workplace. While the ADEA has eliminated much egregious discrimination, employers continue to engage in more subtle behavior to deny older applicants fair treatment. The availability of the disparate impact theory to

[1] AARP certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than AARP and its members, contributed money intended to prepare or submit this brief. Fed. R. App. P. 29(c)(5). Both parties have consented to the filing of AARP's brief.

prospective employees is essential to fighting intractable hiring discrimination that contributes to older workers being overrepresented among the long-term unemployed.

AARP has advocated vigilantly for older workers' right to pursue disparate impact claims. AARP filed an amicus curiae brief in *Smith v. City of Jackson*, 544 U.S. 228, 125 S. Ct. 1536 (2005), supporting age discrimination victims seeking to pursue disparate impact claims under the ADEA, and another in *Meacham v. Knolls Atomic Power Lab*., 554 U.S. 84, 123 S. Ct. 2385 (2008), urging recognition that the statute's "reasonable factor other than age provision" (RFOA) is an affirmative defense for which the employer bears the burdens of production and proof. AARP continues to advocate in the courts, Congress, and regulatory agencies to ensure that the disparate impact theory is an effective method of challenging and eliminating the most intractable forms of age discrimination from the workplace.

In this case the district court ignored the plain language of the statute in accepting the Defendants' unsubstantiated argument that § 4(a)(2) of the ADEA only protects current employees and not prospective employees from employer policies or practices that have a discriminatory disparate impact on older workers. Since Congress's concern about age discrimination in hiring practices was the driving force behind the enactment of the ADEA, and further, because Congress

was well aware, based on Secretary of Labor Willard Wirtz's report and other authorities, that age bias in hiring included age-neutral policies disadvantaging older workers, it is nonsensical to conclude that the ADEA excludes disparate impact as a tool to address hiring discrimination.

For these reasons, AARP respectfully submits this brief amicus curiae.

SUMMARY OF ARGUMENT

When Congress enacted the ADEA in 1967, the most pressing problem it sought to remedy was rampant age discrimination in hiring including age-neutral hiring criteria unrelated to performance that unfairly disadvantaged older workers. Almost 50 years later, this agenda is still not realized. Despite some progress, older workers are still overrepresented among the long-term unemployed.

The district court's decision ignores the plain text of § 4(a)(2) of the ADEA, denying the victims of age discrimination in hiring one of the most effective means to combat covert age bias. Presented with identical language that the U.S. Supreme Court found prohibited hiring policies or practices that adversely impact Title VII's protected groups, the district court read key words out of the ADEA's comparable section to justify its decision.

Additionally, as both the Supreme Court and this Court have long acknowledged, equitable tolling is available to job applicants. It is especially vital in cases of hiring bias because so little information is available to its victims. In

denying the protections of equitable tolling to Mr. Villarreal, the district court erroneously relied on inapposite precedents while ignoring this Court's more analogous favorable authority.

ARGUMENT

I. EMPLOYER POLICIES OR PRACTICES THAT ADVERSELY AFFECT OLDER APPLICANTS ARE SUBJECT TO CHALLENGE UNDER § 4(a)(2) OF THE ADEA.

A. The Plain Language of § 4(a)(2) Supports Applying Its Protections to Prospective Employees.

In *Smith v. City of Jackson*, the Supreme Court asserted that since Congress used the identical language in sections 4(a)(2) of the ADEA and 703(a)(2) of Title VII, Congress intended their protections to be the same, as to both whom they protect and what they protect. 544 U.S. 228, 233, 125 S. Ct. 1536, 1540-41 (2005) ("Except for substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,' the language of [§ 4(a)(2)] in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII).")[2] After

[2] While § 703(a)(2) was amended after it was incorporated in *haec verba* into the ADEA, *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S. Ct. 866, 872 (1978), to add the phrase "applicants for employment," the district court was wrong to apply the flawed reasoning of *Gross v. FBL Fin. Servs*., 557 U.S. 167, 129 S. Ct. 2343 (2009), to presumptively conclude that by not similarly amending the ADEA in 1972, Congress intentionally narrowed the scope of § 4(a)(2) to exclude prospective employees from its protections. In so holding, the district court took no notice of the fact that the 1972 amendment to Title VII was intended merely to express Congress's *agreement* with court decisions already applying § 703(a)(2) to applicants for employment. *See* Br. of Pl.-Appellant at 31-34.

acknowledging the existence of "differences between age and the classes protected in Title VII," *Smith* noted that "Congress obviously considered those classes of individuals to be sufficiently similar to warrant enacting identical legislation at least with respect to employment practices it sought to prohibit." *Id*. at 236 n.7, 1542 n.7.

In addition to protecting the same broad group of "any individual[s]," sections 703(a)(2) and 4(a)(2) also prohibit the same type of employer actions. As the *Smith* Court explained, "[n]either § 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that 'limit, segregate, or classify' persons; rather the language prohibits actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race or age." *Id*. at 235, 1542 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991, 108 S. Ct. 2777, 2787 (1988)) (emphasis in original).

It was in this context that *Smith* identified the only "key textual difference" between 4(a)(1) and 4(a)(2). The Court juxtaposed § 4(a)(1), which "makes it unlawful for an employer 'to fail or refuse to hire . . . *any individual* . . . because of *such individual's* age'" with § 4(a)(2), which "makes it unlawful for an employer 'to limit. . . 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'" to stress the fact that in § 4(a)(1),

the focus "is on the employer's actions with respect to the target individual," but in § 4(a)(2) the focus is on the employer's actions regarding its employees generally and how those actions may adversely affect an *individual*. 544 U.S. at 236 n.6, 125 S. Ct. at 1542 n.6 (emphasis added).[3]

Applying that analysis here, R.J. Reynolds' actions limiting its Territory Manager employees to those who satisfied its ideal candidate profile "deprive[d] or tend[ed] to deprive any individual" who did not meet the ideal candidate profile, or satisfy its "Resume Review Guidelines," of the opportunity to be employed by R.J. Reynolds as a Territory Manager. An individual cannot become an employee if the way that R.J. Reynolds limits its ideal employees eliminates them from contention.

Additional textual support demonstrating that Congress's focus in enacting § 4(a)(2) was *individuals* who might be deprived of employment opportunities, or be otherwise adversely affected by the way an employer limits, segregates or classifies its employees, is the parallel structure of the ADEA's other prohibitory sections. In addition to sections 4(a)(1) and 4(a)(2), the phrases "any individual" and "because of such individual's age" also appear in § 4(b), 29 U.S.C. § 623(b) (prohibiting age discrimination by employment agencies); § 4(c)(1), 29 U.S.C.

[3] This was the only difference between the two sections that *Smith* deemed significant. The fact that § 4(a)(2) did not include the term "applicants" or refer to hiring did not even merit mentioning.

§ 623(c)(1); and § 4(c)(2), § 623(c)(2) (prohibiting age discrimination by labor organizations). The idea that "any individual" is meaningless in § 4(a)(2) but significant in the others is inconceivable.

The only section in the ADEA's prohibitions that does not use the term "any individual" is the seldom-cited § 4(a)(3) which makes it unlawful "to reduce the wage rate of *any employee* in order to comply with this chapter." 29 U.S.C. § 623(a)(3). This section is the only prohibition in the ADEA that focuses on employer's current employees because it is impossible to reduce the wage rate of anyone but current employees. Section 4(a)(3) demonstrates that Congress knew how to limit a prohibited practice to current employees by using only the term "employees" and not the broader term "any individual" in the textual description of the prohibited practice. By contrast, in § 4(a)(2) Congress prohibited employers from actions that "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) (emphasis added).[4]

[4] That Congress included the term "employees" in § 4(a)(2) *in addition to* "any individual" is not without legal significance. As this Court has held, "Th[e] deliberate variation in terminology within the same sentence of a statute suggests that Congress did not interpret the two terms as being equivalent." *United States v. Williams*, 340 F.3d 1231, 1236 (11th Cir. 2003) citing *United States v. Bean*, 537 U.S. 71, 76 n.4, 123 S. Ct. 584, 587 n.4 (2002). In § 4(a)(2), Congress prohibited employers from taking actions regarding its employees generally that would discriminate against "any individual."

The district court erred in selectively ignoring significant terms in § 4(a)(2) and effectively rewriting the section to only protect current employees. As a remedial statute, the ADEA's prohibitions are to be "broadly construed to effectuate its general purpose: ameliorating age discrimination in employment." *Sperling v. Hofffmann-LaRoche, Inc.*, 118 F.R.D. 392, 403 (D.N.J. 1988). *See also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765-66, 99 S. Ct. 2066, 2076 (1979) (Blackmun, J., concurring).

B. *Smith v. City of Jackson* Supports Applying § 4(a)(2)'s Protections to Prospective Employees.

In the proceedings below, both the district court and the Defendants recited from Justice O'Connor's concurring opinion in *Smith v. City of Jackson* to declare unequivocally that § 4(a)(2) does not protect individuals who experience age-based discrimination during their efforts to find employment. *See Villarreal v. R.J. Reynolds Tobacco Co.*, 2013 U.S. Dist. LEXIS 30018, at *14-15 (N.D. Ga. Mar. 6, 2013). Justice O'Connor, however, was not speaking for the Court in her concurrence, which has no precedential value.[5] The actual *Smith* decision, i.e., the

[5] That the plurality opinion does not directly address whether or not § 4(a)(2) protects "applicants," does not change the fact that Justice O'Connor's statement has no precedential value. *See Alexander v. Sandoval*, 532 U.S. 275, 285 n.5, 121 S. Ct. 1511, 1526 n.5 (2001) ("[A majority's] holding is not made coextensive with the concurrence because their opinion does not expressly preclude . . . the concurrence's approach. The Court would be in an odd predicament if a concurring minority of the Justices could force the majority to address a point they found

plurality opinion, is more of an Achilles heel than a boon to the argument that § 4(a)(2) does not protect applicants.[6]

In addition to its textual analysis of the differences between sections 4(a)(1) and 4(a)(2) of the ADEA – which did not discuss the absence of the terms "hiring" or "applicants" in section 4(a)(2) – the *Smith* plurality also noted only two textual differences between the ADEA and Title VII that "make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact theory under ADEA is narrower than under Title VII." 544 U.S. at 240, 125 S. Ct. at 1544.

The only differences between the disparate impact theory under the ADEA and that under Title VII noted by the *Smith* Court were: (1) the ADEA's reasonable factors other than age (RFOA) provision, 29 U.S.C. § 623(f)(1), is the employer defense to a disparate impact under the ADEA as opposed to "business necessity" under Title VII, and (2) "*Ward's Cove*[7] pre-1991 interpretation of Title VII"s identical language [referring to 4(a)(2) and 703(a)(2)] remains applicable to the

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unnecessary (and did not wish) to address, under compulsion of [the] principle that silence implies agreement.").

[6] In his concurring opinion, Justice Scalia indicated that he "agree[d] with all of the Court's reasoning," 544 U.S. at 243, 125 S. Ct. at 1546, but wrote separately to state his opinion that the Court should have "deferr[ed] to the reasonable views of the Equal Employment Opportunity Commission . . . ." *Id.*

[7] *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989).

ADEA." 544 U.S. at 240, 125 S. Ct. at 1544. Limiting disparate impact claims under the ADEA to those brought by current employees would render the disparate impact theory under the ADEA narrower than under Title VII. Yet, *Smith* did not mention that as a distinction between the two. Instead, tellingly, *Smith* listed two age discrimination in hiring cases as "appropriate" ADEA disparate impact cases. 544 U.S. at 237, 238 n.8, 125 S. Ct. at 1543 n.8 (citing *Wooden v. Bd. of Ed. of Jefferson Cnty.*, 931 F.2d 376 (6th Cir. 1991) and *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993)).

Smith supports applying the disparate impact theory to combat age discrimination in hiring and in no way suggests that it cannot be used by older job applicants victimized by employer policies or practices that adversely affect their efforts to secure employment. *Smith* delineated the only two ways Congress narrowed the scope of the disparate impact theory under the ADEA. No additional limitations should be implied. *See Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17, 100 S. Ct. 1905, 1910 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of contrary legislative intent.") (internal citation omitted).

II. IT WOULD BE NONSENSICAL TO DENY OLDER JOBSEEKERS THE PROTECTIONS OF SECTION 4(a)(2) GIVEN THE PRINCIPAL REASON FOR THE ADEA'S ENACTMENT WAS THE PLIGHT OF UNEMPLOYED OLDER WORKERS.

The ADEA's legislative record powerfully supports the proposition that eliminating hiring discrimination against older workers was Congress's principal goal – indeed, arguably the primary purpose –in passing the ADEA. Thus, it is nonsensical to conclude that Congress favored significantly lesser protection for the job-seeking group it was most concerned about.

Interpreting the ADEA to allow disparate impact hiring claims is consistent with the stated purposes of the law which grew out of Congress's concern that "older workers find themselves disadvantaged in their efforts to retain employment, *and especially to regain employment when displaced from jobs,*" and that "the incidence of unemployment, especially long-term unemployment . . . is relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave." 29 U.S.C. § 621(a)(1), (a)(3) (emphasis added). When the ADEA was enacted, approximately half of all private job openings explicitly barred applicants over age 55, and a quarter barred those over 45.[8] Section 4(a)(1) has been instrumental in eliminating such job

[8] U.S. Dep't of Labor, *The Older Worker: Age Discrimination in Employment*, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964, 6 (1965) [hereinafter Wirtz Report].

advertisements and other blatant forms of age discrimination in hiring. However, much work remains to be done. Older workers still experience far longer periods of unemployment and are disproportionately represented among the long-term unemployed.[9] One of the reasons for that disparity is that employers still engage in more subtle and covert discriminatory behavior to deny older job applicants fair treatment. To combat this type of discrimination, § 4(a)(2)'s protections are critical.

A. The ADEA's Legislative History Addresses the Unjust Impact of Age-Neutral Barriers to Hiring Older Workers and Reflects Congress's Intent to Provide a Means to Secure Relief for Such Injuries in the Form of a Disparate Impact Claim.

The ADEA's legislative record contains important indicia of support for applying the disparate impact theory to hiring discrimination. The ADEA's architects identified a need to combat arbitrary age-neutral employer restrictions that impede job offers to older workers, and that are unrelated to their ability to do the work well. Such barriers, they said, included unnecessary educational, testing and physical qualifications that compound the burdens imposed by overt age bias.

[9] Sara E. Rix, *Long-Term Unemployment: Greater Risks and Consequences for Older Workers*, AARP Public Policy Institute (Feb. 2015), http://www.aarp.org/content/dam/aarp/ppi/2015-2/AARP953_LongTerm Unemployment_FSFeb2v1.pdf.

1. The Wirtz Report.

For more than three decades, the Supreme Court has looked to the "Wirtz Report," a 1965 report to Congress, produced by U.S. Labor Secretary Willard Wirtz,[10] as the preeminent source for construing the legislative intent behind the ADEA.[11] In *Smith*, a majority of Justices found the Wirtz Report highly persuasive in establishing that the ADEA encompasses disparate impact hiring claims. *Smith v. City of Jackson*, 544 U.S. 228, 238, 125 S. Ct. 1536, 1543 (2005) ("we think the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports the pre-*Hazen Paper*[12] consensus concerning disparate impact liability.").

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[10] DOL compiled the Wirtz Report after Congress directed the Secretary to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected," in Section 715 of the 1964 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964).

[11] *See EEOC v. Wyo.*, 460 U.S. 226, 230-32, 103 S. Ct. 1054, 1058 (1983), explaining that the Report's "findings were confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress," and that after the Report's submission, Congress directed the Secretary "to submit specific legislative proposals for prohibiting age discrimination"; President Johnson endorsed these proposals, and they culminated in the 1967 law enacted by Congress. *See also Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 587-91, 124 S. Ct. 1236, 1240-43 (2004) (discussing the strong influence of the Wirtz Report on the ADEA's text).

[12] *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993).

Indeed, *Smith* specifically suggests that the Wirtz Report anticipated the ruling in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971), in the context of unjustified hiring criteria:

> The congressional purposes on which we relied in *Griggs* have a striking parallel to . . . important points made in the Wirtz Report . . . just as *Griggs* recognized that the high school diploma requirement, which was unrelated to job performance, had an unfair impact on African-Americans who had received inferior educational opportunities in segregated schools . . . the Wirtz Report identified the identical obstacle to the employment of older workers. "Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers—unfairly if, despite his [or her] limited schooling, an older worker's years of experience have given him [or her] the relevant equivalent of a high school education." Wirtz Report 3. Thus, just as the statutory text is identical, there is a remarkable similarity between the congressional goals we cited in *Griggs* and those present in the Wirtz Report.

Smith, 554 U.S. at 235 n.5, 125 S. Ct. at 1541 n.5 (internal citation omitted).

While the origins of race-related and age-related inequity attributable to an unnecessary high school diploma requirement differ, the impact is the same: poorer prospects of securing jobs, in some instances unrelated to a worker's ability to perform. Thus, one specific basis for approving disparate impact liability in *Griggs* and in *Smith* was a precise form of hiring discrimination identified in the Wirtz Report. *See also* Wirtz Report at 12 ("Even for many plant production jobs in the major industries, employers for a variety of reasons seek young workers with high school educations or equivalent vocational training.").

Another "striking parallel" between the Wirtz Report and *Griggs*, also involving hiring discrimination, involves the disparate impact of testing requirements that are unrelated to job qualifications and performance. The Wirtz Report objected to arbitrary requirements that some job applicants "pass a variety of aptitude and other entrance tests." *Id.* at 14. Specifically, it noted that younger workers' "recency of education and testing experience," rather than any strong connection between test results and "average performance" or "steadiness of output," explained younger applicants' greater success in securing some jobs. *Id.* at 14-15. It reasoned that some jobs genuinely require workers with "better" or more "recent" education, but others do not. For instance, "average performance of older workers compares most favorably in office jobs, where productivity ... r[i]se[s] with age." *Id.* at 14. Likewise, in *Griggs*, the Supreme Court faulted Duke Power for relying on aptitude test results as hiring criteria because of their lack of a "demonstrable relationship" to job performance, and grossly disparate pass rates favoring whites and disfavoring black applicants. 401 U.S. at 430-31 and 430 n.6, 91 S. Ct. 849, 854 and n.6.

Thus, six years prior to *Griggs*, the Wirtz Report described as unjust the precise hiring criteria the Supreme Court later held unlawful on a theory of disparate impact. The Wirtz Report's prescience should not be casually dismissed as coincidence and its consistent and repeated attention to inequities that

disadvantaged older applicants belies the notion that the ADEA may be reasonably read to disallow hiring claims brought pursuant to the disparate impact theory.

More broadly, the overwhelming thrust of the Wirtz Report is the inhumanity of employers' irrational resistance to hiring skilled and productive older workers. The Wirtz Report opens by lamenting tragedy "at the hiring gate":

> There is . . . no harsher verdict in most men's lives than someone else's judgment that they are no longer worth their keep. It is then, when the answer at the hiring gate is "You're too old," that a man turns away, in [a] poet's phrase, finding nothing to look backward to with pride and nothing forward to with hope."

Wirtz Report at 1.

A significant portion of the Wirtz Report focuses on "[t]he most obvious kind of age discrimination in employment," but plainly does not describe it as the "only" kind of hiring age bias, i.e., "not hiring people over a certain age . . . ." *Id.* at 6, 7-11. Subsequent sections maintain a focus on hiring discrimination. For instance, they discuss the "many reasons why a particular older worker does not get a particular job," *id.* at 11, 12-16, and next, the impact on older worker hiring of employers' "personnel policies" and "seniority systems," as well as "workman's compensation laws," and "private pension, health and insurance plans." *Id.* at 15-17. The final sections also stress the challenges older workers face in finding and keeping work. *See id.* at 17-25. Nowhere does the Report indicate that hiring discrimination is a lesser problem than age bias in terminations

or other aspects of employment. It follows that ADEA claims for disparate impact hiring bias should receive equal – not less – priority based on the Wirtz Report.

2. Congressional Consideration of the ADEA.

In reports accompanying legislation that became the ADEA, the congressional committees responsible for developing the ADEA stressed the objective of eliminating hiring discrimination. The House Committee on Education and Labor, *see* H.R. Rep. 90-805 (1967) [hereinafter House Report], and the Senate Committee on Labor and Public Welfare, *see* S. Rep. 90-723 (1967) [hereinafter Senate Report], stated that "the purpose of [these bills] [was] to promote the employment of older workers based on their ability." House Report at 1 (discussing H.R. 13054); Senate Report at 1 (discussing S. 830). Both reports quoted the Wirtz Report's support for legislation banning age discrimination in hiring:

> The possibility of a new nonstatutory means of dealing with such arbitrary discrimination has been explored. That area is barren * * * A clear cut and implemented Federal policy * * * would provide a foundation for a much-needed vigorous, nationwide campaign to promote hiring without discrimination on the basis of age.

House Report at 2; Senate Report at 2. Both committees also quoted President Johnson's message endorsing a draft ADEA of 1967 "transmitted to Congress" by Secretary Wirtz, and praising it as a response to the pressing need of many older workers to be hired. The President's message, both Committees observed,

highlighted the numbers of unemployed older workers, their substantial (40%) representation among "the long-term unemployed," and the large amount of federal expenditures on unemployment insurance for older workers. *Id.*

In committee hearings, prominent ADEA supporters echoed themes in the Wirtz Report indicating that the proposed law was designed to address covert or indirect age hiring restrictions. The chief sponsor of the ADEA, Senator Yarborough, declared: "It is time that we turn our attention to the older worker who is not ready for retirement – but who cannot find a job because of his age, despite the fact that he is able, capable, and efficient. He is not ready for retirement – but *he is, in effect, being retired* nonetheless, regardless of his ability to do the job." *Age Discrimination in Employment: Hearing on S. 830 and S. 788 Before the S. Subcomm. on Labor, Comm. on Labor and Public Welfare*, 90th Cong. 22 (1967) [hereinafter 1967 Senate Hearings] (emphasis added). He added: "Our industrial system has *apparently almost unconsciously* placed a premium on youth." *Id.* Senator Javits quoted the Wirtz Report at length, including its call for Congress to enact a law that "declares, clearly and unequivocally, and implements, as far as is practical, *a national policy with respect to hiring on the basis of ability rather than age*." *Id*. at 26 (emphasis added).

One committee witness, testifying regarding disparate impact claims, spoke to the lack of empirical evidence that non-discriminatory factors other than age

explain age-based disparities in hiring data. *Id.* at 175-89 (Statement of Dr. Harold L. Sheppard, Social Scientist, Upjohn Institute for Employment Research).Dr. Sheppard described what he called the "obstacle course set up by our public institutions and private employers" confronting older workers "becoming unemployed after many years of continuous employment." *Id.* at 176. The obstacle course, he said, "includes . . . conscious and *unconscious patterns of discrimination against older jobseekers*." *Id.* (emphasis added). Sheppard rebutted the assertion that "skill level is the simple explanation for the problems of older job seekers," summarizing the results of studies using "multiple classification analysis" (now known as multiple regression analysis") that "when every other factor was taken into account" to assess workers' unemployment, "age was still found to be significantly related to unemployment status." *Id.* at 181.

As the ADEA neared enactment, congressional leaders shepherding the law focused on the ADEA's potential to address older worker unemployment by breaking down age discrimination in hiring. Mr. Perkins, the manager of the House bill, proclaimed that it was "a bill to promote employment of middle aged and older persons on the basis of ability." 113 Cong. Rec. 34738, 34740 (1967). Perkins invoked conditions "[i]n [his] own district in Kentucky," in which "thousands of former coal miners" learned that "age is a great handicap in finding a job." *Id.* He claimed the ADEA would redress "this longstanding

misconception about the employability of older workers" despite their superior "reliability, productivity, and attendance." *Id.*

Senate floor manager Yarborough summarized that "[i]n simple terms, this bill prohibits [age] discrimination in hiring and firing." 113 Cong. Rec. 31248, 31252 (1967). *See id.* 31256 ("Should those 65 or older applying for positions they are eminently qualified to fill be discriminated against in favor of someone with less experience but who happens to be 10 or 20 or 30 years younger?") (Sen. Young, D., Oh.).

Finally, just days before the House agreed to final changes to the ADEA passed by the Senate, Rep. Burke offered grounds for Congress to conclude that age bias in hiring is especially serious:

> It is one of the cruel paradoxes of our time that older workers holding jobs are considered invaluable because of their experience and stability. But let that same worker become unemployed and he is considered "too old" to be hired. Once unemployed, the older worker can look forward to longer stretches between jobs than a young worker in the same position.

113 Cong. Rec. 34742 (daily ed. Dec. 4, 1967). Nowhere in the record of the ADEA's enactment is there a hint that Congress intended older applicants to have less legal protection than incumbent older workers. The evidence is entirely to the contrary. It makes no sense to interpret the ADEA to deny applicants a disparate impact claim.

B. Federal Regulations and Advisory Opinions Issued Shortly After Enactment of the ADEA Reaffirm that Age-Neutral, Non-Job-Related Hiring Restrictions with Adverse Impacts on Older Applicants Violate the ADEA.

Following the ADEA's enactment, Secretary Wirtz supervised the issuance of interpretive regulations and opinion letters implementing the ADEA. These documents support language in the Wirtz Report, in legislative hearing testimony and the law itself, to the effect that the ADEA permits older employment applicants to challenge age-neutral, non-performance-related hiring practices with an adverse disparate impact on those applicants' job prospects.

Within days after the ADEA went into effect, the DOL promulgated interpretive regulations. *See* 29 C.F.R. Part 860 (1968). These required, inter alia, with regard to physical requirements for job applicants and incumbents, that: (a) age-neutral fitness standards be "reasonably necessary for the specific work to be performed"; (b) a "differentiation based on a physical examination, but not one based on age" was "reasonable" only for positions which "necessitate" stringent physical requirements; and (c) pre-employment physical examinations distinguish between the physical demands of various jobs.[13] In addition, the regulations

[13] These provisions "were entirely consistent with Secretary Wirtz's findings three years earlier that physical requirements (i.e., strength, speed, dexterity, quantity of work) were employers' most frequently mentioned consideration for restrictions on the hiring of older workers, but that many of these requirements had 'no studied basis.'" Keith R. Fentonmiller, *Continuing Validity of Disparate Impact Analysis for Federal Sector Age Discrimination Claims*, 47 Am. U. L. Rev. 1071, 1104, n.

provided that age-neutral employment criteria, including educational level, had to have "a valid relationship to job requirements." 29 C.F.R. § 860.103(f)(1)-(2).[14]

Also in 1968, Secretary Wirtz's Labor Department issued advisory opinions confirming that the ADEA applied to age-neutral employer practices, including hiring criteria. DOL declared, inter alia, that "'facially-neutral job requirements and employment practices, such as testing, must be validated and job-related.'" Fentonmiller, *supra*, at 1104 and n.204.

This post-enactment evidence supports evidence from the ADEA's legislative record that Congress intended the ADEA to cover disparate impact hiring claims.

III. EQUITABLE TOLLING IS OF PARTICULAR IMPORTANCE IN THE CONTEXT OF HIRING DISCRIMINATION.

In *Zipes v. TWA*, 455 U.S. 385, 102 S. Ct. 1127 (1982), the Supreme Court explicitly authorized equitable tolling as a remedy available to persons seeking an

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195, 196 (1998) (quoting Wirtz Report at 8, and referring to the Secretary's Research Materials at 4, 11-12). The Secretary submitted the "Research Materials" along with and in support of the Report. *See* Wirtz Report at ii.

[14] In this respect, the regulations also "echoed the Secretary's prior criticism of unfair educational requirements that 'penalize' the older worker [and] his finding that written tests with 'little direct relationship to the jobs' tended to preclude the employment of otherwise qualified older applicants." Fentonmiller, *supra*, at 1104-05, nn. 198-200 (citing Research Materials at 81 and at 14, and Wirtz Report at 3). *See also* 29 C.F.R. § 860.104(b) (1969) (ADEA rule revised to clarify that even a validated employee test had to be "specifically related to the requirements of the job," as well as "fair and reasonable.").

extension of the EEOC charge filing deadline based upon equitable principles. *Id*. at 393. This Court has relied upon *Zipes* in its own case law.

The statute of limitations in ADEA claims may be equitably tolled until "the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Sturniolo v. Schaeffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994). Furthermore, to be precluded from seeking the protections of equitable tolling, a plaintiff must possess or be exposed to concrete information from which a valid claim of discrimination could arise. The "mere suspicion of age discrimination, unsupported by personal knowledge" does not defeat tolling. *Id*. at 1026. Accordingly, tolling does not end until a plaintiff possesses "knowledge of facts sufficient to support a prima facie case of age discrimination." *Id.*

Likewise, in *Jones v. Dillard's Inc.*, 331 F.3d 1259, 1268 (11th Cir. 2003), this Court applied equitable tolling to save a plaintiff's claim even though the plaintiff had expressed suspicions of age bias long before filing her EEOC discrimination charge and had committed those suspicions to writing. The Court declared that employees need not act on "mere suspicion" in order to avoid losing the protection of equitable tolling. *Id*. at 1264, 1268.

A. The Precedent Relied Upon by the District Court is Inapposite.

The district court rejected equitable tolling in this case, primarily based on *Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004) and *Bond v. Dep't of Air Force*, 202 Fed. App'x 391 (11th Cir. 2006). Both decisions are factually inapposite.

In *Bost*, this Court affirmed a district court's refusal to apply equitable tolling to a plaintiff's claim that arose in a completely different procedural posture. The limitations period at issue in *Bost* was not the period in which to bring a claim before the EEOC, as here, but rather, the period in which the plaintiff was allowed to file suit in federal court *after receiving a right to sue letter*. *See* 372 F.3d at 1236. Thus, the equitable tolling argument in *Bost* is fundamentally different from Mr. Villarreal's claim.

Villarreal asked the district court to toll the limitations period in which he was allowed to file an ADEA charge with the EEOC. In contesting defendants' motion to dismiss, Villarreal relied on well-plead contentions that he did not, and could not have, gained access to information necessary to alert him that he had a valid ADEA claim until after the limitations period had already expired. *See* Pet'r's Proposed Am. Compl., Docket. No. 61-1 ¶28, *Villarreal v. R.J. Reynolds Tobacco Co.*, 2013 U.S. Dist. LEXIS 30018 (N.D. Ga.) (Civ. No. 2:12-CV-0138-RWS). No such arguments were made – or could have been made – in *Bost* because the

plaintiff there had already filed an EEOC charge and received a right to sue letter. Bost's error was her failure to continue to pursue her claim in a timely manner. Furthermore, *Bost* rests not only on the plaintiff's failure to explain why she should be granted equitable tolling – an explanation Villarreal did provide – but also on plaintiff's failure to amend her complaint to include such an explanation when prompted to do so by the district court. *See* 372 F.3d at 1242.

Villarreal, by contrast, tried to amend his complaint to remedy the alleged deficiencies highlighted by the district court. However, the district court rebuffed this effort. Accordingly, *Bost* in no way justifies the district court's reliance on it.

The same is true of *Bond*, in which this Court also affirmed a district court's refusal to extend equitable tolling to a plaintiff. *See* 202 Fed. App'x at 396-97. In *Bond*, the district court found, based on plaintiff's own assertions, that plaintiff received information that should have alerted a reasonably prudent person that they had a discrimination claim far in advance of the date when plaintiff actually filed. *Id*. at 396. As a result, the limitations period started to run when the plaintiff received this information, which still left plaintiff's claim time-barred. *Id*. Unlike the plaintiff in *Bond*, however, Villarreal was not, at least on the face of his assertions, in a position to gain information that would have led a reasonably prudent person to believe that he had been discriminated against until a month

before he filed his EEOC claim. *See* Pet'r's Proposed Am. Compl., Docket. No. 61-1 ¶18, 29-30.

B. This Court's Opinions in *Sturniolo* and *Jones* Control This Case.

The district court erred by failing to rely on the precedents set by this Court in *Sturniolo* and *Jones*. In *Sturniolo*, the plaintiff was terminated, allegedly for business reasons, *i.e.*, to save money. *See* 15 F.3d at 1025-26. He did not file an ADEA claim until he learned that his position had been filled by a significantly younger successor. *Id*. Plaintiff learned about his replacement only after the EEOC limitations period had expired. *Id*. Accordingly, this Court held that "[a]t the time of discharge, Sturniolo had no facts sufficient to support a claim of age discrimination. It was not until Sturniolo learned that a younger individual had replaced him that Sturniolo possessed enough information to support a claim of age discrimination." *Id*. at 1026. Thus, "[t]he date when Sturniolo knew or should have known that Sheaffer had hired a younger individual to replace him is the date upon which the tolling period should commence." *Id*.

Similarly, in *Jones*, the plaintiff was allegedly terminated as a cost-cutting measure. *See* 331 F.3d at 1265. Plaintiff believed her employer's explanation due to her knowledge of low sales at the store where she worked. *Id*. Subsequently, however, she came to suspect that she was actually terminated as a result of her age and made a writing to that effect. Plaintiff did not file an EEOC charge until

confirming that she had been replaced and that her replacement was significantly younger. *Id*. at 1266. Under these circumstances, this Court held that the plaintiff had a "mere suspicion of age discrimination until Dillard's hired Winters in her stead." *Id*. at 1267. "[E]quitable tolling operate[d] to save [her] claims" since she filed with the EEOC promptly after discovering that Winters, who was significantly younger, had been hired. *Id*.

Like the plaintiffs in *Sturniolo* and *Jones*, Villarreal found himself in a situation all too common among job applicants: no access to information necessary to discern possible age discrimination. Villarreal completed multiple job applications through online platforms. While efficient, this increasingly common medium in the job market leaves applicants blind to the employer's hiring mechanisms. Online applicants are even less well off than applicants in the past. In contrast, an employee denied a promotion generally can find out who was promoted, and a terminated employee often can contact former coworkers to find out who, if anyone, replaced them.[15]

[15] In listing hiring discrimination as one of its focus areas for strategic enforcement, the EEOC acknowledged the difficulties faced in litigating failure to hire cases, noting that "because of the EEOC's access to data [as well as to] documents and potential evidence of discrimination in recruitment and hiring, the EEOC is better situated to address these issues than individuals or private attorneys, who have difficulties obtaining such information." U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-201,http://www.eeoc.gov/eeoc/plan/sep.cfm.

In short, Villarreal could not have known the identity or demographic profile of the persons ultimately hired to fill the positions for which he applied and was rejected. Nor could he have learned of the age-discriminatory hiring criteria used to evaluate his application. *See* Pet'r's Proposed Am. Compl., Docket. No. 61-1 ¶28.

Villarreal's situation only changed when an attorney from Altshuler Berzon LLP revealed R.J. Reynold's discriminatory hiring practices to him. Villarreal then acted decisively and filed a charge of discrimination with the EEOC. *Id*. at ¶¶18, 29-30. Given these facts, *Sturniolo* and *Jones* govern evaluating Villarreal's equitable tolling claim, and in particular, his response to defendants' undisclosed online hiring practices.

Since Villarreal did not have "knowledge of facts sufficient to support a prima facie case of age discrimination" until April 2010, *Sturniolo*, 15 F.3d at 1025, he was not required to file an EEOC charge before that time as doing so would have required that he "act on mere suspicion." *Jones*, 331 F.3d at 1268. Equitable tolling should have been applied to save all of Villarreal's EEOC charges. The district court's contrary finding was erroneous and should be reversed.

CONCLUSION

"Congress designed the remedial measures in [the ADEA and Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine… their employment practices and, to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18, 95 S. Ct. 2362, 2372 (1975)). By clarifying that the ADEA authorizes disparate impact claims, the *Smith* decision significantly enhanced the ADEA's power to "promote the employment of older persons based on their ability rather than age." 29 U.S.C. § 621(b). If older jobseekers are denied access to disparate impact theory, the "last vestiges" of age discrimination in hiring will likely become entrenched, "operat[ing] to 'freeze' the status quo of prior discriminatory practices." *Griggs v. Duke Power Co.*, 401 U.S. at 430, 91 S. Ct. at 853.

For the foregoing reasons, the decision of the district court should be reversed.

March 30, 2015

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), because this brief contains 6,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

March 30, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2015, I electronically filed the foregoing Brief of AARP as Amicus Curiae in Support of Plaintiff-Appellant with the Clerk of the Court of the U.S. Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

March 30, 2015

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