

## Job Applicants Are Afforded Limited Protection By the Age Discrimination in Employment Act

In May of 2018, we alerted our readers to an opinion issued by the United States Court of Appeals for the Seventh Circuit (covering Illinois, Wisconsin and Indiana) in *Kleber v. Carefusion Corp.*, 888 F.3d 868 (7th Cir. 2018). In that case, the Court held that a job posting seeking to hire an in-house attorney with 3-5 years of experience could amount to age discrimination, the theory being that the cap on years of experience could unlawfully weed out older applicants in violation of the Age Discrimination in Employment Act (“ADEA”). Based on that ruling, we cautioned employers to think twice about placing a cap on the numbers of years of experience required for an open position.

On Jan. 23, 2019, the Seventh Circuit vacated its May 2018 opinion, holding that job applicants cannot bring claims for disparate impact age discrimination under Section 4(a)(2) of the ADEA. See *Kleber v. Carefusion Corp.*, 2019 WL 290241, at \*1 (7th Cir. Jan. 23, 2019). What this means is that applicants do not have a viable claim under the ADEA to challenge an employment practice that is facially neutral in its treatment of different groups (both older and younger applicants), but that falls more harshly on one group (older applicants) than another (younger applicants).

While the recent *Kleber* opinion defeated the applicant’s claim under Section 4(a)(2) of the ADEA, employers are cautioned not to read *Kleber* too broadly. Below are a few key takeaways from the opinion:

- The Seventh Circuit’s ruling may not extend to employers and applicants in other jurisdictions. The Eleventh Circuit (covering Alabama, Florida and Georgia) appears to be in alignment with the Seventh Circuit, but neither the U.S. Supreme Court nor other federal appellate courts have chimed in on the issue.
- Although it is clear that applicants cannot proceed on their claims for disparate impact age discrimination (at least in the Seventh and Eleventh Circuits), applicants may have other avenues of recovery under the ADEA, such as Section 4(a)(1), which makes it unlawful for employers to fail or refuse to hire an individual because of such individual’s age. This type of claim is often referred to as one for disparate treatment age discrimination.
- Applicants may seek relief under state anti-discrimination laws, which could afford them

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broader protection and greater recoverable damages than under federal law.

- The Equal Employment Opportunity Commission's ("EEOC") position is that the ADEA applies to applicants without restriction, a position that appears to be at odds with the *Kleber* decision. In light of this conflict, an applicant may be able to maintain a claim before the EEOC for disparate impact age discrimination. With that being said, it is unlikely that the EEOC would file suit on behalf

of such applicant in the Seventh and Eleventh Circuits.

*If you have any questions about this Alert, if you would like a copy of the recent Kleber decision, or if you would like assistance in drafting a job posting, please contact the author listed below or the Aronberg Goldgehn attorney with whom you work.*

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