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)

BRIEF OF PLAINTIFF-APELLANT RICHARD M. VILLARREAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following is a complete list of persons and entities who, to the best of Plaintiff-Appellant's knowledge, have an interest in the outcome of this case, pursuant to Eleventh Circuit Rule 26.1-1:

1. Almond, John J. - Attorney for Plaintiff-Appellant Richard M. Villarreal
2. Altshuler Berzon, LLP - Law firm for Plaintiff-Appellant Richard M. Villarreal
3. Beightol, Scott - Former Attorney for Defendant-Appellee Pinstripe, Inc.
4. Benson, Paul - Former Attorney for Defendant-Appellee Pinstripe, Inc.
5. Berger & Montague, P.C. - Law firm for Plaintiff-Appellant Richard M. Villarreal
6. British American Tobacco p.l.c. (BTI) - A publicly traded company with ownership interest in Brown & Williamson Holdings, Inc., the indirect holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellee R.J. Reynolds Tobacco Company
7. Brown & Williamson Holdings, Inc. - Private company and holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellee R.J. Reynolds Tobacco Company

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8. Campbell, R. Scott - Former Attorney for Defendant-Appellee Pinstripe, Inc.
9. CareerBuilder, LLC - Private company and former Defendant
10. Carson, Shanon J. - Attorney for Plaintiff-Appellant Richard M. Villarreal
11. Cielo, Inc. - Name under which Defendant-Appellee Pinstripe, Inc. now operates
12. Dreiband, Eric S. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.
13. Eber, Michael L. - Attorney for Plaintiff-Appellant Richard M. Villarreal
14. Finberg, James M. - Attorney for Plaintiff-Appellant Richard M. Villarreal
15. Greenberg Traurig, LLP - Former law firm for Defendant-Appellee Pinstripe, Inc.
16. Johnson, Mark T. - Attorney for Plaintiff-Appellant Richard M. Villarreal
17. Jones Day - Law firm for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.
18. Marshall, Alison B. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.
19. McArthur, Nikki L. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.
20. McClain, Sherron T. - Former Attorney for Defendants-Appellees R.J.

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21. Michael Best & Friedrich LLP - Former law firm for Defendant-Appellee Pinstripe, Inc.

22. Pinstripe Holdings, LLC - Private company and parent corporation of Pinstripe, Inc., now operating as Cielo, Inc.

23. Pinstripe, Inc. - Private company and Defendant-Appellee, now operating as Cielo, Inc.

24. Pitts, P. Casey - Attorney for Plaintiff-Appellant Richard M. Villarreal

25. Reynolds American Inc. (RAI) – Publicly held company and parent company of Defendant-Appellee R.J. Reynolds Tobacco Company

26. Richard M. Villarreal - Plaintiff-Appellant

27. R.J. Reynolds Tobacco Company – Private company and Defendant-Appellee

28. R.J. Reynolds Tobacco Holdings, Inc.- Private company and parent company of Defendant R.J. Reynolds Tobacco Company

29. Rogers & Hardin LLP – Law firm for Plaintiff- Appellant Richard M. Villarreal

30. Schalman-Bergen, Sarah R. - Attorney for Plaintiff-Appellant Richard M. Villarreal

31. Schneider, Todd M. - Attorney for Plaintiff-Appellant Richard M. Villarreal

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32. Schneider Wallace Cottrel Brayton Konecky, LLP - Law firm for Plaintiff-Appellant Richard M. Villarreal

33. Seyfarth Shaw LLP - Law firm for former Defendant CareerBuilder, Inc.

34. Smith, Frederick T. - Attorney for former Defendant CareerBuilder, LLC

35. Story, Richard W. - Trial Judge, U.S. District Court for the Northern District of Georgia

36. Sudbury, Deborah A. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be heard in this appeal, which raises important questions regarding whether prospective employees may pursue disparate impact claims under Section 4(a)(2) of the Age Discrimination in Employment Act, 29 U.S.C. §623(a)(2); how the equitable tolling principle recognized by this Court in *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023 (11th Cir. 1994), and *Jones v. Dillard's, Inc.*, 331 F.3d 1259 (11th Cir. 2003), applies to an individual who did not know and could not reasonably have learned until less than three weeks before he filed his EEOC charge that his application for employment had been rejected on account of his age; and whether a representative plaintiff who brings a timely challenge to an employer's pattern or practice of illegal age discrimination may seek a remedy targeting all implementations or applications of that unlawful pattern or practice.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Plaintiff-Appellant does not adopt by reference any part of the brief of any other party.

STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

Because this matter arises under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, the district court had subject-matter jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1343(4).

The district court entered final judgment on January 20, 2015, and Plaintiff-Appellant filed his Notice of Appeal on February 9, 2015. This Court has appellate jurisdiction under 28 U.S.C. §1291. Plaintiff-Appellant's appeal is timely under Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

(1) Whether §4(a)(2) of the Age Discrimination in Employment Act, 29 U.S.C. §623(a)(2), permits prospective employees to challenge hiring criteria that have the effect of denying employment to individuals over the age of 40 because of their age.

(2) Whether the equitable tolling principle recognized in *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023 (11th Cir. 1994), and *Jones v. Dillard's, Inc.*, 331 F.3d 1259 (11th Cir. 2003), tolls the EEOC charge-filing deadline for an individual who did not know and could not reasonably have learned that his application for employment was rejected on account of his age until less than three weeks before he filed his EEOC charge.

(3) Whether a representative plaintiff who brings a timely challenge to an employer's unlawful pattern or practice of illegal age discrimination may seek a remedy addressing all implementations or applications of that unlawful pattern or practice.

STATEMENT OF THE CASE

This is a collective action under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* ("ADEA"), challenging a policy of unlawful age discrimination applied over the course of several years in the hiring of individuals for regional sales positions. Since at least September 1, 2007, Defendant R.J. Reynolds Tobacco Company ("RJR"), with the assistance of Pinstripe, Inc. ("Pinstripe") (collectively "Defendants") and Kelly Services, Inc. ("Kelly Services"), has hired over a thousand individuals to fill "Territory Manager / Sales Representative / Trade Marketing" positions ("Territory Managers") throughout the United States. RJR retained recruiting services Pinstripe and Kelly Services to assist it in filling these positions. RJR instructed them to reject candidates with eight years or more of sales experience and to target candidates two to three years out of college when reviewing applications. RJR intended that these "Resume Review Guidelines" would result in the rejection of candidates 40 years of age or older, and its policies had precisely that effect: Almost all of the individuals hired for the Territory Manager position—more than 98% over a period of approximately three years—were 39 years of age or younger, and hundreds, perhaps thousands, of qualified persons 40 years of age and over were rejected on the basis of their age. By applying hiring criteria whose purpose and effect was to

discriminate against prospective employees on the basis of their age, RJR and Pinstripe violated the ADEA.

I. FACTUAL BACKGROUND

A. RJ Reynolds Used Hiring Criteria Whose Purpose And Effect Was To Discriminate Against Individuals Over 40.

RJR, with the assistance of recruiting services including defendant Pinstripe, has recruited and hired individuals to fill Territory Manager positions within the company since at least September 2007. Appendix Volume I ("App. Vol. I"), Dkt. No. 1, at 5 ¶10; Appendix Volume II ("App. Vol. II"), Dkt. No. 61-1, at 5 ¶9.[1] A Territory Manager is assigned to a specific geographic region and is responsible for working with various tobacco retailers in that area to increase sales of RJR's products. App. Vol. I, Dkt. No. 1, at 5-6 ¶10; App. Vol. II, Dkt. No. 61-1, at 5 ¶9. Territory Managers also market and promote RJR's products directly to consumers. App. Vol. I, Dkt. No. 1, at 6 ¶ 10; App. Vol. II, Dkt. No. 61-1, at 5 ¶9.[2]

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[1] Because this appeal involves both the granting of a partial motion to dismiss and the denial of leave to amend the complaint, this brief cites the allegations in both Mr. Villarreal's original complaint, App. Vol. I, Dkt. No. 1, and his proposed amended complaint, App. Vol. II, Dkt. No. 61-1.

[2] RJR advertises Territory Manager vacancies on a website maintained by CareerBuilder, LLC ("CareerBuilder"), which directs interested applicants to an RJR website. App. Vol. I, Dkt. No. 1, at 6 ¶11; App. Vol. II, Dkt. No. 61-1, at 5 ¶10. There, applicants fill out a questionnaire, upload a resume, and submit an application. App. Vol. I, Dkt. No. 1, at 6 ¶11; App. Vol. II, Dkt. No. 61-1, at 5 (continued…)

RJR used two recruiting services—Kelly Services and Pinstripe—to review Territory Manager applications for the company. App. Vol. I, Dkt. No. 1, at 6-7, 9 ¶¶13, 21; App. Vol. II, Dkt. No. 61-1, at 6, 8-9 ¶¶12, 20. In 2007 and 2008, RJR provided Kelly Services with "Resume Review Guidelines" to use when determining which candidates should be referred to RJR for further interviews. App. Vol. I, Dkt. No. 1, at 7, 10 ¶¶14, 22; App. Vol. II, Dkt. No. 61-1, at 6, 9 ¶¶13, 21. The guidelines listed several criteria for the "targeted candidate," including "2-3 years out of college" and "adjusts easily to changes." App. Vol. I, Dkt. No. 1, at 7 ¶15 & Exh. A; App. Vol. II, Dkt. No. 61-1, at 6-7 ¶14 & Exh. A. The guidelines instructed the recruiting services to "stay away from" various applicants, including those who had been "in sales for 8-10 years." App. Vol. I, Dkt. No. 1, at 7 ¶15 & Exh. A; App. Vol. II, Dkt. No. 61-1, at 7 ¶14 & Exh. A.

In 2009, after Pinstripe had replaced Kelly Services, RJR and Pinstripe developed a profile of the "ideal" candidate for the Territory Manager position. App. Vol. I, Dkt. No. 1, at 10 ¶23; App. Vol. II, Dkt. No. 61-1, at 9 ¶22. To create this profile, Pinstripe surveyed recent hires who were nominated by management as ideal Territory Managers. App. Vol. I, Dkt. No. 1, at 10 ¶23; App. Vol. II, Dkt.

(…continued)
¶10. Mr. Villarreal's complaint named CareerBuilder as a defendant, but CareerBuilder was dismissed by stipulation on September 25, 2012. App. Vol. I, Dkt. No. 1, at 4 ¶7; App. Vol. I, Dkt. No. 43.

No. 61-1, at 9 ¶22. Pinstripe's profile named the ideal candidate the "Blue Chip TM" (for Territory Manager). App. Vol. I, Dkt. No. 1, at 10 ¶23 & Exh. B; App. Vol. II, Dkt. No. 61-1, at 9 ¶22 & Exh. B. Because RJR had discriminated on the basis of age in hiring Territory Managers since at least September 2007, the ideal candidate profile accorded a strong preference to younger applicants. App. Vol. I, Dkt. No. 1, at 10 ¶23; App. Vol. II, Dkt. No. 61-1, at 9 ¶22. For instance, the profile stated that 67% of the "Blue Chip TM" candidates had two years or less of work experience, while only 9% had more than five years of experience. App. Vol. I, Dkt. No. 1, at 10 ¶23; App. Vol. II, Dkt. No. 61-1, at 9 ¶22. Pinstripe used this profile, along with the "Resume Review Guidelines," when making hiring decisions. App. Vol. I, Dkt. No. 1, at 10 ¶23; App. Vol. II, Dkt. No. 61-1, at 9-10 ¶22.

Through Kelly Services and Pinstripe, RJR applied these criteria in making thousands of hiring decisions since September 2007. App. Vol. I, Dkt. No. 1, at 11 ¶24; App. Vol. II, Dkt. No. 61-1, at 10 ¶23. As a result, the company hired almost no applicants over the age of forty for the Territory Manager position. App. Vol. I, Dkt. No. 1, at 11 ¶24; App. Vol. II, Dkt. No. 61-1, at 10 ¶23. Of the 1,024 people RJ Reynolds hired to fill the Territory manager position from September 2007 to July 2010, only 19 (1.85%) were over the age of 40, even though a much higher percentage of those who applied were over 40. App. Vol. I, Dkt. No. 1, at 11 ¶24;

App. Vol. II, Dkt. No. 61-1, at 10 ¶23. The 2000 Census, for example, reported that more than 54% of individuals occupying positions similar to the Territory Manager position were over the age of 40. App. Vol. I, Dkt. No. 1, at 11 ¶25; App. Vol. II, Dkt. No. 61-1, at 10 ¶24. Likewise, Pinstripe referred a disproportionately low number of older applicants to RJ Reynolds. App. Vol. I, Dkt. No. 1, at 12 ¶25; App. Vol. II, Dkt. No. 61-1, at 10-11 ¶24. From February to July 2010, over 49% of the 25,729 applicants for the Territory Manager position had ten years or more of sales experience. App. Vol. I, Dkt. No. 1, at 12 ¶25; App. Vol. II, Dkt. No. 61-1, at 11 ¶24. Relying on RJR's criteria, Pinstripe forwarded only 7.7% of those applications to the company for further consideration. App. Vol. I, Dkt. No. 1, at 12 ¶25; App. Vol. II, Dkt. No. 61-1, at 11 ¶24. By contrast, Pinstripe referred 45% of the candidates with one to three years of experience to RJ Reynolds. App. Vol. I, Dkt. No. 1, at 12 ¶25; App. Vol. II, Dkt. No. 61-1, at 11 ¶24.

B. Plaintiff Richard M. Villarreal Was Qualified for the Territory Manager Position But Was Rejected Due To His Age.

Plaintiff Richard M. Villarreal is a fifty-seven year old resident of Cumming, Georgia. App. Vol. I, Dkt. No. 1, at 3 ¶4; App. Vol. II, Dkt. No. 61-1, at 3 ¶4. He has significant sales experience and is well-qualified for the Territory Manager position. App. Vol. I, Dkt. No. 1, at 7 ¶15; App. Vol. II, Dkt. No. 61-1, at 6-7 ¶14. He applied for the Territory Manager position on six separate occasions between November 8, 2007, and April 2012, but was rejected each time due to the

preference for younger applicants created by RJR's Resume Review Guidelines and Blue Chip TM profile. App. Vol. I, Dkt. No. 1, at 3-4, 8, 9 ¶¶4, 16, 19, 20; App. Vol. II, Dkt. No. 61-1, at 3, 7, 8 ¶¶4, 15, 18, 19.

The first time that Mr. Villarreal applied for the Territory Manager position, on November 8, 2007, he was forty-nine years old, had more than eight years of sales experience, and was well-qualified for the position. App. Vol. I, Dkt. No. 1, at 6, 8 ¶¶11, 16; App. Vol. II, Dkt. No. 61-1, at 5-7 ¶¶10, 15.[3] Kelly Services applied RJR's Resume Review Guidelines when reviewing Mr. Villarreal's application and rejected Mr. Villarreal due to his extensive sales experience and age. App. Vol. I, Dkt. No. 1, at 8 ¶16; App. Vol. II, Dkt. No. 61-1, at 7 ¶15. Neither Kelly Services nor RJR contacted Mr. Villarreal regarding his application or informed him of the reasons why his application had been rejected. App. Vol. I, Dkt. No. 1, at 6, 13 ¶¶12, 28; App. Vol. II, Dkt. No. 61-1, at 6, 12 ¶¶11, 28.

In April 2010, attorneys from Altshuler Berzon LLP contacted Mr. Villarreal regarding RJR's hiring practices. App. Vol. II, Dkt. No. 61-1, at 12-13 ¶¶29-30. They informed Mr. Villarreal that RJR had used the "Resume Review Guidelines" when screening his November 2007 application for the Territory Manager position. App. Vol. II, Dkt. No. 61-1, at 13 ¶30. That was the first time Mr. Villarreal

[3] He learned of the position through CareerBuilder and uploaded his resume on RJR's website. App. Vol. I, Dkt. No. 1, at 6 ¶11; App. Vol. II, Dkt. No. 61-1, at 5 ¶10.

learned about the Resume Review Guidelines and about RJR's practice of discriminating against individuals forty years of age or older when filling the Territory Manager position. App. Vol. II, Dkt. No. 61-1, at 13 ¶30. Before that time, Mr. Villarreal had never had any direct contact with RJR (other than by uploading his resume to their website) or with any of its recruiters. App. Vol. I, Dkt. No. 1, at 13 ¶28; App. Vol. II, Dkt. No. 61-1, at 12 ¶28. Mr. Villarreal had no idea whether anyone had even reviewed his application, much less that anyone at RJR or at a recruiting service retained by RJR had relied on discriminatory criteria when making those hiring decisions. App. Vol. II, Dkt. No. 61-1, at 12, 13 ¶¶28, 30.

Mr. Villarreal applied for the Territory Manager position again in June 2010. App. Vol. I, Dkt. No. 1, at 8 ¶17; App. Vol. II, Dkt. No. 61-1, at 7 ¶16. At that time, he was fifty-two years old and was well-qualified for the position. App. Vol. I, Dkt. No. 1, at 8 ¶17; App. Vol. II, Dkt. No. 61-1, at 7-8 ¶16. Less than one week later, he received an email from RJR rejecting his application. App. Vol. I, Dkt. No. 1, at 8 ¶18; App. Vol. II, Dkt. No. 61-1, at 8 ¶17. RJR's email stated that RJR intended to pursue other candidates. App. Vol. I, Dkt. No. 1, at 8-9 ¶¶18-19; App. Vol. II, Dkt. No. 61-1, at 8 ¶¶17-18. Mr. Villarreal again applied for the Territory Manager position in December 2010, May 2011, September 2011, and March 2012. App. Vol. I, Dkt. No. 1, at 9 ¶20; App. Vol. II, Dkt. No. 61-1, at 8 ¶19.

Each time, RJR rejected his application on account of his age and chose to hire individuals younger than forty to fill Territory Manager vacancies. App. Vol. I, Dkt. No. 1, at 9 ¶20; App. Vol. II, Dkt. No. 61-1, at 8 ¶19.

II. PROCEDURAL HISTORY

On May 17, 2010, less than one month after speaking with Altshuler Berzon LLP, Mr. Villarreal filed an EEOC charge alleging that RJR and its recruiters had discriminated against him on the basis of his age in rejecting his November 8, 2007 application. App. Vol. I, Dkt. No. 1, at 12 ¶27; App. Vol. II, Dkt. No. 61-1, at 11 ¶26. Over the next year and a half, Mr. Villarreal amended his EEOC charge to include RJR's rejections of his later applications for the Territory Manager position. App. Vol. I, Dkt. No. 1, at 13 ¶29; App. Vol. II, Dkt. No. 61-1, at 13-14 ¶31.

On April 2, 2012, at Mr. Villarreal's request, the EEOC issued Notices of Right to Sue as to RJR and Pinstripe. App. Vol. I, Dkt. No. 1, at 13-14 ¶30; App. Vol. II, Dkt. No. 61-1, at 14 ¶32. On June 6, 2012, Mr. Villarreal filed a collective action under the ADEA on behalf of all rejected applicants for the Territory Manager position who were 40 years of age or older at the time of application and who applied after RJR began discriminating on the basis of age. App. Vol. I, Dkt. No. 1, at 14 ¶31; App. Vol. II, Dkt. No. 61-1, at 14-15 ¶33.

Mr. Villarreal's complaint alleged two violations of the ADEA. App. Vol. I, Dkt. No. 1, at 16-20 ¶¶36-50; App. Vol. II, Dkt. No. 61-1, at 16-21 ¶¶38-52. In Count One, Mr. Villarreal alleged that by targeting individuals under the age of forty for the Territory Manager position and rejecting those over the age of forty, RJR and its recruiters had engaged in an unlawful pattern or practice of intentional age discrimination. App. Vol. I, Dkt. No. 1, at 17-18 ¶¶41-42; App. Vol. II, Dkt. No. 61-1, at 18 ¶¶43-44. Mr. Villarreal further alleged that the defendants used experience as a proxy for age, and that their violations of the ADEA were intentional and willful. App. Vol. I, Dkt. No. 1, at 17-18 ¶41; App. Vol. II, Dkt. No. 61-1, at 18 ¶43.

In Count Two, Mr. Villarreal alleged that the defendants had applied unlawful hiring criteria that had a disparate impact on individuals over 40 years of age. App. Vol. I, Dkt. No. 1, at 19-20 ¶¶45-50; App. Vol. II, Dkt. No. 61-1, at 19-20 ¶¶47-52. Mr. Villarreal alleged that RJR's "Resume Review Guidelines" and "Blue Chip TM" profile resulted in the rejection of a disproportionate number of applications from individuals over 40. App. Vol. I, Dkt. No. 1, at 19-20 ¶¶46-48; App. Vol. II, Dkt. No. 61-1, at 19-20 ¶¶48-50.

On August 24, 2012, Defendants filed a partial Rule 12(b)(6) motion to dismiss. App. Vol. I, Dkt. No. 24. Defendants argued that Mr. Villarreal's claims should be dismissed in part for two separate reasons. First, they argued that the

ADEA does not authorize disparate impact claims challenging an employer's hiring decisions. App. Vol. I, Dkt. No. 24-1, at 5. Second, they argued that all claims arising more than 180 days before Mr. Villarreal filed his EEOC charge—i.e., all claims arising prior to November 19, 2009, including those involving Mr. Villarreal's November 2007 application—were time-barred. App. Vol. I, Dkt. No. 24-1, at 9.

The district court granted Defendants' motion on March 6, 2013. App. Vol. I, Dkt. No. 58. As to Mr. Villarreal's disparate impact claim, the court concluded that §4(a)(2) of the ADEA permits disparate impact claims but "is limited to employees and does not encompass hiring claims." App. Vol. I, Dkt. No. 58, at 12.

Regarding the timeliness of Mr. Villarreal's lawsuit, the court acknowledged the Eleventh Circuit's well-established precedent that "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." App. Vol. I, Dkt. No. 58, at 18 (quoting *Sturniolo*, 15 F.3d at 1025). The court concluded, however, that the facts necessary to invoke equitable tolling of the 180-day EEOC charge-filing period were pleaded with insufficient specificity, because the complaint did not disclose how Mr. Villarreal became aware of Defendants' unlawful conduct in April 2010. *Id.* at 17-19. The court stated that "without knowing which facts alerted Plaintiff to his discrimination claim or how

he learned those facts," it "[could not] determine whether or when those facts should have become apparent to a reasonably prudent person." *Id.* at 18-19.

Mr. Villarreal thereafter sought leave to file an amended complaint that "specifically describe[d] what facts [Mr. Villarreal] learned, when he learned them, and why he could not possibly have learned those facts earlier." App. Vol. II, Dkt. No. 61, at 2. The proposed amended complaint described Mr. Villarreal's April 2010 communications with Altshuler Berzon LLP, the facts regarding RJR's hiring practices that Altshuler Berzon LLP disclosed to him in that conversation, and the reasons why Mr. Villarreal had not learned any of those facts prior to April 2010. App. Vol. II, Dkt. No. 61-1, at 12-13 ¶¶29-30.

The district court denied Mr. Villarreal's motion to amend, however, concluding that granting leave to amend would be futile. App. Vol. II, Dkt. No. 67, at 4-5. The court reasoned that Mr. Villarreal "ha[d] not alleged any misrepresentations or concealment that hindered Plaintiff from learning of any alleged discrimination" and, furthermore, that Mr. Villarreal "ha[d] not alleged any due diligence on his part to determine the status of his" November 2007 application. *Id.* at 5. The court concluded that, absent those allegations, Mr. Villarreal's "proposed amendments do not assert a claim that can be saved by equitable tolling." *Id.* at 6.

On January 16, 2015, the district court granted Mr. Villarreal's unopposed motion to dismiss with prejudice those claims that were not dismissed by the March 6, 2013 order granting Defendants' partial motion to dismiss. App. Vol. II, Dkt. No. 88.[4]

III. STANDARD OF REVIEW

This Court reviews the dismissal of a complaint under Fed. R. Civ. P. 12(b)(6) de novo. *Harris v. Ivax Corp.*, 182 F.3d 799, 802 (11th Cir. 1999). In doing so, the Court "accept[s] all of the factual allegations in [the] complaint as true." *Berkovitz v. United States*, 486 U.S. 531, 540, 108 S. Ct. 1954, 1960-61 (1988).

Where a district court denies leave to amend the complaint on the ground that the proposed amendment would be futile, that conclusion is reviewed de novo. *Harris*, 182 F.3d at 802. An amendment is futile only if the proposed amended complaint would be subject to dismissal under Rule 12. *See Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999).

[4] After the district court denied Mr. Villarreal's motion to amend, Mr. Villarreal moved for Entry of Final Judgment under Federal Rule of Civil Procedure 54(b) as to all claims arising prior to November 19, 2009, and the district court granted the motion. App. Vol. II, Dkt. Nos. 67, 77. Mr. Villarreal thereafter appealed the dismissal of those claims, but this Court concluded that it lacked jurisdiction to consider Mr. Villarreal's appeal because other claims remained pending before the district court. App. Vol. II, Dkt. Nos. 84-85.

SUMMARY OF THE ARGUMENT

The district court's holding that prospective employees may not pursue disparate impact claims under §4(a)(2) of the ADEA is inconsistent with the relevant statutory text, with the Supreme Court's interpretation of identical language in Title VII, with the EEOC's interpretation of that provision, and with Congress's intent in enacting the ADEA. Section 4(a)(2) provides that an employer may not "limit . . . his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. §623(a)(2). By establishing and applying hiring criteria like the Resume Review Guidelines and Blue Chip TM profile at issue here, an employer "limit[s]" its employees to the individuals defined by those hiring criteria, and such limitations on employment are unlawful under §4(a)(2) if they "tend to deprive *any individual* of employment opportunities . . . because of such individual's age." *Id.* (emphasis added).

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971), the Supreme Court interpreted the then-identical language of Title VII as permitting disparate impact challenges by both prospective and existing employees, holding that Title VII outlaws "condition[s] of employment in or transfer to" particular jobs that "operate to disqualify Negroes at a substantially higher rate than white

applicants." 401 U.S. at 425-26, 91 S. Ct. at 851. *Griggs* is "a precedent of compelling importance" in interpreting the ADEA. *Smith v. City of Jackson*, 544 U.S. 228, 234, 125 S. Ct. 1536, 1541 (2005) (plurality opinion). Interpreting the ADEA to permit disparate impact claims by prospective employees is the only construction of §4(a)(2) consistent with *Griggs*, with Congress's desire "to give older workers employment opportunities whenever possible," *Smith*, 544 U.S. at 241, 125 S. Ct. at 1545, and with the EEOC's longstanding interpretations of §4(a)(2), *see, e.g.*, *Smith*, 544 U.S. at 243-44, 125 S. Ct. at 1546-47 (Scalia, J., concurring in the judgment) (citing 29 C.F.R. §1625.7(d) (2004), and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984)).

In concluding that the ADEA does not permit prospective employees to pursue disparate impact claims, the district court placed dispositive weight on Congress's decision to amend Title VII shortly after *Griggs* was decided. But that amendment did not modify the scope of Title VII. Instead, the amendment *confirmed Griggs*'s interpretation of Title VII; it was "merely . . . declaratory of present law," S. Rep. No. 92-415, at 43 (1971), and "fully in accord with the decision of the Court" in *Griggs*. H.R. Rep. No. 92-238, at 21-22 (1971). The amendment thus provides no basis for disregarding *Griggs*'s binding interpretation of the statutory language that is indistinguishable from §4(a)(2).

The district court also erred in concluding that Mr. Villarreal cannot challenge RJR's rejection of his 2007 application for the Territory Manager position in this action. This Circuit has long recognized that the deadline for filing a charge of discrimination with the EEOC is tolled until the facts which would support a charge of discrimination are apparent or should have become apparent to the charging party. *Reeb*, 516 F.2d at 931; *Sturniolo*, 15 F.3d at 1025; *Jones*, 331 F.3d at 1264, 1267-68. There is no dispute that, until April 2010, Mr. Villarreal was unaware of the facts underlying his EEOC charge, and Defendants have never even suggested that Mr. Villarreal could have discovered any of those facts before that time. Under *Reeb*, *Sturniolo*, and *Jones*, the deadline for the filing of Mr. Villarreal's charge was tolled until at least April 2010, and Mr. Villarreal's May 2010 charge was therefore timely.

Even if equitable tolling did not render Mr. Villarreal's charge regarding his 2007 application timely, moreover, his claims in this case properly encompass that application because Mr. Villarreal challenges RJR's pattern or practice of discriminating against applicants over the age of 40. A timely pattern-or-practice claim challenging an employer's "longstanding and demonstrable policy of discrimination" on behalf of all individuals harmed by that pattern or practice properly encompasses every implementation of the unlawful pattern or practice, not merely those occurring within 180 days of the filing of the representative

plaintiff's EEOC charge. *See Sharpe v. Cureton*, 319 F.3d 259, 267-68 (6th Cir. 2003); *Bowerman v. UAW*, 646 F.3d 360, 366 (6th Cir. 2011).

ARGUMENT

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

In *Griggs*, the Supreme Court held that §703(a)(2) of Title VII permits disparate impact claims by job applicants. The Court held that that section permits challenges to job criteria imposed "as a condition of employment" that are not "significantly related to successful job performance" and that "operate to disqualify [minorities] at a substantially higher rate than [non-minority] *applicants*." *Griggs*, 401 U.S. at 425-26, 91 S. Ct. at 851 (emphasis added). According to the Court, such "artificial, arbitrary, and unnecessary barriers to employment . . . operate invidiously to discriminate on the basis of racial or other impermissible classification," and §703(a)(2) "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 431, 91 S. Ct. at 853. For that reason, *Griggs* concluded that §703(a)(2), as it then read, permitted disparate impact claims challenging criteria employed either in hiring new employees *or* in transferring and promoting existing employees. *See Griggs*, 401 U.S. at 425-26, 91 S. Ct. at 851 (considering challenge to neutral job requirement that privileged non-minority "applicants").

Section 4(a)(2) of the ADEA is identical in all relevant respects to the statutory language construed in *Griggs*.[5] The district court in this case nonetheless concluded that the ADEA, unlike Title VII, does *not* permit challenges to job criteria applied "as a condition of employment" that "operate to disqualify [members of the statutorily protected class] at a substantially higher rate than [other] *applicants*." *Griggs*, 401 U.S. at 426, 91 S. Ct. at 851 (emphasis added); *see* App. Vol. I, Dkt. No. 58, at 12 (concluding that §4(a)(2) "does not encompass hiring claims"). In so ruling, the district court disregarded the plain language of §4(a)(2), which permits challenges "by any individual" to the manner in which an employer "limits" its employees through the use of hiring criteria or guidelines; ignored the Supreme Court's interpretation of identical statutory language as permitting disparate impact claims by prospective employees in *Griggs*; undermined the purposes served by the ADEA; and acted contrary to longstanding EEOC interpretations of the ADEA. The court justified its ruling by noting that, *after* the Supreme Court decided *Griggs*, Congress amended Title VII to encompass claims by prospective employees even more explicitly. That

[5] *Compare Griggs*, 401 U.S. at 426 n.1, 91 S. Ct. at 851 n.1 (at the time of *Griggs*, §703(a)(2) made 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 race, color, religion, sex, or national origin") (emphasis added); *with* 29 U.S.C. §623(a)(2) (replacing "race, color, religious, sex, or national original" with "age").

amendment, however, was merely "declaratory of present law," S. Rep. No. 92-415, at 43 (1971), and did not expand the statutory language that *Griggs* interpreted as permitting disparate impact claims by prospective employees. This Court should therefore reverse the decision below and hold that prospective employees may pursue disparate impact claims under §4(a)(2) of the ADEA.

A. Section 4(a)(2) Permits Challenges By "Any Individual" To Limitations On Employment Such As Hiring Criteria And Guidelines.

Section 4(a) of the ADEA contains three broad prohibitions on employer age discrimination. That section provides:

> It shall be unlawful for an employer—
>
> (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;
>
> (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; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. §623(a).

Subsections 4(a)(1) and 4(a)(2) of the ADEA address different forms of age discrimination. Section 4(a)(1) prohibits *intentional* discrimination on the basis of an individual's age, permitting claims challenging an employer's "disparate

treatment" of older workers. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609-10, 113 S. Ct. 1701, 1706 (1993) (liability under Section 4(a)(1) "depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision"); *Smith*, 544 U.S. at 236 n.6, 125 S. Ct. at 1542 n.6 (plurality opinion) (stating that §4(a)(1) "does not encompass disparate impact liability").

Section 4(a)(2), by contrast, is not limited to intentional discrimination. Its text "focuses on the *effects* of the action . . . rather than the motivation for the action of the employer," and thus permits challenges to employment practices "'that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another[.]'" *Smith*, 544 U.S. at 236, 239, 125 S. Ct. at 1542, 1544 (plurality opinion) (quoting *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15, 97 S. Ct. 1843, 1854-55 n.15 (1977)). Like the "comparable language" of §703(a)(2), §4(a)(2) of the ADEA prohibits "'employment procedures or testing mechanisms that operate as built-in headwinds for [protected] groups and are unrelated to measuring job capability.'" *Smith*, 544 U.S. at 234-35, 125 S. Ct. at 1541-42 (quoting *Griggs*, 401 U.S. at 432, 91 S. Ct. at 854). Such claims help eliminate unfair "obstacle[s] to the employment of older workers." 544 U.S. at 235 n.5, 125 S. Ct. at 1541 n.5.

In defining the group of individuals protected from such facially neutral but nonetheless discriminatory and unlawful forms of age discrimination, §4(a)(2) uses

the broadest possible language. An employer's practices are unlawful under that section if they "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). Far from permitting only existing employees to pursue claims, §4(a)(2) provides that "any individual" harmed by any employment practice that has a disparate impact on older individuals may challenge that practice. Had Congress intended to permit claims by current employees only, as the district court concluded, §4(a)(2) would use the phrase "any existing employee" in place of its broad language permitting suits by "any individual" harmed by an unlawful practice.

Tellingly, Congress has used language similar to §4(a)(2) in other instances where it did *not* intend to limit relief to existing employees. The Family Medical Leave Act ("FMLA"), for example, makes it "unlawful for any employer to discharge or in any other manner discriminate against *any individual* for opposing any practice made unlawful" by the FMLA. 29 U.S.C. §2615(a)(2) (emphasis added). That prohibition reaches "any person (whether or not an employee)." 29 C.F.R. §825.220.

Indeed, even where other anti-retaliation statutes have used language that is arguably more restrictive than §4(a)(2)—referring to "an" or "any" employee instead of "any individual"—those statutes have been interpreted to reach

prospective as well as existing employees. For example, the Sarbanes-Oxley Act makes it unlawful to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against *an employee* in the terms and conditions of employment because of any lawful act done by the employee" to assist in an investigation or participate in a proceeding related to a securities rule or regulation. 18 U.S.C. §1514A(a) (emphasis added). As used in that section, "[e]mployee means an individual presently or formerly working for a covered person, *an individual applying to work for a covered person*, or an individual whose employment could be affected by a covered person." 29 C.F.R. §1980.101(g) (emphasis added).[6]

The district court acknowledged that the ADEA permits disparate impact claims as a general matter, but concluded that *prospective* employees cannot pursue claims under §4(a)(2) because that section applies only to the manner in

[6] The Consumer Product Safety Improvement Act similarly prohibits "discriminat[ion] against an employee . . . because the employee" provided information, testified or assisted in a proceeding, or refused to participate in a violation of the Act, 15 U.S.C. §2087(a), and "employee," as used therein, includes "an individual presently or formerly working for, *an individual applying to work for*, or an individual whose employment could be affected by a manufacturer." 29 C.F.R. §1983.101(h) (emphasis added). Likewise, the Occupational Safety & Health Act provides that "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this [Act]." 29 U.S.C. §660(c)(1). "[A]n applicant for employment could be considered an employee" under that section. 29 C.F.R. §1977.5(b).

which an employer "limit[s], segregate[s], or classif[ies] *his employees*." *See* App. Vol. I, Dkt. No. 58, at 12-15 (emphasis added). But that conclusion disregards the plain language of §4(a)(2), which permits challenges to the manner in which an employer "limits" its employees. By establishing and applying hiring criteria like the high school diploma and general intelligence test requirements at issue in *Griggs* or the Resume Review Guidelines and Blue Chip TM profile at issue here, an employer determines which prospective employees are eligible to serve as employees and which are not, thus "limiting" its employees to the individuals defined by those hiring criteria. Challenges to such limitations fall squarely within §4(a)(2)'s text, as the Supreme Court held when interpreting the identical language of Title VII in *Griggs*.[7]

In short, the plain language of §4(a)(2) permits "any individual" deprived of employment opportunities by employer-imposed limitations on employment within

[7] Nothing in the language of §4(a)(2) compels the conclusion that only existing employees may pursue claims under that section. To the contrary, Congress used the precise language of §4(a)(2) where it indisputably intended to permit challenges by prospective employees. *See* 42 U.S.C. §2000ff-1(a)(2) (making it unlawful for employer "*to limit, segregate, or classify the employees of the employer* in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee") (emphasis added); 42 U.S.C. §2000ff(2)(A)(i) (for purposes of 42 U.S.C. §2000ff-1(a)(2), "employee" includes "applicant"); *see also* 29 C.F.R. §1635.2(c) (in 42 U.S.C. §2000ff-1(a)(2), "[e]mployee means an individual employed by a covered entity, as well as an applicant for employment and a former employee").

a particular position to challenge those limitations. *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). In this case, Mr. Villarreal alleges that he was denied employment as a Territory Manager because RJR limited employment within that position to individuals who satisfied the criteria established by the Resume Review Guidelines and the Blue Chip TM profile. That claim is squarely within the statutory text of §4(a)(2).

B. *Griggs* Recognized that Language Identical to the ADEA's Language Permits Disparate Impact Claims By Prospective Employees.

The Supreme Court's interpretation of identical statutory language in *Griggs* confirms that §4(a)(2) is properly interpreted to permit disparate impact claims by prospective employees. At the time that *Griggs* was decided, the language of Title VII was identical to that of §4(a)(2) "[e]xcept for substitution of the word 'age' [in the ADEA] for the words 'race, color, religion, sex, or national origin' [in Title VII]." *Smith*, 544 U.S. at 233, 125 S. Ct. at 1540 (majority opinion); *see also Lorillard v. Pons*, 434 U.S. 575, 584, 98 S. Ct. 866, 872 (1978) ("[T]he prohibitions of the ADEA were derived *in haec verba* from Title VII."). *Griggs* considered whether that language prohibited 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." *Griggs*, 401 U.S. at 425-26, 91 S. Ct. at 851 (emphasis added). The Supreme Court 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 imposed as "condition[s] of employment" for those jobs. *Griggs*, 401 U.S. at 426, 91 S. Ct. at 851; *see also Griggs*, 401 U.S. at 427-28, 91 S. Ct. at 851-852 (employer required high school education "for *initial* assignment to any department except Labor" and required that "*new employees* . . . register satisfactory scores on two professional prepared aptitude tests") (emphasis added).

Griggs nowhere limited its decision to policies and practices applied to current employees, and it nowhere suggested that the employer defendant could continue to apply the requirements challenged therein 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, 91 S. Ct. 849 (1971).

Griggs's interpretation of the ADEA's language is also consistent with the Supreme Court's post-*Griggs* decisions. *Smith*, for example, cited two cases involving "failure-to-hire" claims as "appropriate" ADEA disparate impact cases. *See* 544 U.S. at 237 & n.8, 125 S.Ct. at 1543 & n.8 (plurality opinion) (citing *Wooden v. Bd. of Ed. of Jefferson County*, 931 F.2d 376 (6th Cir. 1991), and *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993)).

As the Supreme Court has emphasized, *Griggs* is "a precedent of compelling importance" in interpreting the ADEA. *Smith*, 544 U.S. at 234, 125 S. Ct. at 1541. Because *Griggs* holds that language identical to that of §4(a)(2) permits challenges to requirements imposed by an employer as a "condition of employment in *or* transfer to" a particular job, *Griggs*, 401 U.S. at 426, 91 S. Ct. at 851 (emphasis added), this Court should construe §4(a)(2) in the same manner and hold that §4(a)(2) permits claims by prospective employees like Mr. Villarreal challenging conditions for "employment in" a particular job, as well as claims by current employees challenging the conditions for "transfer to" a different job.

C. The ADEA's Purposes Are Disserved By Interpreting §4(a)(2) To Prohibit Disparate Impact Claims By Prospective Employees.

Permitting disparate impact age discrimination claims by both prospective and existing employees is also the only interpretation of Section 4(a)(2) consistent with the ADEA's statutory purposes. In enacting the ADEA, Congress was particularly concerned about discrimination against older job applicants. Congress

explained that "older workers find themselves disadvantaged in their efforts to retain employment, *and especially to regain employment when displaced from jobs*," and noted 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). Thus, 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); *see also Smith*, 544 U.S. at 241, 125 S. Ct. at 1545 (majority opinion) ("[T]he ADEA reflects Congress' intent to give older workers employment opportunities whenever possible. . . .").

Congress's concerns regarding the obstacles older workers face when seeking employment, including those posed by policies and practices that are not facially discriminatory, are evident in the report by Secretary of Labor W. Willard Wirtz on which Congress drew heavily in crafting the ADEA. *See* U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment* (1965) (hereinafter "Wirtz Report").[8] Secretary Wirtz noted that "[a]ny formal

[8] The Wirtz Report was prepared in accordance with the Civil Rights Act of 1964's directive that the Secretary of Labor "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected." Pub. L. No. 88-352 §715, 78 Stat. 241, 265 (1964); *see also Smith*, 544 U.S. at 232, 125 S. Ct. at 1540 (discussing Wirtz Report's origin).

employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers—unfairly if, despite his limited schooling, an older worker's years of experience have given him the relevant equivalent of a high school education." Wirtz Report, at 3; *see also Smith*, 544 U.S. at 235 n.5, 125 S. Ct. at 1541 n.5 (plurality opinion) (noting "remarkable similarity between the congressional goals [the Supreme Court] cited in *Griggs* and those present in the Wirtz Report"). The Wirtz Report catalogued the discriminatory effects of "institutional arrangements that indirectly restrict the employment of older workers." Wirtz Report, at 15; *see also Smith*, 544 U.S. at 232, 125 S. Ct. at 1540 (majority opinion) (noting same discussion). It concluded that "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to *age limits in hiring*." Wirtz Report, at 22 (emphasis added).

Construing the ADEA to permit disparate impact claims only by individuals who are currently employed, as the district court did, is inconsistent with Congress's stated concern for the unemployed and its desire to promote the employment of older workers, as well as with the Wirtz Report's acknowledgement that "discrimination in the employment of older workers" can be eliminated only by addressing intentional *and* unintentional "age limits in hiring."

Id. There is no reason Congress, with these concerns in mind, would have permitted disparate impact claims by existing employees but not by unemployed older workers, the very group for whom Congress was most concerned. *See Chisom v. Roemer*, 501 U.S. 380, 403, 111 S. Ct. 2354, 2368 (1991) (remedial statutes should be given the "broadest possible" interpretation); *Chisom*, 501 U.S. at 396, 111 S. Ct. at 2364 (if Congress intends to limit the scope of a broad remedial statute, it does so explicitly and unambiguously).

D. The EEOC Interprets The ADEA To Permit Disparate Impact Claims By Prospective Employees.

The district court's construction of §4(a)(2) is also inconsistent with longstanding agency interpretations of that statute. The EEOC has long interpreted the ADEA—as well as the identical pre-1972 language of §703(a)(2)—to permit disparate impact claims by both prospective and current employees. *See, e.g.*, *Smith*, 544 U.S. at 243-44, 125 S. Ct. at 1546-1547 (Scalia, J., concurring) (quoting 29 C.F.R. §1625.7(d) (2004)); *Griggs*, 401 U.S. at 433, 433 n.9, 91 S. Ct. at 854 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 ADEA disparate impact regulations do not distinguish in any way between prospective and existing employees. Instead, they provide that

employment practices that disparately impact individuals 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(c) (as amended March 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); U.S. Equal Employment Opportunity Commission, Prohibited Employment Policies/Practices, http://www.eeoc.gov/laws/practices/ (last visited March 1, 2015) ("If an employer requires job applicants to take a test . . . . the employer may not use a test that excludes applicants age 40 or older if the test is not based on a reasonable factor other than age.").[9]

[9] *See also* Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act, 77 Fed. Reg. 19080, 19092 (Mar. 30, 2012) ("Data show that older individuals who become unemployed have more difficulty finding a new position and tend to stay unemployed longer than younger individuals. To the extent that the difficulty in finding new work is attributable to neutral practices that act as barriers to the employment of older workers, the [EEOC's] regulation [concerning disparate impact claims under §4(a)(2)] should help to reduce the rate of their unemployment and, thus held to reduce these unique burdens on society."); *id.* at 19094 (regulation regarding ADEA disparate impact claims "will seldom be implicated in actions by small employers because issues of age-based disparate impact are most likely to arise in the context of mass terminations, *hiring based on tests*, or other practices involving significant numbers of individuals") (emphasis added).

Because the EEOC's regulations are entitled to "great deference" when interpreting the ADEA, *see Griggs*, 401 U.S. at 433-434, 91 S. Ct. at 854-855, the district court erred by construing §4(a)(2) in a manner inconsistent with those regulations. *Smith*, 544 U.S. at 243-47, 125 S. Ct. 1546-1549 (Scalia, J., concurring) (deferring to EEOC's interpretation of the ADEA based on EEOC's "express authority to promulgate rules and regulations interpreting the ADEA"); *see also Chevron USA Inc.*, 467 U.S. at 845, 104 S.Ct. at 2783.

E. The Post-*Griggs* Amendment of Title VII Was Declaratory Of Existing Law.

In concluding that §4(a)(2) does not permit claims by prospective employees, the district court relied primarily on the addition of the phrase "or applicants for employment" to §703(a)(2) shortly after *Griggs* was decided. *See* 42 U.S.C. §2000e-2(a)(2). The district court's rationale was that Congress presumably "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." App. Vol. I, Dkt. No. 58, at 15. But this rationale is based on a false premise. Congress did not "expand the scope" of §703(a)(2) when it amended Title VII. Instead, the amendment, only *confirmed* that *Griggs*'s interpretation of Title VII is correct. Consistent with *Griggs*'s holding that the unamended language of §703(a)(2) permitted disparate impact claims by prospective employees, the Senate Committee on Labor and Public Welfare explained that the addition to §703(a)(2)

"would merely be declaratory of present law." S. Rep. No. 92-415, at 43. The House Report regarding the same set of amendments quoted extensively from *Griggs*, and explained that "the provisions of the bill [were] fully in accord with the decision of the Court" in *Griggs*. H.R. Rep. No. 92-238, at 21-22 (1971); *see also id.* at 30 (as amended, §703(a)(2) would be "[c]omparable to present Section 703(a)(2)").

Accordingly, contrary to the holding of the district court, Congress did not "expand the scope of §703(a)(2)" when modifying that section. Rather, Congress only endorsed and confirmed *Griggs*'s holding that the *original* version of §703(a)(2) of Title VII—in language *identical* to that of ADEA §4(a)(2)—permitted prospective as well as current employees to pursue disparate impact discrimination claims.[10]

For that reason, *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167, 129 S. Ct. 2343 (2009), does not apply here. The 1991 amendments to Title VII at issue in *Gross* were entirely different from the 1972 amendment to §703(a)(2). The purpose of the 1991 amendments was to *reverse* the Supreme Court's construction

[10] The district court also accorded significant weight to a single sentence of dicta from Justice O'Connor's concurrence in *Smith*, *see* 544 U.S. at 266, 125 S. Ct. at 1559 (O'Connor, J., concurring in the judgment), but that concurrence is neither binding nor persuasive. Only two other Justices joined Justice O'Connor's opinion, which—*contrary* to the majority's holding—would have entirely prohibited ADEA disparate impact claims.

of Title VII's statutory language in several prior decisions. *See Gross*, 557 U.S. at 174, 129 S. Ct. at 2349. *Gross* concluded that Congress's failure to amend the comparable language in the ADEA reflected a congressional judgment that the two statutes should not be interpreted in the same manner going forward, and that the Supreme Court's interpretations should continue to apply in the ADEA context.

If *Griggs* had held that Title VII did *not* permit disparate impact claims by prospective employees, *Gross* would arguably be relevant here. As explained above, however, *Griggs* reached precisely the opposite conclusion. Because the 1972 amendment did nothing to change the meaning of Title VII, but instead simply codified *Griggs*'s interpretation of its pre-amendment language, the 1972 amendment offers no support for the district court's interpretation of §4(a)(2).

Accordingly, consistent with §4(a)(2)'s plain text; with *Griggs*'s interpretation of identical statutory language as permitting disparate impact claims by prospective employees; with the ADEA's underlying purposes; and with longstanding agency interpretations of the ADEA, this Court should reverse the decision below and conclude that §4(a)(2) permits disparate impact claims by prospective employees like Mr. Villarreal who are harmed by hiring criteria that are arguably facially neutral but in practice deny employment to individuals over 40 on the basis of their age.

II. Mr. Villarreal's Deadline For Filing An EEOC Charge Regarding His 2007 Application Was Equitably Tolled Until At Least April 2010.

For 40 years, this Court and its predecessor have recognized that the deadline for filing a charge of discrimination with the EEOC is tolled until the facts which would support a charge of discrimination become apparent or should have become apparent to the charging party. *Reeb*, 516 F.2d at 931.[11] In granting Defendants' partial motion to dismiss, the district court recognized that well-established principle but concluded that Mr. Villarreal's original complaint lacked the factual specificity necessary for the court to determine whether equitable tolling applied to render Mr. Villarreal's May 2010 charge regarding his November 2007 application for the Territory Manager position timely. *See* App. Vol. I, Dkt. No. 58, at 18-19. When Mr. Villarreal sought to add those facts to the complaint, however, the court reversed course and concluded that equitable tolling requires evidence of employer misconduct or some extraordinary circumstance. In so ruling, the district court disregarded longstanding circuit precedent. Because the facts alleged in Mr. Villarreal's proposed amended complaint establish that the deadline to file an EEOC charge regarding his 2007 application was equitably

[11] This Court has adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

tolled until at least April 2010, Mr. Villarreal's proposed amendment was not futile.

A. Under Binding Circuit Precedent, The EEOC Charge Filing Deadline Is Tolled Until The Facts Supporting A Charge Of Discrimination Are Apparent Or Should Have Become Apparent To The Charging Party.

In this Circuit, it is well-established that "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 (citing *Reeb*, 516 F.2d at 931); *see also Cocke v. Merrill Lynch & Co., Inc.*, 817 F.2d 1559, 1561 (11th Cir. 1987) ("While *Reeb* is a Title VII case, the equitable modification standard applies to ADEA actions.").[12] This standard was first announced by the Fifth Circuit nearly 40 years ago in *Reeb*. The plaintiff there, who had been terminated, discovered after the expiration of the limitations period that she had been replaced by a less-qualified male employee. 516 F.2d at 926. Emphasizing that "remedial legislation such as Title VII of the

[12] This Court has repeatedly reaffirmed the applicability of the *Reeb*/*Sturniolo* rule in ADEA cases. *See Jones*, 331 F.3d at 1268; *Hargett v. Valley Fed. Sav. Bank*, 60 F.3d 754, 765 (11th Cir. 1995); *see also Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1435 (11th Cir. 1998) ("ADEA's timing requirements might have been equitably tolled if, in the period prior to the 180 days before filing the initial EEOC charge, Turlington had no reason to believe he was a victim of unlawful discrimination."); *Hill v. Metro. Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1545 (11th Cir. 1988) ("The 180 days begins running from the date the employee knows or reasonably should know that he or she has been discriminated against.").

Civil Rights Act of 1964 is entitled to the benefit of liberal construction," *Reeb* concluded that, because the plaintiff had no basis for suspecting discrimination until she learned the identity of her replacement, her suit was not time-barred. *Id.* at 928. As *Reeb* explained, permitting equitable tolling until a plaintiff becomes aware of the factual basis for his or her claims is particularly important in the context of employment discrimination, where "[s]ecret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the individual discriminated against." *Id.* at 931.

Under the *Reeb* standard, "mere suspicion of age discrimination, unsupported by personal knowledge of discrimination," is insufficient to terminate the tolling period. *Sturniolo*, 15 F.3d at 1026. Instead, the limitations period is tolled until the plaintiff has "knowledge of facts sufficient to support a prima facie case of age discrimination." *Id.* The plaintiff in *Sturniolo*, for example, suspected that he had been the victim of age discrimination when he was terminated, but several months passed before he learned that he had been replaced by a younger employee. *Id.* at 1025. Because "[a]t the time of discharge, Sturniolo had no facts sufficient to support a claim of age discrimination," the limitations period for his EEOC charge was tolled until he "learned that a younger individual had replaced him" and thus "possessed enough information to support a claim of age discrimination." *Id.* at 1026. Likewise, in *Jones v. Dillard's*, this Court explained

that the purposes of the ADEA are not advanced by requiring an employee to "act[] on a mere suspicion," and reiterated this Circuit's long-settled rule that the limitations period is tolled until the plaintiff is aware of the specific facts supporting his or her claim. *Jones*, 331 F.3d at 1264, 1267-68.

B. Mr. Villarreal's Deadline For Filing An EEOC Charge Regarding His November 2007 Application Was Equitably Tolled Until April 2010.

The equitable tolling standard recognized in *Reeb*, *Sturniolo*, and *Jones* applies fully here, and establishes that Mr. Villarreal's May 2010 EEOC charge regarding his November 2007 application was timely. When Mr. Villarreal's 2007 application was rejected, he could not have known that RJR was using discriminatory hiring guidelines, for he applied through a website, was never told why he was rejected, and did not even know whether his application had been reviewed or that Kelly Services had conducted that review on RJR's behalf. App. Vol. II, Dkt. No. 61-1, at 12 ¶28. Mr. Villarreal was not employed by RJR, so he had no existing work relationships to help him discover that information. *Id.* He did not learn those facts until an attorney from Altshuler Berzon LLP informed him in April 2010 that applications for the Territory Manager position, including his own, had been screened using guidelines designed "to target candidates under 40 years of age and to reject candidates 40 years of age and over." App. Vol. II, Dkt. No. 61-1, at 8, 12-13 ¶¶18, 29-30.

Accordingly, "the facts which would support [Mr. Villarreal's] charge of discrimination" were not apparent to him and could not have been apparent to him until April 2010 at the earliest. *Sturniolo*, 15 F.3d at 1025. There is no dispute that Mr. Villarreal was unaware of the facts underlying his EEOC charge prior to April 2010. Defendants have never even suggested that Mr. Villarreal could have discovered any of those facts before that time, and they could not credibly suggest that his own investigation would have revealed those facts to him.

If anything, this case presents an even stronger case for equitable tolling than cases like *Sturniolo*, which involved individuals who *suspected* discrimination but lacked the facts necessary to establish a prima facie case of unlawful discrimination. Unlike those plaintiffs, Mr. Villarreal simply filled out an online job application and then heard no response. He had no reason even to suspect RJR's unlawful practices. Its "[s]ecret preferences in hiring" were not, and could not have been, apparent to him. *Reeb*, 516 F.2d at 931.

The application of the *Reeb*/*Sturniolo* rule here is also consistent with the equitable considerations underlying all of this Circuit's tolling precedents. As this Court has explained, "[t]he interests of justice are most often aligned with the plaintiff" "when she has no reasonable way of discovering the wrong perpetrated against her." *Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993). On the other hand, "[t]he interests of justice side with the defendant when the plaintiff

does not file her action in a timely fashion despite knowing or being in a position reasonably to know that the limitations period is running." *Id.* (citations omitted). In this case, the "interests of justice" plainly require tolling. With no knowledge of the facts supporting his charge of discrimination, Mr. Villarreal was not "in a position reasonably to know that the limitations period [was] running" until April 2010, and he cannot be faulted for failing to file a charge before that time. *Id.*[13]

C. Under This Circuit's Precedents, Equitable Tolling Does Not Require Employer Misconduct.

Notwithstanding the clear rule established in *Reeb*, *Sturniolo*, and *Jones*, the district court ruled that Plaintiff failed to state a claim for equitable tolling because he had "not alleged any misrepresentations or concealment that hindered [him] from learning of any alleged discrimination." App. Vol. II, Dkt. No. 67, at 5. But this Circuit has squarely and repeatedly recognized that "equitable tolling does *not* require employer misconduct." *Cocke*, 817 F.2d at 1561 (emphasis added); *see also Browning v. AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997)

[13] Were it otherwise, any individual whose job application was rejected would have to file a protective EEOC charge almost immediately thereafter to protect his rights should he *later* discover some reason to believe that he had been the subject of unlawful employment discrimination.

("[E]quitable tolling does not require any misconduct on the part of the defendant.").[14]

By requiring such allegations, the district court "confus[ed] . . . the doctrines of equitable tolling and equitable estoppel." *Browning*, 120 F.3d at 226; *see also Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451-52 (7th Cir. 1990) (Posner, J.) ("Many cases . . . in the age discrimination field as in other areas, fuse the two doctrines, presumably inadvertently."). While equitable *estoppel* depends upon the employer's conduct and extends the filing period when that conduct wrongfully prevents the plaintiff from discovering his claim, equitable *tolling* "focuses on the employee with a reasonably prudent regard for his rights." *Cocke*, 817 F.3d at 1561. Allegations of "misrepresentation[] or concealment" by the employer are not required to establish the employee's lack of knowledge or his "reasonably prudent regard for his rights."[15]

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[14] Indeed, the district court recognized the proper legal standard when it ruled upon Defendants' partial motion to dismiss, explaining that "the line of cases" concerning employer misconduct or "wrongful concealment of facts" is "not relevant" to the equitable tolling issues in this case. App. Vol. I, Dkt. No. 58, at 19 n.5.

[15] Defendants asked the court below to ignore *Sturniolo* because the employer in that case had purportedly misled the plaintiff. *See* App. Vol. I, Dkt. No. 45, at 9. But nothing in *Sturniolo*'s application of this Circuit's equitable tolling standard turned upon the employer's conduct. Rather, *Sturniolo* noted the employer's actions only to identify the point at which the plaintiff finally acquired "knowledge of facts sufficient to support a prima facie case of age discrimination." 15 F.3d at 1026. The same was true in *Reeb*, where the employer's actions provided an (continued…)

D. Mr. Villarreal Was Not Required To Allege Any "Extraordinary Circumstances" Beyond His Reasonable Lack Of Knowledge.

Furthermore, Mr. Villarreal was not required to allege "some extraordinary circumstance"—other than his lack of knowledge—that "stood in his way" and prevented him from filing an earlier EEOC charge. *But see* App. Vol. II, Dkt. No. 67, at 4 (citing *Downs v. McNeil*, 520 F.3d 1311, 1324 (11th Cir. 2008)). This Circuit does not apply the "extraordinary circumstances" standard in cases where the plaintiff was unaware of any facts suggesting he had a cause of action against the defendant for unlawful employment discrimination. In applying that standard, the district court cited and relied upon *Downs*, but that case arose in the federal habeas context, where it may reasonably be presumed that a convicted defendant is aware of the facts underlying his habeas petition—namely, the circumstances leading to his conviction.[16] Application of the "extraordinary circumstances" standard is appropriate in the unique context of habeas petitions challenging state court convictions—such as the petition in *Downs*—because those petitions

(…continued)
additional argument in favor of tolling. *See Reeb*, 516 F.2d at 930. The *Reeb* court characterized the principle that a "party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense" as a mere "corollary" to the general rule that "the statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Id.*

[16] *Outler v. United States*, 485 F.3d 1273 (11th Cir. 2007), and *Sandvik v. United States*, 177 F.3d 1269 (11th Cir. 1999), also applied the "extraordinary circumstances" standard in the context of habeas petitions.

implicate the states' strong interest in the finality of their criminal convictions, as well as the deference owed by federal courts to state court proceedings. *See*, *e.g.*, *Williams v. Taylor*, 529 U.S. 420, 436, 120 S. Ct. 1479, 1490 (2000) ("Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings.").

The interests implicated by federal employment discrimination lawsuits are very different. Rather than limiting the scope and reach of federal antidiscrimination laws, courts in this Circuit are "extremely reluctant to allow procedural technicalities to bar claims" of unlawful employment discrimination. *Gregory v. Ga. Dep't of Human Resources*, 355 F.3d 1277, 1280 (11th Cir. 2004) (citation omitted). *Reeb*, *Sturniolo*, and *Jones* properly recognize that where a litigant files a charge of discrimination outside the statutory limitations period but soon after he first learns that he was a victim of unlawful employment discrimination, the important purposes served by Title VII and the ADEA outweigh the statute of limitation's goal of "encourage[ing] plaintiffs to bring

actions in a timely manner." *CTS Corp. v. Waldburger*, __ U.S. __, 134 S.Ct. 2175, 2183 (2014).[17]

In the district court, Defendants also cited *Tarmas v. Mabus*, 2010 WL 3746636 (M.D. Fla. Sept. 21, 2010), *aff'd sub nom. Tarmas v. Sec'y of Navy*, 433 F. App'x 754 (11th Cir. 2011), but that case is similarly inapposite. The plaintiff there "routinely challenged his supervisor's decisions regarding his leave, his requested transfers, and his requested flexible schedule," and thus could not "claim that he was unaware that he might have a claim for discrimination." 433 F. App'x at 760 n.5. In both *Downs* and *Tarmas*, an "extraordinary circumstances" standard was appropriate because the plaintiffs were in the midst of litigation or had clear notice of their claims. Where such a plaintiff nonetheless fails to pursue his or her rights in a timely manner, this Court quite reasonably requires an "extraordinary" reason to excuse that failure. In this case, by contrast, Mr. Villarreal's lack of knowledge of RJR's discriminatory practices and his inability to discover those practices until April 2010 prevented him from filing his EEOC charge before May

[17] The equitable tolling standard established by *Reeb*, *Sturniolo*, and *Jones* does not subject employers to unbounded liability for their past acts of discrimination. Just as employees may rely upon equitable tolling to pursue otherwise untimely claims, employers harmed by a plaintiff's delay in filing suit may raise an equitable laches defense, and under such circumstances courts retain the equitable discretion to "locate a just result in light of the circumstances peculiar to the case." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 121, 122 S. Ct. 2061, 2077 (2002) (citation omitted).

2010. Under this Circuit's precedents, no other "extraordinary circumstance" is necessary to toll the deadline for filing that charge.

E. Plaintiff Exercised Due Diligence In Pursuing His Claim.

Finally, the district court faulted Mr. Villarreal for failing to "allege[] any due diligence on his part to determine the status of his 2007 application." App. Vol. II, Dkt. No. 67, at 5. But under the facts alleged in Mr. Villarreal's complaint, no additional diligence was required or could reasonably have been expected.

The district court criticized Mr. Villarreal for failing to "determine the status of his 2007 application," *id.*, apparently believing that Mr. Villarreal could have called someone at RJR (although he had only previously contacted RJR through an automated online application system) to confirm the rejection of his 2007 application. But Mr. Villarreal quite reasonably understood that RJR had not contacted him because it had rejected his application, and he would have learned nothing material by simply confirming that fact (were he even able to identify and reach any individual capable of offering such confirmation). Tellingly, when RJR rejected Mr. Villarreal's later applications for the Territory Manager position, RJR told Mr. Villarreal only that it intended to pursue other candidates. App. Vol. I, Dkt. No. 1, at 8-9 ¶¶18-19; App. Vol. II, Dkt. No. 61-1, at 8 ¶¶17-18.

Likewise, Defendants cannot reasonably contend that they would have admitted their unlawful age discrimination had Mr. Villarreal simply asked, as the

district court acknowledged. *See* App. Vol. II, Dkt. No. 67, at 5. Whether or not such a false response would have permitted Mr. Villarreal to argue for equitable *estoppel* based on Defendants' "concealment or malfeasance," *id.*, the only question relevant to the equitable *tolling* analysis is whether Mr. Villarreal acted reasonably and prudently under the circumstances. Given that Mr. Villarreal would have learned nothing material by making further inquiries of Defendants after they rejected his 2007 application, his failure to do so was reasonable and does not exhibit any lack of due diligence on his part.[18]

None of this Circuit's cases finding an absence of due diligence are analogous to the present case. In *Bost v. Fed. Express Corp.*, for example, the plaintiffs failed to amend an earlier complaint in a timely manner after being *ordered* to do so by the court. *See* 372 F.3d 1233, 1242 (11th Cir. 2004); *see also supra* Section II.D (discussing untimely habeas petitions). In the district court proceedings, Defendants did not cite a single case in which this Court found equitable tolling unavailable on due diligence grounds even though the plaintiff lacked any knowledge of the facts necessary to support a charge of discrimination.

In short, none of the district court's reasons for departing from this Circuit's well-established equitable tolling precedents have merit. Because Mr. Villarreal

[18] Defendants have never disputed that Mr. Villarreal acted with due diligence after he was alerted to RJR's discriminatory practices by his attorneys.

was not aware of RJR's discriminatory practices until April 2010 and could not have learned of those practices until then, the deadline for filing his EEOC charge was tolled until that time. Because Mr. Villarreal's proposed amendment was not futile, this Court should reverse the decision below and instruct the district court to permit the filing of Mr. Villarreal's amended complaint.

III. Mr. Villarreal May Challenge All Applications Of Defendants' Unlawful Pattern Or Practice Of Discriminating Against Prospective Employees Over 40.

Although this Circuit's well-established equitable tolling precedents alone suffice to establish that Mr. Villarreal's challenge to RJR's rejection of his November 2007 application was timely, that is not the only reason why the district court's decision should be reversed. The district court also erred in failing to recognize that this is a representative action challenging RJR's policy of using Resume Review Guidelines and a Blue Chip TM candidate profile that had the purpose and effect of discriminating against applicants over the age of 40—in other words, a "pattern-or-practice" discrimination claim. As a number of circuits have recognized, a timely claim on behalf of all individuals harmed by a pattern or practice of discrimination properly encompasses every implementation of the unlawful pattern or practice, not merely those occurring within 180 days of the filing of the representative plaintiff's EEOC charge.

The starting point for determining the timeliness and scope of a pattern-or-practice claim is *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2002), which clarified the applicability of the "continuing violation doctrine" in employment discrimination cases. *Morgan* held that a claim based upon a "discrete . . . discriminatory act" is timely only if the claimant filed his or her EEOC charge within 180 or 300 days of the act, because such an act "'occur[s]'" on the date it happens and not on some later date. 536 U.S. at 110, 122 S. Ct. at 2070-71; *see also* 42 U.S.C. 2000e-5(e)(1) ("A charge under this section shall be filed within one hundred and eighty days *after the alleged unlawful employment practice occurred*[.]") (emphasis added). *Morgan* also held, however, that a hostile work environment claim can be based in part upon acts occurring outside the statutory period. *Morgan*, 536 U.S. at 105, 122 S.Ct. at 2068. Such claims "are different in kind from discrete acts" because the unlawful practice challenged in such a claim "cannot be said to occur on any particular day." *Morgan*, 536 U.S. at 115, 122 S.Ct. at 2073.

The district court concluded that because Mr. Villarreal is not pursuing a hostile work environment claim, his claim is subject to *Morgan*'s "discrete acts" rule. App. Vol. I, Dkt. No. 58, at 20-21. But *Morgan* did not address the timeliness of "pattern-or-practice" discrimination claims like Mr. Villarreal's challenge to RJR's discriminatory hiring policies. To the contrary, *Morgan*

expressly declined to decide whether such claims can encompass actions outside of the limitations period that were taken pursuant to a policy that was applied and implemented within the limitations period and that was the subject of a timely EEOC charge. *Morgan*, 536 U.S. at 115 n.9, 122 S. Ct. at 2073 n.9. As the Sixth Circuit recognized in *Sharpe v. Cureton*, *Morgan*'s limitation on the "continuing violation" theory does not affect claims involving a "longstanding and demonstrable *policy* of discrimination," because such claims properly encompass "'all relevant actions allegedly taken pursuant to the employer's discriminatory policy or practice, including those that would otherwise be time barred.'" 319 F.3d at 267-68 (quoting *Alexander v. Local 496*, 177 F.3d 394, 408 (6th Cir. 1999)) (emphasis added); *see also Bowerman*, 646 F.3d at 366 (challenge to "'longstanding and demonstrable policy of discrimination'" may encompass actions taken outside limitations period) (quoting *Bell v. Ohio State Univ.*, 351 F.3d 240, 247 (6th Cir. 2003)).[19]

[19] *Sharpe* concluded that the specific claims at issue therein challenged discrete acts rather than an actual pattern or practice, and thus were not timely. *See Sharpe*, 319 F.3d at 268-69. As explained below, Mr. Villarreal brings a true pattern-or-practice claim challenging Defendants' discriminatory hiring policies, and does not simply seek to revive time-barred claims involving discrete acts by arguing that that acts flowed from an unlawful pattern or practice of discrimination. *Cf., e.g.*, *Cherosky v. Henderson*, 330 F.3d 1243, 1247 (9th Cir. 2003); *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1186 (10th Cir. 2003).

As *Sharpe* correctly recognized, true pattern-or-practice claims closely resemble hostile work environment claims and thus, under *Morgan*, properly encompass applications of the challenged policy or practice both inside and outside the limitations period. Like a hostile work environment claim, an unlawful pattern or practice of discrimination "is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Morgan*, 536 U.S. at 117, 122 S. Ct. at 2074 (quoting 42 U.S.C. § 2000e-5(e)(1)); *see also Morgan*, 536 U.S. at 111, 122 S. Ct. at 2071 (contrasting "discrete act" of discrimination with unlawful "pattern or practice" subject to civil prosecution by Attorney General). A pattern-or-practice claim's "very nature involves repeated conduct" and is "based on the cumulative effect of individual acts." *Morgan*, 536 U.S. at 115, 122 S. Ct. at 2073. Such claims are not based on "sporadic discriminatory acts" but on discrimination that is widespread throughout a company or that is a routine and regular part of the workplace. *Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 1855 (1977). Unlike the "discrete acts" considered in *Morgan*, an unlawful pattern or practice of discrimination, like a hostile work environment, occurs within the limitations period for the purposes of the charge-filing deadline if the employer implements that pattern or practice within the limitations period. No more is required to establish the timeliness of any challenge to that pattern or practice, and the charge-filing deadline does not limit the *relief* that may be sought

when pursing a timely pattern-or-practice claim. *Cf. Morgan*, 536 U.S. at 118-19, 122 S. Ct. at 2075 ("[T]he timely filing provision [of Title VII] was not meant to serve as a specific limitation either on damages or the conduct that may be considered for the purposes of one actionable hostile work environment claim.").

Furthermore, in much the same way that a "single act of harassment may not be actionable on its own" under a hostile work environment theory, *Morgan*, 536 U.S. at 115, 122 S. Ct. at 2073, the evidence that an employer has a widespread or routine policy, pattern, or practice of unlawful 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. This is particularly true to the extent that a representative plaintiff's pattern or practice claims depends upon statistical proof reflecting the challenged policy's application over time. *See, e.g.*, *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08, 97 S. Ct. 2736, 2741 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

The present case involves precisely the sort of timely pattern-or-practice claim that properly encompasses all applications of RJR's pattern, practice, or policy of discrimination. Mr. Villarreal does not challenge a series of discrete hiring decisions by RJR and Pinstripe. Rather, he challenges RJR's unitary policy

of "targeting applicants . . . under the age of 40, and rejecting applications of those 40 years of age or over" through hiring criteria whose purpose and effect was to discriminate against older workers. *See, e.g.*, App. Vol. I, Dkt. No. 1, at 17-18 ¶41; App. Vol. II, Dkt. No. 61-1, at 18 ¶43. Mr. Villarreal's fundamental claim is that RJR's Resume Review Guidelines and Blue Chip TM profile made age discrimination RJR's "standard operating procedure[—]the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336, 97 S. Ct. at 1855. That claim is supported by statistical evidence of the sort "typically used to prove a pattern or practice of discrimination." *Lyons v. England*, 307 F.3d 1092, 1107 n.8 (9th Cir. 2002) (use of statistical evidence is hallmark of pattern-or-practice claim); *see, e.g.*, App. Vol. I, Dkt. No. 1, at 11-12 ¶¶24-25; App. Vol. II, Dkt. No. 61-1, at 10-11 ¶¶23-24 (providing statistics regarding age of individuals hired into Territory Manager positions and Pinstripe's practices in forwarding resumes to RJR for further consideration). Just as a hostile work environment claim involves individual acts that would not be actionable on their own, a claim premised on Mr. Villarreal's 2007 application could not, standing on its own, establish an unlawful pattern or practice of age discrimination. The evidence that fewer than two percent of the individuals hired as Territory Managers between September 2007 and July 2010 were over the age of 40, for example, could not possibly have been available to Mr. Villarreal at the time that his 2007 application was rejected.

This Court has not yet decided whether a representative pattern-or-practice claim of the sort brought by Mr. Villarreal may properly encompass discriminatory actions taken outside that period under the challenged policy.[20] For the reasons explained above, however, such claims should be treated like hostile work environment claims under *Morgan*. Because Mr. Villarreal's claims challenge a pattern or practice of age discrimination by RJR, they properly encompass all applications of that unlawful policy, including those occurring more than 180 days before the filing of his Mr. Villarreal's charge.

CONCLUSION

For the foregoing reasons, the decision below should be REVERSED.

[20] *Riccard v. Prudential Insurance Co. of America*, 307 F.3d 1277 (11th Cir. 2002), for example, did not involve any 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 named plaintiffs *years* before the filing of the EEOC charge, and there was no allegation that the practice continued within the limitations period. And in *Davis v. Coca-Cola Bottling Co. Consolidated*, 516 F.3d 955, 967-79 (11th Cir. 2008), the Court concluded that the plaintiffs could not pursue a pattern-or-practice claim because they were not pursuing their claims in a representative capacity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), because this brief contains 13,036 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2015, I electronically filed the foregoing 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 BRIEF OF PLAINTIFF-APELLANT RICHARD M. VILLARREAL to be filed with the Clerk of Court and served upon the following counsel by U.S. First Class Mail:

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