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-Appellants.

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)

APPENDIX VOLUME I: DOCKET NOS. 1-58

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II	61-2	03/28/2013	Brief in Support of Plaintiff's Motion for Leave to Amend Complaint
II	63	04/11/2013	Defendants R.J. Reynolds Tobacco Company's and Pinstripe, Inc.'s Opposition to Plaintiff's Motion for Leave to Amend the Complaint
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Dkt.

4months,APPEAL,CLOSED

U.S. District Court
Northern District of Georgia (Gainesville)
CIVIL DOCKET FOR CASE #: 2:12−cv−00138−RWS

Villarreal v. R.J. Reynolds Tobacco Company et al
Assigned to: Judge Richard W. Story
Case in other court: USCA, 11th Circuit, 14−12707−BB
Cause: 29:621 Job Discrimination (Age)

Date Filed: 06/06/2012
Date Terminated: 01/20/2015
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

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Date Filed	#	Docket Text
06/06/2012	1	COMPLAINT with Jury Demand filed and summon(s) issued. Consent form to proceed before U.S. Magistrate and pretrial instructions provided. (Filing fee $350, receipt number 113E−3975596), filed by Richard M. Villarreal. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Civil Cover Sheet) (vld) Please visit our website at http://www.gand.uscourts.gov to obtain Pretrial Instructions. (Entered: 06/07/2012)
06/07/2012	2	Letter from Clerk re: LR 83.1 Pro Hac Vice requirements for James M. Finberg, P. Casey Pitts, Shanon J. Carson, Sarah R. Schalman−Bergen, Todd M. Schneider. (Attachment(s): # 1 PHV Letter to P. Casey Pitts, # 2 PHV Letter to Shanon J. Carson, # 3 PHV Letter to Sarah R. Schalman−Bergen, # 4 PHV Letter to Todd M. Schneider). Clerk to follow−up by 7/9/2012. (vld) (Entered: 06/07/2012)
06/07/2012	3	Certificate of Interested Persons by Richard M. Villarreal. (Almond, John) (Entered: 06/07/2012)
06/18/2012	4	APPLICATION for Admission of Shanon J. Carson Pro Hac Vice (Application fee $ 150, receipt number 113E−3995427)by Richard M. Villarreal. (Almond, John) (Entered: 06/18/2012)
06/18/2012	5	APPLICATION for Admission of Sarah Schalman−Bergen Pro Hac Vice (Application fee $ 150, receipt number 113E−3995480)by Richard M. Villarreal. (Almond, John) (Entered: 06/18/2012)
06/20/2012		APPROVAL by Clerks Office re: 5 APPLICATION for Admission of Sarah Schalman−Bergen Pro Hac Vice (Application fee $ 150, receipt number 113E−3995480), 4 APPLICATION for Admission of Shanon J. Carson Pro Hac Vice (Application fee $ 150, receipt number 113E−3995427). Attorney Sarah R. Schalman−Bergen, Shanon J. Carson added appearing on behalf of Richard M. Villarreal (pb) (Entered: 06/20/2012)
06/21/2012	6	ORDER approving 4 Application for Admission Pro Hac Vice, adding attorney Shanon J. Carson. Signed by Judge William C. O'Kelley on 6/21/2012. (dcs) (Entered: 06/21/2012)
06/21/2012	7	ORDER approving 5 Application for Admission Pro Hac Vice, adding attorney Sarah Schalman−Bergen. Signed by Judge William C. O'Kelley on 6/21/2012. (dcs) (Entered: 06/21/2012)
06/26/2012	8	APPLICATION for Admission of James M. Finberg Pro Hac Vice (Application fee $ 150, receipt number 113E−4010943)by Richard M. Villarreal. (Almond, John) (Entered: 06/26/2012)
06/26/2012	9	APPLICATION for Admission of P. Casey Pitts Pro Hac Vice (Application fee $ 150, receipt number 113E−4010973)by Richard M. Villarreal. (Almond, John) (Entered: 06/26/2012)
06/28/2012		APPROVAL by Clerks Office re: 8 APPLICATION for Admission of James M. Finberg Pro Hac Vice (Application fee $ 150, receipt number 113E−4010943), 9 APPLICATION for Admission of P. Casey Pitts Pro Hac Vice (Application fee $ 150, receipt number 113E−4010973). Attorney P. Casey Pitts, James M. Finberg added appearing on behalf of Richard M. Villarreal (pb) (Entered: 06/28/2012)
06/29/2012	10	WAIVER OF SERVICE Returned Executed by Richard M. Villarreal. R.J. Reynolds Tobacco Company waiver mailed on 6/27/2012, answer due 8/27/2012. (Jones, Kristina) (Entered: 06/29/2012)
07/03/2012	11	ORDER granting 8 Application for Admission Pro Hac Vice, adding attorney James M. Finberg. Signed by Judge William C. O'Kelley on 7/3/2012. (dcs) (Entered: 07/03/2012)

07/03/2012	12	ORDER granting 9 Application for Admission Pro Hac Vice, adding attorney P. Casey Pitts. Signed by Judge William C. O'Kelley on 7/3/2012. (dcs) (Entered: 07/03/2012)
07/13/2012	13	APPLICATION for Admission of Mark T. Johnson Pro Hac Vice (Application fee $ 150, receipt number 113E−4042013)by Richard M. Villarreal. (Almond, John) (Entered: 07/13/2012)
07/13/2012	14	APPLICATION for Admission of Todd M. Schneider Pro Hac Vice (Application fee $ 150, receipt number 113E−4042079)by Richard M. Villarreal. (Almond, John) (Entered: 07/13/2012)
07/17/2012		APPROVAL by Clerks Office re: 13 APPLICATION for Admission of Mark T. Johnson Pro Hac Vice (Application fee $ 150, receipt number 113E−4042013), 14 APPLICATION for Admission of Todd M. Schneider Pro Hac Vice (Application fee $ 150, receipt number 113E−4042079). Attorney Todd M. Schneider, Mark T. Johnson added appearing on behalf of Richard M. Villarreal (pb) (Entered: 07/17/2012)
07/19/2012	15	ORDER approving 13 Application for Admission Pro Hac Vice, adding attorney Mark T. Johnson. Signed by Judge William C. O'Kelley on 7/19/2012. (dcs) (Entered: 07/19/2012)
07/19/2012	16	ORDER approving 14 Application for Admission Pro Hac Vice, adding attorney Todd M. Schneider. Signed by Judge William C. O'Kelley on 7/19/2012. (dcs) (Entered: 07/19/2012)
07/19/2012	17	WAIVER OF SERVICE Returned Executed by Richard M. Villarreal. Pinstripe, Inc. waiver mailed on 6/20/2012, answer due 8/20/2012. (Jones, Kristina) (Entered: 07/19/2012)
07/20/2012	18	WAIVER OF SERVICE Returned Executed by Richard M. Villarreal. Careerbuilder, LLC waiver mailed on 7/13/2012, answer due 9/11/2012. (Jones, Kristina) (Entered: 07/20/2012)
08/17/2012	19	Consent MOTION for Extension of Time to File Answer re 1 Complaint, by Pinstripe, Inc.. (Attachments: # 1 Text of Proposed Order)(Campbell, R.) (Entered: 08/17/2012)
08/20/2012	20	ORDER granting 19 Consent Motion for Extension of Time to Answer; Pinstripe, Inc. Answer due 8/27/2012. Signed by Judge William C. O'Kelley on 08/20/12. (sk) (Entered: 08/20/2012)
08/24/2012	21	APPLICATION for Admission of Alison B. Marshall Pro Hac Vice (Application fee $ 150, receipt number 113E−4118312)by R.J. Reynolds Tobacco Company. (Attachments: # 1 Text of Proposed Order of Admission)(Sudbury, Deborah) (Entered: 08/24/2012)
08/24/2012	22	APPLICATION for Admission of Eric S. Dreiband Pro Hac Vice (Application fee $ 150, receipt number 113E−4118314)by R.J. Reynolds Tobacco Company. (Attachments: # 1 Text of Proposed Order of Admission)(Sudbury, Deborah) (Entered: 08/24/2012)
08/24/2012	23	Corporate Disclosure Statement by R.J. Reynolds Tobacco Company identifying Corporate Parent RJ Reynolds Tobacco Holdings, Inc., Corporate Parent Reynolds American Inc., Other Affiliate Brown &Williamson Holdings, Inc., Other Affiliate British American Tobacco p.l.c. for R.J. Reynolds Tobacco Company by R.J. Reynolds Tobacco Company.(Sudbury, Deborah) (Entered: 08/24/2012)
08/24/2012	24	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *by R.J. Reynolds Tobacco Company and Pinstripe, Inc.* with Brief In Support by R.J. Reynolds Tobacco Company. (Attachments: # 1 Brief /Memorandum In Support of Partial Motion to Dismiss, # 2 Appendix of Exhibits, # 3 Exhibit 1, # 4 Text of Proposed Order)(Sudbury, Deborah) (Entered: 08/24/2012)
08/24/2012	25	Joint MOTION to Stay *the Filing of an Answer and Discovery by R.J. Reynolds Tobacco Company and Pinstripe, Inc.* with Brief In Support by R.J. Reynolds Tobacco Company. (Attachments: # 1 Brief /Memorandum in Support of Defendants' Motion to Stay Filing An Answer and Discovery, # 2 Text of Proposed

		Order)(Sudbury, Deborah) Modified on 3/7/2013 to correctly terminate (sk). Modified on 3/28/2013 to remove date terminated (vld). (Entered: 08/24/2012)
08/28/2012		APPROVAL by Clerks Office re: 21 APPLICATION for Admission of Alison B. Marshall Pro Hac Vice (Application fee $ 150, receipt number 113E−4118312), 22 APPLICATION for Admission of Eric S. Dreiband Pro Hac Vice (Application fee $ 150, receipt number 113E−4118314). Attorney Eric S. Dreiband, Alison B. Marshall added appearing on behalf of R.J. Reynolds Tobacco Company (pb) (Entered: 08/28/2012)
08/28/2012	26	Joint MOTION for Extension of Time To Respond to and To Reply In Support of re: 25 Joint MOTION to Stay *the Filing of an Answer and Discovery by R.J. Reynolds Tobacco Company and Pinstripe, Inc.*, 24 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *by R.J. Reynolds Tobacco Company and Pinstripe, Inc.* by Pinstripe, Inc., R.J. Reynolds Tobacco Company, Richard M. Villarreal. (Attachments: # 1 Text of Proposed Order)(Almond, John) (Entered: 08/28/2012)
08/29/2012	27	APPLICATION for Admission of Paul E. Benson Pro Hac Vice (Application fee $ 150, receipt number 113E−4124575)by Pinstripe, Inc.. (Attachments: # 1 Text of Proposed Order)(Campbell, R.) (Entered: 08/29/2012)
08/29/2012		ORAL ORDER granting 26 Joint Motion for Extension of Time To Respond to and To Reply In Support of re: 25 Joint Motion to Stay the Filing of an Answer and Discovery. It is hereby ORDERED that the time for Plaintiff to file a response to the Partial Motion to Dismiss and a response to the Motion to Stay the Filing of an Answer and Discovery of Defendants R.J. Reynolds TobaccoCompany and Pinstripe, Inc. is extended through and including September 24,2012. It is further ORDERED that the time for Defendants R.J. Reynolds TobaccoCompany and Pinstripe, Inc. to file a reply in support of their joint Partial Motion to Dismiss and a reply in support of their joint Motion to Stay the Filing of an Answer and Discovery is extended through and including October 15, 2012. Entered by Judge William C. O'Kelley on 8/29/2012. (dcs) (Entered: 08/29/2012)
08/30/2012		APPROVAL by Clerks Office re: 27 APPLICATION for Admission of Paul E. Benson Pro Hac Vice (Application fee $ 150, receipt number 113E−4124575). Attorney Paul E. Benson added appearing on behalf of Pinstripe, Inc. (pb) (Entered: 08/30/2012)
09/04/2012	28	Certificate of Interested Persons by Pinstripe, Inc.. (Campbell, R.) (Entered: 09/04/2012)
09/04/2012	29	ORDER granting 27 Application for Admission Pro Hac Vice, adding attorney Paul E. Benson. Signed by Judge William C. O'Kelley on 9/4/2012. (dcs) (Entered: 09/04/2012)
09/04/2012	30	ORDER granting 22 Application for Admission Pro Hac Vice, adding attorney Eric S. Dreiband. Entered by Judge William C. O'Kelley on 9/4/2012. (dcs) (Entered: 09/04/2012)
09/04/2012	31	ORDER granting 21 Application for Admission Pro Hac Vice, adding attorney Alison B. Marshall. Signed by Judge William C. O'Kelley on 9/4/2012. (dcs) (Entered: 09/04/2012)
09/06/2012	32	APPLICATION for Admission of Scott Beightol Pro Hac Vice (Application fee $ 150, receipt number 113E−4138669)by Pinstripe, Inc.. (Attachments: # 1 Text of Proposed Order)(Campbell, R.) (Entered: 09/06/2012)
09/07/2012	33	PROPOSED STIPULATION Confidentiality Order by Careerbuilder, LLC, Pinstripe, Inc., R.J. Reynolds Tobacco Company, Richard M. Villarreal. (Almond, John) Modified on 9/7/2012 (vld). (Entered: 09/07/2012)
09/10/2012		APPROVAL by Clerks Office re: 32 APPLICATION for Admission of Scott Beightol Pro Hac Vice (Application fee $ 150, receipt number 113E−4138669). Attorney Scott Beightol added appearing on behalf of Pinstripe, Inc. (pb) (Entered: 09/10/2012)

09/11/2012	34	APPLICATION for Admission of Joshua G. Konecky Pro Hac Vice (Application fee $ 150, receipt number 113E−4146406)by Richard M. Villarreal. (Almond, John) (Entered: 09/11/2012)
09/11/2012	35	ORDER approving 32 Application for Admission Pro Hac Vice, adding attorney Scott Beightol. Signed by Judge William C. O'Kelley on 9/11/2012. (dcs) (Entered: 09/11/2012)
09/13/2012		APPROVAL by Clerks Office re: 34 APPLICATION for Admission of Joshua G. Konecky Pro Hac Vice (Application fee $ 150, receipt number 113E−4146406). Attorney Joshua G. Konecky added appearing on behalf of Richard M. Villarreal (pb) (Entered: 09/13/2012)
09/18/2012	36	ORDER granting 34 Application for Admission Pro Hac Vice, adding attorney Joshua G. Konecky. Signed by Judge William C. O'Kelley on 9/18/2012. (dcs) (Entered: 09/18/2012)
09/24/2012	37	Joint PRELIMINARY REPORT AND DISCOVERY PLAN filed by Careerbuilder, LLC, Pinstripe, Inc., R.J. Reynolds Tobacco Company, Richard M. Villarreal. (Almond, John) (Entered: 09/24/2012)
09/24/2012	38	STIPULATION re 25 Joint MOTION to Stay *the Filing of an Answer and Discovery by R.J. Reynolds Tobacco Company and Pinstripe, Inc. Withdrawal, Without Prejudice* by Pinstripe, Inc., R.J. Reynolds Tobacco Company, Richard M. Villarreal. (Almond, John) (Entered: 09/24/2012)
09/24/2012	39	CERTIFICATE OF SERVICE *for Plaintiff Villarreal's Initial Disclosures* by Richard M. Villarreal.(Jones, Kristina) (Entered: 09/24/2012)
09/24/2012	40	RESPONSE in Opposition re 24 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *by R.J. Reynolds Tobacco Company and Pinstripe, Inc.* filed by Richard M. Villarreal. (Almond, John) (Entered: 09/24/2012)
09/24/2012	41	CERTIFICATE OF SERVICE *of Initial Disclosures* by R.J. Reynolds Tobacco Company.(Sudbury, Deborah) (Entered: 09/24/2012)
09/24/2012	42	CERTIFICATE OF SERVICE filed by Pinstripe, Inc. *for Initial Disclosures* (Campbell, R.) (Entered: 09/24/2012)
09/25/2012	43	STIPULATION of Dismissal *with Prejudice* by Careerbuilder, LLC, Richard M. Villarreal. (Almond, John) (Entered: 09/25/2012)
09/25/2012		Clerk's Entry of Dismissal APPROVING 43 Stipulation of Dismissal of Defendant CareerBuilder, LLC. pursuant to Fed.R.Civ.P.41(a)(1)(ii). (sk) (Entered: 09/25/2012)
10/03/2012	44	ORDER REASSIGNING CASE. Case reassigned to Judge Richard W. Story for all further proceedings. Judge William C. O'Kelley no longer assigned to case. NOTICE TO ALL COUNSEL OF RECORD: The Judge designation in the civil action number assigned to this case has been changed to 2:12−cv−00138−RWS. Please make note of this change in order to facilitate the docketing of pleadings in this case. Signed by Judge William C. O'Kelley on 10/3/2012. (dcs) (Entered: 10/03/2012)
10/12/2012	45	REPLY to Response to Motion re 24 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *by R.J. Reynolds Tobacco Company and Pinstripe, Inc.* filed by Pinstripe, Inc., R.J. Reynolds Tobacco Company. (Dreiband, Eric) (Entered: 10/12/2012)
10/15/2012		Submission of 24 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *by R.J. Reynolds Tobacco Company and Pinstripe, Inc.*, submitted to District Judge Richard W. Story. (sk) (Entered: 10/15/2012)
10/17/2012	46	MOTION for Oral Argument re 40 Response in Opposition to Motion, 45 Reply to Response to Motion, 24 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *by R.J. Reynolds Tobacco Company and Pinstripe, Inc.* by Richard M. Villarreal. (Almond, John) (Entered: 10/17/2012)

10/19/2012	47	NOTICE Of Filing by Richard M. Villarreal *Consents to Join* (Attachments: # 1 Exhibit A − Consents to Join)(Almond, John) (Entered: 10/19/2012)
10/19/2012	48	RESPONSE in Opposition re 46 MOTION for Oral Argument re 40 Response in Opposition to Motion, 45 Reply to Response to Motion, 24 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *by R.J. Reynolds Tobacco Company and Pinstripe, Inc.* filed by R.J. Reynolds Tobacco Company. (Dreiband, Eric) (Entered: 10/19/2012)
11/06/2012		Submission of 46 MOTION for Oral Argument re 40 Response in Opposition to Motion, 45 Reply to Response to Motion, 24 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *by R.J. Reynolds Tobacco Company and Pinstripe, Inc.* , submitted to District Judge Richard W. Story. (sk) (Entered: 11/06/2012)
11/14/2012	49	NOTICE Of Filing re 47 Consents to Join by Richard M. Villarreal (Attachments: # 1 Exhibit A to Villarreal's 2nd Notice of Filing Consents to Join)(Almond, John) (Entered: 11/14/2012)
11/16/2012	50	MOTION for Approval of Hoffmann−LaRoche Notice by Richard M. Villarreal (Attachments: # 1 Affidavit of Richard Drogin, # 2 Affidavit of Louis Lanier, # 3 Affidavit of Sandra Vaughn, # 4 Text of Proposed Order)(Almond, John) Modified on 11/16/2012 to edit docket text to reflect e−filed pleading (mdy) (Entered: 11/16/2012)
11/16/2012	51	NOTICE Of Filing of Memorandum of Points and Authorities in Support re 50 Motion for Approval of Hoffmann−LaRoche Notice by Richard M. Villarreal (Almond, John) Modified on 11/19/2012 (vld). (Entered: 11/16/2012)
11/21/2012	52	Emergency MOTION to Stay *Briefing On Plaintiff's Motion For Approval of Hoffmann−La Roche Notice* with Brief In Support by R.J. Reynolds Tobacco Company. (Attachments: # 1 Brief Memorandum In Support of Emergency Motion to Stay Briefing, # 2 Text of Proposed Order Proposed Order)(Dreiband, Eric) (Entered: 11/21/2012)
11/26/2012	53	NOTICE Of Filing Corrected Declaration by Richard M. Villarreal in support of 50 Motion (Attachments: # 1 Exhibit A)(Almond, John) Modified on 11/28/2012 to add document link (sk). (Entered: 11/26/2012)
11/27/2012	54	RESPONSE in Opposition re 52 Emergency MOTION to Stay *Briefing On Plaintiff's Motion For Approval of Hoffmann−La Roche Notice* filed by Richard M. Villarreal. (Attachments: # 1 Exhibit A)(Almond, John) (Entered: 11/27/2012)
11/28/2012	55	REPLY to Response to Motion re 52 Emergency MOTION to Stay *Briefing On Plaintiff's Motion For Approval of Hoffmann−La Roche Notice* filed by R.J. Reynolds Tobacco Company. (Dreiband, Eric) (Entered: 11/28/2012)
11/29/2012		Submission of 52 Emergency MOTION to Stay *Briefing On Plaintiff's Motion For Approval of Hoffmann−La Roche Notice*, submitted to District Judge Richard W. Story. (sk) (Entered: 11/29/2012)
11/29/2012	56	ORDER: Defendant's obligation to file a reponse to Plaintiff's 52 Emergency MOTION For Approval of Hoffmann−La Roche Notice is STAYED until further order of the Court. Signed by Judge Richard W. Story on 11/29/12. (sk) (Entered: 11/29/2012)
01/31/2013	57	Certification of Consent to Substitution of Counsel. Natasha Wilson replacing attorney R. Scott Campbell. (Campbell, R.) Modified on 1/31/2013 to correctly identify replacing attorney (sk). (Entered: 01/31/2013)
03/06/2013	58	ORDER granting Defendants' 24 Partial Motion to Dismiss for Failure to State a Claim; denying Plaintiff's 46 Motion for Oral Argument; denying Plaintiff's 50 Motion for Approval of Hoffman La−Roche Notice, with the right to refile requesting notice consistent with the foregoing rulings. Signed by Judge Richard W. Story on 03/06/13. (sk) (Entered: 03/06/2013)
03/20/2013	59	ANSWER to 1 COMPLAINT by R.J. Reynolds Tobacco Company. Discovery ends on 8/19/2013.(Dreiband, Eric) Please visit our website at http://www.gand.uscourts.gov to obtain Pretrial Instructions. (Entered: 03/20/2013)

03/20/2013	60	ANSWER to 1 COMPLAINT by Pinstripe, Inc. (Wilson, Natasha) Please visit our website at http://www.gand.uscourts.gov to obtain Pretrial Instructions. (Entered: 03/20/2013)
03/28/2013	61	MOTION to Amend 1 Complaint with Brief In Support by Richard M. Villarreal. (Attachments: # 1 Exhibit A−Amended Complaint, # 2 Brief in Support)(Almond, John) (Entered: 03/28/2013)
04/10/2013	62	Certification of Consent to Substitution of Counsel. Alison B. Marshall, Deborah Sudbury, and Eric Dreiband replacing attorneys Natasha Wilson; Scott Beightol and Paul E. Benson. (Marshall, Alison) Modified on 4/11/2013 to correct attorney names (sk). (Entered: 04/10/2013)
04/11/2013	63	RESPONSE in Opposition re 61 MOTION to Amend 1 Complaint filed by Pinstripe, Inc., R.J. Reynolds Tobacco Company. (Marshall, Alison) (Entered: 04/11/2013)
04/12/2013	64	Joint MOTION for Extension of Time to Complete Discovery *and Deadline for Renewed Motion for Collective Action Designation* with Brief In Support by Pinstripe, Inc., R.J. Reynolds Tobacco Company, Richard M. Villarreal. (Attachments: # 1 Exhibit Proposed Consent Order)(Almond, John) (Entered: 04/12/2013)
04/15/2013	65	ORDER granting 64 Motion for Extension of Time to Complete Discovery. IT IS HEREBY ORDERED that (l) the discovery period in this matter shall not open until thirty (30) days after the Court enters an order ruling upon the pending Plaintiff's Motion for Leave to Amend Complaint; and (2) the deadline for filing Plaintiff's Motion for Approval ofHoffman LaRoche Notice shall be thirty (30)days after commencement ofthe discovery period hereunder. Signed by Judge Richard W. Story on 04/15/13. (sk) (Entered: 04/15/2013)
04/26/2013		Submission of 61 MOTION to Amend 1 Complaint, submitted to District Judge Richard W. Story. (vld) (Entered: 04/26/2013)
04/26/2013	66	REPLY BRIEF re 61 MOTION to Amend 1 Complaint filed by Richard M. Villarreal. (Almond, John) (Entered: 04/26/2013)
11/26/2013	67	ORDER denying Plaintiff's 61 Motion to Amend Complaint. Signed by Judge Richard W. Story on 11/26/13. (sk) (Entered: 11/26/2013)
12/11/2013	68	MOTION for Entry of Judgment under Rule 54(b) with Brief In Support by Richard M. Villarreal. (Attachments: # 1 Brief in Support, # 2 Text of Proposed Order Directing Entry)(Almond, John) (Entered: 12/11/2013)
12/11/2013	69	Emergency MOTION to Stay *Hoffman LaRoche Motion* by Richard M. Villarreal. (Attachments: # 1 Text of Proposed Order Staying Motion)(Almond, John) (Entered: 12/11/2013)
12/19/2013	70	RESPONSE in Opposition re 69 Emergency MOTION to Stay *Hoffman LaRoche Motion* filed by Pinstripe, Inc., R.J. Reynolds Tobacco Company. (Dreiband, Eric) (Entered: 12/19/2013)
12/23/2013	71	RESPONSE re 68 MOTION for Entry of Judgment under Rule 54(b) *and For Stay Pending Appeal* filed by Pinstripe, Inc., R.J. Reynolds Tobacco Company. (Dreiband, Eric) (Entered: 12/23/2013)
01/06/2014		Submission of 69 Emergency MOTION to Stay *Hoffman LaRoche Motion*, submitted to District Judge Richard W. Story. (sk) (Entered: 01/06/2014)
01/06/2014	72	REPLY BRIEF re 68 MOTION for Entry of Judgment under Rule 54(b) filed by Richard M. Villarreal. (Almond, John) (Entered: 01/06/2014)
01/07/2014		Submission of 68 MOTION for Entry of Judgment under Rule 54(b) , submitted to District Judge Richard W. Story. (sk) (Entered: 01/07/2014)
01/07/2014	73	CERTIFICATE OF SERVICE *for Request for Production of Documents to Plaintiff Villarreal* by R.J. Reynolds Tobacco Company.(Marshall, Alison) (Entered: 01/07/2014)

01/09/2014	74	ORDER granting Plaintiff's Emergency 69 Motion to Stay (Hoffman−LaRoche). Plaintiffs obligation to file a renewed motion for approval of Hoffman−LaRoche notice is STAYED pending the Courts ruling on Plaintiffs Motion for Entry of Final Judgment Under Rule 54(b) and for Stay Pending Appeal (the Motion for Judgment). If the Motion for Judgment is denied, the renewed Motion for Approval for Hoffman−LaRoche Notice shall be filed not later than 45 days after the Court rules on the Motion for Judgment. If the Motion for Judgment is granted, the deadline for filing the renewed motion for approval shall be set following a ruling on the appeal. Signed by Judge Richard W. Story on 02/09/14. (sk) (Entered: 01/09/2014)
02/06/2014	75	STIPULATION *Extending Time* by R.J. Reynolds Tobacco Company, Richard M. Villarreal. (Almond, John) (Entered: 02/06/2014)
03/10/2014	76	CERTIFICATE OF SERVICE *OF DISCOVERY* by Richard M. Villarreal.(Almond, John) (Entered: 03/10/2014)
05/21/2014	77	ORDER granting 68 Motion for Entry of Judgment under Rule 54(b). The Clerk of Court is hereby DIRECTED to enter final judgment on the Claims immediately in the form ofthe "Final Judgment as to Certain Claims". This matter is hereby STAYED pending appeal of the Final Judgment on Certain Claims or until further order of this Court. Signed by Judge Richard W. Story on 05/20/14. (sk) (Entered: 05/21/2014)
05/21/2014	78	CLERK'S JUDGMENT dismissing all claims asserted in the Complaint based on hiring decisions before November 19, 2009. (sk)−−Please refer to http://www.ca11.uscourts.gov to obtain an appeals jurisdiction checklist−− (Entered: 05/21/2014)
06/18/2014	79	NOTICE OF APPEAL as to 58 Order on Motion to Dismiss for Failure to State a Claim, Order on Motion for Oral Argument, Order on Exparte Motion,,, 78 Clerk's Judgment, 67 Order on Motion to Amend by Richard M. Villarreal. Filing fee $ 505, receipt number 113E−5244202. Transcript Order Form due on 7/2/2014 (Almond, John) (Entered: 06/18/2014)
06/18/2014	80	Appeal Remark: Letter mailed to Attorney John J. Almond with transcript order form included re 79 Notice of Appeal. (vld) (Entered: 06/18/2014)
06/18/2014	81	Transmission of Notice of Appeal, Judgment, Order and Docket Sheet to US Court of Appeals re 79 Notice of Appeal. (Attachments: # 1 Docket Sheet, Order &Judgment appealed) (vld) (Entered: 06/18/2014)
06/20/2014	82	TRANSCRIPT ORDER FORM re 79 Notice of Appeal,. (Almond, John) (Entered: 06/20/2014)
06/20/2014		Set/Reset Deadlines re 82 Transcript Order Form : Certificate of Readiness due on 7/7/2014 (vld) (Entered: 06/24/2014)
06/27/2014	83	USCA Acknowledgment of 79 Notice of Appeal, filed by Richard M. Villarreal. Case Appealed to USCA Case Number 14−12707−BB. (Attachments: # 1 Notice of Appeal docketed)(vld) (Entered: 06/27/2014)
07/09/2014		Pursuant to F.R.A.P.11(c), the Clerk certifies that the record is complete for purposes of this appeal, 79 Notice of Appeal,. Case Appealed to USCA/11th Circuit Case Number 14−12707−BB. The entire record on appeal is available electronically. (sk) (Entered: 07/09/2014)
09/22/2014	84	Certified copy of ORDER of USCA GRANTING Appellees R. J. Reynolds Tobacco Company and Pinstripe, Inc.'s Motion to Dismiss for lack of jurisdiction re: 79 Notice of Appeal, filed by Richard M. Villarreal. Case Appealed to USCA, 11th Circuit Case Number 14−12707−BB. (document not received from USCA. Order located in PACER system and docketed on 12/05/14) (sk) (Entered: 12/05/2014)
12/04/2014	85	Certified copy of ORDER of USCA DENYING Appellant's Motion for Reconsideration of the September 22, 2014 order dismissing the appeal for lack of jurisdiction re: 79 Notice of Appeal, filed by Richard M. Villarreal. Case Appealed to USCA, 11th Circuit Case Number 14−12707−BB. (sk) (Entered: 12/05/2014)

12/10/2014	86	ORDER LIFTING STAY and Plaintiff is ORDERED to file a renewed motion for approval of Hoffman−LaRoche notice within 45 days of the entry of this Order. Signed by Judge Richard W. Story on 12/10/14. (rsg) (Entered: 12/10/2014)
01/14/2015	87	Unopposed MOTION to Dismiss *Remaining Claims with Prejudice* by Richard M. Villarreal. (Attachments: # 1 Text of Proposed Order − Exhibit A − Consent Order of Dismissal of Remaining Claims with Prejudice)(Almond, John) (Entered: 01/14/2015)
01/20/2015	88	ORDER granting 87 Motion for Order dismissing the Remaining Claims with prejudice. It is ORDERED, ADJUDGED, and DECREED that the Remaining Claims are hereby DISMISSED WITH PREJUDICE, each party to bear his or its own costs of this matter, including attorneys' fees, in regard to the Remaining Claims.Signed by Judge Richard W. Story on 01/16/15. (sk) (Entered: 01/20/2015)
01/20/2015		Civil Case Terminated. (sk) (Entered: 01/20/2015)
01/20/2015	89	CLERK'S JUDGMENT dismissing all remaining claims. (sk)−−Please refer to http://www.ca11.uscourts.gov to obtain an appeals jurisdiction checklist−− (Entered: 01/20/2015)
02/09/2015	90	NOTICE OF APPEAL as to 58 Order on Motion to Dismiss for Failure to State a Claim, Order on Motion for Oral Argument, Order on Exparte Motion,,, 89 Clerk's Judgment, 78 Clerk's Judgment, 67 Order on Motion to Amend by Richard M. Villarreal. Filing fee $ 505, receipt number 113E−5649739. Transcript Order Form due on 2/23/2015 (Almond, John) (Entered: 02/09/2015)
02/09/2015	91	NOTICE by Richard M. Villarreal *Notice of Withdrawal of Kristina Michele Jones* (Almond, John) (Entered: 02/09/2015)
02/11/2015	92	NOTICE Of Filing Transmission Notice re 90 Notice of Appeal. (sk) (Entered: 02/11/2015)
02/11/2015	93	NOTICE to Attorney for Richard M. Villarreal re 90 Notice of Appeal. (sk) (Entered: 02/11/2015)
02/11/2015	94	Transmission of Certified Copy of Notice of Appeal, Judgment, Order and Docket Sheet to US Court of Appeals re 90 Notice of Appeal. (sk) (Entered: 02/11/2015)

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

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

Plaintiff,

v.

R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC,

Defendants.

Civil Action No. 2:12-CV-0138

COMPLAINT AND JURY DEMAND

(Collective Action)

COMPLAINT FOR AGE DISCRIMINATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Plaintiff Richard M. Villarreal ("Plaintiff" or "Mr. Villarreal"), on behalf of himself and all others similarly situated, by and through his undersigned counsel, files this collective action Complaint and Jury Demand (the "Complaint") against Defendants R.J. Reynolds Tobacco Company; Pinstripe, Inc.; and CareerBuilder, LLC, (collectively, "Defendants"). The following allegations are based on personal knowledge as to Plaintiff's own conduct and on information and belief as to the acts of others.

INTRODUCTION

1. This is a collective action challenging Defendants' repeated acts of unlawful age discrimination with respect to the hiring of individuals to fill regional sales positions. Since at least September 1, 2007 and perhaps earlier, Defendant R.J. Reynolds Tobacco Company ("RJ Reynolds"), with the assistance of Defendants Pinstripe, Inc. ("Pinstripe") and CareerBuilder, LLC ("CareerBuilder"), has hired over a thousand individuals to fill its "Territory Manager/Sales Representative/Trade Marketing" positions ("Territory Managers") throughout the United States. In doing so, Defendants followed policies established by RJ Reynolds that expressly instructed recruiters to reject candidates with eight years or more of sales experience and to target candidates two to three years out of college. RJ Reynolds understood and intended that these policies would result in the rejection of candidates 40 years of age or older. Pursuant to those policies, almost all of the individuals hired for the Territory Manager position were 39 years of age or younger, and many hundreds, if not thousands, of qualified persons 40 years of age and over were rejected on the basis of their age alone.

2. Defendants engaged in a pattern or practice of intentionally discriminating against qualified applicants age 40 or over on the basis of their age,

and they also applied employment policies and practices that, although not expressly directed at age, had a disparate impact on qualified applicants over the age of 40, in violation of the federal Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA").

3. Plaintiff Richard M. Villarreal, whose applications for the Territory Manager position were repeatedly rejected due to his age, brings this action on his own behalf and on behalf of all other similarly situated applicants for the Territory Manager position. Mr. Villarreal seeks a declaration that Defendants' hiring policies and/or practices violate the ADEA; an injunction prohibiting Defendants from discriminating against applicants over the age of 40 in the future and requiring Defendants to remedy the effects of their past discrimination; and damages for himself and for all similarly situated applicants who opt into this action pursuant to 29 U.S.C. § 216(b).

PARTIES

4. Plaintiff Richard M. Villarreal is a 55-year-old resident of Cumming, Georgia, who applied for a Territory Manager position with RJ Reynolds on six separate occasions between November 8, 2007 and April 2012. Cumming is located in the Gainesville Division ("this Division") of this District.

Mr. Villarreal's applications for the Territory Manager position were rejected each time he applied.

5. Defendant RJ Reynolds Tobacco Company is a tobacco company with approximately 4,800 employees. It is headquartered in Winston-Salem, North Carolina, and incorporated in North Carolina. RJ Reynolds markets and sells its tobacco products in all fifty states, including within this Division, and engages in recruiting activities in all fifty states, including within this Division.

6. Defendant Pinstripe, Inc. is a recruiting services company and employment agency. Pinstripe regularly procures employees for employers engaged in interstate commerce and employs twenty or more employees. Its principal office is located in Brookfield, Wisconsin, and it is incorporated in Wisconsin. Pinstripe provides recruiting services in all fifty states, including within this Division.

7. Defendant CareerBuilder, LLC is a recruiting services company and employment agency. CareerBuilder regularly procures employees for employers engaged in interstate commerce and employs twenty or more employees. Its principal office is located in Chicago, Illinois, and it is incorporated in Delaware. CareerBuilder provides recruiting services in all fifty states, including within this Division.

JURISDICTION AND VENUE

8. Because this case is brought under the ADEA, 29 U.S.C. § 621 *et seq.*, this Court has federal question jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(4).

9. Venue is proper in this District because a substantial part of the events and omissions giving rise to the claims in this case occurred in this District, and because each of the Defendants is subject to personal jurisdiction in this District by virtue of its substantial, continuous, and systematic commercial activities in this District. *See* 28 U.S.C. § 1391(b), (c). Venue is proper in this Division because all Defendants are subject to personal jurisdiction in this Division and, thus, "reside" in this Division for venue purposes (*see* LR, NDGa 3.1(B)(1); 28 U.S.C. § 1391(c)); and because this cause of action arose within this Division (s*ee* LR, NDGa 3.1(B)(3)).

FACTS

10. Since at least September 1, 2007, RJ Reynolds, with the assistance of the other Defendants, has actively recruited and hired individuals to fill Territory Manager positions within RJ Reynolds. Territory Managers are assigned to a specific geographic territory and are responsible for working with traditional and non-traditional retailers in that territory to increase sales of RJ Reynolds's tobacco

products and to build RJ Reynolds's brands. Territory Managers also market RJ Reynolds's products directly to consumers through "one-to-one" engagements designed to convert consumers to RJ Reynolds's tobacco products. Being of a certain age is not a *bona fide* occupational qualification reasonably necessary for the Territory Manager position.

11. On November 8, 2007, Mr. Villarreal applied for a Territory Manager position with RJ Reynolds. Mr. Villarreal learned of the vacancy on a website maintained by CareerBuilder, which directed him to a website maintained by RJ Reynolds. On that website, Mr. Villarreal completed a questionnaire; uploaded his resume; and submitted his application. He also indicated his desire to be notified of future job openings that matched his website profile. At the time, Mr. Villarreal was 49 years old. Mr. Villarreal resided in Cumming, Georgia, when he learned of the opening and applied for the position.

12. Mr. Villarreal was never contacted by any of the Defendants regarding his November 8, 2007 application, and he was never offered the Territory Manager position.

13. Kelly Services, Inc. ("Kelly Services"), a recruiting and staffing company and employment agency, through its subdivision Kelly HRFirst, assisted RJ Reynolds in recruiting and screening applications for the Territory Manager

position in 2007 and 2008, and was doing so when Mr. Villarreal first applied for the position. Kelly Services screened all of the applications for the position that RJ Reynolds received during that time period, including Mr. Villarreal's application, and it determined which applicants should be rejected based on their resumes alone and which should be interviewed by RJ Reynolds.

14. In screening those applications, Kelly Services used "resume review guidelines" provided by RJ Reynolds. A true and correct copy of a document setting forth the resume guidelines that was obtained from Kelly Services is attached to this Complaint as **Exhibit A** and incorporated herein.

15. RJ Reynolds's resume review guidelines listed various desired aspects of the "**targeted candidate**," including, among others, "willing to relocate," "leadership skill," "21 and over," "comfortable with tobacco industry," "***2-3 years out of college***," "***adjusts easily to changes***," "ability to travel 65-75% of time," and "bilingual candidates (is a plus, but not required)." (Emphasis added.) The guidelines also listed candidates to "**stay away from**," including, among others, "former employees of competitors," "candidates with DUI(s)," "graduates who held a 4.0 w/o involvement in other activities," and "***in sales for 8-10 years***." (Emphasis added.)

16. Kelly Services applied these guidelines when reviewing Mr. Villarreal's November 8, 2007 application for RJ Reynolds. Mr. Villarreal's application was rejected by Kelly Services on behalf of RJ Reynolds because Mr. Villarreal had over eight years of sales experience and was 49 years old, and RJ Reynolds had instructed Kelly Services to "stay away from" such candidates. Mr. Villarreal was well qualified for the Territory Manager position but, due to Mr. Villarreal's extensive sales experience and age, Kelly Services, acting on RJ Reynolds's behalf, rejected Mr. Villarreal's application and instead forwarded the applications of substantially younger individuals to RJ Reynolds for further consideration for the Territory Manager position.

17. In June 2010, after receiving an email from RJ Reynolds soliciting applications for the Territory Manager position, Mr. Villarreal again applied for a Territory Manager position with RJ Reynolds. Mr. Villarreal was 52 years old at the time of his June 2010 application, and he was well-qualified for the Territory Manager position.

18. Less than one week after applying, Mr. Villarreal received an email from RJ Reynolds rejecting his application and stating that RJ Reynolds was pursuing other individuals.

19. At the time of Mr. Villarreal's June 2010 application, RJ Reynolds continued to target candidates under 40 years of age and to reject candidates 40 years of age and over. Like his November 2007 application, Mr. Villarreal's June 2010 application for the Territory Manager was rejected because of his age. Rather than hiring Mr. Villarreal, RJ Reynolds hired substantially younger individuals.

20. Mr. Villarreal applied for the Territory Manager again in December 2010, May 2011, September 2011, and March 2012. He was well-qualified for the position, but was rejected on account of his age each time he applied. Each time, RJ Reynolds chose to hire individuals younger than 40 to fill the Territory Manager position.

21. Defendant Pinstripe has assisted RJ Reynolds in recruiting and screening applications for the Territory Manager position from at least April 2009 through the present, and was doing so when Mr. Villarreal applied for the position in 2010, 2011, and 2012. Pinstripe screened all of the applications for the position that RJ Reynolds received, including Mr. Villarreal's application, and it determined which applicants should be rejected based on their resumes alone and which should be interviewed by RJ Reynolds.

22. In screening applications, Pinstripe used "resume review guidelines" identical or almost identical to those in Exhibit A, pursuant to which Pinstripe rejected candidates like Mr. Villarreal who were 40 years of age or older, and instead forwarded on the applications of substantially younger candidates.

23. In addition to applying these resume review guidelines, Pinstripe and RJ Reynolds developed a candidate profile that identified the characteristics RJ Reynolds preferred in Territory Manager candidates. The profile labeled the ideal candidate as the "Blue Chip TM." RJ Reynolds and Pinstripe created the profile by surveying recent hires who were nominated by management as ideal new hires. Because RJ Reynolds had been discriminating against persons over 40 in its hiring for Territory Manager positions, since at least September 1, 2007, the 2009 candidate profile created from strong recent hires not surprisingly was heavily weighted toward young persons. The profile stated that 67% of "Blue Chip TMs" had no prior experience or 1-2 years of work experience, while only 9% had six or more years of prior experience. Pinstripe used the "Blue Chip TM" candidate profile, as well as the resume review guidelines described above, in screening candidates for the Territory Manager position. A true and correct copy of the "Blue Chip TM" profile is attached as **Exhibit B**.

24. From at least September 1, 2007 (and perhaps earlier) through the present, RJ Reynolds has applied the same policy or practice of hiring only individuals under the age of 40 to fill the Territory Manager position. During that time, many hundreds, if not thousands, of qualified applicants other than Mr. Villarreal were similarly rejected because they were 40 years of age or older. Indeed, from September 1, 2007 through July 10, 2010, RJ Reynolds hired 1,024 people to fill the Territory Manager position, and only 19 of those hires (1.85%) were over the age of 40.

25. This hiring disparity was caused by RJ Reynolds's discriminatory practices, not by any unique characteristics of the Territory Manager position or the applicant pool. Throughout the relevant time period, individuals over the age of 40 constituted far more than 1.85% of the pool of applicants for the Territory Manager position. For example, the 2000 Census reported that more than 54% of the individuals occupying outside sales representative positions like the Territory Manager position are over the age of 40. Of the applications for the Territory Manager position screened by Kelly Services between September 2007 and March 2008, approximately 48% (9,100 of 19,086) were from individuals with eight or more years of sales experience, yet Kelly Services, following RJ Reynolds's guidelines, only referred 15% of that group on to RJ Reynolds for further

consideration, compared to 35% of individuals with less experience. Of the applications for the Territory Manager position screened by Pinstripe from February 1, 2010 through July 10, 2010, more than 49% (12,727 out of 25,729) were from individuals with 10 years or more of sales experience, but Pinstripe only forwarded 7.7% of the persons with 10 or more years of sales experience to RJ Reynolds for further review, rejecting 92.3% of them based on RJ Reynolds's discriminatory guidelines. In contrast Pinstripe forwarded 45% of the candidates who only had one-to-three years of sales experience.

26. Defendants Pinstripe and CareerBuilder assisted RJ Reynolds in recruiting and hiring applicants for the Territory Manager position, as described above. While assisting RJ Reynolds, these Defendants were aware of RJ Reynolds's policy of hiring only individuals under the age of 40 for the position, and applied that policy when screening applicants for the position. In assisting RJ Reynolds in recruiting, screening, and hiring applicants for the Territory Manager position, Defendants Pinstripe and CareerBuilder acted as agents of RJ Reynolds.

FACTS SUPPORTING EQUITABLE TOLLING

27. On May 17, 2010, Mr. Villarreal filed a charge of discrimination with the EEOC, alleging that RJ Reynolds discriminated against him on the basis of age in rejecting his November 8, 2007 application.

28. Mr. Villarreal did not file his charge before 2010 because he did not become aware until shortly before filing the charge that there was reason to believe that his 2007 application for the Territory Manager position had been rejected on account of his age. The facts necessary to support Mr. Villarreal's charge of discrimination were not apparent to him, and could not have been apparent to him, until less than a month before he filed his May 17, 2010 EEOC charge.

EEOC PROCEEDINGS

29. In July 2010, Mr. Villarreal filed an amended charge of discrimination including both the 2007 rejection and the June 2010 rejection of his application for the same position. In December 2011, Mr. Villarreal filed another amended charge of discrimination addressing the rejection of his December 2010, May 2011, and September 2011 applications for the Territory Manager position and adding, among others, Pinstripe and CareerBuilder as Respondents. Mr. Villarreal's EEOC charge, and the various amendments to his charge, are attached collectively as **Exhibit C**.

30. On March 26, 2012, Mr. Villarreal asked the EEOC to issue Notices of Right to Sue as to Defendants RJ Reynolds, Pinstripe, and Career Builder so that he could litigate the case in court against those Defendants on his own behalf. On April 2, 2012, the EEOC issued Notices of Right to Sue letters in Charge Numbers

435-2012-00211 and 435-2012-00212 – the charge numbers assigned to Pinstripe and CareerBuilder – and in Charge Number 410-2010-04714 – Mr. Villarreal's original charge against RJ Reynolds. Copies of the EEOC right-to-sue letters as to RJ Reynolds, Pinstripe, and Career Builder are attached collectively as **Exhibit D**.

ADEA COLLECTIVE ACTION ALLEGATIONS

31. Mr. Villarreal brings this action for violation of the ADEA as a collective action pursuant to 29 U.S.C. § 626(b), (c), and 29 U.S.C. § 216(b). Mr. Villarreal brings this collective action on behalf of:

> all applicants for the Territory Manager position who applied for the position since the date RJ Reynolds began its pattern or practice of discriminating against applicants over the age of 40 (which Plaintiff is informed and believes was no later than September 1, 2007, and possibly earlier); who were 40 years of age or older at the time of their application; and who were rejected for the position (the "ADEA Collective Action Members").

32. At all relevant times, Mr. Villarreal and the other ADEA Collective Action Members are and have been similarly situated. All of the ADEA Collective Action Members were subject to the same common, unified decisions, policies, practices, plans, procedures, programs, rules, and schemes of discrimination, pursuant to which Defendants willfully and intentionally rejected qualified applicants for the Territory Manager position 40 years of age and older and instead targeted and hired applicants under the age of 40.

33. In addition, all of the ADEA Collective Action Members were subject to the same common, unified decisions, policies, practices, plans, procedures, programs, rules, and schemes of discrimination, pursuant to which Defendants applied hiring guidelines that had an adverse or disparate impact on older workers, including guidelines targeting recent college graduates, candidates with 1-2 years of experience, and candidates who "adjust[ ] easily to change[ ]," and guidelines disfavoring applicants who have been in sales for 8-10 years or who have six or more years of prior experience. Mr. Villarreal's claims against Defendants are the same in all material respects as those of the other ADEA Collective Action Members.

34. This action is properly brought under and maintained as an opt-in collective action pursuant to 29 U.S.C. § 216(b). The ADEA Collective Action Members are readily ascertainable. Their names and addresses are readily available from Defendants, and notice of this action, as permitted by the ADEA and *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989), can readily be provided to the last current address reasonably ascertainable by Defendants' records, and to any changes of address ascertained using the U.S. Post Office's National Change of Address database and other publicly available records.

35. Mr. Villarreal hereby consents to sue under the ADEA and 29 U.S.C. §216(b). A copy of his consent to sue is attached as **Exhibit E**.

COUNT ONE

Unlawful Pattern or Practice of Intentional Age Discrimination (Disparate Treatment) in Violation of the ADEA, 29 U.S.C. § 621 *et seq*.

36. Mr. Villarreal realleges and incorporates herein by reference the foregoing paragraphs.

37. Mr. Villarreal brings this action as a collective action, on his own behalf and on behalf of the other ADEA Collective Action Members.

38. Mr. Villarreal filed timely charges of discrimination with the EEOC, making claims of age discrimination on his own behalf and on behalf of all similarly situated individuals, and he has satisfied all preconditions to bringing this action. Mr. Villarreal has exhausted his administrative remedies on his own behalf and on behalf of the other ADEA Collective Action Members. Mr. Villarreal timely files this suit following notices of his right to sue.

39. At all relevant times, Defendants have been, and continue to be, employers or agents of an employer within the meaning of the ADEA, 29 U.S.C. § 630. Defendants Pinstripe and CareerBuilder are also employment agencies within the meaning of the ADEA. *Id*. At all relevant times, Defendants have been

engaged in interstate commerce within the meaning of the ADEA, *id*., and all of the Defendants have employed, and continue to employ, twenty or more employees.

40. The ADEA makes it unlawful for employers and their agents "to fail or refuse to hire . . . any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). Likewise, the ADEA makes it unlawful for any employment agency "to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age." 29 U.S.C. § 623(b). These prohibitions apply if an employer, an employer's agent, or an employment agency discriminates against an individual who is at least 40 years of age in favor of a substantially younger individual. 29 U.S.C. § 631(a); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004).

41. By targeting applicants for the Territory Manager position under the age of 40, and rejecting applications of those 40 years of age or over, Defendants engaged in a pattern or practice of discriminating against qualified applicants over the age of 40, in violation of the ADEA. In addition, when targeting candidates with 1-2 years of experience pursuant to the "Blue Chip TM" candidate profile, Defendants used lack of experience as a proxy for age, and thereby engaged in a

pattern or practice of discriminating against qualified applicants over the age of 40, in violation of the ADEA. Defendants' violations of the ADEA were intentional and willful.

42. Defendants engaged in this unlawful age discrimination from at least September 2007 onward, and they continue to engage in unlawful age discrimination in hiring RJ Reynolds Territory Managers.

43. As a direct and proximate result of the foregoing violations of the ADEA, the ADEA Collective Action Members, including Mr. Villarreal, have sustained economic and non-economic damages, including, but not limited to, denial of the wages and other benefits provided to RJ Reynolds's Territory Managers, lost interest on those wages and other benefits, and loss of the opportunity to advance within RJ Reynolds. The ADEA Collective Action Members are entitled to recover economic and statutory damages and penalties, including back pay, front pay, liquidated damages, and other appropriate relief under the ADEA.

COUNT TWO

Unlawful Use of Hiring Criteria Having Disparate Impact on Applicants Over 40 Years of Age in Violation of the ADEA, 29 U.S.C. § 621 *et seq.*

44. Mr. Villarreal realleges and incorporates herein by reference the foregoing paragraphs, except for the intent and willfulness allegations alleged in paragraphs 2, 32, and 41.

45. The ADEA, as construed by the United States Supreme Court, prohibits employment practices or policies that, although facially neutral with respect to age, have an adverse or disparate impact on older workers.

46. The RJ Reynolds resume review guidelines used by Defendants in screening applications for the Territory Manager position included criteria that, although not expressly directed at age, have disparate impact on applicants over the age of 40, in violation of the ADEA. Those criteria include, without limitation:

a. That the "Targeted Candidate[s]" are those "2-3 years out of college" or "[r]ecent college grad[s];"

b. That the "Targeted Candidate[s]" are those who "[a]djust[ ] easily to changes;" and

c. The directive to "Stay Away From" applicants who have been "[i]n sales for 8-10 years."

47. The "Blue Chip TM" profile also included criteria that, although not expressly directed at age, have disparate impact on applicants over the age of 40, in violation of the ADEA, including, without limitation, that a "Blue Chip TM" has "1-2 years of experience."

48. By imposing and applying the foregoing resume review criteria and "Blue Chip TM" candidate profile, Defendants discriminated against qualified applicants over the age of 40, in violation of the ADEA.

49. Defendants engaged in these unlawful employment policies or practices from at least September 2007 onward, and they continue to engage in such unlawful age discrimination in hiring RJ Reynolds Territory managers.

50. As a direct and proximate result of the foregoing violations of the ADEA, the ADEA Collective Action Members, including Mr. Villarreal, have sustained economic and non-economic damages, including, but not limited to, denial of the wages and other benefits provided to RJ Reynolds's Territory Managers, lost interest on those wages and other benefits, and loss of the opportunity to advance within RJ Reynolds. The ADEA Collective Action Members are entitled to recover economic and statutory damages and penalties, including back pay, front pay, liquidated damages, and other appropriate relief under the ADEA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Richard M. Villarreal, on behalf of himself and all others similarly situated, prays for the following relief:

a. Certification of this action as a collective action brought pursuant to the ADEA, 29 U.S.C. § 626(b), (c), and 29 U.S.C. § 216(b);

b. Designation of Plaintiff Richard M. Villarreal as the representative of the ADEA Collective Action Members;

c. An order requiring that notice of the pendency of this action and of the right to opt into this action be provided, at Defendants' expense, to each of the ADEA Collective Action Members at the last current address reasonably ascertainable using Defendants' records and other publicly available records;

d. A declaratory judgment that the practices complained of herein are unlawful and violate the ADEA, 29 U.S.C. § 621 *et seq*.;

e. A permanent injunction against all Defendants and their officers, agents, successors, employees, representatives, and any and all persons acting in concert with them, prohibiting them from engaging in unlawful age discrimination in recruiting, screening, and hiring applicants for the Territory Manager position;

f. A permanent injunction requiring that RJ Reynolds institute and carry out policies, practices, and programs that provide equal employment opportunities

for all job applicants regardless of age, and that eradicate the effects of its past and present unlawful employment practices;

g. Back pay and front pay (including interest and benefits) for all ADEA Collective Action Members who join this action;

h. Liquidated damages for all ADEA Collective Action Members who join this action;

i. Reasonable attorneys' fees and all expenses and costs of this action;

j. Pre-judgment interest, in the event liquidated damages are not awarded, as provided by law;

k. Such other and further legal and equitable relief as this Court deems necessary, just, and proper.

DEMAND FOR JURY TRIAL

Under Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury of all issues so triable in this action.

/s/ John J. Almond
John J. Almond
Georgia Bar No. 013613
jalmond@rh-law.com

Kristina M. Jones
Georgia Bar No. 435145
kjones@rh-law.com

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180 Montgomery Street
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San Francisco, California 94104
Telephone: 415-421-7100, Ext. 306
Facsimile: 415-421-7105

Counsel for Plaintiff Richard M. Villarreal and all others similarly situated

1-1

EXHIBIT A

Resume Review Guidelines

What To Look For On A Resume

- 4 year College Degree (Needs client clarification)
- Outside Sales Experience
- Past employment with rental car companies. (i.e. Hertz, Enterprise Rental Car)
- Ability to engage others
- Merchandising
- Multi-tasking
- Teaching Experience (2-3 yrs.)
- Former Manager of a large retail establishment (i.e. Wal-Mart)
- Marketing
- Recent college grad involved in many activities (sports, fraternities/ sororities, clubs etc.) simultaneously while maintaining a GPA of 2.8-3.1.
- Communication Skills
- Pharmaceutical Sales Experience
- Advertising

Targeted Candidate

- Willing to relocate
- Leadership skill
- 21 and over
- Comfortable with tobacco industry
- 2-3 years out of college
- Adjusts easily to changes
- Ability to travel 65-75% of time
- Bilingual Candidates (is a plus, but not required)

Stay Away From

- Former employees of competitors
  - Phillip Morris
  - Lorillard Tobacco Company
- Candidates with DUI(S)
- Graduates who held a 4.0 w/o involvement in other activities
- Candidates taking drastic pay cuts
- In sales for 8-10 years

1-2

EXHIBIT B

2009 Trade Marketing Talent Acquisition Review

Blue Chipper Project

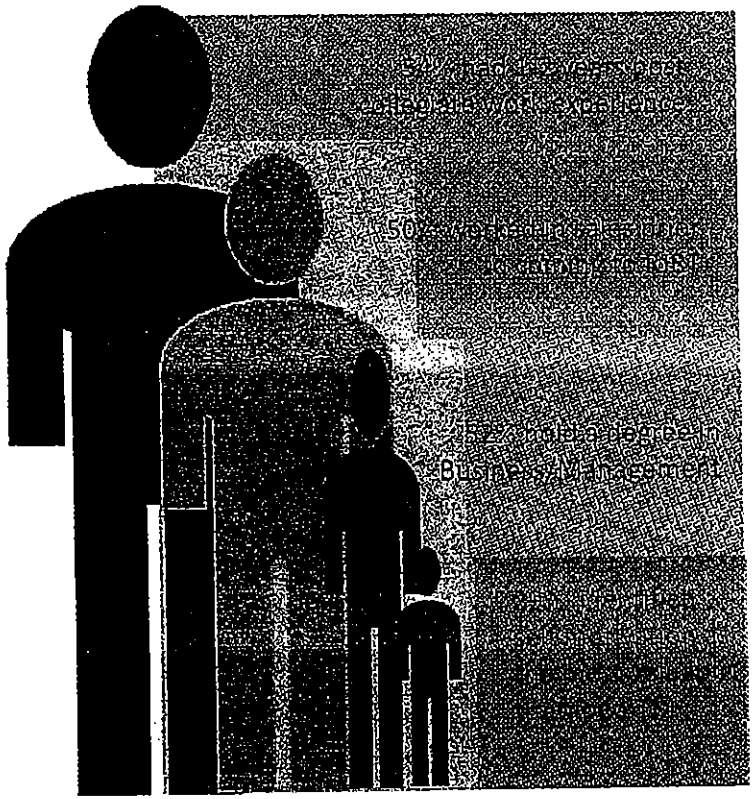
Reynolds American
RJReynolds

Previous Experience - Tenure	
No Prior Experience	15%
1 – 2 years of Experience	52%
3 – 4 Years of Experience	15%
4 – 5 Years of Experience	12%
6+ Years of Experience	9%

Previous Experience - Background	
Sales	50%
Finance/Insurance	17%
Recent College Grads	12%

Previous Education – Major Studies	
Business/Management	52%
Liberal Arts	30%
Marketing/Advertising	12%

The make up of a "Blue Chip TM"



1-3

EXHIBIT C

May 10, 2010

Equal Employment Opportunity Commission
Sam Nunn Atlanta Federal Center
100 Alabama Street, SW, Suite 4R30
Atlanta, Georgia 30303
Telephone: 800.669.4000
Fax: 912.652.4248

Re: Charge of Age Discrimination in Hiring for R.J. Reynolds Tobacco Company Territory Manager/Sales Representative/Trade Marketing Position on Behalf of Richard M. Villareal

Dear Equal Employment Opportunity Commission:

I, Richard M. Villareal, file this charge of age discrimination on behalf of myself and others similarly situated. I applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position at R.J. Reynolds Tobacco Company ("RJ Reynolds"). I believe that my application for the position was rejected on account of my age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA").

RJ Reynolds is a tobacco company with approximately 4,800 employees. The principal office of RJ Reynolds is located at 401 North Main Street, Winston-Salem, NC 27102. Its telephone number is (336) 741-5000.

In November 2007, when I was 49 years old, I applied for a Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds. I believe that RJ Reynolds was hiring individuals to fill that position throughout the country. I was well qualified for the position. However, I was never contacted by RJ Reynolds and never received the position. I believe that the individuals hired by RJ Reynolds were younger than 40 years old, and that RJ Reynolds rejected my application on account of my age.

It is my understanding that RJ Reynolds applied the same policy of hiring only individuals under the age of 40 when hiring individuals for the Territory Manager/Sales Representative/Trade Marketing position throughout the United States. I file this class-wide charge of age discrimination on behalf of myself and all others similarly situated who applied for the Territory Manager/Sales Representative/Trade Marketing (or similar positions) and were rejected on the basis of age.

I declare under penalty of perjury that I have read the above charge and that it is true and correct to the best of my knowledge, information, and belief.

5/17/10
Date

Richard M. Villareal
Richard M. Villareal

July __, 2010

Equal Employment Opportunity Commission
Sam Nunn Atlanta Federal Center
100 Alabama Street, SW, Suite 4R30
Atlanta, Georgia 30303
Telephone: 800.669.4000
Fax: 912.652.4248

Re: Amended Charge of Age Discrimination in Hiring for R.J. Reynolds Tobacco Company Territory Manager/Sales Representative/Trade Marketing Position on Behalf of Richard M. Villareal

Dear Equal Employment Opportunity Commission:

I, Richard M. Villareal, file this amended charge of age discrimination on behalf of myself and others similarly situated. I twice applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position at R.J. Reynolds Tobacco Company ("RJ Reynolds"). I believe that my applications for the position were rejected on account of my age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA").[1]

RJ Reynolds is a tobacco company with approximately 4,800 employees. The principal office of RJ Reynolds is located at 401 North Main Street, Winston-Salem, NC 27102. Its telephone number is (336) 741-5000.

In November 2007, when I was 49 years old, I applied for a Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds. I believe that RJ Reynolds was hiring individuals to fill that position throughout the country. I was well qualified for the position. However, I was never contacted by RJ Reynolds and never received the position. I believe that the individuals hired by RJ Reynolds were younger than 40 years old, and that RJ Reynolds rejected my application on account of my age.

In June 2010, when I was 52 years old, I again applied for a Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds. RJ Reynolds was hiring individuals to fill that position throughout the country. As before, I was well qualified for the position. Nonetheless, less than week after I applied for the position I received an email from RJ Reynolds rejecting my application and stating that they were pursuing other individuals. I believe that those individuals were younger than 40 years old, and that RJ Reynolds again rejected my application on account of my age.

---

[1] On May 17, 2010, I filed a charge alleging that RJ Reynolds discriminated against me on the basis of my age when I applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position in November 2007. This amended charge includes both that 2007 rejection and my June 2010 rejection for the same position at RJ Reynolds.

It is my understanding that in both 2007 and 2010 RJ Reynolds applied the same policy of hiring only individuals under the age of 40 when hiring individuals for the Territory Manager/Sales Representative/Trade Marketing position throughout the United States. I file this class-wide charge of age discrimination on behalf of myself and all others similarly situated who applied for the Territory Manager/Sales Representative/Trade Marketing (or similar positions) and were rejected on the basis of age.

I declare under penalty of perjury that I have read the above charge and that it is true and correct to the best of my knowledge, information, and belief.

7/21/10
Date

Richard M. Villareal

EEOC Form 5 (11/09)

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

- [ ] FEPA
- [X] EEOC — 410-2010-04714

and EEOC

State or local Agency, if any

Name *(Indicate Mr., Ms., Mrs.)*	Home Phone *(Incl. Area Code)*	Date of Birth
Richard Villareal		**12-23-1957**

Street Address: **3720 Riverdell Lane, Cumming, GA 30040** — City, State and ZIP Code

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. *(If more than two, list under PARTICULARS below.)*

Name	No. Employees, Members	Phone No. *(Include Area Code)*
R. J. REYNOLDS TOBBACCO CO	**500 or More**	

Street Address: **401 N Main St, Winston Salem, NC 27102** — City, State and ZIP Code

Name	No. Employees, Members	Phone No. *(Include Area Code)*

Street Address — City, State and ZIP Code

DISCRIMINATION BASED ON *(Check appropriate box(es).)*

- [ ] RACE
- [ ] COLOR
- [ ] SEX
- [ ] RELIGION
- [ ] NATIONAL ORIGIN
- [ ] RETALIATION
- [X] AGE
- [ ] DISABILITY
- [ ] GENETIC INFORMATION
- [ ] OTHER *(Specify)*

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
06-15-2010	**06-15-2010**

- [ ] CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

SEE ATTACHED CHARGE DETAILS

RECEIVED
SEP 0 2 2010
EEOC-ATDO

THIS PERFECTS MY ORIGINAL CHARGE WHICH WAS TIMELY FILED WITH THE EEOC ON JULY 21, 2010.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

Sep 02, 2010
Date

Charging Party Signature

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(month, day, year)

PRIVACY ACT STATEMENT: Under the Privacy Act of 1974, Pub. Law 93-579, authority to request personal data and its uses are:

1. **FORM NUMBER/TITLE/DATE.** EEOC Form 5, Charge of Discrimination (11/09).

2. **AUTHORITY.** 42 U.S.C. 2000e-5(b), 29 U.S.C. 211, 29 U.S.C. 626, 42 U.S.C. 12117, 42 U.S.C. 2000ff-6.

3. **PRINCIPAL PURPOSES.** The purposes of a charge, taken on this form or otherwise reduced to writing (whether later recorded on this form or not) are, as applicable under the EEOC anti-discrimination statutes (EEOC statutes), to preserve private suit rights under the EEOC statutes, to invoke the EEOC's jurisdiction and, where dual-filing or referral arrangements exist, to begin state or local proceedings.

4. **ROUTINE USES.** This form is used to provide facts that may establish the existence of matters covered by the EEOC statutes (and as applicable, other federal, state or local laws). Information given will be used by staff to guide its mediation and investigation efforts and, as applicable, to determine, conciliate and litigate claims of unlawful discrimination. This form may be presented to or disclosed to other federal, state or local agencies as appropriate or necessary in carrying out EEOC's functions. A copy of this charge will ordinarily be sent to the respondent organization against which the charge is made.

5. **WHETHER DISCLOSURE IS MANDATORY; EFFECT OF NOT GIVING INFORMATION.** Charges must be reduced to writing and should identify the charging and responding parties and the actions or policies complained of. Without a written charge, EEOC will ordinarily not act on the complaint. Charges under Title VII, the ADA or GINA must be sworn to or affirmed (either by using this form or by presenting a notarized statement or unsworn declaration under penalty of perjury); charges under the ADEA should ordinarily be signed. Charges may be clarified or amplified later by amendment. It is not mandatory that this form be used to make a charge.

NOTICE OF RIGHT TO REQUEST SUBSTANTIAL WEIGHT REVIEW

Charges filed at a state or local Fair Employment Practices Agency (FEPA) that dual-files charges with EEOC will ordinarily be handled first by the FEPA. Some charges filed at EEOC may also be first handled by a FEPA under worksharing agreements. You will be told which agency will handle your charge. When the FEPA is the first to handle the charge, it will notify you of its final resolution of the matter. Then, if you wish EEOC to give Substantial Weight Review to the FEPA's final findings, you must ask us in writing to do so within 15 days of your receipt of its findings. Otherwise, we will ordinarily adopt the FEPA's finding and close our file on the charge.

NOTICE OF NON-RETALIATION REQUIREMENTS

Please **notify** EEOC or the state or local agency where you filed your charge **if retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, Section 503(a) of the ADA and Section 207(f) of GINA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.

July 21, 2010

Equal Employment Opportunity Commission
Sam Nunn Atlanta Federal Center
100 Alabama Street, SW, Suite 4R30
Atlanta, Georgia 30303
Telephone: 800.669.4000
Fax: 912.652.4248

Re: Charge of Age Discrimination in Hiring for R.J. Reynolds Tobacco Company Territory Manager/Sales Representative/Trade Marketing Position on Behalf of Richard M. Villareal

Dear Equal Employment Opportunity Commission:

I, Richard M. Villareal, file this charge of age discrimination on behalf of myself and others similarly situated. I twice applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position at R.J. Reynolds Tobacco Company ("RJ Reynolds"). I believe that my applications for the position were rejected on account of my age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA").[1]

RJ Reynolds is a tobacco company with approximately 4,800 employees. The principal office of RJ Reynolds is located at 401 North Main Street, Winston-Salem, NC 27102. Its telephone number is (336) 741-5000.

In November 2007, when I was 49 years old, I applied for a Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds. I believe that RJ Reynolds was hiring individuals to fill that position throughout the country. I was well qualified for the position. However, I was never contacted by RJ Reynolds and never received the position. I believe that the individuals hired by RJ Reynolds were younger than 40 years old, and that RJ Reynolds rejected my application on account of my age.

In June 2010, when I was 52 years old, I again applied for a Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds. RJ Reynolds was hiring individuals to fill that position throughout the country. As before, I was well qualified for the position. Nonetheless, less than week after I applied for the position I received an email from RJ Reynolds rejecting my application and stating that they were pursuing other individuals. I believe that those individuals were younger than 40 years old, and that RJ Reynolds again rejected my application on account of my age.

[1] On May 17, 2010, I filed a charge alleging that RJ Reynolds discriminated against me on the basis of my age when I applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position in November 2007. This amended charge includes both that 2007 rejection and my June 2010 rejection for the same position at RJ Reynolds.

It is my understanding that in both 2007 and 2010 RJ Reynolds applied the same policy of hiring only individuals under the age of 40 when hiring individuals for the Territory Manager/Sales Representative/Trade Marketing position throughout the United States. I file this class-wide charge of age discrimination on behalf of myself and all others similarly situated who applied for the Territory Manager/Sales Representative/Trade Marketing (or similar positions) and were rejected on the basis of age.

I declare under penalty of perjury that I have read the above charge and that it is true and correct to the best of my knowledge, information, and belief.

7/21/10
Date

Richard M. Villareal
Richard M. Villareal

Equal Employment Opportunity Commission
Charlotte District Office
129 West Trade Street, Suite 400
Charlotte, North Carolina 28202
Telephone: 800-669-4000
Fax: 704-954-6410
Email: TINA.BURNSIDE@EEOC.GOV; JOSE.ROSENBERG@EEOC.GOV; JEFFERY.WALTERS@EEOC.GOV

Re: EEOC Charge: 410-2010-04714

Third Amended Charge of Age Discrimination in Hiring for R.J. Reynolds Tobacco Company Territory Manager/Sales Representative/Trade Marketing Position on Behalf of Richard M. Villareal

Dear Equal Employment Opportunity Commission:

I, Richard M. Villareal, file this third amended charge of age discrimination on behalf of myself and others similarly situated against R.J. Reynolds Tobacco Company ("RJ Reynolds"); Kelly Services, Inc. ("Kelly"); Pinstripe, Inc. ("Pinstripe"); and CareerBuilder, LLC ("CareerBuilder"). I applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position at R.J. Reynolds Tobacco Company ("RJ Reynolds") on five different occasions. I believe that my applications for the position were rejected on account of my age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA").[1]

RJ Reynolds is a tobacco company with approximately 4,800 employees. The principal office of RJ Reynolds is located at 401 North Main Street, Winston-Salem, NC 27102. Its telephone number is (336) 741-5000.

Kelly is a recruiting and staffing services company with more than 5,000 employees.[2] Its principal office is located at 999 West Big Beaver Road, Troy, Michigan 48084-4782. Its telephone number is (248) 362-4444.

---

[1] On May 17, 2010, I filed a charge alleging that RJ Reynolds discriminated against me on the basis of my age when I applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position in November 2007. In July 2010, I filed an amended charge including both that 2007 rejection and my June 2010 rejection for the same position at RJ Reynolds. In September 2010, I filed a second amended charge that included additional contact information for myself and my attorneys. This third amended charge includes three additional instances since June 2010 in which I applied and was rejected for the Territory Manager/Sales Representative/Trade Marketing position at RJ Reynolds, and adds as respondents three recruiting companies used by RJ Reynolds when hiring employees into that position.

[2] In its 2010 Annual Report, Kelly reported that it had 530,000 employees worldwide.

Pinstripe is a recruiting services company with more than 500 employees. Its principal office is located at 200 S. Executive Drive, Suite 400, Brookfield, WI 53005. Its telephone number is (262) 754-5050.

CareerBuilder is a recruiting services company with more than 1,000 employees. Its principal office is located at 200 N. LaSalle St, Suite 1100, Chicago, IL 60601. Its telephone number is (773) 527-3600.

In November 2007, when I was 49 years old, I applied for a Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds. I believe that RJ Reynolds was hiring individuals to fill that position throughout the country, and that Kelly, through its subdivision Kelly HRFirst, was assisting RJ Reynolds in recruiting and screening applicants for that position. I was well qualified for the position. However, I was never contacted by RJ Reynolds and never received the position. I believe that the individuals hired by RJ Reynolds were younger than 40 years old, and that RJ Reynolds rejected my application on account of my age.

In June 2010, when I was 52 years old, I again applied for a Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds. RJ Reynolds was hiring individuals to fill that position throughout the country. As before, I was well qualified for the position. Nonetheless, less than week after I applied for the position I received an email from RJ Reynolds rejecting my application and stating that RJ Reynolds was pursuing other individuals. I believe that those individuals were younger than 40 years old, and that RJ Reynolds again rejected my application on account of my age.

I again applied for the Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds in December 2010 and May 2011. As before, I was well qualified for the position. Shortly after applying for the position, I again received emails from RJ Reynolds rejecting my applications and stating that RJ Reynolds was pursuing other individuals. I believe that those individuals were younger than 40 years old, and that RJ Reynolds rejected my applications on account of my age.

I again applied for the Territory Manager/Sales Representative/Trade Marketing position with RJ Reynolds in September 2011. As before, I was well qualified for the position. After applying I received an email stating that the position was no longer available. I believe that RJ Reynolds again rejected my application on account of my age, and selected individuals younger than 40 years old to fill the position.

I believe that, when I applied for the Territory Manager/Sales Representative/Trade Marketing position in 2010 and 2011, Kelly, Pinstripe, and/or CareerBuilder assisted RJ Reynolds in screening applicants for the position.

It is my understanding that in 2007, 2010, and 2011, RJ Reynolds applied the same policy of hiring only individuals under the age of 40 when hiring individuals for the Territory Manager/Sales Representative/Trade Marketing position throughout the United

States. I file this class-wide charge of age discrimination on behalf of myself and all others similarly situated who applied for the Territory Manager/Sales Representative/Trade Marketing (or similar positions) and were rejected on the basis of age.

I am informed and believe that RJ Reynolds retained Kelly, Pinstripe, and CareerBuilder to assist it in hiring persons for the Territory Manager/Sales Representative/Trade Marketing position in 2007, 2010, and 2011; that Kelly, Pinstripe, and CareerBuilder were joint employers with RJ Reynolds in doing so; and that they discriminated against me on the basis of my age.

My contact information is as follows:

Richard M. Villareal
3720 Rivendell Lane
Cumming, GA 30040
Tel: 678-779-0026

I am represented by the following attorneys in this matter:

James M. Finberg
Eve H. Cervantez
P. Casey Pitts
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel: 415-421-7151

I declare under penalty of perjury that I have read the above charge and that it is true and correct to the best of my knowledge, information, and belief.

12/2/2011
Date

Richard M Villareal
Richard M. Villareal

1-4

EXHIBIT D

EEOC Form 161-B (11/09) **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

NOTICE OF RIGHT TO SUE *(ISSUED ON REQUEST)*

To: **Richard Villareal**
3720 Rivendell Lane
Cumming, GA 30040

From: **Greensboro Local Office**
2303 West Meadowview Rd
Suite 201
Greensboro, NC 27407

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR §1601.7(a))*

EEOC Charge No.	EEOC Representative	Telephone No.
435-2012-00211	**JEFFERY R. WALTERS, Investigator**	**(336) 547-4116**

(See also the additional information enclosed with this form.)

NOTICE TO THE PERSON AGGRIEVED:

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☐ More than 180 days have passed since the filing of this charge.

☐ Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of this charge.

☐ The EEOC is terminating its processing of this charge.

☐ The EEOC will continue to process this charge.

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If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

JOSE G. ROSENBERG,
Local Office Director

4/2/12
(Date Mailed)

Enclosures(s)

cc: **Scott Beightol**
MICHAEL BEST & FRIEDRICH, LLP
100 East Wisconsin Ave., Suite 3300
Milwaukee, WI 53202-4108

James Finberg, Esq.
ALTSHULER BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

Enclosure with EEOC
Form 161-B (11/09)

INFORMATION RELATED TO FILING SUIT UNDER THE LAWS ENFORCED BY THE EEOC

*(This information relates to filing suit in Federal or State court under Federal law.
If you also plan to sue claiming violations of State law, please be aware that time limits and other provisions of State law may be shorter or more limited than those described below.)*

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If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, in limited circumstances, assist you in obtaining a lawyer. Requests for such assistance must be made to the U.S. District Court in the form and manner it requires (you should be prepared to explain in detail your efforts to retain an attorney). Requests should be made well before the end of the 90-day period mentioned above, because such requests do not relieve you of the requirement to bring suit within 90 days.

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IF YOU FILE SUIT, PLEASE SEND A COPY OF YOUR COURT COMPLAINT TO THIS OFFICE.

EEOC Form 161-B (11/09) **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

NOTICE OF RIGHT TO SUE *(ISSUED ON REQUEST)*

To: **Richard Villareal**
3720 Rivendell Lane
Cumming, GA 30040

From: **Greensboro Local Office**
2303 West Meadowview Rd
Suite 201
Greensboro, NC 27407

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR §1601.7(a))*

EEOC Charge No.	EEOC Representative	Telephone No.
435-2012-00212	**JEFFERY R. WALTERS, Investigator**	**(336) 547-4116**

(See also the additional information enclosed with this form.)

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On behalf of the Commission

Enclosures(s)

JOSE G. ROSENBERG,
Local Office Director

4/2/12
(Date Mailed)

cc: **Fredrick Smith**
SEYFARTH SHAW LLP
1075 Peachtree Street, N.E., Suite 2500
Atlanta, GA 30309

James Finberg, Esq.
ALTSHULER BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

Enclosure with EEOC

Form 161-B (11/09)

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410-2010-04714	**JEFFERY R. WALTERS, Investigator**	**(336) 547-4116**

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JOSE G. ROSENBERG,
Local Office Director

4/2/12
(Date Mailed)

Enclosures(s)

cc: **Eric Dreiband**
JONES DAY
51 Louisiana Ave. N.W.
Washington, D.C. 20001-2113

James Finberg, Esq.
ALTSHULER BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

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1-5

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Richard M. Villarreal, on behalf of himself and all others similarly situated,

Plaintiff,

v.

R.J. Reynolds Tobacco Company; Pinstripe, Inc.; and CareerBuilder, LLC,

Defendants.

Civil Action No. _____

CONSENT TO SUE/JOIN

(Collective Action)

Pursuant to 29 U.S.C. §216(b), I, Richard M. Villarreal, hereby consent to join this collective action for violations of the Age Discrimination in Employment Act.

Dated: June 6, 2012

Richard M. Villarreal

1-6

JS44 (Rev. 1/08 NDGA)

CIVIL COVER SHEET

The JS44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form is required for the use of the Clerk of Court for the purpose of initiating the civil docket record. (SEE INSTRUCTIONS ATTACHED)

I. (a) PLAINTIFF(S)

Richard M. Villarreal, on behalf of himself and all others similarly situated

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Forsyth, GA
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANT(S)

R.J. Reynolds Tobacco Company; Pinstripe, Inc.; and CareerBuilder, LLC

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Forsyth, NC
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, TELEPHONE NUMBER, AND E-MAIL ADDRESS)

John J. Almond, Esq.
ROGERS & HARDIN LLP
229 Peachtree Street N.E., 2700 International Tower
Atlanta, GA 30303
404-522-4700
jalmond@rh-law.com

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION
(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. GOVERNMENT PLAINTIFF
- ☑ 3 FEDERAL QUESTION (U.S. GOVERNMENT NOT A PARTY)
- ☐ 2 U.S. GOVERNMENT DEFENDANT
- ☐ 4 DIVERSITY (INDICATE CITIZENSHIP OF PARTIES IN ITEM III)

III. CITIZENSHIP OF PRINCIPAL PARTIES
(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(FOR DIVERSITY CASES ONLY)

PLF	DEF		PLF	DEF	
☐ 1	☐ 1	CITIZEN OF THIS STATE	☐ 4	☐ 4	INCORPORATED OR PRINCIPAL PLACE OF BUSINESS IN THIS STATE
☐ 2	☐ 2	CITIZEN OF ANOTHER STATE	☐ 5	☐ 5	INCORPORATED AND PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE
☐ 3	☐ 3	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY	☐ 6	☐ 6	FOREIGN NATION

IV. ORIGIN (PLACE AN "X "IN ONE BOX ONLY)

☑ 1 ORIGINAL PROCEEDING ☐ 2 REMOVED FROM STATE COURT ☐ 3 REMANDED FROM APPELLATE COURT ☐ 4 REINSTATED OR REOPENED ☐ 5 TRANSFERRED FROM ANOTHER DISTRICT (Specify District) ☐ 6 MULTIDISTRICT LITIGATION ☐ 7 APPEAL TO DISTRICT JUDGE FROM MAGISTRATE JUDGMENT

V. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE - DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

This is a collective action challenging Defendants' repeated acts of unlawful age discrimination with respect to the hiring of individuals to fill regional sales positions. Defendants followed a policy that expressly instructed recruiters to reject candidates on the basis of age. Defendants engaged in a pattern or practice of intentionally discriminating against qualified applicants over the age of 40, and they also applied employment policies and practices that, although not expressly directed at age, had a disparate impact on qualified applicants over the age of 40, in violation of the federal Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA").

(IF COMPLEX, CHECK REASON BELOW)

- ☑ 1. Unusually large number of parties.
- ☐ 2. Unusually large number of claims or defenses.
- ☑ 3. Factual issues are exceptionally complex
- ☐ 4. Greater than normal volume of evidence.
- ☑ 5. Extended discovery period is needed.
- ☑ 6. Problems locating or preserving evidence
- ☑ 7. Pending parallel investigations or actions by government.
- ☑ 8. Multiple use of experts.
- ☐ 9. Need for discovery outside United States boundaries.
- ☑ 10. Existence of highly technical issues and proof.

CONTINUED ON REVERSE

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT $_____ APPLYING IFP _____ MAG. JUDGE (IFP)_____

JUDGE_____ MAG. JUDGE_____ NATURE OF SUIT_____ CAUSE OF ACTION_____
(Referral)

VI. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT - "0" MONTHS DISCOVERY TRACK'
- ☐ 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT
- ☐ 152 RECOVERY OF DEFAULTED STUDENT LOANS (Excl. Veterans)
- ☐ 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS

CONTRACT - "4" MONTHS DISCOVERY TRACK
- ☐ 110 INSURANCE
- ☐ 120 MARINE
- ☐ 130 MILLER ACT
- ☐ 140 NEGOTIABLE INSTRUMENT
- ☐ 151 MEDICARE ACT
- ☐ 160 STOCKHOLDERS' SUITS
- ☐ 190 OTHER CONTRACT
- ☐ 195 CONTRACT PRODUCT LIABILITY
- ☐ 196 FRANCHISE

REAL PROPERTY - "4" MONTHS DISCOVERY TRACK
- ☐ 210 LAND CONDEMNATION
- ☐ 220 FORECLOSURE
- ☐ 230 RENT LEASE & EJECTMENT
- ☐ 240 TORTS TO LAND
- ☐ 245 TORT PRODUCT LIABILITY
- ☐ 290 ALL OTHER REAL PROPERTY

TORTS - PERSONAL INJURY - "4" MONTHS DISCOVERY TRACK
- ☐ 310 AIRPLANE
- ☐ 315 AIRPLANE PRODUCT LIABILITY
- ☐ 320 ASSAULT, LIBEL & SLANDER
- ☐ 330 FEDERAL EMPLOYERS' LIABILITY
- ☐ 340 MARINE
- ☐ 345 MARINE PRODUCT LIABILITY
- ☐ 350 MOTOR VEHICLE
- ☐ 355 MOTOR VEHICLE PRODUCT LIABILITY
- ☐ 360 OTHER PERSONAL INJURY
- ☐ 362 PERSONAL INJURY - MEDICAL MALPRACTICE
- ☐ 365 PERSONAL INJURY - PRODUCT LIABILITY
- ☐ 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY

TORTS - PERSONAL PROPERTY - "4" MONTHS DISCOVERY TRACK
- ☐ 370 OTHER FRAUD
- ☐ 371 TRUTH IN LENDING
- ☐ 380 OTHER PERSONAL PROPERTY DAMAGE
- ☐ 385 PROPERTY DAMAGE PRODUCT LIABILITY

BANKRUPTCY - "0" MONTHS DISCOVERY TRACK
- ☐ 422 APPEAL 28 USC 158
- ☐ 423 WITHDRAWAL 28 USC 157

CIVIL RIGHTS - "4" MONTHS DISCOVERY TRACK
- ☐ 441 VOTING
- ☒ 442 EMPLOYMENT
- ☐ 443 HOUSING/ ACCOMMODATIONS
- ☐ 444 WELFARE
- ☐ 440 OTHER CIVIL RIGHTS
- ☐ 445 AMERICANS with DISABILITIES - Employment
- ☐ 446 AMERICANS with DISABILITIES - Other

IMMIGRATION - "0" MONTHS DISCOVERY TRACK
- ☐ 462 NATURALIZATION APPLICATION
- ☐ 463 HABEAS CORPUS- Alien Detainee
- ☐ 465 OTHER IMMIGRATION ACTIONS

PRISONER PETITIONS - "0" MONTHS DISCOVERY TRACK
- ☐ 510 MOTIONS TO VACATE SENTENCE
- ☐ 530 HABEAS CORPUS
- ☐ 535 HABEAS CORPUS DEATH PENALTY
- ☐ 540 MANDAMUS & OTHER
- ☐ 550 CIVIL RIGHTS - Filed Pro se
- ☐ 555 PRISON CONDITION(S) - Filed Pro se

PRISONER PETITIONS - "4" MONTHS DISCOVERY TRACK
- ☐ 550 CIVIL RIGHTS - Filed by Counsel
- ☐ 555 PRISON CONDITION(S) - Filed by Counsel

FORFEITURE/PENALTY - "4" MONTHS DISCOVERY TRACK
- ☐ 610 AGRICULTURE
- ☐ 620 FOOD & DRUG
- ☐ 625 DRUG RELATED SEIZURE OF PROPERTY 21 USC 881
- ☐ 630 LIQUOR LAWS
- ☐ 640 R.R. & TRUCK
- ☐ 650 AIRLINE REGS.
- ☐ 660 OCCUPATIONAL SAFETY / HEALTH
- ☐ 690 OTHER

LABOR - "4" MONTHS DISCOVERY TRACK
- ☐ 710 FAIR LABOR STANDARDS ACT
- ☐ 720 LABOR/MGMT. RELATIONS
- ☐ 730 LABOR/MGMT. REPORTING & DISCLOSURE ACT
- ☐ 740 RAILWAY LABOR ACT
- ☐ 790 OTHER LABOR LITIGATION
- ☐ 791 EMPL. RET. INC. SECURITY ACT

PROPERTY RIGHTS - "4" MONTHS DISCOVERY TRACK
- ☐ 820 COPYRIGHTS
- ☐ 840 TRADEMARK

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SOCIAL SECURITY - "0" MONTHS DISCOVERY TRACK
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- ☐ 850 SECURITIES / COMMODITIES / EXCHANGE

OTHER STATUTES - "0" MONTHS DISCOVERY TRACK
- ☐ ARBITRATION (Confirm / Vacate / Order / Modify)

(Note: Mark underlying Nature of Suit as well)

*** PLEASE NOTE DISCOVERY TRACK FOR EACH CASE TYPE. SEE LOCAL RULE 26.3**

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF CLASS ACTION UNDER F.R.Civ.P. 23 DEMAND $_____

JURY DEMAND ☑ YES ☐ NO (CHECK YES ONLY IF DEMANDED IN COMPLAINT)

VIII. RELATED/REFILED CASE(S) IF ANY

JUDGE_____ DOCKET NO._____

CIVIL CASES ARE DEEMED RELATED IF THE PENDING CASE INVOLVES: (CHECK APPROPRIATE BOX)

- ☐ 1. PROPERTY INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
- ☐ 2. SAME ISSUE OF FACT OR ARISES OUT OF THE SAME EVENT OR TRANSACTION INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
- ☐ 3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT, COPYRIGHT OR TRADEMARK INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
- ☐ 4. APPEALS ARISING OUT OF THE SAME BANKRUPTCY CASE AND ANY CASE RELATED THERETO WHICH HAVE BEEN DECIDED BY THE SAME BANKRUPTCY JUDGE.
- ☐ 5. REPETITIVE CASES FILED BY PRO SE LITIGANTS.
- ☐ 6. COMPANION OR RELATED CASE TO CASE(S) BEING SIMULTANEOUSLY FILED (INCLUDE ABBREVIATED STYLE OF OTHER CASE(S)):

☐ 7. EITHER SAME OR ALL OF THE PARTIES AND ISSUES IN THIS CASE WERE PREVIOUSLY INVOLVED IN CASE NO. Nonw , WHICH WAS DISMISSED. This case ☐ IS ☐ IS NOT (check one box) SUBSTANTIALLY THE SAME CASE.

SIGNATURE OF ATTORNEY OF RECORD DATE 6/6/12

24

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC, Defendants.	)	Civil Action No. 2:12-CV-0138

DEFENDANTS R.J. REYNOLDS' AND PINSTRIPE, INC.'S PARTIAL MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants R.J. Reynolds Tobacco Company and Pinstripe, Inc. (collectively "Defendants") move this Court to dismiss Count Two of the Complaint of Plaintiff Richard Villarreal ("Villarreal") and all time-barred claims. As set forth more fully in the attached Memorandum in Support, Count Two attempts to allege a disparate impact failure-to-hire age claim, but the Age Discrimination in Employment Act does not authorize such claims. In addition, all claims that arose before November 19, 2009 — more than 180 days before Villarreal filed his May 17, 2010 charge with the Equal Employment Opportunity Commission—are time-barred, and cannot be "saved" by the continuing violations doctrine. Finally, the Complaint does not

allege facts to support equitable tolling of the applicable charge-filing limitations period.

Dated: August 24, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2012, I electronically filed Defendants R.J. Reynolds Tobacco Company's and Pinstripe, Inc.'s Partial Motion to Dismiss with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys:

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24-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC, Defendants.	)	Civil Action No. 2:12-CV-0138

MEMORANDUM IN SUPPORT OF DEFENDANTS
R.J. REYNOLDS TOBACCO COMPANY'S AND PINSTRIPE'S PARTIAL MOTION TO DISMISS

Dated: August 24, 2012

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Defendants R.J. Reynolds Tobacco Company ("RJRT") and Pinstripe, Inc. ("Pinstripe) (collectively "Defendants") respectfully request that this Court dismiss Count Two of the Complaint of Plaintiff, Richard Villarreal ("Villarreal") and all time-barred claims.

First, Count Two attempts to allege a disparate impact failure-to-hire age discrimination claim. The Age Discrimination in Employment Act ("ADEA"), however, does not authorize such claims. Failure-to-hire ADEA claims may be brought as a violation of ADEA Section 4(a)(1), 29 U.S.C. § 623(a)(1), but Section 4(a)(1) does not authorize disparate impact claims. ADEA disparate impact claims are limited to alleged violations of ADEA Section 4(a)(2), 29 U.S.C. § 623(a)(2). Section 4(a)(2) does not apply to applicants for employment nor does it authorize a failure-to-hire claim. *Smith v. City of Jackson*, 544 U.S. 228, 237 n.9 (2005); *EEOC v. Allstate Ins. Co. ("Allstate")*, 458 F. Supp. 2d 980, 986-89 (E.D. Mo. 2006), *aff'd*, 528 F.3d 1042, 1047 (8th Cir. 2008), *reh'g en banc granted, opinion vacated* (Sept. 8, 2008).

Second, all claims brought on behalf of the putative collective action class, as well as those of Villarreal, before November 19, 2009 are time-barred because those claims arose more than 180 days before Villarreal filed his May 17, 2010 EEOC charge. 29 U.S.C. § 626(d)(1)(A); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1214 n.2 (11th Cir. 2001). The continuing violations doctrine cannot

"save" these claims because they are based on discrete hiring decisions. *Id.* at 1222. Furthermore, the Complaint fails to allege sufficient facts to support any equitable tolling of the 180-day charge-filing limitations period. Defendants do not seek dismissal of Count One's timely claims.

STATEMENT OF FACTS

The following facts are alleged in Villarreal's Complaint and are assumed to be true only for purposes of this motion.

RJRT employs regional sales representatives known as "Territory Managers" to promote and sell its tobacco products. Compl. ¶ 10. On or about November 8, 2007, Villarreal applied for the Territory Manager job position. Compl. ¶ 11. RJRT did not hire Villarreal. Compl. ¶ 12. Villarreal applied for the position again in June 2010, December 2010, May 2011, September 2011, and March 2012. Compl. ¶ 20. RJRT rejected Villarreal each time he applied. *Id.*

On May 17, 2010, Villarreal filed an age discrimination charge with the Equal Employment Opportunity Commission ("EEOC") and alleged that RJRT failed to hire him because of his age. Compl. ¶ 27. Villarreal's Complaint alleges that RJRT discriminated against applicants age 40 and over "[s]ince at least September 1, 2007 (and perhaps earlier)." Compl. ¶ 24. The Complaint also alleges that "facts" supporting Villarreal's charge "were not apparent to him, and

could not have been apparent to him, until less than a month before he filed his May 17, 2010 EEOC charge." Compl. ¶ 28.

On June 6, 2012, Villarreal filed this lawsuit as an ADEA collective action. Compl. ¶ 34. Villarreal filed a two-count complaint. Count One alleges a failure-to-hire disparate treatment or intentional age discrimination claim. Compl. ¶¶ 36-43. Count Two alleges a failure-to-hire disparate impact age discrimination claim. Compl. ¶¶ 44-50. Villarreal alleges in both Counts that the Defendants violated the ADEA by applying certain "hiring guidelines that had an adverse or disparate impact on older workers," such as a preference for applicants with "1-2 years of experience" and by "disfavoring applicants who have been in sales for 8-10 years." Compl. ¶ 33. Villarreal seeks to bring a collective action on behalf of all applicants for the Territory Manger position dating back to at least September 1, 2007. Compl. ¶ 31.

ARGUMENT

I. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) mandates dismissal when a complaint "fail[s] to state a claim upon which relief can be granted." This standard requires that a complaint allege facts that state a "plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 622, 679 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint "must contain either direct or inferential

allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562. When dealing with complex litigation that may result in great expense to the parties, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 558 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)). "[W]here there are dispositive issues of law, a court may dismiss a claim regardless of the alleged facts." *Stringer v. Forsyth Inns*, No. 5:11-cv-137, 2011 WL 5573909, at *1 (M.D. Ga. Nov. 16, 2011). Rule 12(b)(6) also authorizes a defendant to raise numerous defenses, including that all or some of a plaintiff's claims are time-barred. *Boatright v. Sch. Bd. of Polk Cnty., Fla.*, No. 8:08–cv–1070, 2009 WL 806801, at *11 n.8 (M.D. Fla. Mar. 27, 2009).

II. Villarreal's Disparate Impact Claim Should be Dismissed

ADEA disparate impact claims are available only under section 4(a)(2). Section 4(a)(2) of the ADEA does not authorize hiring claims. Accordingly, Villarreal's disparate impact failure-to-hire claim should be dismissed.

A. ADEA Disparate Impact Claims Are Available Only Under ADEA Section 4(a)(2)

In relevant part, ADEA Section 4(a) makes it unlawful for employers:

> (1) *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; [or]
>
> (2) 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[.]

29 U.S.C. § 623(a)(1) & (2)(emphasis added).

In *City of Jackson*, the Supreme Court determined that Section 4(a)(1), 29 U.S.C. § 623(a)(1), "does not encompass disparate-impact liability." *City of Jackson,* 544 U.S. at 236 n.6. "Disparate impact claims are available under 29 U.S.C. § 623(a)(2), but not under § 623(a)(1)." *Aldridge v. City of Memphis,* No. 05-2966, 2008 WL 2999557, at *5 (W.D. Tenn. July 31, 2008), *aff'd,* 404 F. App'x 29 (6th Cir. 2010).

B. ADEA Section 4(a)(2) Does Not Authorize Villarreal's Failure-To-Hire Disparate Impact Claim

Section 4(a)(1) prohibits the "fail[ure] or refus[al] to hire . . . any individual." Section 4(a)(1)'s reference to "any individual" includes applicants. Section 4(a)(2), 29 U.S.C. § 623(a)(2), differs from section 4(a)(1) in two ways. First, Section 4(a)(2) protects only "employees," not applicants. *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 n.2 (8th Cir. 1996). And, second, Section 4(a)(2) says nothing about hiring. *See City of Jackson*, 544 U.S. at 266 ("Section 4(a)(2), of course, does not apply to 'applicants for employment' at all-it is only [§] 4(a)(1) that protects this group.") (O'Connor, J., concurring).

Because of the differences between Sections 4(a)(1) and 4(a)(2), the court in *Allstate* held that employees may state a disparate impact claim under the ADEA but applicants cannot. In *Allstate*, the EEOC alleged that Allstate's failure to rehire former employees violated the ADEA because it had an unlawful disparate impact on older workers. 458 F. Supp. 2d at 980. The district court determined that "a disparate impact hiring case . . . is no longer cognizable after *City of Jackson*" and that "[t]he effect of [finding] that [this] is a hiring case, is to find that no cause of action exists." *Id.* at 989 (citation omitted). A three-judge Eighth Circuit panel agreed that the "textual differences" between Sections 4(a)(1) and 4(a)(2) mean that "disparate-impact claims are *not available* to challenging *hiring* and termination practices prohibited under § 623(a)(1)." *Allstate*, 528 F.3d at 1047 (emphasis in original). The court explained that "the text of section (a)(2) focuses on the effect of an employer's practices on employees *generally*, which, unlike section (a)(1), gives rise to a disparate-impact claim." *Id.* (emphasis in original) (citing *City of Jackson*, 544 U.S. at 236 n.6). The Eighth Circuit granted rehearing of the panel's opinion, but the reasoning of the panel opinion is sound, and the district court's decision in *Allstate* remains valid. *See also Allen v. Sears Roebuck & Co.*, 803 F. Supp. 2d 690, 695 (E.D. Mich. 2011) ("[p]laintiffs recognize that disparate impact claims are not available to challenge hiring and termination practices.").

City of Jackson and *Allstate* reflect the fact that "though both [the ADEA and Title VII of the Civil Rights Act of 1964] authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII." *City of Jackson*, 544 U.S. at 241. Congress enacted the ADEA in 1967, and modeled Section 4(a)(2) on Title VII Section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2). *Lorillard v. Pons,* 434 U.S. 575, 584 & n. 12 (1978). As originally enacted, "[e]xcept for substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,' the language of [Section 4(a)(2)] in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII)." *City of Jackson*, 544 U.S. at 233.

Before 1972, neither Section 703(a)(2) nor Section 4(a)(2) applied to applicants for employment. In 1972, Congress amended Section 703(a)(2) by "inserting the words 'or applicants for employment' after the words 'his employees.'" Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 8(a), 86 Stat. 109. (Exhibit 1). With this amendment, Section 703(a)(2) makes it 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.

42 U.S.C. § 2000e-2(a)(2) (emphasis added).

Congress has never amended ADEA Section 4(a)(2) to apply to "applicants for employment." As a result, "Section 623(a)(2) of the ADEA governs employer conduct with respect to 'employees' only, while the parallel provision of Title VII protects 'employees or applicants for employment.'" *City of Des Moines*, 99 F.3d at 1470 n.2 (comparing Section 4(a)(2) with Section 703(a)(2)).

Congress' decision to amend Section 703(a)(2) and not Section 4(a)(2) is significant. In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Court determined that Congress' decision to amend Title VII, but not parallel ADEA provisions suggested that Congress "acted intentionally." *Id.* at 174. The Court observed that Congress amended Title VII in 1991 by adding so called "mixed motive" claims to Title VII and that Congress did not similarly amend the ADEA. The Court explained that "[w]e cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." *Id.* at 173-74. The Court therefore concluded that the ADEA does not authorize mixed motive claims.

This same rationale applies to this case. In 1972, Congress amended Title VII Section 703(a)(2) to extend its protections to "applicants for employment." Congress did not make similar changes to ADEA Section 4(a)(2). And, like the Court in *Gross*, this Court must presume that Congress acted intentionally when it declined to amend Section 4(a)(2). The result is that Section 703(a)(2) protects

applicants; Section 4(a)(2) does not. Therefore, applicants like Villarreal cannot bring failure-to-hire claims under Section 4(a)(2). *See also Hardy v. Town of Greenwich*, 629 F. Supp. 2d 192, 200 (D. Conn. 2009) ("Congress applied the [§1991] amendments only to Title VII; if Congress had also intended to apply them to § 1981 or other discrimination laws more generally, Congress should have said so. That it did not say so speaks volumes.").

Taken together, *City of Jackson*'s finding that disparate impact claims are properly brought only under Section 4(a)(2); Section 4(a)(2)'s focus on "employees" and its omission of "applicants" and hiring; and Congress' decision to amend Title VII's parallel provision to include applicants and its corresponding decision not to amend Section 4(a)(2), all establish that disparate impact failure-to-hire claims are not available under the ADEA.

III. All Claims Before November 19, 2009 Are Time-Barred

Any claims related to hiring decisions made more than 180 days before Villarreal filed his charge on May 17, 2010 are untimely and should be dismissed.

Before a plaintiff can file an ADEA lawsuit, the plaintiff "shall" file a "charge alleging unlawful discrimination" with the EEOC "within 180 days after the alleged unlawful practice occurred." 29 U.S.C. § 626(d)(1)-(A). *Accord Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1238 (11th Cir. 2004); *Hipp*, 252 F.3d at 1214 n.2. The "period [for] filing of an initial charge" operates as a "statute of

limitations" that embodies Congress' "concern for the need of time limitations in the fair operation of the Act." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 371-72 (1977).[1]

If a state has a "law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice," the 180-day charge-filing period is extended to 300 days in these "deferral" states. 29 U.S.C. §§ 626(d)(1)(B) & 633(b); *Hipp*, 252 F.3d at 1214 n.2. Georgia does not have an age discrimination law, nor does it have any "State authority." Because Villarreal filed this case in Georgia, a non-deferral jurisdiction, the 180 day limitation applies. *See* 29 U.S.C. § 626(d)(1); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002) ("[A] litigant [in a non-deferral state] has up to 180 . . . days *after* the unlawful practice happened to file with the EEOC."). *Accord Hipp*, 252 F.3d at 1214 n.2; *Arnold v. United Parcel Serv., Inc.*, No. 7:11–CV–00118**,** 2012 WL 1035441, at *2 (M.D. Ga. Mar. 27, 2012) (applying 180-day limitation period to Title VII charge filed in "Georgia, a non-deferral state.").

[1] *Occidental Life* was a Title VII case. "The purposes underlying ADEA and Title VII, specifically their respective requirements that employees file charges of discrimination with the EEOC . . . are similar. [The Eleventh Circuit] therefore look[s] to Title VII cases as well as ADEA cases in examining this issue." *Hipp*, 252 F.3d at 1221 n.10.

Any alleged discriminatory act that "is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed" and is "merely an unfortunate event in history which has no present legal consequences." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Any claim that fails to satisfy this requirement is time-barred and must be dismissed. *Arnold*, 2012 WL 1035441, at *2.

The ADEA's charge-filing period operates as a statute of limitations in collective actions like and including this case. The Eleventh Circuit's decision in *Hipp* is dispositive. The court in that case determined that "the rearward scope of an ADEA opt-in action should be limited to those plaintiffs who allege discriminatory treatment within 180 or 300 days before the representative charge is filed." *Hipp*, 252 F.3d at 1214 n.2, 1220-21.

Here, the Complaint alleges that RJRT discriminated against older individuals from "at least September 1, 2007 (and perhaps earlier)." Compl. ¶ 24. This alleged discrimination occurred more than 180 days before Villarreal filed his May 17, 2010 charge and is time-barred. Thus, the Court should limit this case to claims that arose on or after November 19, 2009, which is 180 days prior to Villarreal's first EEOC charge. [2]

[2] Villarreal's Complaint is limited to his claims. If additional individuals join this lawsuit, each individual's place of residence will determine whether the

A. The Continuing Violations Doctrine Does Not Save Villarreal's Time-Barred Claims.

Villarreal's allegation that RJRT discriminated against older applicants prior to November 19, 2009—the outer limit of the charge-filing period—describes a series of untimely discrete acts that are not subject to the continuing violation theory. The ADEA forecloses plaintiffs from reviving stale claims, and the Supreme Court has never authorized any litigant to revive otherwise time-barred claims by means of the continuing violations doctrine. *Morgan* held that discrete incidents of discrimination cannot amount to a continuing violation: "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges . . . Discrete acts such as termination, failure to promote, denial of transfer, or *refusal to hire* are easy to identify." *Morgan*, 536 U.S. at 113-14 (emphasis added).

(continued…)

limitations period is 180 or 300 days before Villarreal filed his charge. July 22, 2009 is 300 days before Villarreal's May 27, 2010 charge, and any claim by a claimant from a deferral state that is before that date will be time-barred. *Hipp*, 252 F.3d at 1214 n.2. *See also Rhodes v. Cracker Barrel Old Country Store, Inc.*, No. 99 – cv – 217, 2002 WL 32058462, at *50 (N.D. Ga. Dec. 31, 2002) ("The rearward temporal scope of a Title VII class is limited to those persons who allege discriminatory treatment within 180 or 300 days (depending on their state of residence) before the representative charge was filed."), *report & recommendation adopted by* 213 F.R.D. 619 (N.D. Ga 2003)

In light of *Morgan*, the Eleventh Circuit has consistently rejected attempts to evade the charge-filing period by resort to a continuing violation theory. For example, in *Riccard v. Prudential Insurance Co. of America*, 307 F.3d 1277, 1291-92 (11th Cir. 2002), the court affirmed the dismissal of untimely age and disability failure-to-reinstate claims because "failure to reinstate is a discrete retaliatory act akin to a refusal to hire or promote." *Id*. at 1292. Likewise, *EEOC v. Joe's Stone Crabs*, 296 F.3d 1265 (11th Cir. 2002), rejected the plaintiffs' continuing violation theory because "[t]he alleged acts at issue – the failure to hire the claimants because they were women – were discrete, one-time employment events that should have put the claimants on notice that a cause of action had accrued." *Id.* at 1272.

The same rule governs class and collective actions. For this reason, the court in *City of Hialeah v. Rojas*, 311 F.3d 1096, 1101-02 (11th Cir. 2002) applied *Morgan* to a Title VII class action and determined that the plaintiffs' claims were "time-barred" and, as a result, the plaintiffs "[did] not have standing to bring this action on behalf of the class." *Id.* at 1103.

Villarreal's failure to hire claims accrued at precise points in time, namely, when he and other potential applicants learned that their Territory Manager applications were unsuccessful. Indeed, Villarreal alleges that RJRT rejected him on six distinct occasions: November 8, 2007, June 2010, December 2010, May

2011, September 2011, and March 2012. Compl. ¶¶ 19, 20. Under *Morgan* and its progeny, these "discrete acts" are each a separate employment practice with a separate charge-filing period. 536 U.S. at 105, 114-15. As in *Riccard, Joe's Stone Crabs*, and *City of Hialeah*, the continuing violations doctrine does not apply because each discrete act triggers the administrative clock at the time the alleged discriminatory decision occurs. Claims based on discrete hiring decisions that occurred more than 180 days before Villarreal filed his representative charge on May 17, 2010 are therefore time-barred.

B. The Equitable Tolling Doctrine Cannot Rescue Villarreal's Untimely Claims.

Villarreal's Complaint seeks to evade the limitations period by making vague allegations that Villarreal was "unaware" of "facts" that prevented him from acting in a timely manner. He has not pleaded sufficient facts, or even any facts, that would justify permitting time-barred claims to proceed.

"[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. TWA*, 455 U.S. 385, 393 (1982). *Accord Morgan*, 536 U.S. at 105. Although statutory time limits may be extended or "tolled" for equitable reasons, "equitable tolling of a limitations period is an extraordinary remedy which should be extended only sparingly." *Bost*, 372 F.3d at 1242. "Equitable tolling is inappropriate when

a plaintiff did not file an action promptly or failed to act with due diligence." *Id.* A plaintiff bears the burden of pleading and proving that tolling is warranted, and a plaintiff must allege specific reasons for requesting this extraordinary remedy. *Id.* General allegations are not enough.

Indeed, *Bost* rejected the plaintiffs' equitable tolling argument because they "fail[ed] to explain why we should apply the doctrine of equitable tolling to revive their [ADEA] complaint." *Id.* Similarly, the court in *Lomako v. New York Institute of Technology*, 440 F. App'x 1, 2 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 2382 (2012), affirmed the dismissal of a plaintiff's ADEA and other claims after the plaintiff alleged that defendants "intentionally misled" him to prevent him from filing his EEOC charge. These allegations were too "vague and conclusory," and they "[did] not suggest a plausible basis for equitable tolling." *Id.* at 2. Likewise, in *Bond v. Roche,* No. Civ.A. 504-cv-377, 2006 WL 50624 (M.D. Ga. Jan. 9, 2006), *aff'd, Bond v. Dep't of Air Force*, 202 F. App'x 391 (11th Cir. 2006), the district court dismissed the plaintiff's untimely race, sex, and age discrimination claims and rejected the plaintiff's equitable tolling claim. The plaintiff claimed that he was not aware of his employer's discriminatory motive until an unidentified third party informed him of his rights. *Bond*, 2006 WL 50624, at *1-*2. This "vague reference to a conversation with an unidentified individual [was] insufficient to show the Court that the limitations period should be tolled . . . . [T]he Court ha[d]

no way to determine whether those facts should or should not have been apparent to a person with a reasonably prudent regard for his rights[.]" *Id.* at *2. This approach is consistent with the Supreme Court's clear mandate that plaintiffs must allege sufficient facts to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 547. *Accord Iqbal*, 556 U.S. at 678 ; *Lomako*, 440 F. App'x at 2 (citing *Twombly,* 550 U.S. at 570).

In this case, Villarreal's Complaint does not allege sufficient facts to support equitable tolling. Instead, the Complaint alleges only that certain mysterious "facts" somehow were not and could not have been "apparent" to Villarreal "until less than a month before he filed his May 17, 2010 EEOC charge." Compl. ¶¶ 27-28. Exactly what "facts" were not "apparent" is anybody's guess. The Complaint is silent about how and when Villarreal learned of the alleged discrimination, and it provides the Court with no basis "to determine whether those facts should or should not have been apparent to a person with a reasonably prudent regard for his rights." *Bond*, 2006 WL 50624, at *2. This is precisely the type of vague, formulaic pleading that the Supreme Court soundly rejected in *Iqbal*, 556 U.S at 677-79, and *Twombly*, 550 U.S. at 555. If these allegations are enough to evade the statute of limitations, then the equitable tolling doctrine would completely eviscerate all statutes of limitations: any allegation of unknown and undescribed

"facts" would be enough. But that is not the law. Because he has not pled sufficient facts, equitable tolling cannot rescue Villarreal's time-barred claims.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Count Two of the Complaint and any claims under both Count One and Two that arose before November 19, 2009.

STATEMENT OF COMPLIANCE

Pursuant to Local Rule 7.1(D), this brief was prepared in court approved font and point.

Dated: August 24, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2012, I electronically filed Defendants R.J. Reynolds Tobacco Company's and Pinstripe, Inc.'s Partial Motion to Dismiss with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys:

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24-2

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on Behalf of himself and all others similarly situated PLAINTIFF, v. R. J. REYNOLDS TOBACCO COMPANY, PINSTRIPE, INC.; and CAREERBUILDER, LLC., DEFENDANTS.	Civil Action No. 2:12-CV-0138-WCO

INDEX OF EVIDENCE IN SUPPORT OF DEFENDANTS R.J. REYNOLDS TOBACCO COMPANY'S AND PINSTRIPE'S PARTIAL MOTION TO DISMISS

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24-3

EXHIBIT 1

Public Law 92-261

AN ACT

To further promote equal employment opportunities for American workers.

March 24, 1972
[H. R. 1746]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Employment Opportunity Act of 1972".

Equal Employment Opportunity Act of 1972.

SEC. 2. Section 701 of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is amended as follows:

78 Stat. 662.

(1) In subsection (a) insert "governments, governmental agencies, political subdivisions," after the word "individuals".

(2) Subsection (b) is amended to read as follows:

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers."

80 Stat. 408.

68A Stat. 163.
26 USC 501.

(3) In subsection (c) beginning with the semicolon strike out through the word "assistance".

(4) In subsection (e) strike out between "(A)" and "and such labor organization", and insert in lieu thereof "twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, or (B) fifteen or more thereafter,".

(5) In subsection (f), insert before the period a comma and the following: "except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision."

(6) At the end of subsection (h) insert before the period a comma and the following: "and further includes any governmental industry, business, or activity".

(7) After subsection (i) insert the following new subsection (j):

"Religion."

"(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

SEC. 3. Section 702 of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e–1) is amended to read as follows:

"EXEMPTION

"SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

Enforcement.

SEC. 4. (a) Subsections (a) through (g) of section 706 of the Civil Rights Act of 1964 (78 Stat. 259; 42 U.S.C. 2000e-5(a)-(g)) are amended to read as follows:

"SEC. 706. (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

42 USC 2000e-2. 2000e-3.

Charges.

"(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

Penalty.

State enforcement proceedings, deferral period.

"(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier termi-

nated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

"(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Filing.

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil action.

"(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed

a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

"(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

28 USC app.

Jurisdiction.

"(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

62 Stat. 937; 74 Stat. 912; 76A Stat. 699.

Judge, designation.

"(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

"(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

28 USC app. Relief.

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a)."

Back pay liability.

Post, p. 109.

(b)(1) Subsection (i) of section 706 of such Act is amended by striking out "subsection (e)" and inserting in lieu thereof "this section".

78 Stat. 259. 42 USC 2000e-5.

(2) Subsection (j) of such section is amended by striking out "subsection (e)" and inserting in lieu thereof "this section".

SEC. 5. Section 707 of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new subsection:

42 USC 2000e-6.

"(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

Transfer of functions.

80 Stat. 394; 85 Stat. 574. 5 USC 901.

"(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

"(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act."

Authority.

Ante, p. 104.

SEC. 6. Subsections (b), (c), and (d) of section 709 of the Civil

Rights Act of 1964 (78 Stat. 263; 42 U.S.C. 2000e–8(b)–(d)) are amended to read as follows:

State and local agencies, cooperation.

"(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

Recordkeeping; reports.

"(c) Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

State and Federal agencies, coordination.

"(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements

with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection." Information, availability.

SEC. 7. Section 710 of the Civil Rights Act of 1964 (78 Stat. 264; 42 U.S.C. 2000e–9) is amended to read as follows:

"INVESTIGATORY POWERS

"SEC. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply." 61 Stat. 150; 84 Stat. 930.

SEC. 8. (a) Section 703(a)(2) of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e–2(a)(2)) is amended by inserting the words "or applicants for employment" after the words "his employees".

(b) Section 703(c)(2) of such Act is amended by inserting the words "or applicants for membership" after the word "membership".

(c)(1) Section 704(a) of such Act is amended by inserting a comma and the following: "or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs," after "employment agency". 78 Stat. 257. 42 USC 2000e-3.

(2) Section 704(b) of such Act is amended by (A) striking out "or employment agency" and inserting in lieu thereof "employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs.", and (B) inserting a comma and the words "or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee" before the word "indicating".

(d) Section 705(a) of the Civil Rights Act of 1964 (78 Stat. 258; 42 U.S.C. 2000e–4(a)) is amended to read as follows: Equal Employment Opportunity Commission.

"SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b), shall appoint, in accordance with the provisions of title 5, United States Term.

5 USC 101 *et seq.*

Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: *Provided*, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code."

5 USC 5101, 5331.

80 Stat. 415, 425, 473, 528.
78 Stat. 258.
42 USC 2000e-4.

(e) (1) Section 705 of such Act is amended by inserting after subsection (a) the following new subsection (b):

General Counsel, appointment.

"(b) (1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

Ante, p. 104.
Ante, p. 107.

"(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title."

Repeal.

(2) Subsections (e) and (h) of such section 705 are repealed.

(3) Subsections (b), (c), (d), (i), and (j) of such section 705, and all references thereto, are redesignated as subsections (c), (d), (e), (h), and (i), respectively.

(f) Section 705(g)(6) of such Act, is amended to read as follows:

"(6) to intervene in a civil action brought under section 706 by an aggrieved party against a respondent other than a government, governmental agency or political subdivision."

42 USC 2000e-13.

(g) Section 714 of such Act is amended to read as follows:

"FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

"SEC. 714. The provisions of sections 111 and 1114, title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life."

62 Stat. 688; 65 Stat. 721.

80 Stat. 460; 85 Stat. 625.

SEC. 9. (a) Section 5314 of title 5 of the United States Code is amended by adding at the end thereof the following new clause:

"(58) Chairman, Equal Employment Opportunity Commission."

(b) Clause (72) of section 5315 of such title is amended to read as follows:

"(72) Members, Equal Employment Opportunity Commission (4)."

Repeal.

(c) Clause (111) of section 5316 of such title is repealed.

84 Stat. 968; *Ante*, p. 69.

(d) Section 5316 of such title is amended by adding at the end thereof the following new clause:

"(131) General Counsel of the Equal Employment Opportunity Commission."

SEC. 10. Section 715 of the Civil Rights Act of 1964 is amended to read as follows: 78 Stat. 265. 42 USC 2000e-14 note.

"EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

"SEC. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section." Report to President and Congress.

SEC. 11. Title VII of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e et seq.) is amended by adding at the end thereof the following new section: *Ante*, p. 103.

"NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

"SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin. 80 Stat. 378.

"(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall— Enforcement; rules and regulations.

"(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment; National and regional plan, annual review.

Progress reports, publication.

"(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

"(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

"(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

"(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

Librarian of Congress, authority.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

"(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 USC 2000e note.

Ante, p. 104.

78 Stat. 259.
42 USC 2000e-5.

"(d) The provisions of section 706 (f) through (k), as applicable, shall govern civil actions brought hereunder.

"(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government."

USC prec. title 1.

80 Stat. 453;
84 Stat. 1955.

SEC. 12. Section 5108(c) of title 5, United States Code, is amended by—

(1) striking out the word "and" at the end of paragraph (9);

(2) striking out the period at the end of paragraph (10) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding immediately after paragraph (10) the last time it appears therein in the following new paragraph:

"(11) the Chairman of the Equal Employment Opportunity Commission, subject to the standards and procedures prescribed by this chapter, may place an additional ten positions in the Equal Employment Opportunity Commission in GS–16, GS–17, and GS–18 for the purposes of carrying out title VII of the Civil Rights Act of 1964."

SEC. 13. Title VII of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e et seq.) is further amended by adding at the end thereof the following new section: *Ante*, p. 111.

"SPECIAL PROVISION WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

"SEC. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: *Provided*, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: *Provided further*, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan." 80 Stat. 384.

SEC. 14. The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter. Effective date. *Ante*, p. 104.

Approved March 24, 1972.

Public Law 92-262

AN ACT

To continue until the close of September 30, 1973, the International Coffee Agreement Act of 1968.

March 24, 1972
[H. R. 8293]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 302 of the International Coffee Agreement Act of 1968 (19 U.S.C. 1356f) is amended by striking out "July 1, 1971" and inserting in lieu thereof "October 1, 1973". 82 Stat. 1348; 84 Stat. 2077.

Approved March 24, 1972.

Public Law 92-263

AN ACT

To authorize the Commissioner of the District of Columbia to enter into contracts for the payment of the District's equitable portions of the costs of reservoirs on the Potomac River and its tributaries, and for other purposes.

March 24, 1972
[S. 1362]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of the District of Columbia is hereby authorized to contract, D.C. Non-Federal reservoir costs, contract authority.

24-4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC, Defendants.	)	Civil Action No. 2:12-CV-0138

[PROPOSED] ORDER

The Court, having considered the circumstances, weighed the arguments of counsel, and being fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Partial Motion to Dismiss Count Two of Plaintiff's Complaint and all time-barred claims by Defendants R. J. Reynolds Tobacco Company and Pinstripe, Inc. is GRANTED.

DONE and ORDERED this ___ day of _____, 2012.

_____
Hon. William C. O'Kelley

United States District Court Senior Judge
Northern District of Georgia
Gainesville Division

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC, Defendants.	Civil Action No. 2:12-CV-0138-WCO (Collective Action)

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' PARTIAL MOTION TO DISMISS

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INTRODUCTION

This collective action challenges employment policies and practices defendant R.J. Reynolds Tobacco Company ("RJR") and its agents used in hiring individuals to fill RJR's "Territory Manager/Sales Representative/Trade Marketing" position ("Territory Manager"). Approximately half of the applicants for that position were over the age of 40 but, because of RJR's policies and practices (applied by the other defendants at RJR's request), only 19 of the 1,024 individuals hired between September 2007 and July 10, 2010 were over the age of 40. (Compl. ¶¶ 24-25.) Plaintiff Richard M. Villarreal ("Mr. Villarreal") asserts that the policies and practices RJR and the other defendants used when screening applicants for the Territory Manager position violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), because they intentionally disfavored applicants over the age of 40 (Compl. ¶¶ 36-43, Count One: Unlawful Pattern or Practice of Intentional Age Discrimination), and because they had a disparate impact on individuals over the age of 40 (Compl. ¶¶ 44-50, Count Two: Unlawful Use of Hiring Criteria Having Disparate Impact on Applicants Over 40 Years of Age).

In their partial motion to dismiss, Defendants RJR and Pinstripe, Inc. ("Pinstripe") (collectively, "Moving Defendants") assert that Count Two,

Mr. Villarreal's disparate impact claim, must be dismissed because Section 4(a)(2) of the ADEA permits only existing employees, not applicants for employment like Mr. Villarreal, to challenge employment policies and practices having a disparate impact on individuals over the age of 40. (Mem. in Support of Defs.' Partial Mot. to Dismiss ("Ds.' Mem.") at 1, 5-9.) More than 40 years ago, however, the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), interpreted language identical to that of Section 4(a)(2) as permitting disparate impact claims brought by applicants for employment. *Griggs* is "a precedent of compelling importance" in interpreting the ADEA, *Smith v. City of Jackson*, 544 U.S. 228, 234 (2005), and it establishes that Section 4(a)(2) permits claims by prospective employees like Mr. Villarreal.

This Court should also deny Moving Defendants' motion to dismiss all claims by Mr. Villarreal or any other participant in this collective action involving hiring decisions that occurred before November 19, 2009. Moving Defendants assert that those claims are time-barred because the discrimination in question occurred more than 180 days before the filing of Mr. Villarreal's May 2010 EEOC charge. (Ds.' Mem. at 9-11.) The Complaint establishes, however, that the ADEA's 180-day statute of limitations for challenging the Defendants' discriminatory conduct from 2007 forward was tolled until shortly before

Mr. Villarreal filed his charge. *See* Compl. ¶ 28 (Mr. Villarreal "did not become aware until shortly before filing the charge that there was reason to believe that his 2007 application for the Territory Manager position had been rejected on account of his age"); *Sturniolo v. Scheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025-26 (11th Cir. 1994) (in employment discrimination cases, statute of limitations tolled for so long as plaintiff lacks information necessary to establish *prima facie* case of discrimination).

Moreover, the Complaint challenges a "longstanding and demonstrable policy of discrimination" against individuals over the age of 40 when recruiting and hiring Territory Managers. That policy was not known, or knowable, to Mr. Villarreal or the other victims of the policy, but constituted a pattern or practice of discrimination over a period of several years. A challenge to a "pattern-or-practice" may encompass all implementations of the challenged policy whenever they occurred. *Sharpe v. Cureton*, 319 F.3d 259, 268 (6th Cir. 2003).

Accordingly, Moving Defendants' partial motion to dismiss should be denied in its entirety.

STATEMENT OF FACTS[1]

Since at least September 1, 2007, RJR, with the assistance of Pinstripe and other companies, has recruited and hired individuals to fill the Territory Manager position. (Compl. ¶ 10.) RJR developed "resume review guidelines" and a "preferred candidate profile" to screen candidates for the position that were intended to, and did, cause applicants over the age of 40 to be rejected. (*Id.* ¶¶ 14-23.) The resume review guidelines provided, among other things, that the Defendants would "target" individuals "2-3 years out of college" and "stay away from" individuals "in sales for 8-10 years." (*Id.* ¶ 15 & Ex. A.) The candidate profile similarly stated that individuals with 0-2 years of work experience were likely to become "Blue Chip" Territory Managers, while individuals with six or more years of experience were unlikely to do so. (*Id.* ¶ 23 & Ex. B.) Pinstripe used the guidelines and profiles when screening candidates for RJR, just as Kelly Services, Inc. had used RJR's discriminatory resume review guidelines when screening applicants for the Territory Manager position in 2007 and 2008. (*Id.* ¶¶ 13-16, 21-23.)

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[1] In ruling on a 12(b)(6) motion, the Court must accept the factual allegations in the complaint as true and construe them in the light most favorable to the nonmoving party. *See Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003).

As intended, RJR's policies resulted in the rejection of hundreds of qualified applicants over the age of 40. (*Id.* ¶ 24.) Although more than 54% of the individuals occupying comparable outside sales representative positions in the United States are over the age of 40 (*id.* ¶ 25), only 19 (1.85%) of the 1,024 individuals hired as Territory Managers between September 1, 2007 and July 10, 2010 were over the age of 40 (*id.* ¶ 24).

Mr. Villarreal first applied for the Territory Manager position in November 2007. (*Id.* ¶ 11.) Mr. Villarreal learned of the vacancy on a website maintained by Defendant CareerBuilder, LLC ("CareerBuilder"), which directed him to a website maintained by RJR through which Mr. Villarreal applied for the position. (*Id.*) Mr. Villarreal was never contacted by any of the Defendants, and he was never offered the position. (*Id.* ¶ 12.) Mr. Villarreal applied for the position again in June 2010, December 2010, May 2011, September 2011, and March 2012, but each time his application was rejected. (*Id.* ¶¶ 17, 20.)

On May 17, 2010, Mr. Villarreal filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that RJR had discriminated against him on the basis of his age in rejecting his November 2007 application. (*Id.* ¶ 27.) Mr. Villarreal did not become aware until shortly before filing his charge that there was any reason to believe that his 2007 application had been rejected on

account of his age. (*Id.* ¶ 28.) Mr. Villarreal thereafter filed amended EEOC charges encompassing his later applications for the Territory Manager position and the rejections of those applications. (*Id.* ¶ 29.) On April 2, 2012, the EEOC issued Mr. Villarreal notice of his right to sue the Defendants, and Mr. Villarreal filed this action on June 6, 2012. (*Id.* ¶ 30.)

ARGUMENT

I. The ADEA Permits Disparate Impact Claims by Prospective Employees.

In *Smith v. City of Jackson*, the Supreme Court held that Section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2), permits disparate impact claims as well as disparate treatment claims. *See, e.g.*, *Smith*, 544 U.S. at 240 (both Title VII and the ADEA "authorize recovery on a disparate-impact theory"). Moving Defendants contend, however, that the disparate impact cause of action recognized in *Smith* is available only to an employer's existing employees, not applicants for employment – *i.e.*, *prospective* employees. This argument is contrary to the Supreme Court's foundational disparate impact decision, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and is inconsistent with the ADEA's statutory language, its purpose, and its interpretation by the EEOC.

A. *Griggs* Recognized that Identical Language in Title VII Permits Disparate Impact Claims by Prospective Employees.

Section 4(a)(2) of the ADEA makes it unlawful for any employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of his employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). "Except for substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,' [this language] is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII)." *Smith*, 544 U.S. at 233; *see also Lorillard v. Pons*, 434 U.S. 575, 584 (1978) ("[T]he prohibitions of the ADEA were derived *in haec verba* from Title VII.").

The Supreme Court interpreted that language – before Title VII was amended – in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* considered whether Title VII prohibits an employer "from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites." *Id.* at 425-26.

Griggs concluded that such requirements for employment that lack a "manifest relationship to the employment in question" and that "operate as 'built-in headwinds' for minority groups" are prohibited by Section 703(a)(2). *Id.* at 432. Applying the language of Title VII as originally enacted in 1964 – the very same language that Congress three years later imported into the ADEA – *Griggs* held that hiring practices and policies that have a disparate impact on a protected class and lack a relationship to the jobs in question cannot be made "condition[s] of employment" for those jobs. *Id.* at 425; *see also id.* at 427-28 (employer required high school education "for *initial* assignment to any department except Labor" and required that "*new employees* . . . . register satisfactory scores on two professionally prepared aptitude tests") (emphasis added). *Griggs* nowhere limited its decision to policies and practices applied to current employees and nowhere suggested that the employer defendant could continue to apply the challenged requirements when hiring new employees. To the contrary, the employees who filed the suit brought it as a class action on behalf of a class that included, among others, "all Negroes who may hereafter seek employment" at the employer's power station. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1227-28 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971).

There is therefore no merit to Moving Defendants' assertion that, "[b]efore 1972, neither Section 703(a)(2) nor Section 4(a)(2) applied to applicants for employment." (Ds.' Mem. at 7.) *Griggs* in fact held just the opposite, and its recognition that hiring practices with a disparate impact may be challenged under language identical to that of Section 4(a)(2) squarely refutes Moving Defendants' interpretation of the ADEA's identical language.

B. Permitting Disparate Impact Claims by Prospective Employees Is Consistent with the Supreme Court's Later Decisions and with the Text and Purpose of the ADEA.

The interpretation of Section 703(a)(2) in *Griggs* provides persuasive evidence of the meaning of Section 4(a)(2) of the ADEA. As *Smith* recognized, the Court's "unanimous interpretation of § 703(a)(2) of Title VII in *Griggs* is . . . a precedent of compelling importance" in interpreting Section 4(a)(2) of the ADEA. 544 U.S. at 234. Accordingly, this Court need look no further than *Griggs* to conclude that Moving Defendants' motion to dismiss Count Two should be denied. Were *Griggs* not authority enough, interpreting Section 4(a)(2) to permit claims by applicants for employment as well as claims by existing employees is the only result consistent with the section's text, its purpose, its interpretation by the EEOC, and with later decisions interpreting the ADEA.

First, by its own terms Section 4(a)(2) focuses on "individuals," not merely "employees." The section prohibits practices 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). If Congress had intended Section 4(a)(2) to permit claims by current employees only, it would have used the phrase "any existing employee" and not, as it did, the words "any individual."

Permitting disparate impact claims by applicants for employment is also the only interpretation of Section 4(a)(2) consistent with the ADEA's statutory purposes. In enacting the ADEA, Congress was even more concerned about discrimination against older job applicants than about discrimination against existing employees. Congress explained 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), (3) (emphasis added). The ADEA's first and foremost purpose was to "promote employment of older persons based on their ability rather than age." 29 U.S.C. § 621(b). Construing the ADEA to permit

disparate impact claims only by individuals who are currently employed, as Moving Defendants ask this Court to do, would be inconsistent with Congress's stated concern for the unemployed and its desire to promote the employment of older workers. Moving Defendants offer no explanation why Congress would have permitted the disparate impact claims of existing employees but not those of prospective employees, when its stated concerns cover both.

In addition, the EEOC has long interpreted the ADEA as permitting disparate impact claims by both prospective and current employees. *See, e.g.*, *Smith*, 544 U.S. at 243-44 (Scalia, J., concurring) (quoting 29 C.F.R. § 1625.7(d) (2004)); *Griggs*, 401 U.S. at 433, 434 n.9 (quoting 1966 EEOC guidelines requiring that ability tests "fairly measure[ ] the knowledge or skills required by the particular job or class of jobs which the *applicant* seeks, or which fairly affords the employer a chance to measure the *applicant's* ability to perform a particular job or class of jobs") (emphasis added). The EEOC's current regulations, which are entitled to "great deference" when interpreting the ADEA, *Griggs*, 401 U.S. at 434, make no distinction between prospective and existing employees and provide yet further evidence that employment practices that disparately impact workers 40 or older and that are not justified by a "reasonable factor other than age" are prohibited whether they are applied when hiring new employees or when dealing

with existing employees. *See* 29 C.F.R. § 1625.7 (as amended Mar. 30, 2012) ("*Any* employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a 'reasonable factor other than age.'") (emphasis added).

Finally, *Griggs*'s interpretation of the ADEA's language is consistent with the Supreme Court's post-*Griggs* decisions. *Smith* confirmed that *Griggs* provides "compelling" evidence of the meaning of Section 4(a)(2), 544 U.S. at 234, and the Court cited two cases involving "failure-to-hire" claims as "appropriate" ADEA disparate impact cases, *id.* at 237, 238 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)). In addition, the EEOC regulation to which Justice Scalia's concurrence chose to defer applied the disparate impact analysis to claims by "employees or applicants for employment." *Smith*, 544 U.S. at 244 (Scalia, J., concurring). Moving Defendants' reliance on Justice O'Connor's concurrence in the judgment in *Smith* is misplaced: Only two other Justices joined that opinion, which would have prohibited ADEA disparate impact claims altogether.[2]

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[2] Consistent with the majority's analysis, many federal courts after *Smith* have allowed ADEA disparate impact claims brought by job applicants. *See, e.g.*, *Hunter v. Santa Fe Protective Servs., Inc.*, 822 F. Supp. 2d 1238, 1252-53 (M.D. Ala. 2011) (job applicants established *prima facie* ADEA disparate impact case).

Gross v. FBL Financial Servs., Inc., 557 U.S. 167 (2009), is irrelevant here. Citing *Gross*, Moving Defendants contend that Congress must have "acted intentionally" in 1972 when amending Title VII to include "applicants for employment" in Section 703(a)(2) without making a comparable amendment to the ADEA. (Ds.' Mem. at 8 (citing *Gross*, 557 U.S. at 174).) However, the 1991 amendments to Title VII at issue in *Gross* were entirely different from the 1972 amendment to Section 703(a)(2) relied upon by Moving Defendants.

Congress enacted the 1991 amendments in order to reverse the construction of Title VII's statutory language in several Supreme Court cases, including *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See Gross*, 557 U.S. at 174. *Gross* concluded that Congress's failure to amend the ADEA's identical language at the same time that it rejected the Court's interpretation of that language in Title VII reflected a judgment that the two statutes should not be interpreted in the same manner going forward.

The 1972 amendment of Section 703(a)(2), by contrast, did nothing to change the meaning of Title VII. Rather than "extending" that section to prospective employees (Ds.' Mem. at 8), the amendment simply codified the Court's interpretation of Title VII in *Griggs*. Indeed, the House Report on the 1972 amendments to Title VII quoted extensively from *Griggs* and explained that

"[t]he provisions of the bill are fully in accord with the decision of the Court" in *Griggs*. H.R. Rep. No. 92-238, at 21-22 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2157. Congress's decision to codify and endorse that holding does not suggest that Congress thereby intended to *reverse* that holding as to the ADEA. If anything it demonstrates that *Griggs* was correctly decided.[3]

Moving Defendants' motion to dismiss Count Two should therefore be denied.

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[3] The other authorities cited by Moving Defendants, none of which are binding on this Court, make no attempt to explain how their interpretation of Section 4(a)(2) can be squared with *Griggs*. Moreover, in each decision the court's passing suggestion that Section 4(a)(2) permits claims only by current employees had no impact on the ultimate disposition of the case. *See, e.g.*, *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 n.2 (8th Cir. 1996) (disparate impact claim was brought by existing employee); *Allen v. Sears Roebuck & Co.*, 803 F. Supp. 2d 690, 698 (E.D. Mich. 2011) (rejecting disparate impact claim for failure to identify specific employment practice or make adequate statistical showing, and because defendant's policy was based on reasonable factor other than age); *EEOC v. Allstate Ins. Co.*, 458 F. Supp. 2d 980, 989-90 (E.D. Mo. 2006) (permitting disparate impact claim by former employees because rehire policy was "part of [a] Reorganization Plan which effected all employee-agents"). Moving Defendants' reliance on the vacated Eighth Circuit opinion in *Allstate* is particularly inappropriate, because the Eighth Circuit both vacated that panel opinion and concluded that the Court had lacked jurisdiction over the appeal. *See* Judgment, *EEOC v. Allstate Ins. Co.*, No. 07-1559 (8th Cir. Sept. 8, 2008).

II. None of the Claims by Mr. Villarreal or Any Other Participants in this Collective Action Are Time-Barred.

Moving Defendants also ask this Court to dismiss as time-barred "[a]ny claims related to hiring decisions made more than 180 days before [Mr.] Villarreal filed his [EEOC] charge on May 17, 2010." (Ds. Mem. at 9.) However, Mr. Villarreal's Complaint establishes that the statute of limitations for filing an EEOC charge challenging the rejection of his 2007 application for the Territory Manager position was equitably tolled until shortly before he filed his EEOC charge, if not later. Moreover, the Complaint challenges a longstanding pattern-or-practice of discrimination by RJR and the other Defendants arising out of a longstanding discriminatory policy, and, under the law, Mr. Villarreal may challenge all applications of that discriminatory policy whenever they occurred.

A. The Statute of Limitations Was Equitably Tolled Until Spring 2010 at the Earliest.

As Moving Defendants acknowledge, the ADEA's statute of limitations is not jurisdictional, and "is subject to waiver, estoppel, and equitable tolling." (Ds.' Mem. at 14 (citing *Zipes v. TWA*, 455 U.S. 385, 393 (1982).) Equitable tolling forgives any passage of time that occurs before "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. Scheaffer, Eaton, Inc.*, 15

F.3d 1023, 1025 (11th Cir. 1994) (quoting *Reeb v. Econ. Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir. 1975)). Until a plaintiff has enough information to establish a *prima facie* case of unlawful discrimination, the limitations period does not begin to run. *Sturniolo*, 15 F.3d at 1025; *see also Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1265 (11th Cir. 2003). "[M]ere suspicion of age discrimination, unsupported by personal knowledge," does not start the limitations period for filing an EEOC charge. *Sturniolo*, 15 F.3d at 1026; *see also Jones*, 331 F.3d at 1267-68 (limitations period was tolled even after plaintiff prepared handwritten note describing her suspicions of age discrimination).

Mr. Villarreal's Complaint establishes that the limitations period for filing an EEOC charge challenging the rejection of his 2007 application for the Territory Manager was equitably tolled until less than a month before he filed his EEOC charge, if not later. Unlike the plaintiffs in *Sturniolo* and *Jones*, who suspected age discrimination but lacked the facts necessary to establish a *prima facie* case, Mr. Villarreal was not aware "until shortly before filing [his EEOC] charge" that there was any reason whatsoever to believe that he had been the victim of age discrimination, and "[t]he facts necessary to support Mr. Villarreal's charge of discrimination were not apparent to him . . . until less than a month before he filed his May 17, 2010 EEOC charge." (Compl. ¶ 28.)

The Complaint demonstrates why Mr. Villarreal's failure to discover the Defendants' discriminatory actions at any time before April 2010 was reasonable and not imprudent. The employment policies and practices at issue in this case were applied by the Defendants when recruiting and hiring individuals to fill the Territory Manager position for RJR. (Compl. ¶¶ 10, 13-23 & Exs. A, B.) As an applicant for the Territory Manager position who applied using a website maintained by RJR (Compl. ¶ 11), Mr. Villarreal did not know whom RJR ultimately hired to fill the Territory Manager position, and he had no access to information about RJR's employment policies and practices or any way of learning how RJR and the other Defendants were applying those policies and practices. All that Mr. Villarreal knew or could have known until 2010 was that he applied for the position but was never contacted or offered it – facts that are by themselves insufficient to support a charge of discrimination. (Compl. ¶¶ 11-12, 28.)

Moving Defendants do not contend that these facts, if true, are insufficient to establish equitable tolling. Rather, they contend that the Complaint fails to plead these facts with the specificity required to establish a "plausible" case for equitable tolling. (Ds.' Mem. at 15-17.) Under the circumstances alleged above, however, it is entirely plausible that Mr. Villarreal, despite demonstrating "a reasonably prudent regard for his rights," *Sturniolo*, 15 F.3d at 1025 (citation omitted), did not

learn, and could not have learned, of the Defendants' discriminatory actions, policies, and practices until April 2010. (*See* Compl. ¶ 28 ("The facts necessary to support Mr. Villarreal's charge of discrimination . . . could not have been apparent to him, until less than a month before he filed his May 17, 2010 EEOC charge.").) Indeed, Moving Defendants make no effort to explain how Mr. Villarreal could have learned of their resume review guidelines, their preferred candidate profile, and their discriminatory policy of preferring candidates under the age of 40 for the Territory Manager position.

Ultimately, Moving Defendants' contention is not that the Complaint fails to provide a plausible explanation as to why Mr. Villarreal, despite acting with diligence, failed to learn of their discriminatory policies and practices until 2010. Instead, Moving Defendants simply complain that the Complaint provides inadequate details regarding how, less than a month before filing his EEOC charge, Mr. Villarreal finally learned of RJR's policies and practices. (Compl. ¶ 28.) But those details would be relevant, if at all, only to determining whether the statute of limitations actually began to run in April 2010, or whether, like the plaintiffs *Sturniolo* and *Jones*, Mr. Villarreal still lacked the facts necessary to establish a *prima facie* case of discrimination. That issue is irrelevant and need not be resolved by this Court, because Mr. Villarreal's EEOC charge was filed less than a

month after he learned of RJR's discriminatory policies and was therefore timely whether or not the statute of limitations began to run in April 2010.

B. Mr. Villarreal's "Pattern-or-Practice" Claim Properly Encompasses All Instances in Which the Defendants Enforced RJR's Policy of Discriminating Against Individuals Over 40.

Even if the statute of limitations were not tolled until April 2010 or later, Moving Defendants' motion to dismiss claims arising before November 19, 2009 would be without merit in any event because Mr. Villarreal's Complaint challenges a longstanding pattern or practice of discrimination by RJR and the other Defendants.

In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Supreme Court expressly declined to consider whether "'pattern-or-practice' claims brought by private litigants" can properly encompass actions that occurred outside of the limitations period but that were taken pursuant to a policy that continued within the limitations period. *Id.* at 115 n.9. Since *Morgan*, several circuit courts have recognized that such a "pattern-or-practice" claim indeed can permissibly encompass discriminatory acts occurring outside the limitations period. In *Sharpe v. Cureton*, 319 F.3d 259 (6th Cir. 2003), for example, the Sixth Circuit held that *Morgan*'s limitation on the "continuing violation" theory does not affect claims involving a "longstanding and demonstrable policy of

discrimination." *Id.* at 268. Likewise, the Seventh Circuit has explained that, if a plaintiff alleges a pattern and practice of discrimination, the court "may look outside of the relevant time period." *Dandy v. UPS*, 388 F.3d 263, 270 (7th Cir. 2004). And the Third Circuit has recognized that "application of the continuing violations theory may be appropriate in cases in which a plaintiff can demonstrate that the defendant's allegedly wrongful conduct was part of a practice or pattern of conduct in which he engaged both without and within the limitations period." *McAleese v. Brennan*, 483 F.3d 206, 218 (3d Cir. 2007).

The Eleventh Circuit has not decided whether pattern-or-practice class action claims brought by a representative plaintiff like Mr. Villarreal and which challenge a "longstanding and demonstrable policy of discrimination" that was enforced within the limitations period, *Sharpe*, 319 F.3d at 268, may properly encompass discriminatory actions taken outside that period pursuant to the challenged policy.[4] If directly confronted with the question, however, the Eleventh

[4] *Riccard v. Prudential Insurance Co. of America*, 307 F.3d 1277 (11th Cir. 2002), for example, did not involve a pattern-or-practice claim. Likewise, in *EEOC v. Joe's Stone Crabs*, 296 F.3d 1265, 1269 n.1 (11th Cir. 2002), "the EEOC expressly stated before both the district court and [the Eleventh Circuit] that [the case] was not a pattern and practice case." In *City of Hialeah v. Rojas*, 311 F.3d 1096, 1102 (11th Cir. 2002), the purported discriminatory practice had last been applied to the plaintiff *18 years* before he filed his EEOC charge. And in *Davis v. Coca-Cola Bottling Co. Consolidated*, 516 F.3d 955, 967-79 (11th Cir. 2008), the Eleventh Circuit concluded that the plaintiffs

Circuit would likely recognize, like the other courts cited above, that a true pattern-or-practice claim brought by a private plaintiff in a representative capacity to challenge a "longstanding and demonstrable policy of discrimination" that was enforced within the limitations period may properly encompass all discriminatory actions taken by the defendant pursuant to that policy. Like the hostile work environment claims considered in *Morgan*, a pattern-or-practice "is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Morgan*, 536 U.S. at 117 (quoting 42 U.S.C. § 2000e-5(e)(1)). Such a claim's "very nature involves repeated conduct" and is "based on the cumulative effect of individual acts." *Id.* at 115. In much the same way that "a single act of harassment may not be actionable on its own" under a hostile work environment theory, *id.*, the evidence that an employer has a longstanding policy of discrimination generally is not available to a representative plaintiff until the employer has applied that policy repeatedly over a period of days, months, or sometimes years. In this case, for example, the evidence that less than two percent of the individuals that RJR hired as Territory Managers between September 2007 and July 2010 were over the age of 40 (Compl. ¶ 25) could not possibly have been

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could not pursue a true pattern-or-practice claim because they were not pursuing their claims in a representative capacity.

available to Mr. Villarreal when his 2007 application for the Territory Manager position was rejected because of his age.

Accordingly, even if the Court finds equitable tolling unavailable here, the Court should deny Moving Defendants' motion to dismiss all claims arising before November 19, 2009 and should instead hold that "the entire time period" during which RJR and the other Defendants implemented their discriminatory hiring policies "may be considered by [the] court for the purposes of determining liability." *Morgan*, 536 U.S. at 117.

CONCLUSION

For the foregoing reasons, Moving Defendants' partial motion to dismiss should be DENIED.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

Pursuant to Local Rule 7.1(D), the undersigned counsel hereby certifies that the foregoing ***PLAINTIFF'S OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS*** has been prepared in accordance with Local Rule 5.1(C) using 14-point Times New Roman font.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC, Defendants.	Civil Action No. 2:12-CV-0138-WCO (Collective Action)

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2012, I caused the foregoing ***PLAINTIFF'S OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS*** to be electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification to the following attorneys of record:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

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

Plaintiff,

v.

Case No. 2:12-cv-00138-WCO

R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC,

Defendants.
_____/

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff RICHARD M. VILLARREAL and Defendant CAREERBUILDER, LLC, by their attorneys and pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, hereby stipulate to the dismissal with prejudice of Plaintiff's claims against Defendant CareerBuilder, LLC. Each party will bear its own costs and attorneys' fees.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

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

Plaintiff,

v.

Case No. 2:12-cv-00138-WCO

R.J. REYNOLDS TOBACCO COMPANY; PINSTRIPE, INC.; and CAREERBUILDER, LLC,

Defendants.
_____/

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2012, I electronically filed this ***STIPULATION OF DISMISSAL WITH PREJUDICE*** with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification to the following attorneys of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY; and PINSTRIPE, INC. Defendants.	)	Civil Action No. 2:12-CV-0138-RWS

REPLY IN SUPPORT OF DEFENDANTS
R.J. REYNOLDS TOBACCO COMPANY'S
AND PINSTRIPE'S PARTIAL MOTION TO DISMISS

Dated: October 12, 2012

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I. Introduction

In his Opposition, Plaintiff concedes that only Section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2), authorizes disparate impact claims. (Opp'n 6.) In response to Defendants' argument that Section 4(a)(2) does not authorize failure-to-hire claims, Plaintiff cites *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the ADEA's text and purpose, and various guidelines issued by the Equal Employment Opportunity Commission ("EEOC"). But, none of these save Plaintiff's claim.

First, *Griggs* was a Title VII case brought by current employees. It did not consider whether applicants for employment may bring disparate impact claims and said nothing about the ADEA. Second, the ADEA's purpose is consistent with its text. The ADEA "contains language that significantly narrows its coverage" compared to Title VII, and as relevant here, it precludes failure-to-hire adverse impact claims. *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). Finally, the EEOC's guidelines are irrelevant because they do not interpret Section 4(a)(2).

Plaintiff's attempt to salvage his untimely claims by invoking the equitable tolling and continuing violation doctrines also fails. He has not pled any facts that would establish the "extraordinary circumstances" necessary to justify equitable tolling. And hiring decisions are discrete acts that are not subject to the continuing

violation doctrine. Linking a series of decisions not to hire under the label of a pattern or practice does not alter that fact.

II. Plaintiff's Disparate Impact Claim Should be Dismissed

Plaintiff provides no grounds upon which to deny Defendants' Motion.

A. *Griggs v. Duke Power Company* Did Not Authorize Disparate Impact Claims By Applicants For Employment

Griggs involved a Title VII challenge by a group of incumbent employees against two practices utilized by Duke Power Company. 401 U.S. at 426-28. The employees challenged completion of high school as a prerequisite to transfer and a test score requirement for "placement" in any department other than Duke Power's relatively low-paying Labor Department. *Id.* at 427-28. *Griggs* was not a hiring case, and the Court did not analyze Title VII's statutory language, did not say anything about whether Title VII authorizes a claim by applicants for employment, and did not mention the ADEA. Thus, Plaintiff's reliance on *Griggs* is misplaced.

Of course, when the Court decided *Griggs* in 1971, Title VII's relevant statutory provision, Section 703(a)(2), 42 U.S.C. § 2000e-2(a), said nothing about "applicants for employment." Congress added that phrase in 1972, and by doing so, expanded Section 703(a)(2)'s protections. (*See* Defs.' Br. 7.) Congress has never amended the ADEA's parallel provision, Section 4(a)(2), and this Court "cannot ignore Congress' decision to amend Title VII's relevant provisions but not make

similar changes to the ADEA." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). As a result, the textual differences between Title VII and the ADEA demonstrate that Congress extended disparate impact protections to Title VII applicants and did not do so for the ADEA.

Plaintiff counters by citing the Fourth Circuit's decision in *Griggs*. (Opp'n 8.) (citing *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), *rev'd*, 401 U.S. 42 (1971)). Yet, the Fourth Circuit did not consider whether Title VII permits adverse impact claims by applicants and acknowledged that the plaintiff employees challenged only Duke Power's "promotion and transfer system," not its hiring practices. 420 F.2d at 1228. In any case, the Supreme Court reversed.

Finally, *Griggs* was not an ADEA case. And, the Supreme Court has repeatedly declined to import Title VII standards into the ADEA. *Gross*, 557 U.S. at 175 n.2 (citing cases that declined to extend Title VII protections to the ADEA.).

B. The ADEA's Text And Purpose Do Not Authorize Adverse Impact Hiring Claims

Section 4(a)(2) makes it 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.

29 U.S.C. § 623(a)(2). Section 4(a)(2) protects "employees" and contrasts with Section 4(a)(1)'s protections for "any individual." (*See* Defs.' Br. 5-7.) Congress could have amended Section 4(a)(2) by adding the phrase "applicants for employment" in the same way that it amended Section 703(a)(2). It did not.

Plaintiff ignores these textual differences and points to Section 4(a)(2)'s reference to "any individual." But Section 4(a)(2)'s prohibitions against limiting, segregating, and classifying "employees" limits and defines its subsequent reference to "any individual." Plaintiff also asserts that Congress could have added the phrase "any existing employee" (Opp'n 10), but that phrase is unnecessary because the first clause of Section 4(a)(2) limits the prohibitions to "employees." And if Congress had intended that Section 4(a)(2) apply to "applicants for employment," it would have included that phrase in Section 4(a)(2) in the same way that it repeatedly used the phrase elsewhere in the ADEA. *See, e.g.*, 29 U.S.C. §§ 623(c), 623(d), 631(b), 633a(a) 633a(b), all of which distinguish between "employee" or "employees" and "applicant(s) for employment."

Plaintiff's argument about the ADEA's purpose fares no better. (*See* Opp'n 10.) The ADEA prohibits "arbitrary" age discrimination, not all age discrimination. 29 U.S.C. § 621(b); *Gen. Dynamics v. Cline*, 540 U.S. 581, 587-91 (2004). For this reason, *City of Jackson* recognized that "age, unlike Title VII's protected

classifications, not uncommonly has relevance to an individual's capacity to engage in certain types of employment." 544 U.S. at 229. "[T]he differences between age and the classes protected in Title VII are relevant" and "Congress might well have intended to treat the two differently." 544 U.S. at 237 n.7. These differences "*coupled with a difference in the text of the statute*" establish that the "scope of disparate-impact liability under ADEA is narrower than under Title VII." *Id.* at 237 n.7, 240 (emphasis in original).

The Court took the same approach in 2009 when, in *Gross*, it concluded that the "textual differences" between the ADEA and Title VII mean that so-called "mixed motive" protections extend to Title VII and not to the ADEA. *Gross*, 557 U.S. at 175 n.2. Likewise, in this case, the textual differences mean that Title VII authorizes disparate impact claims by applicants and the ADEA does not.

Next, Plaintiff asserts that EEOC interprets the ADEA as permitting disparate impact claims by applicants. He cites EEOC's 1966 Title VII guidelines; a former regulation about the ADEA's "reasonable factor other than age" ("RFOA") defense; and a current RFOA regulation. (Opp'n 11-12.) These authorities do not support Plaintiff.

First, the 1966 guidelines interpreted Title VII's use of the phrase "professionally developed ability test." *Griggs*, 401 U.S. 433 n.9. That phrase is

not part of the ADEA, and EEOC's 1966 guidelines did not and could not say anything about the ADEA because Congress did not enact the ADEA until 1967.

Second, EEOC's now-rescinded RFOA regulation is irrelevant, and the government "disavowed" it as "overtaken" by *City of Jackson*. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 95 & n.9 (2008). Plaintiff cites Justice Scalia's concurrence in *City of Jackson* (Opp'n 11-12), but Justice Scalia cited the regulation only as support for his view that the ADEA generally recognizes disparate impact claims. He properly conceded that "perhaps [EEOC's] attempt to sweep employment applications into the disparate-impact prohibition is mistaken." *City of Jackson*, 544 U.S. at 246 n.3 (Scalia, J., concurring).

Finally, EEOC's current disparate impact regulation, enacted earlier this year, does not interpret Section 4(a)(2). Rather, it purports to establish standards that govern the RFOA affirmative defenses contained in ADEA Section 4(f)(1), 29 U.S.C. § 623(f)(1). *See* 29 C.F.R. § 1625.7(b)-(e).

Plaintiff also argues the fact that the 1972 Title VII amendments did "nothing" to change the meaning of Title VII Section 703(a)(2). (Opp'n 13.) Plaintiff's theory would render meaningless the addition of the phrase "applicants for employment" to Section 703(a)(2). (*See* Defs.' Br. 7-8.)

Plaintiff cites legislative history that says only that the "provisions" of the 1972 Title VII amendments are "fully in accord" with *Griggs*. (Opp'n 13-14.) This history says nothing about the ADEA or whether the pre-1972 version of Title VII recognized a disparate impact claim by applicants. Furthermore, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

Finally, Plaintiff cites *Hunter v. Santa Fe Protective Services, Inc.*, 822 F. Supp. 2d 1238 (M.D. Ala. 2011), and asserts that "many" courts have "allowed" disparate impact failure-to-hire age claims. (Opp'n 12 n.2.) However, the *Hunter* court never addressed whether Section 4(a)(2) permits disparate impact claims by applicants because it was never asked to do so. Moreover, the court granted summary judgment for the defendant. 822 F. Supp. 2d at 1252-54.

III. The Equitable Tolling and Continuing Violation Doctrines Do Not Save Plaintiff's Untimely Claims

Plaintiff does not dispute that the ADEA's charge-filing period operates as a statute of limitations. Indeed, he ignores *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208 (11th Cir. 2001), in which the Eleventh Circuit held that "the rearward scope of an ADEA opt-in action should be limited to those plaintiffs who allege discriminatory [conduct] within 180 or 300 days before the representative charge is filed." *Id.* at 1214 n.2, 1220-21. Instead, Plaintiff claims that the statute of

limitations on his individual charge was equitably tolled and that the continuing violation doctrine allows him to pursue claims for applications submitted outside the 180-day charge filing period. Neither argument saves his untimely claims.

A. Plaintiff Has Failed to Plead Sufficient Facts to State a Claim for Equitable Tolling

Equitable tolling is "an extraordinary remedy to be applied sparingly." *Hunt v. Ga. Dep't of Cmty. Affairs*, No. 12-10935, 2012 WL 4074568, at *2 (11th Cir. Sept. 18, 2012); *Bost v. Fed. Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004). To establish equitable tolling, a plaintiff must establish that: (1) he pursued his rights diligently; and (2) some extraordinary circumstance stood in his way. *Downs v. McNeil*, 520 F.3d 1311, 1324 (11th Cir. 2008). Indeed, "[e]quitable tolling typically requires some affirmative misconduct, such as fraud, misinformation or deliberate concealment." *Hunt*, 2012 WL 4074568, at *2 (citation omitted).

Here, Plaintiff alleges no extraordinary circumstances that delayed his charge. Rather, Plaintiff claims that equitable tolling applies because the necessary "facts" were not "apparent" to him until a month before he attempted to file an EEOC charge in May 2010. (Opp'n 16.) These allegations are insufficient to state a claim for equitable tolling. Indeed, Plaintiff does not allege what facts he learned in April 2010 that he did not previously know or how he learned them. And, the same argument could be made in every failure to hire case because external applicants

generally do not have specific information about the selection process or other candidates. Thus, Plaintiff's argument, if accepted, would eviscerate the statute of limitations in failure to hire cases and mean that the limitations period in such cases is indefinitely tolled. That is not the law. *See, e.g.*, *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001) (equitable tolling rejected in failure-to-hire case because plaintiff did not allege any misrepresentation or wrongdoing by defendant).

Indeed, Defendants' opening brief demonstrates that courts reject equitable tolling claims even when a plaintiff alleges that the defendant misled him. (Defs.' Br. 14-16.) Plaintiff ignores these cases and cites two cases that he says show that the statute of limitations is tolled until the plaintiff has sufficient facts to establish a *prima facie* case of discrimination. (Opp'n 15-16.) But he fails to mention a critical additional component to these decisions – in each, the employer affirmatively misled the plaintiff about the facts surrounding the challenged employment action.

Specifically, in *Sturniolo v. Scheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994), the plaintiff was told at the time of his termination that his position as Southeast region sales manager was being eliminated and his region was being combined with another region. The plaintiff later learned that his position was not eliminated and a younger employee was assigned to it. Based on these facts, the court held that equitable modification might apply. Similarly, in *Jones v. Dillard's*

Inc., 331 F.3d 1259 (11th Cir. 2003), at the time of her layoff, the plaintiff was led to believe that her position was being discontinued. She subsequently learned that in fact the company did not eliminate her position and hired a younger person. *Id.* at 1261-62. The *Jones* court observed that "a party responsible for [] wrongful concealment is estopped from asserting the statute of limitations as a defense." *Id.* at 1265 (citation omitted). Here, Plaintiff has not alleged — and cannot allege — that anyone misled him or wrongfully withheld any facts from him.

B. The Continuing Violation Doctrine Does Not Apply to a Series of Discrete Hiring Decisions

Plaintiff's attempt to rely on the continuing violation doctrine is equally devoid of merit. As noted, Plaintiff makes no mention of the Eleventh Circuit's decision in *Hipp*. Yet *Hipp* was filed as a pattern or practice ADEA action, and the court determined that an opt-in plaintiff's claims were untimely and rejected application of the continuing violation theory. In doing so, the court explained that it could "find no authority . . . for allowing one plaintiff to revive a stale claim simply because the allegedly discriminatory policy still exists and is being enforced against others." *Hipp*, 252 F.3d at 1221. *Hipp* governs Plaintiff's representative

pattern or practice claim and limits it to hiring decisions that occurred within 180 days before he filed his charge.[1]

Despite *Hipp*, Plaintiff argues that his challenge to an alleged "longstanding policy" of considering years of prior sales experience enables him to avoid the limitations period. (Opp'n 21.) Plaintiff overlooks the fact that a discriminatory hiring policy is only implemented through a series of discrete acts, and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002), explains that such a "serial violation" situation is not subject to the continuing violations exception. Plaintiff also overlooks the numerous recent decisions in which the courts, in light of *Morgan*, repeatedly held that discrete acts cannot be aggregated under a continuing violations theory to revive time-barred claims. Indeed, this was the Eleventh Circuit's holding in *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 970 (11th Cir. 2008) (holding that some of the defendant's allegedly discriminatory hiring decisions and light work assignments "constituted discrete

[1] Plaintiff may not bring an individual pattern or practice discrimination claim. *Banks v. Ackerman Sec. Sys., Inc.*, 2009 WL 974242, at *3 (N.D. Ga. Apr. 10, 2009) ("The Eleventh Circuit has held that pattern and practice cases only may be brought by the EEOC or a class of plaintiffs."). Plaintiff apparently recognizes this fact and argues only that the continuing violation theory applies to the pattern or practice class claim. (Opp'n 21.)

acts" and were time barred despite plaintiff's claims of a pattern or practice of discrimination).[2]

Moreover, immediately following *Morgan*, several circuits held that a challenge to a long-standing policy does not enable plaintiffs to revive untimely claims based on discrete acts. *See, e.g., Williams v. Giant Food, Inc.*, 370 F.3d 423, 429-430 (4th Cir. 2004) (alleged 20-year "pattern or practice" of discrimination did not extend the limitations period.); *Davidson v. AOL*, 337 F.3d 1179 (10th Cir. 2003) (failure-to-hire challenge to company-wide policy; continuing violations theory did not apply); *Cherosky v. Henderson*, 330 F.3d 1243, 1248 (9th Cir. 2003) ("it would eviscerate *Morgan*'s premise to circumvent the timely filing requirements merely because a plaintiff alleges that the acts were taken pursuant to a discriminatory policy").

More recently, numerous courts have explicitly held that the continuing violation doctrine does not allow a plaintiff to pursue a pattern or practice failure-to-

[2] Plaintiff argues that *Davis* is not dispositive on this issue because the court went on to find the pattern or practice claims lacked merit (Opp'n 20 n.4), but that fact, as the court itself noted, does not affect its statute of limitations analysis. 516 F.3d at 970 n.33. Likewise, Plaintiff unpersuasively attempts to distinguish *City of Hialeah v. Rojas*, 311 F.3d 1096 (11th Cir. 2002), in which the court applied *Morgan* to a Title VII class action, on the grounds that the discriminatory practice last applied to the plaintiff 18 years before he filed his charge. If Plaintiff's theory is correct, whether one, two or twenty years have passed should make no difference.

hire claim for acts that pre-date the charge-filing period. For example, in *EEOC v. Freeman*, No. RWT 09cv2573, 2010 WL 1728847 (D. Md. Apr. 27, 2010), the court rejected the EEOC's argument that the continuing violation doctrine allows it to pursue stale claims in a pattern or practice Title VII failure-to-hire case challenging the use of credit and criminal histories to reject applicants. The court explained that "the continuing violation doctrine permits the inclusion of additional, but otherwise time-barred, *claims* – not the inclusion of otherwise time-barred *parties*." *Id.* at *6. (emphasis in original). The court also explained that "[a] pattern or practice of refusing to hire job applicants does not constitute a continuing violation." *Id.* The court held that "[l]inking together a series of decisions not to hire under the label of a pattern or practice does not change the fact that each decision constituting the pattern or practice is discrete." *Id.*

Similarly, in *EEOC v. Kaplan*, 790 F. Supp. 2d 619 (N.D. Ohio 2011), another pattern or practice failure-to-hire race discrimination case, the court rejected EEOC's continuing violation theory because "in a pattern-or-practice case such as this, the discrete decisions to refuse to hire and to terminate employment cannot be linked together to create a continuing violation." *Id.* at 625. The court emphasized that each hiring decision occurred on a readily-identifiable date certain, and each was, therefore, subject to the charge-filing limitations period. Other courts have

reached the same conclusion. *E.g.*, *EEOC v. United States Steel Corp.*, Civil Action No. 10-1284, 2012 WL 3017869, at *7 (W.D.Pa. July 23, 2012); *EEOC v. PBM Graphics, Inc.*, No. 1:11-cv-805, 2012 WL 2513512, at *13 (M.D.N.C. June 28, 2012); *EEOC v. Bloomberg, L.P.*, 751 F. Supp. 2d 628, 647 (S.D.N.Y. 2010).

Plaintiff cites no post-*Morgan* cases in which a court has held that the continuing violation doctrine enables a plaintiff to avoid the charging-filing limitations period in a pattern or practice failure-to-hire case. Instead, he cites ambiguous language from three out-of-circuit cases. (*See* Opp'n 19-20.) None of these cases actually extended the limitations period. For example, Plaintiff cites *Dandy v. UPS*, 388 F.3d 263, 270 (7th Cir. 2004), for the proposition that a court may "look outside the relevant period," but that statement referred to hostile work environment harassment cases that *Morgan* determined are governed by different timeliness standards than discrete act cases like this one. *Morgan*, 536 U.S. at 117. And the *Dandy* court ultimately held that the charge-filing period limited plaintiff's failure-to-hire claims. 388 F.3d at 270.

Plaintiff also cites *Sharpe v. Cureton*, 319 F.3d 259 (6th Cir. 2003), but nothing in *Sharpe* suggests that a representative plaintiff in a putative opt-in collective action can salvage the untimely claims of other individuals by alleging

that there is an ongoing discriminatory policy. And, the court determined that the continuing violations doctrine did not save plaintiff's untimely retaliation claims.

Finally, in *McAleese v. Brennan*, 483 F.3d 206 (3d Cir. 2007), the Third Circuit held that the continuing violation doctrine did not save the plaintiff's habeas corpus claims because each denial of habeas corpus was a discrete act.

IV. Conclusion

For the foregoing reasons, Defendants respectfully request that the Court dismiss Count Two of the Complaint and any claims under both Count One and Two that arose before November 19, 2009.

STATEMENT OF COMPLIANCE

Pursuant to Local Rule 7.1(D), this brief was prepared in court approved font and point.

Dated: October 12, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2012, I electronically filed Defendants R.J. Reynolds Tobacco Company's and Pinstripe, Inc.'s Reply In Support of Partial Motion to Dismiss with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys:

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Richard M. Villarreal, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. Reynolds Tobacco Company and Pinstripe, Inc., Defendants.	Civil Action No. 2:12-CV-00138-RWS

NOTICE OF FILING CONSENTS TO JOIN

Plaintiff Richard M. Villarreal, by his undersigned counsel, hereby gives notice of the filing in this matter of Consents to Join in this Civil Action, executed by each of the individuals listed below, which consents are attached hereto collectively as Exhibit A:

1. Shuntel Blount
2. Teresa Callaway
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4. Jeffrey P. Clark
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Richard M. Villarreal, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. Reynolds Tobacco Company and Pinstripe, Inc., Defendants.	Civil Action No. 2:12-CV-0138-RWS

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2012, I served a copy of ***NOTICE OF FILING CONSENTS TO JOIN*** with the Clerk of the Court using the CM/ECF system, which will automatically send email notification to the following attorneys of record:

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47-1

EXHIBIT A

CONSENT TO JOIN

Consent to Sue Under the Age Discrimination in Employment Act ("ADEA")

I applied to R. J. Reynolds Tobacco Company sometime after September 2007 for employment in the position of Territory Manager.

I choose to participate in the ADEA collective action titled *Villarreal, et al. v. R. J. Reynolds Tobacco Company*, Civil Action No. 2:12-CV-0138 (U.S.D.C., Northern District of Georgia, Gainesville Division).

I choose to be represented in this matter by the named Plaintiff and his counsel of record in this action.

Name: SHUNTEL D. BLOUNT

Signature: Shuntel D. Blount

Date Signed: 10/05/2012

CONSENT TO JOIN

Consent to Sue Under the Age Discrimination in Employment Act ("ADEA")

I applied to R. J. Reynolds Tobacco Company sometime after September 2007 for employment in the position of Territory Manager.

I choose to participate in the ADEA collective action titled *Villarreal, et al. v. R. J. Reynolds Tobacco Company*, Civil Action No. 2:12-CV-0138 (U.S.D.C., Northern District of Georgia, Gainesville Division).

I choose to be represented in this matter by the named Plaintiff and his counsel of record in this action.

Name: TERESA CALLAWAY

Signature: Teresa Callaway

Date Signed: 10/12/12

CONSENT TO JOIN

Consent to Sue Under the Age Discrimination in Employment Act ("ADEA")

I applied to R. J. Reynolds Tobacco Company sometime after September 2007 for employment in the position of Territory Manager.

I choose to participate in the ADEA collective action titled *Villarreal, et al. v. R. J. Reynolds Tobacco Company*, Civil Action No. 2:12-CV-0138 (U.S.D.C., Northern District of Georgia, Gainesville Division).

I choose to be represented in this matter by the named Plaintiff and his counsel of record in this action.

Name: BILLY R. CARTER

Signature:

Date Signed: 10/4/12

CONSENT TO JOIN

Consent to Sue Under the Age Discrimination in Employment Act ("ADEA")

I applied to R. J. Reynolds Tobacco Company sometime after September 2007 for employment in the position of Territory Manager.

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I choose to be represented in this matter by the named Plaintiff and his counsel of record in this action.

Name: JEFFREY P. CLARK

Signature: Jeffrey P. Clark

Date Signed: 10/5/12

CONSENT TO JOIN

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I choose to be represented in this matter by the named Plaintiff and his counsel of record in this action.

Name: KIM J. FARMER

Signature: Kim J. Farmer

Date Signed: 10/7/12

CONSENT TO JOIN

Consent to Sue Under the Age Discrimination in Employment Act ("ADEA")

I applied to R. J. Reynolds Tobacco Company sometime after September 2007 for employment in the position of Territory Manager.

I choose to participate in the ADEA collective action titled *Villarreal, et al. v. R. J. Reynolds Tobacco Company*, Civil Action No. 2:12-CV-0138 (U.S.D.C., Northern District of Georgia, Gainesville Division).

I choose to be represented in this matter by the named Plaintiff and his counsel of record in this action.

Name: GEORGE HOWELL

Signature: George Howell

Date Signed: 10/17/2012

CONSENT TO JOIN

Consent to Sue Under the Age Discrimination in Employment Act ("ADEA")

I applied to R. J. Reynolds Tobacco Company sometime after September 2007 for employment in the position of Territory Manager.

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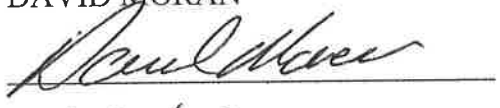
I choose to be represented in this matter by the named Plaintiff and his counsel of record in this action.

Name: DAVID MORAN

Signature: 

Date Signed: 10/4/12

CONSENT TO JOIN

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I choose to participate in the ADEA collective action titled *Villarreal, et al. v. R. J. Reynolds Tobacco Company*, Civil Action No. 2:12-CV-0138 (U.S.D.C., Northern District of Georgia, Gainesville Division).

I choose to be represented in this matter by the named Plaintiff and his counsel of record in this action.

Name: MICHAEL P. O'KELLY, SR.

Signature: Michael P. O'Kelly Sr.

Date Signed: October 15, 2012

CONSENT TO JOIN

Consent to Sue Under the Age Discrimination in Employment Act ("ADEA")

I applied to R. J. Reynolds Tobacco Company sometime after September 2007 for employment in the position of Territory Manager.

I choose to participate in the ADEA collective action titled *Villarreal, et al. v. R. J. Reynolds Tobacco Company*, Civil Action No. 2:12-CV-0138 (U.S.D.C., Northern District of Georgia, Gainesville Division).

I choose to be represented in this matter by the named Plaintiff and his counsel of record in this action.

Name: JOHN K. PIEPER

Signature: _____

Date Signed: 10/9/12

CONSENT TO JOIN

Consent to Sue Under the Age Discrimination in Employment Act ("ADEA")

I applied to R. J. Reynolds Tobacco Company sometime after September 2007 for employment in the position of Territory Manager.

I choose to participate in the ADEA collective action titled *Villarreal, et al. v. R. J. Reynolds Tobacco Company*, Civil Action No. 2:12-CV-0138 (U.S.D.C., Northern District of Georgia, Gainesville Division).

I choose to be represented in this matter by the named Plaintiff and his counsel of record in this action.

Name: KEVIN R. ROTH

Signature: Kevin R Roth

Date Signed: Oct. 11, 2012

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Richard M. Villarreal, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. Reynolds Tobacco Company and Pinstripe, Inc., Defendants.	Civil Action No. 2:12-CV-00138-RWS

NOTICE OF FILING CONSENTS TO JOIN

Plaintiff Richard M. Villarreal, by his undersigned counsel, hereby gives notice of the filing in this matter of Consents to Join in this Civil Action, executed by each of the individuals listed below, which consents are attached hereto collectively as Exhibit A:

1. Jeffrey G. Atkinson
2. Bruce Robinson

/s/ John J. Almond
John J. Almond
Georgia Bar No. 013613
jalmond@rh-law.com

Kristina M. Jones
Georgia Bar No. 435145
kjones@rh-law.com

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Facsimile: 415-421-7105

Counsel for Plaintiff Richard M. Villarreal and all others similarly situated

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Richard M. Villarreal, on behalf of himself and all others similarly situated, Plaintiff, v. R.J. Reynolds Tobacco Company and Pinstripe, Inc., Defendants.	Civil Action No. 2:12-CV-0138-RWS

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2012, I served a copy of ***NOTICE OF FILING CONSENTS TO JOIN*** with the Clerk of the Court using the CM/ECF system, which will automatically send email notification to the following attorneys of record:

Deborah A. Sudbury
dsudbury@jonesday.com

Eric S. Dreiband
esdreiband@jonesday.com

R. Scott Campbell
campbellrs@gtlaw.com

Alison B. Marshall
abmarshall@jonesday.com

and that I have caused a copy to be served by U.S. Mail on the following attorneys of record:

Paul E. Benson
Michael Best & Friedrich
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108

Scott Beightol
Michael Best & Friedrich
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108

/*s*/ John J. Almond
John J. Almond
Georgia Bar No. 013613

49-1

EXHIBIT A

CONSENT TO JOIN

Consent to Sue Under the Age Discrimination in Employment Act ("ADEA")

I applied to R. J. Reynolds Tobacco Company sometime after September 2007 for employment in the position of Territory Manager.

I choose to participate in the ADEA collective action titled *Villarreal, et al. v. R. J. Reynolds Tobacco Company*, Civil Action No. 2:12-CV-0138 (U.S.D.C., Northern District of Georgia, Gainesville Division).

I choose to be represented in this matter by the named Plaintiff and his counsel of record in this action.

Name: JEFFREY G. ATKINSON

Signature: Jeffrey G. Atkinson

Date Signed: 10/30/12

CONSENT TO JOIN

Consent to Sue Under the Age Discrimination in Employment Act ("ADEA")

I applied to R. J. Reynolds Tobacco Company sometime after September 2007 for employment in the position of Territory Manager.

I choose to participate in the ADEA collective action titled *Villarreal, et al. v. R. J. Reynolds Tobacco Company*, Civil Action No. 2:12-CV-0138 (U.S.D.C., Northern District of Georgia, Gainesville Division).

I choose to be represented in this matter by the named Plaintiff and his counsel of record in this action.

Name: BRUCE ROBINSON

Signature: Bruce Robinson

Date Signed: 10/11/12

58

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

RICHARD M. VILLARREAL, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,	:	
Plaintiff,	:	CIVIL ACTION NO. 2:12-CV-0138-RWS
v.	:	
	:	(Collective Action)
R.J. REYNOLDS TOBACCO COMPANY, PINSTRIPE, INC., AND CAREERBUILDER, LLC,	:	
Defendants.	:	

ORDER

This case comes before the Court on Defendants R.J. Reynolds' and Pinstripe, Inc.'s Partial Motion to Dismiss [24], Plaintiff's Motion for Oral Hearing on Partial Motion to Dismiss [46], and Plaintiff's Motion for Approval of *Hoffman La-Roche* Notice [50] . After reviewing the record, the Court enters the following Order.

Background

Since at least September 1, 2007, R.J. Reynolds ("RJR"), with the assistance of the other Defendants, has actively recruited and hired individuals

to fill Territory Manager positions.[1] Territory Managers are assigned to specific geographic areas and are responsible for working with traditional and non-traditional retailers in their area to increase sales of RJR tobacco products and to build RJR's brands. Territory Managers also market RJR products directly to consumers through "one-to-one" engagements designed to convert consumers to RJR tobacco products.

On November 8, 2007, Mr. Villarreal applied for a Territory Manager position with RJR. Mr. Villarreal learned of the vacancy on a website maintained by CareerBuilder, which directed him to a website maintained by RJR. Mr. Villarreal completed a questionnaire on the website, uploaded his resume, and submitted his application. He also indicated his desire to be notified of future job openings that matched his website profile. At the time, Mr. Villarreal was 49 years old and was residing in Cumming, Georgia. Mr. Villarreal was never contacted by any of the Defendants regarding his application and was never offered a Territory Manager position.

[1] Unless otherwise noted, the facts are taken from the Complaint [1]. At the motion to dismiss stage, all well-pleaded facts in the Complaint are accepted as true. Cooper v. Pate, 378 U.S. 546, 546 (1964).

Kelly Services, Inc., a recruiting and staffing company and employment agency, through its subdivision Kelly HRFirst, assisted RJR in recruiting and screening applications for the Territory Manager positions in 2007 and 2008, and was doing so when Mr. Villarreal first applied for that position. Kelly Services screened all of the applications for Territory Manager positions during that time period, including Mr. Villarreal's application, and determined which applicants should be rejected based on their resumes alone and which applicants should be interviewed by RJR.

Kelly Services used "resume review guidelines" [1-1] provided by RJR to screen applications. The guidelines include "what to look for on a resume," "targeted candidate" guidelines, and "stay away from" guidelines. The "targeted candidate" guidelines include, among other factors, "2-3 years out of college" and "adjusts easily to changes." Under the "stay away from" category, the guidelines include "in sales for 8-10 years." Kelly Services applied RJR's guidelines when reviewing Mr. Villarreal's November 8, 2007 application. Mr. Villarreal had over 8 years of sales experience and had been out of college much longer than 3 years. His application was rejected. Kelly Services

forwarded the applications of substantially younger individuals to RJR for further consideration.

In June 2010, after receiving an email from RJR soliciting applications for Territory Manager positions, Mr. Villarreal applied again. Mr. Villarreal was 52 years old at the time of his second application. Less than one week after applying, Mr. Villarreal received an email from RJR stating that his application had been rejected and RJR was pursuing other individuals for the Territory Manager position. Ultimately, RJR hired substantially younger individuals for the position.

Mr. Villarreal applied for the Territory Manager position again in December 2010, May 2011, September 2011, and March 2012. Each time, RJR hired individuals under the age of 40 to fill the position. Defendant Pinstripe has assisted RJR in recruiting and screening applications for the Territory Manager position from at least April 2009 through the present, and was doing so when Mr. Villarreal applied in 2010, 2011, and 2012. Like Kelly Services before it, Pinstripe determined which applicants should be rejected based on their resumes and which candidates should be interviewed by RJR. Pinstripe

used resume review guidelines from RJR (identical or almost identical to those used by Kelly Services) to screen applicants.

In addition to the resume review guidelines, RJR and Pinstripe developed a candidate profile that identified the characteristics RJR preferred in Territory Manager candidates [1-2]. The profile labeled the ideal candidate as the "Blue Chip TM." The profile was created by surveying recent hires who were nominated by management as ideal new hires. The profile stated that 67% of Blue Chip TMs had no prior experience or 1-2 years of work experience, while only 9% had six or more years of experience.

From at least September 2007 through the time the Complaint was filed, RJR almost exclusively hired individuals under age 40 for the position of Territory Manager. Between September 1, 2007 and July 10, 2010, RJR hired 1,024 people to fill Territory Manager positions; only 19 of those hires (1.85%) were over 40. Mr. Villarreal maintains that this hiring disparity was caused by RJR's discriminatory practices, not by any unique characteristics of the Territory Manager position or the applicant pool. The 2000 Census reported that more than 54% of individuals occupying outside sales representative positions like the Territory Manager position are over the age of 40. Of the

applications for RJR's Territory Manager position screened by Kelly Services between September 2007 and March 2008, approximately 48% (9,100 of 19,086) were from individuals with 8 or more years of sales experience. Yet Kelly Services, employing RJR's guidelines, only referred 15% of that group to RJR for further consideration, compared to 35% of individuals with less experience. Similarly, of the applications screened by Pinstripe between February 2010 through July 2010, more than 49% (12,727 of 25,729) were from individuals with over 10 years of sales experience, but only 7.7% of those were forwarded to RJR. Pinstripe forwarded 45% of candidates with only 1-3 years of sales experience.

Defendants Pinstripe and CareerBuilder assisted RJR in recruiting and hiring for the Territory Manager position. Mr. Villarreal alleges that these Defendants were aware of RJR's policy of hiring only individuals under the age of 40 for the position, and that they applied this policy while screening applicants. Mr. Villarreal argues that these Defendants acted as agents of RJR when they assisted RJR with recruiting, screening, and hiring.

On May 17, 2010, Mr. Villarreal filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC"), alleging that RJR

discriminated against him on the basis of age in rejecting his November 8, 2007 application. Mr. Villarreal says he did not file his charge before 2010 because he did not have reason to believe that his 2007 application had been rejected because of his age until just before he filed his charge. He claims that the facts necessary to support his charge of discrimination were not apparent to him, and could not have been apparent to him, until less than a month before he filed the charge.

In July 2010, Mr. Villarreal filed an amended charge with the EEOC that included both his 2007 rejection and his June 2010 rejection. In December 2011, Mr. Villarreal filed another amended charge that included his rejections in December 2010, May 2011, and September 2011, and added, among others, Pinstripe and CareerBuilder as Respondents. On April 2, 2012, the EEOC issued Notices of Right to Sue letters in charges 435-2012-00211 (Pinstripe charge), 435-2012-00212 (CareerBuilder charge), and 410-2010-04714 (original charge against RJR) [1-4].

Mr. Villarreal brings this action for violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*., as a collective action

pursuant to 29 U.S.C. § 626(b), (c), and 29 U.S.C. § 216(b). He brings the action on behalf of:

> all applicants for the Territory manager position who applied for the position since the date RJ Reynolds began its pattern or practice of discriminating against applicants over the age of 40 (which Plaintiff is informed and believes was no later than September 1, 2007, and possibly earlier); who were 40 years of age or older at the time of their application; and who were rejected for the position (the "ADEA Collective Action Members").

Mr. Villarreal, on behalf of himself and all others similarly situated, claims that Defendants engaged in an unlawful pattern or practice of intentional age discrimination (disparate treatment) in violation of the ADEA (Count I) and unlawful use of hiring criteria having disparate impact on applicants over 40 years of age in violation of the ADEA (Count II). Mr. Villarreal seeks: (1) a declaratory judgment that the practices complained of are unlawful and violate the ADEA; (2) a permanent injunction against Defendants prohibiting them from engaging in unlawful age discrimination in recruiting, screening, and hiring applicants for the Territory Manager Position; (3) a permanent injunction requiring that RJR institute and carry out policies, practices, and programs that provide equal employment opportunities for all job applicants regardless of age,

and that eradicate the effects of its past and present unlawful employment practices; (4) back pay and front pay (including interest and benefits) for all ADEA Collective Action Members who join this action; (5) liquidated damages for all ADEA Collective Action Members who join this action; (6) reasonable attorneys' fees and expenses and costs of litigation; (7) pre-judgment interest, in the event liquidated damages are not awarded; and (8) such other and further legal and equitable relief as the Court deems necessary, just, and proper.

Discussion

I. Motion to Dismiss - Legal Standard

As an initial matter, the Court finds that the Parties have adequately briefed the issues before the Court such that oral argument is not necessary. Therefore, Plaintiff's Motion for Oral Hearing on Motion for Partial Motion to Dismiss [46] is **DENIED**.

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." While this pleading standard does not require "detailed factual allegations," mere labels and conclusions or "a formulaic recitation of the

elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In order to withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570). A complaint is plausible on its face when the plaintiff pleads factual content necessary for the court to draw the reasonable inference that the defendant is liable for the conduct alleged. Id.

"At the motion to dismiss stage, all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1273 n.1 (11th Cir. 1999). However, the same does not apply to legal conclusions set forth in the complaint. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009) (citing Iqbal, 129 S. Ct. at 1949). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Furthermore, the court does not "accept as true a legal conclusion couched as a factual allegation." Twombly, 550 U.S. at 555.

"The district court generally must convert a motion to dismiss into a motion for summary judgment if it considers materials outside the complaint." D.L. Day v. Taylor, 400 F.3d 1272, 1275-76 (11th Cir. 2005); see also Fed. R. Civ. P. 12(d). However, documents attached to a complaint are considered part of the complaint. Fed. R. Civ. P. 10(c). Documents "need not be physically attached to a pleading to be incorporated by reference into it; if the document's contents are alleged in a complaint and no party questions those contents, [the court] may consider such a document," provided it is central to the plaintiff's claim. D.L. Day, 400 F.3d at 1276. At the motion to dismiss phase, the Court may also consider "a document attached to a motion to dismiss . . . if the attached document is (1) central to the plaintiff's claim and (2) undisputed." Id. (citing Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002)). "'Undisputed' means that the authenticity of the document is not challenged." Id.

II. Analysis

Pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6), Defendants RJR and Pinstripe, Inc. move to dismiss Count Two of the complaint and all time-barred claims [24]. Defendants argue that the ADEA

does not authorize Plaintiff's disparate impact claim (Count II), and that all claims that arose before November 19, 2009 are time-barred.

A. Plaintiff's Disparate Impact Hiring Claim (Count II)

Defendants argue that disparate impact claims are available only under § 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2).[2] (Memorandum in Support of Defendants R.J. Reynolds Tobacco Company's and Pinstripe's Partial Motion to Dismiss ("Def.s' MTD Br."), Dkt. [24-1] at 4.) That section, however, is limited to "employees" and does not encompass hiring claims. (Id.) Therefore, Plaintiff's disparate impact failure-to-hire claim (Count II) should be dismissed for failure to state a claim upon which relief may be granted. (Id.) The Court agrees with Defendants.

In Smith v. City of Jackson, 544 U.S. 228 (2005), the Supreme Court resolved a long-standing circuit split and held that the ADEA does authorize disparate impact cases. However, those claims are limited to § 4(a)(2). The

[2] Section 4(a)(1), 29 U.S.C. § 623(a)(1), 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." Section 4(a)(2), 29 U.S.C. § 623(a)(2), makes it 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."

Court explained, there are "key textual differences between § 4(a)(1), which does not encompass disparate-impact liability, and § 4(a)(2)." Smith, 544 U.S. at 236 n.6. Unlike § 4(a)(1), which focuses on employers' actions toward targeted individuals, "the text [of § 4(a)(2)] focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." Id. at 236; see also id. at 249 ("Neither petitioners nor the plurality contend that the first paragraph, § 4(a)(1), authorizes disparate impact claims, and I think it obvious that it does not.") (O'Connor, J., concurring).

There is another important textual difference between § 4(a)(1) and § 4(a)(2) of the ADEA. Unlike § 4(a)(1), § 4(a)(2) does not mention hiring or prospective employees. In fact, § 4(a)(2) is limited to employees' claims. See Smith, 544 U.S. at 266 ("Section 4(a)(2), of course, does not apply to 'applicants for employment' at all – it is only § 4(a)(1) that protects this group.") (O'Connor, J., concurring); see also Smith v. City of Des Moines, Iowa, 99 F.3d 1466, 1470 n.2 (8th Cir. 1996) ("Section [4(a)(2)] of the ADEA governs employer conduct with respect to 'employees' only, while the parallel provision of Title VII protects 'employees or applicants for employment.'").

Despite the Supreme Court's findings in Smith, Plaintiff argues that disparate impact claims are available to prospective employees under § 4(a)(2). (Plaintiff's Opposition to Defendants' Partial Motion to Dismiss ("Pl.'s Opp. Br."), Dkt. [40] at 7-9.) Plaintiff relies on Griggs v. Duke Power Co., 401 U.S. 424 (1971). However, Griggs is not controlling here. Griggs was a Title VII case involving current employees. The Court's decision in Smith, which includes a lengthy discussion of Griggs, settled this issue under the ADEA.

Furthermore, Griggs pre-dated significant amendments to Title VII – amendments notably absent from the ADEA. As originally enacted, "[e]xcept for the substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,' the language of [§ 4(a)(2)] in the ADEA [was] identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII)." Smith, 544 U.S. at 33. Then, in 1972, Congress amended § 703(a)(2) of Title VII to include "employees *or applicants for employment*" (emphasis added). But Congress did not amend § 4(a)(2) of the ADEA to include applicants.

As the Supreme Court recognized in Gross v. FBL Fin. Serv.s, 557 U.S. 167, 174 (2009), a case involving different parallel Title VII-ADEA provisions, "[w]hen Congress amends one statutory provision but not another, it is

presumed to have acted intentionally." The Court explained, "[w]e cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." Id. The same rationale applies here. This Court presumes that Congress acted intentionally when it expanded the scope of § 703(a)(2) to include applicants and did not do the same with § 4(a)(2) of the ADEA.

Based on the foregoing, the Court agrees with Defendants that disparate impact failure-to-hire claims are not authorized under § 4(a)(2) of the ADEA. Therefore, Defendants' motion to dismiss Count II of Plaintiff's Complaint is **GRANTED.**

B. Time-Barred Claims

Defendants argue that all claims related to hiring decisions before November 19, 2009 are time-barred under 29 U.S.C. § 626(d)(1)-(A).[3] (Def.s' MTD Br., Dkt. [24-1] at 9-17.) Additionally, they argue, the charge-filing

[3] The provision provides that before a plaintiff files an ADEA lawsuit, he shall file a charge with the EEOC alleging unlawful discrimination within 180 days after the alleged unlawful practice occurred. Under 29 U.S.C. §§ 626(d)(1)(B) & 633(b), if a state has a "law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice," the 180-day charge-filing period is extended to 300 days. Georgia does not have an age discrimination law, so the 180-day period applies in this jurisdiction.

period operates as a statute of limitations for any opt-in plaintiffs who join this collective action.[4] Finally, Defendants argue that Plaintiff's time-barred claims cannot be saved by the continuing violations doctrine or equitable tolling. They maintain that the continuing violations doctrine does not apply here because discrete incidents of discrimination (e.g., refusal to hire at issue here) cannot amount to a continuing violation. Further, they argue that Plaintiff has not pled sufficient facts to invoke equitable tolling.

Plaintiff responds that the period of limitation for filing his EEOC charge challenging his 2007 rejection was equitably tolled until less than a month before the charge was filed. (Pl.'s Opp. Br., Dkt. [40] at 15-19.) He also claims that because he is challenging a longstanding pattern or practice of discrimination by Defendants, he may challenge all applications of that discriminatory policy, regardless of when they occurred. (Id. 19-22.) The Court agrees with Defendants.

The parties do not dispute that § 626(d)(1)-(A)'s 180-day limitation period applies to Plaintiff Villarreal or that his 2007 rejection falls outside that

[4] Defendants note that the 180-day rule applies to Plaintiff Villarreal, but if additional individuals join the lawsuit, each individual's place of residence will determine whether the limitations period is 180 days or 300 days.

period. The parties also do not dispute that this period operates as a statute of limitations for opt-in plaintiffs. See Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1220 (11th Cir. 2001) (holding "the rearward scope of an ADEA opt-in action should be limited to those plaintiffs who allege discriminatory treatment within 180 or 300 days before the representative charge is filed"). Therefore, the Court must determine whether equitable tolling or the continuing violations doctrine apply here.

1. Equitable Tolling

"The requirement that a claimant file a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to sue in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Sturniolo v. Sheaffer, Eaton, Inc., 15 F.3d 1023, 1025 (11th Cir. 1994) (internal quotations omitted). But "[e]quitable tolling is a remedy that must be used sparingly." Downs v. McNeil, 520 F.3d 1311, 1318 (11th Cir. 2008). In this circuit, "equitable tolling of the limitations period is warranted when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." Id. at 1319 (internal quotations omitted); see also Bond v. Roche,

2006 WL 50624, at *1-2 (M.D. Ga. Jan. 9, 2006) (a plaintiff has the burden to "show good cause for tolling the limitations period").

Defendants contend that Plaintiff has not alleged any extraordinary circumstances that were beyond his control or shown good cause to support tolling the limitations period. Instead, the Complaint states that Plaintiff did not file his initial charge with the EEOC before 2010 because "he did not become aware until shortly before filing the charge that there was reason to believe that his 2007 application . . . had been rejected on account of his age." (Complaint, Dkt. [1] ¶ 28.) According to the Complaint, "[t]he facts necessary to support [Plaintiff's] charge of discrimination were not apparent to him, and could not have been apparent to him until less than a month before he filed his May 17, 2010 EEOC charge." (Id.) The Complaint does not specify which facts Plaintiff came to know in 2010, or how Plaintiff came to know them.

The Court finds that Plaintiff has not met his burden regarding tolling of the limitations period. "Under equitable modification, a limitations period does not start to run 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, 15 F.3d at 1025. Here, without knowing which facts

alerted Plaintiff to his discrimination claim or how he learned those facts, the Court cannot determine whether or when those facts should have become apparent to a reasonably prudent person.

This case is analogous to Bond, 2006 WL 50624, at *2, where the plaintiff alleged that he did not have reason to believe he had a discrimination claim until "a conversation with a third party who had inside knowledge of [the employer's] history of racial discrimination through covert and subtle means." The court found these allegations insufficient to show that the limitations period should be tolled. "In the absence of any detail as to the new facts confided by this mysterious informant, the Court has no way to determine whether those facts should or should not have been apparent to a person with a reasonably prudent regard for his rights." Id.[5]

Therefore, the Court finds that Plaintiff's untimely claims are not saved by equitable tolling.

[5] Plaintiff has not alleged that Defendants took any action to prevent him from asserting his claim or that they engaged in any wrongful concealment of facts. Therefore, the line of cases applicable to those scenarios are not relevant here.

2. Continuing Violations Doctrine

"The proper focus for when a statute of limitations begins to run is the time of the discriminatory act." Jones, 331 F.3d at 1263. Defendants argue that Plaintiff's failure-to-hire claims accrued at precise points in time – when he and other potential applicants learned that their applications for Territory Manager positions were unsuccessful. (Def.s' MTD Br., Dkt. [24-1] at 13.) Plaintiff, on the other hand, argues that Defendants' longstanding policy of discrimination was enforced within the limitations period, and therefore, Plaintiff's challenge "may properly encompass discriminatory actions taken outside that period pursuant to the challenged policy." (Pl.'s Opp. Br., Dkt. [40] at 20.)

The Supreme Court's decision in Nat'l Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), is instructive here. In that case, the Court considered whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside the statutory time period.[6] The Supreme Court found that "the statute precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period." Morgan, 536 U.S. at 105. Furthermore, "discrete discriminatory acts are not actionable if time

[6] Morgan involved the continuing violations doctrine and Title VII's charge-filing limitation provision, which mirrors the one in the ADEA.

barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act." Id. at 113.

The Court explained, "[d]iscrete acts such as termination, failure to promote, denial of transfer, or *refusal to hire* are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" Id. at 114 (emphasis added). In these instances, "only incidents that took place within the timely filing period are actionable." Id. By contrast, hostile environment claims "are different in kind from discrete acts. Their very nature involves repeated conduct." Id. at 115. "Such claims are based on the cumulative effect of individual acts." Id. In those cases, "consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period." Id. at 105.

The Court finds that Plaintiff's failure-to-hire claim clearly falls under the rule for discrete acts. Therefore, only those incidents that took place within

the limitation period (180 or 300 days before Plaintiff's initial charge was filed with the EEOC) are actionable, and Defendants' motion to dismiss all time-barred claims is **GRANTED**.

Conclusion

Based on the foregoing, Defendants' Partial Motion to Dismiss [24] is **GRANTED** and Plaintiff's Motion for Oral Hearing on Partial Motion to Dismiss [46] is **DENIED**. In light of these rulings, Plaintiff's Motion for Approval of *Hoffman La-Roche* Notice [50] is **DENIED**, with the right to re-file requesting notice consistent with the foregoing rulings.

SO ORDERED, this 6th day of March, 2013.

RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2015, I electronically filed the foregoing APPENDIX with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter. On that same date, I caused physical copies of the foregoing APPENDIX VOLUME I to be filed with the Clerk of Court and served upon the following counsel by U.S. First Class Mail:

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Dated: March 23, 2015

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