Third Circuit Rules That Employment Practices Favoring Employees in Their 40s Over Those in Their 50s Could Constitute Age Discrimination

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The Third Circuit Court of Appeals (which handles appeals of federal cases in Pennsylvania, New Jersey, Delaware, and the Virgin Islands) recently ruled that a facially neutral workplace policy that disproportionately affects a subgroup of a protected class could be illegal, even if the class as a whole is not disproportionately impacted.

Here's what happened:

Faced with difficult economic conditions in 2008, Pittsburgh Glass Works (PGW) engaged in several reductions in force (RIFs) to offset diminishing sales. The RIF at issue resulted in the termination of about 100 employees. Some of the employees who were terminated were in their 40s and some were in their 50s.

The former employees in their 50s brought a "disparate impact" claim against PGW under the Age Discrimination in Employment Act (ADEA), which prohibits employment discrimination on the basis of age and protects employees over the age of 40. A disparate impact claim is designed to challenge the effect that a facially neutral policy (one that, on its face, does not discriminate on the basis of age) has on a certain group of employees. In other words, these claims attack policies or practices that are "fair in form, but discriminatory in operation."

Disparate impact claims are commonly based on statistical evidence and, in the context of age discrimination claims, ordinarily challenge the effect of a policy on *all* employees who are over the age of 40. But here the claim was that PGW's RIF practices disproportionately affected only employees older than 50. In fact, if employees in their 40s were counted in the relevant statistical analysis, it "washed out" the evidence of a disparity based on age.

The court was thus faced with the question of whether a disparate impact claim can proceed where only a "subgroup" of employees protected by the ADEA claim to have been disfavored. Several federal appellate courts previously ruled that such claims could not stand under the law.

The Third Circuit disagreed.

It held that a subgroup of employees at the upper end of the age-range protected by the ADEA could bring a claim where they were allegedly disfavored relative to younger employees (even where the favored employees are also within the ADEA protected class). The Third Circuit then revived the claim and sent it back for trial.

So, what does this mean for employers?

Companies, particularly those in the area covered by the Third Circuit, should review their policies to confirm they do not unintentionally and disproportionately impact employees who are in subgroups over 40 years old and should consult a lawyer before carrying out a significant RIF that could affect a certain group older workers.

For more information regarding the Third Circuit's opinion or if you have questions about compliance with the ADEA or other laws governing the workplace, please contact Jeremy Farrell at 412-594-3938 or via email.

The case is ***Karlo v. Pittsburgh Glass Works***, Third Circuit Court of Appeals Case No. 15-3435 (Opinion Filed: January 10, 2017). You can read the Third Circuit's opinion here: http://www2.ca3.uscourts.gov/opinarch/153435p.pdf