IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-10602

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

v.

R.J. REYNOLDS CO., et al.,

Defendants-Appellees.

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

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF/APPELLANT

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I hereby certify that this list names each person and entity that, as far as the EEOC knows, has an interest in this case and/or this appeal.

s/ Donna J. Brusoski

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March 30, 2015

STATEMENT REGARDING ORAL ARGUMENT

The Equal Employment Opportunity Commission (EEOC) believes that further exploration of the issues at oral argument would assist this Court in resolving this appeal. *See* Fed. R. App. P. 34(a); 11 Cir. R. 28-1(c); 11 Cir. R. 34-3(c). This appeal raises an important question of statutory construction—namely whether the ADEA authorizes applicants to challenge hiring practices that cause age-based disparate impact. This appeal also raises an important question regarding whether the charge-filing limitation period should be equitably tolled when the plaintiff had no reason to know or suspect that his initial non-selection was due to his age, and he filed a charge with the EEOC shortly after learning facts supporting such a claim.

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is the agency charged by Congress with responsibility for interpreting and enforcing federal prohibitions on age discrimination in employment in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.* This appeal raises the important question of whether the ADEA authorizes applicants to bring claims of disparate impact in hiring. Pursuant to its statutory authority, the Commission has issued regulations and other interpretive material, all consistently recognizing that the ADEA authorizes disparate-impact-based challenges to practices adversely affecting applicants. This appeal also raises an important question regarding whether the charge-filing limitation period should be equitably tolled when the plaintiff had no reason to know or suspect that his initial non-selection was due to his age and he filed an age discrimination charge shortly after learning facts from counsel supporting such a claim. Resolution of these issues is important to the effective enforcement of the ADEA and other federal anti-discrimination statutes. As a federal agency, the Commission is authorized to participate as amicus curiae in the federal courts of appeals. Fed. R. App. P. 29(a). Therefore, the Commission respectfully offers its views to the Court.

STATEMENT OF THE ISSUES

1. Whether the district court erred in ruling that applicants for employment may not pursue disparate impact hiring claims under section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2).

2. Whether the district court erred in ruling that equitable tolling of the charge-filing limitation period did not apply where the plaintiff lacked any reason to suspect he was a victim of age discrimination until well after his non-selection.

STATEMENT OF THE CASE

1. Statement of Facts.

Richard Villarreal applied for Territory Manager ("TM") positions with R.J. Reynolds ("RJR") on six separate occasions between November 2007 and April 2012. R.1 at ¶ 4. Territory Managers promote and sell RJR's tobacco products within assigned geographic territories and directly to consumers. *Id.* at ¶ 10. Villarreal was 49 when he first applied for a TM position. *Id.* at ¶ 11. He learned of a vacancy on a CareerBuilder website, which directed him to an RJR website, where he applied for the position. *Id.* Villarreal was never contacted regarding his 2007 application. *Id.* at ¶ 12. He applied for the position again in June 2010, December 2010, May 2011, September 2011, and March 2012, but each time his application was rejected in favor of younger, less experienced applicants. *Id.* at ¶

20. Since September 2007, RJR has hired over a thousand individuals to fill TM positions throughout the country. *Id.* at ¶ 24.

RJR retained the recruiting services of Kelly Services, from 2007 to 2008, to screen all applications RJR received for TM positions. *Id.* at ¶ 13. Applying "Resume Review Guidelines" provided by RJR, Kelly Services determined which applicants should be rejected based on their resumes alone and which should be interviewed by RJR. *Id.* at ¶¶ 14 & 15; R.1-1. RJR's resume guidelines listed desired characteristics of the "targeted candidate," including "*2-3 years out of college*," and characteristics of candidates to "stay away from," including applicants who were "*in sales for 8-10 years*." *Id.* Kelly Services rejected Villarreal's November 2007 application because he had more than eight years of sales experience and was out of college for much more than three years. R.1 at ¶ 16. Instead Kelly Services forwarded applications of substantially younger, less experienced individuals to RJR for further consideration. *Id.*

Pinstripe began performing the same function for RJR in April 2009 and was doing so when Villarreal applied in 2010, 2011, and 2012. *Id.* at ¶¶ 20 & 21. Like Kelly Services, Pinstripe used "resume review guidelines" to determine which applicants should be rejected based on their resumes alone and which should be interviewed by RJR. *Id.* at ¶ 22. In addition, Pinstripe and RJR created a candidate profile that identified characteristics RJR preferred in TM candidates—

the "Blue Chip TM." R.1 at ¶ 23; R.1-2. They created the profile by surveying recent hires nominated by management as ideal new hires. *Id.* Because since at least September 2007, RJR and its recruiting agents relied on the resume guidelines under which RJR hired almost exclusively younger individuals to fill TM positions, the candidate profile was heavily weighted in favor of younger individuals. *Id.* 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. *Id.*

From at least September 2007 through at least 2012, RJR and its agents rejected hundreds of qualified older applicants, including Villarreal, under policies or practices that screened individuals applying to fill TM positions. R.1 at ¶ 24. Data indicates that the age-based hiring disparity was caused by RJR's practices, not by any unique characteristics of the TM position or the applicant pool. R.1 at ¶ 25. Specifically, from September 1, 2007, through July 10, 2010, RJR hired 1,024 people to fill TM positions. *Id.* Only 19 of those hires (1.85%) were over age 40, although individuals over 40 constituted far more than 1.85% of the applicant pool for the position. *Id.* Of the applications screened by Kelly Services, approximately 48% (9,100 of 19,086) were from individuals with eight or more years of sales experience. *Id.* However, using RJR's guidelines, Kelly Services referred only 15% of that group to RJR, compared to 35% of applicants with less

experience. *Id.* Of the applications 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 or more years of sales experience, but Pinstripe forwarded only 7.7% of that group to RJR, compared to 45% of applicants who only had one-to-three years of sales experience. *Id.*

On May 17, 2010, Villarreal filed a charge with the EEOC alleging that RJR had discriminated against him on the basis of his age in rejecting his November 2007 application. R.1 at ¶ 27; R61-1 at ¶ 26. Until that time, he was not aware of any reason to believe that his 2007 application had been rejected due to his age. R.1 at ¶ 27 & ¶ 28; R.61-1 at ¶¶ 27, 28, 29 & 30. Thereafter, Villarreal amended his charge to encompass his later applications for the position and the rejections of those applications, and added Pinstripe and CareerBuilders as respondents. R.1 at ¶ 29; R.61-1 at ¶ 31.

Villarreal filed this ADEA action on behalf of himself and others similarly situated, alleging unlawful age discrimination in hiring individuals to fill RJR's TM position. R.1 at ¶¶ 31, 32, 33, 34 & 35. Villarreal alleged that the policies and practices RJR and its agents used when screening applicants for the position violated the ADEA because they intentionally disfavored applicants age 40 and over (R.1 at ¶¶ 36-43), and they had a disparate impact on applicants age 40 and over (R.1 at ¶¶ 44-50).

Defendants RJR and Pinstripe moved for partial dismissal of the complaint (R.24), arguing that Villarreal's disparate impact claim must be dismissed because the ADEA does not allow applicants to challenge employment policies and practices that have a disparate impact based on age. R.24-1 at 1, 5-9. Defendants also moved to dismiss all claims involving hiring decisions that occurred before November 19, 2009, arguing that those claims are time-barred because the discrimination in question occurred more than 180 days before Villarreal's May 2010 EEOC charge. R.24-1 at 9-11.

2. District Court Opinions.

The district court granted defendants' motion to dismiss Villarreal's disparate impact claim and disparate treatment claims that arose before November 2009 (or July 2009).[1] R.58. The court recognized that the ADEA authorizes disparate impact cases and ruled that such claims are available under section 4(a)(2), 29 U.S.C. § 623(a)(2). R.58 at 12-13 (relying on *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005)).

[1] Because Villarreal resides in Georgia, which has no state equivalent of the EEOC, the 180-day limitation period applies to his claims. 29 U.S.C. § 626(d)(1)(A). Defendants acknowledged, however, that as to additional individuals who opt into this action, each individual's place of residence will determine whether the limitations period is 180 or 300 days. Therefore, because July 22, 2009, is 300 days before Villarreal's EEOC charge, July 2009 may be the relevant date. R.24-1 at 11-12 n.2.

The district court rejected Villarreal's argument that applicants are covered by ADEA section 4(a)(2) because in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court interpreted the identical language contained in Title VII's original section 703(a)(2) to include applicants for employment. R.58 at 14. The district court recognized that, as originally enacted, the language in Title VII section 703(a)(2) was identical to that in ADEA section 4(a)(2), and *Griggs* was decided under the original version of Title VII. But the court concluded that *Griggs* was inapplicable because "*Griggs* involved current employees" and because Congress amended Title VII in 1972 by adding "applicants for employment" to section 703(a)(2), but it did not similarly amend the ADEA's section 4(a)(2). *Id*. The court emphasized that, in construing other provisions of Title VII and the ADEA, the Supreme Court has stated that "'[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally.'" R.58 at 14-15 (quoting *Gross v. FBL Fin. Serv.*, 557 U.S. 167, 174 (2009)).

The district court also declined to toll the charge-filing limitation period and ruled that Villarreal's challenges to hiring decisions made before November 2009 were time-barred. R.58 at 15-19. The court observed that the timely charge-filing requirement is subject to equitable modification and acknowledged this Court's precedent holding 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.'" R.58 at 17-18 (citation omitted). However, the court concluded that the allegations in Villarreal's complaint were insufficient to show that the limitation period should be equitably tolled. R.58 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.

In a subsequent order, the district court denied Villarreal's motion to amend his complaint to allege facts in support of tolling with more specificity. R.67. The court acknowledged that, under Fed. R. Civ. P. 15(a), leave to amend should be freely given when justice so requires. R.67 at 3. However, the court concluded that Villarreal's proposed amendments would be futile because he did not state a claim for equitable tolling. *Id.* at 4-5. The court faulted Villarreal for failing to allege any misrepresentations or concealment that hindered him from learning of any discrimination. *Id.* The court also stated that because Villarreal made no attempt to contact defendants and ascertain the basis for his rejection, he cannot allege concealment or misrepresentation by defendants, or due diligence on his part. *Id.* at 5.

ARGUMENT

I. The ADEA authorizes applicants to bring claims of disparate impact in hiring.

The language of section 4(a)(2) of the ADEA, the *Griggs* Court's interpretation of identical statutory language in Title VII as encompassing disparate impact claims by applicants, and the ADEA's underlying purposes all support the conclusion that the ADEA authorizes disparate impact claims by applicants who are harmed by hiring criteria that are facially neutral but, in practice, deny employment opportunities to individuals on the basis of their age. Moreover, the longstanding agency interpretation of the ADEA recognizes that applicants may pursue ADEA disparate impact claims, making this "an absolutely classic case for deference to agency interpretation." *Smith*, 544 U.S. at 243 (Scalia, J., concurring).

A. The statutory text, Supreme Court rulings, and the statute's purposes indicate that hiring challenges may be pursued under the disparate impact theory.

At the time of the Supreme Court decision in *Griggs*, section 703(a)(2) of Title VII 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." *Griggs*, 401 U.S. at 426 n.1, quoting 42 U.S.C. § 2000e-2(a)(2). Section 4(a)(2) of the

ADEA contains language identical to the Title VII language the Supreme Court construed as supporting a disparate impact theory in *Griggs*, except the ADEA substitutes "age" for the categories of discrimination prohibited by section 703(a)(2): under section 4(a)(2) it is 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). As the Supreme Court has noted, by adopting the same language it used in Title VII, Congress manifested its intent to extend to older workers the same protection against discrimination that it had extended to the groups protected by Title VII three years earlier. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978).

Thus, the availability of disparate impact analysis under the ADEA follows from a line of cases interpreting the statutory language in Title VII and the ADEA, beginning with the Supreme Court's 1971 decision in *Griggs* construing Title VII. In *Griggs* the Court noted that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." 401 U.S. at 432; *see also id.* at 431 (section 703 "proscribes not only overt discrimination but also employment practices that are fair in form but discriminatory in operation"). Contrary to the district court's understanding in this case, *Griggs* involved claims

by both current employees *and applicants* (*id.* at 427-28),[2] and the Supreme Court interpreted section 703(a)(2) to prohibit practices that have a disparate impact on groups protected by Title VII and are not shown to be job-related. 401 U.S. at 431-432. The Supreme Court repeatedly has reaffirmed the validity of the holding in *Griggs* in Title VII cases. *E.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 328-329 (1977); *Connecticut v. Teal*, 457 U.S. 440, 445-450 (1982); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-991 (1988).

In *Smith v. City of Jackson*, 544 U.S. 228, 230 (2005), the Supreme Court granted certiorari to address the question "whether the disparate impact theory of recovery announced in *Griggs* … is cognizable under the ADEA," and a majority concluded that it is. The plurality noted that for over two decades after the decision in *Griggs*, the courts of appeals "uniformly interpreted the ADEA as authorizing recovery on a disparate impact theory," but after the Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), "some of those courts concluded that the ADEA did not authorize a disparate impact theory of liability." 544 U.S. 228, 236-37 (2005) (plurality opinion) (internal punctuation omitted). In *Smith*, the Supreme Court held that plaintiffs may challenge facially neutral

[2] *See Griggs*, 401 U.S. at 427-28 (plaintiffs challenged employer's policy requiring high school education "for initial assignment to any department except Labor," and "*for new employees* on … the date on which Title VII became effective[,] … to register satisfactory scores on two professional prepared aptitude tests, as well as have a high school education") (emphasis added).

employment practices having a disparate impact under the ADEA (*id.* at 232), although it rejected plaintiffs' claim in that case. *Id.* at 241-43.

In concluding that such claims are viable, the *Smith* plurality relied heavily on the Court's decision in *Griggs* as well as on the parallel prohibitory language and common purposes of Title VII and the ADEA. *See Smith*, 544 U.S. at 233-40 (plurality opinion). *Accord McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995) (statutes share "common substantive features" and "common purpose: 'the elimination of discrimination in the workplace'") (quoting *Oscar Meyer*, 441 U.S. at 756). The plurality noted that in enacting the ADEA, Congress was concerned that the application of facially neutral employment standards, such as a high school diploma requirement, may "unfairly" limit the employment opportunities of experienced older workers. *Smith*, 544 U.S. at 235 n.5 (plurality opinion) (quoting Report of the Sec'y of Labor, The Older American Worker: Age Discrimination in Employment 3 (1965), reprinted in U.S. EEOC, Leg. History of the ADEA (1981)) ("Wirtz Report")). In *Smith*, the plurality opinion emphasized that *Griggs* interpreted the identical statutory text at issue, and observed that there is a "remarkable similarity between the congressional goals" the Court cited in *Griggs* (401 U.S. at 430), "and those present in the Wirtz Report" regarding the ADEA. *Smith*, 544 U.S. at 233, 235 n.5, 237 (plurality opinion). The plurality also pointed to the Department of Labor's and the EEOC's consistent interpretation

that the ADEA authorizes relief based on disparate-impact theory. *Id.* at 239-40 (plurality opinion); *see also id.* at 243-44 (Scalia, J., concurring) (relying on agency interpretations of the ADEA, instead of plurality's independent determination of the impact question).

In this case, the district court acknowledged *Smith*'s ruling that section 4(a)(2) of the ADEA prohibits disparate impact age discrimination, but concluded that section is inapplicable here. R.58 at 12-15. Although *Smith* was not a hiring case, and the Supreme Court answered affirmatively only the broad question of whether the ADEA authorizes disparate impact claims generally, the district court relied on *Smith* and held that section 4(a)(2) does not apply to applicants for employment. The court focused on "'key textual differences'" between section 4(a)(1), "'which does not encompass disparate-impact liability,'" and section 4(a)(2), which does. R.58 at 13 (quoting *Smith*, 544 U.S. at 236 n.6) (plurality opinion). The court also relied on *dicta* in Justice O'Connor's concurring opinion, stating that section 4(a)(2) "'does not apply to 'applicants for employment' at all.'" R.58 at 13 (quoting *Smith*, 544 U.S. at 266) (O'Connor, J., concurring).

By its express terms, however, section 4(a)(2) is not limited to protecting incumbent employees, and *Smith* did not say that it is.[3] The text of section 4(a)(2)

[3] Justice O'Connor's statement—that section 4(a)(2) does not apply to applicants—does not represent the view of the Court in *Smith*. That statement was made in a concurring opinion, joined only by two other Justices, which concluded

makes it unlawful for an employer "to limit, segregate, or classify his *employees*," but it goes on to state the employer may not engage in such conduct "in any way which would deprive or tend to deprive *any individual* of employment opportunities, because of such individual's age." 29 U.S.C. § 623(a)(2) (emphasis added). Congress used the broad phrase "individual" not just once, but twice ("such individual's age"), and that shows an intent to apply the provision more broadly than just to "employees" (a word Congress could have used but did not). *Cf. Robinson v. Shell Oil*, 517 U.S. 337, 342 (1997) ("individual" is a broader term than "employee"). The use of the term "individual" rather than "employee" indicates that section 4(a)(2) protects more than simply incumbent employees, and by its plain terms includes applicants for employment as well. The present case illustrates one way in which the text of section 4(a)(2) protects applicants for employment—RJR "limit[ed]" or "classif[ied]" its employees by creating the Blue Chip TM profile, and its use of that profile (along with its resume guidelines) had the effect of depriving an "individual" (here, an applicant) of employment opportunities. *Cf. Shell Oil*, 517 U.S. at 345 (word "employed" is not temporally restricted to those presently employed).

The district court recognized that in *Griggs* the Supreme Court interpreted the identical language contained in Title VII's original section 703(a)(2). R.58 at

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that disparate impact claims are not cognizable under the ADEA at all. *Smith*, 544 U.S. at 247-48 (O'Connor, J., concurring).

14. However, in ruling that "*Griggs* is not controlling here," the court mischaracterized the facts in that case, stating that "*Griggs* was a Title VII case involving current employees." *Id.* To the contrary, *Griggs* involved claims by both current employees *and applicants*. *See* 401 U.S. at 427-28; *supra* at 11 n.2. The district court also stated that *Griggs* pre-dated "significant amendments to Title VII" (but not to the ADEA). R.58 at 14. The court noted that the present version of section 703(a)(2) makes it unlawful for an employer "'to limit, segregate, or classify his employees *or applicants for employment* in any way …'" (*id.* at 13 (quoting 42 U.S.C. § 2000e-2(a)(2) (emphasis in original)), while section 4(a)(2) of the ADEA does not contain the italicized phrase. The court reasoned that this difference in language indicates that section 4(a)(2) protects only incumbent employees and renders *Griggs* inapplicable. R.58 at 13-14. The district court's reasoning is flawed.

Congress did not add the phrase "or applicants for employment" to Title VII until 1972, as part of a series of amendments to that Act. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 8(a), 86 Stat. 103 (1972). While Congress made several substantive changes to Title VII in 1972, the amendment to section 703(a)(2) was merely declaratory in nature. The amendment was intended simply to express Congress's agreement with court decisions applying section 703(a)(2) to applicants. *See* Conf. Rep. on H.R. 1746, *reprinted in* 118 Cong. Rec.

7166, 7169, § 8(a)-(b) (1972) (amendment was "merely declaratory of present laws as contained in [court] decisions"). *See also* H.R. Rep. No. 92-238 at 30 (stating that, as amended, section 703(a)(2) would be "comparable to present [s]ection 703(a)(2)"). When Congress drafted the ADEA in 1967, it imported the version of section 703(a)(2) then in effect, since 1964. Since the lack of an explicit statutory reference to "applicants" did not prevent the *Griggs* Court from holding that hiring policies with a disparate impact on applicants were unlawful under Title VII, there is no reason to assume that Congress intended a different result under the ADEA.

For the same reason, the district court's reliance (R.58 at 14-15) on *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174 (2009), was misplaced. *Gross* concluded that Congress's 1991 failure to amend the "because of" language in the ADEA, while revising the language of Title VII to add a mixed-motive theory of relief, reflected a congressional judgment that, going forward, the two statutes should not be interpreted in the same manner on causation or burden shifting. *Id.* at 174, 179 n.5. The 1991 amendments to Title VII at issue in *Gross* are entirely different from the 1972 amendment to section 703(a)(2). As the 1972 legislative history makes clear, Congress did not make a substantive change when it adopted the amendment to section 703(a)(2). Unlike the 1991 amendments, which were substantive in nature and intended, in part, to modify the Supreme Court's construction of Title VII in several prior decisions, *see* 42 U.S.C. § 1981 note § 2,

in 1972 Congress simply inserted four words, "or applicants for employment," to express Congress's agreement with existing case law applying section 703(a)(2) to applicants—case law that was consistent with the Supreme Court's decision in *Griggs*. Because the 1972 amendment of Title VII did nothing to change the meaning of Title VII, the 1972 amendment offers no support for the district court's interpretation of section 4(a)(2) of the ADEA.

B. The responsible federal agencies have long interpreted the statutory language to encompass disparate impact claims by applicants.

Consistent with the statute's language and the Supreme Court's construction of that language, the Commission has long interpreted this language to authorize disparate-impact-based challenges to practices adversely affecting applicants. The district court failed to take into account the agency's interpretation of the ADEA and of the identical pre-1972 language of Title VII. The court's omission was an error, for if there were any ambiguity in the statutory language of the ADEA, the longstanding agency interpretation of the language is entitled to deference. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1986) (holding that EEOC's interpretation of ambiguous language in Title VII warrants deference).

The Commission first addressed the relevant statutory language in its 1966 Title VII 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 afford[] the employer a chance to measure the *applicant's* ability to

perform a particular job or class of jobs." See *Griggs*, 401 U.S. at 433, 434 n.9 (quoting guidelines) (emphasis added). In 1968, the Secretary of Labor, who then had rulemaking authority under the ADEA,[4] published the Department of Labor's interpretation of the statute, which clarified that neutral "pre[-]employment" screens, such as physical fitness requirements, must be necessary and "equally applied to all applicants." 29 C.F.R. § 860.103(f)(1)(i); *see* 33 Fed. Reg. 9173 (1968).

Upon assuming enforcement authority for the ADEA, the Commission promulgated the following regulation in 1981, after notice-and-comment rulemaking: "When an employment practice, including a test, is claimed as a basis for different treatment of employees or *applicants* for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 C.F.R. § 1625.7(d) (1981) (emphasis added); *see* 46 Fed. Reg. 47724, at *47725, *47727 (1981). *See also Smith*, 544 U.S. at 243-44 (Scalia, J., concurring) (quoting 29 C.F.R. § 1625.7(d) and recognizing that EEOC regulation affirmed longstanding position of Secretary of Labor).

In 2012, in response to Supreme Court's decisions in *Smith* and *Meacham v.*

[4] On July 1, 1979, responsibility and authority for enforcement of the ADEA was transferred from the Secretary of Labor to the EEOC pursuant to Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978).

Knolls Atomic Power Laboratory, 554 U.S. 84 (2008), the Commission again engaged in notice-and-comment rulemaking and issued a new regulation to clarify that the defense to an ADEA disparate impact claim is a "reasonable factor other than age." The Commission's current ADEA disparate impact regulations, which use even broader language than the 1981 regulations, provide that "[a]ny 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.'" 29 C.F.R. §1625.7(c) (2012) (emphasis added); *see* 77 Fed. Reg. 19080 (2012). The Commission issued these regulations under its statutory rulemaking authority, 29 U.S.C. § 628, and, therefore, as the agency's consistent, longstanding interpretation of the ADEA, they are entitled to *Chevron* deference. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (agency regulations given deference "unless they are arbitrary, capricious, or manifestly contrary to the statute"); *see also United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) ("administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law"); *id.* at 229 (recognizing "a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or

rulings for which deference is claimed").

As noted above, section 1625.7(c) now refers to "individuals," which encompasses the "employees or applicants" language of former section 1625.7(d). If there were any doubt about whether "individuals" includes applicants, the preamble to the final regulations resolves that doubt, for the preamble poses numerous examples of cases involving applicants. *See* 77 Fed. Reg. 19080, at *19084 ("candidates for jobs" in meatpacking industry); *id.* at *19086 ("applicants for security guard positions"); *id.* at *19087 ("an employer seeking to hire"). *See also id.* at *19092 ("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 section 4(a)(2)] should help to reduce the rate of their unemployment and, thus help to reduce these unique burdens on society."). The Commission's interpretation of its own regulations is "controlling" under *Auer v. Robinson*, 519 U.S. 452, 462 (1997), "unless plainly erroneous or inconsistent with the regulations," which it is not.

The Commission also has consistently taken the same position in litigation, namely that disparate impact claims by applicants are cognizable under the ADEA,

adding further support for deference. *See EEOC v. Francis Parker Sch.*, 1995 WL 17047545, at *6-*14 (S. Ct. 1995) (EEOC petition for certiorari); *EEOC v. Allstate Ins. Co.*, 2007 WL 6604487, at n.2 (8th Cir. 2007) (EEOC brief as appellee). *See also Auer*, 519 U.S. at 462 (fact that "the Secretary's interpretation comes to us in the form of a legal brief … does not … make it unworthy of deference … [where interpretation reflects] the agency's fair and considered judgment on the matter in question."). Finally, the Commission has consistently recognized that applicants may pursue ADEA disparate impact hiring claims in its formal federal sector adjudicative decisions voted on by the Commission as a whole. *See, e.g.*, *Weinrauch v. Dep't of Treasury*, Appeal No. 01790210, 1983 WL 500299, at *3-*6 (EEOC June 10, 1983). This further supports holding the Commission's position worthy of deference. *See Mead Corp.*, 533 U.S. at 230.

II. Villarreal alleged facts sufficient to support equitable tolling of the charge-filing limitation period.

The Supreme Court addressed in *National Railroad Passenger Corp. v. Morgan*, "whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside [the timely charge-filing] period." 536 U.S. 101, 105 (2002).[5] In doing so, the Court clarified that the charge-filing period begins to run when an "unlawful employment practice has occurred." 536 U.S. at 109. The

[5] "[T]he filing provisions of the ADEA and Title VII are 'virtually *in haec verba*,' the former having been patterned after the latter." *Commercial Office Prods.*, 486 U.S. at 123-24 (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. at 755).

Court concluded that each discriminatory or retaliatory discrete act "starts a new clock for filing charges alleging that act" (*id.* at 113-114), and observed that if a charge is not filed within the appropriate limitations period, the plaintiff generally will lose his ability to recover. *Id.* at 113. However, because the filing of a timely charge is not a jurisdictional prerequisite to suit, *Zipes v. TWA*, 455 U.S. 385, 393 (1982), the Court also reaffirmed that the "time period for filing a charge is subject to equitable doctrines such as tolling or estoppel." *Morgan*, 536 U.S. at 113.

In this case, Villarreal argued that he is entitled to equitable tolling of the charge-filing period because he had no knowledge that RJR refused to hire him in November 2007 due to his age until less than a month before he filed his charge in May 2010. In ruling on defendants' motion to dismiss, the district court properly recognized that, under equitable tolling principles, "'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.'" R.58 at 18 (quoting *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994)). However, the court concluded that the allegations in Villarreal's complaint were insufficient to support equitable tolling. R.58 at 17-19. Relying on a district court decision it deemed "analogous," the court concluded 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." R.58 at 18-19 (citing *Bond v. Roche*, 2006 WL 50624, at *2 (M.D. Ga. Jan. 9, 2006)).

While the facts alleged in support of tolling in Villarreal's original complaint may have been sparse, Villarreal moved under Fed. R. Civ. P. 15(a) to amend his complaint to allege facts in support of tolling with greater specificity. He sought to add allegations that in late April 2010 he learned, from a specified attorney, that RJR used, and continued to use, practices to screen applicants for TM positions that disadvantaged persons aged 40 and older, and that these practices had been in effect at least since 2007, when Villarreal first applied. R.61-1 at ¶¶27, 28, 29 & 30. Before speaking to counsel, Villarreal would have alleged, he had no knowledge or reason to know of these screening practices and their effects. *Id.* These additional allegations would make this case quite different from *Bond*, where the plaintiff alleged only vaguely that he was unaware of discrimination until he had a "conversation with a third party with inside knowledge of the agency's history of racial discrimination through covert and subtle means" and he did not identify the third party or offer any detail of the agency history. *Bond*, 2006 WL 50624, at *1-*2.

Although the district court recognized that leave to amend should be freely granted under Rule 15(a), the court denied Villarreal's motion on the ground that it would be futile because he did not allege any misrepresentations or concealment

nor did he attempt to contact defendant and ascertain the basis for his rejection. R.67 at 3-5. This ruling was incorrect because controlling law does not require employer misconduct or some extraordinary circumstance other than reasonable ignorance of facts that would support a charge of discrimination. Instead, a charge should be deemed timely where, as here, it is filed promptly upon discovery of the discrimination. While futility of amendment is a factor to be considered when ruling on such a motion, in this case Villarreal should be permitted to amend his complaint because the district court erred in concluding that it would be futile to do so.

The Supreme Court expressly noted that "there may be circumstances where it will be difficult to determine when the [charge-filing] time period should begin to run." *Morgan*, 536 U.S. at 114 n.7. An issue raised by such circumstances, the Court stated, is "whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered." *Id.* The "discovery rule," Justice O'Connor added, translates into a standard that bars "recovery based on discrete actions that occurred more than 180 or 300 days after the employee had, or should have had, notice of the discriminatory act." *Id.* at 124 (O'Connor, J., concurring in part, dissenting in part). This discovery rule is consistent with the historical underpinnings of the equitable tolling doctrine—namely that "'where the party injured by the fraud remains in ignorance of it without any fault or want of

diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'" *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (quoting *Bailey v. Glover*, 21 Wall. 342, 348 (1875)). Exemplifying the interplay of these doctrines, this Circuit's equitable tolling case law also applies the discovery rule.

This Court has stated that for equitable tolling purposes, "'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.'" *Calhoun v. Alabama Alcoholic Beverage Control Bd.*, 705 F.2d 422, 425 (11th Cir. 1983) (quoting *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 1026 (5th Cir. 1975)).[6] This Court has consistently reaffirmed this standard. *See, e.g.*, *Arce v. Garcia*, 434 F.3d 1340, 1262-63 (11th Cir. 2005) (listing instances when equitable tolling may be appropriate, including where a "'claimant has received inadequate notice'"); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1155 (11th Cir. 2005) (equitable tolling is appropriate "where the defendant misleads the plaintiff . . . *or when the plaintiff has no reasonable way of discovering the wrong*

[6] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting former Fifth Circuit decisions issued prior to October 1, 1981, as binding precedent).

perpetrated against [him], as is the case here") (emphasis added); *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1265 (11th Cir. 2004) (plaintiff not only must know of the alleged discriminatory act itself but must know or be charged with knowing sufficient facts to support conclusion that employer's facially neutral decision was actually motivated by unlawful discrimination). Nothing in the rule articulated by this Circuit or the Supreme Court requires misconduct.

Indeed, the rationale of this Court's decisions in *Jones* and *Calhoun*, in particular, supports equitable tolling here. In those cases, equitable tolling applied because the plaintiffs filed their charges, as did Villarreal, upon learning facts that revealed they were victims of discrimination, and those facts included more than mere knowledge of the age or race of the successful candidate. Applying those rulings here, it follows that an applicant like Villarreal, who had *no* information about the company's alleged discriminatory policy, *no* explanation for his non-selection, and *no* suspicion of discrimination, would not be expected to conclude that he was a victim of age discrimination when RJR rejected his application.

The district court also erred when it faulted Villarreal for failing to allege in his proposed amended complaint any due diligence on his part regarding his 2007 application. R.67 at 5. Without some suspicion of discrimination, it is highly unlikely that Villarreal, or any other reasonably prudent job applicant, would call an employer and request the age (or race or gender) of the selectee for every job he

fails to obtain, the type of information he would need to form a suspicion of discrimination. Nor is it reasonable to assume that an employer will always release such information. Furthermore, even if Villarreal had obtained such information and learned that RJR selected a younger individual, this knowledge alone is insufficient to establish that discrimination has occurred or to provide notice that he was a victim of discrimination. In other words, while information that the selectee is of a different protected group than the plaintiff may be sufficient to support a prima facie case, *Jones*, 331 F.3d at 1265 n.3, standing alone it is inadequate to establish unlawful discrimination. As this Court stated in *Jones*, "'a discharged employee's mere suspicion of age discrimination, unsupported by personal knowledge of discrimination will not constitute pretext.'" *Id.* at 1265 (internal citation omitted). Therefore, even if Villareal had obtained this information it would not preclude equitable tolling.

CONCLUSION

For the foregoing reasons, the Commission urges this Court to reverse the judgment of the district court and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6489 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional typeface with Times New Roman 14-point font, in text and footnotes, using Microsoft Word 2007.

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CERTIFICATE OF SERVICE

I certify that on March 30, 2015, I electronically filed the foregoing Brief of the EEOC as Amicus Curiae in Support of Plaintiff/Appellant with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the Court's CM/ECF system, and that all participants in the case are registered CM/ECF users and service will be accomplished by the Court's CM/ECF system. I also certify that I deposited in an overnight delivery service the original and six copies of the brief to the Clerk of this Court and copies to counsel of record for the parties.

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