EEOC DOC 03A50040 (E.E.O.C.), 2005 WL 2331775

E.E.O.C.

KEVIN L. BROWN AND RONALD T. HILL, PETITIONERS,
v.
DONALD H. RUMSFELD, SECRETARY, DEPARTMENT OF DEFENSE, (DEFENSE COMMISSARY AGENCY), AGENCY.

Petition Nos. 03A50040 & 03A50041
MSPB Nos. DC-0351-03-0568-I-1 & DC-0351-03-0582-I-1
September 15, 2005

DECISION

***1** On April 13, 2005, the petitioners jointly filed a timely petition with the Equal Employment Opportunity Commission (EEOC or Commission) asking for review of a consolidated Final Order issued by the Merit Systems Protection Board (MSPB or Board) dated March 15, 2005 concerning their claims of discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq.* [1]

After a hearing, an MSPB AJ upheld the RIF based actions against the petitioners, and found no age discrimination. The Board denied the petitioner's petition for review.

The initial decision of the MSPB found that claims of disparate impact discrimination may not be brought under the ADEA. It went on to assume for the sake of argument that if the petitioners could bring such a claim, they did not establish disparate impact age discrimination. The Board's final order denied the petitioners' petition to review the initial decision. It did so on the grounds that there was no new, previously unavailable, evidence and that the administrative judge in the initial decision made no error of law or regulation that affects the outcome. The Commission has held that a claim of disparate impact discrimination may lie under the ADEA against federal government agency employers. *Witkowsky v. Department of the Interior*, EEOC Petition No. 03970122 (January 30, 1998). The Supreme Court decision in *Smith v. City of Jackson, Mississippi* 544 U.S. 228, 125 S.Ct. 1536 (2005) ruled that the ADEA authorizes recovery in disparate impact in a case brought by city employees.

EEOC Regulations provide that the Commission has jurisdiction over mixed case appeals on which the MSPB has issued a decision that makes determinations on allegations of discrimination. 29 C.F.R. § 1614.303 *et seq.* The Commission must determine whether the decision of the MSPB with respect to the allegation of discrimination constitutes a correct interpretation of any applicable law, rule, regulation or policy directive, and is supported by the evidence in the record as a whole. 29 C.F.R. § 1614.305(c).

The petitioners contended that they were disparately impacted based on their ages when via reduction-in-force (RIF) actions, the agency abolished their full-time positions and demoted them. They contended that the agency had a practice of abolishing full-time positions and this disparately impacted older employees, and that younger part-time workers were hired to perform their functions.

***2** In general, to establish a *prima facie* case of disparate impact, the petitioners must show that an agency practice or policy, while neutral on its face, disproportionately impacted members of the protected class through presentation of statistical evidence that demonstrates a statistical disparity that is linked to the challenged practice or policy. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988) (the petitioner must present statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion). Specifically, the petitioners must: (1) identify the specific policy or practice challenged;

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(2) show statistical disparities; and (3) show that the disparity is linked to the challenged practice or policy. *Id.* The burden is on the petitioners to show that the facially neutral standard in question affects those individuals within the protected group in a significantly discriminatory pattern. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *see also Kimble v. Department of Commerce*, EEOC Request No. 05950838 (June 20, 1997).

Here, the record contains insufficient statistical evidence to show that the practice identified had a disproportionate impact on older workers. Without such evidence, the petitioners are unable to show legally significant statistical disparities. Accordingly, the petitioners failed to establish a *prima facie* case of disparate impact age discrimination.

Because the petitioners failed to establish a *prima facie* case of disparate impact age discrimination, the Commission concurs with the MSPB's finding that there was no age discrimination.

PETITIONER'S RIGHT TO FILE A CIVIL ACTION (W0900)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court, based on the decision of the Merit Systems Protection Board, **within thirty (30) calendar days** of the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above (“Right to File A Civil Action”).

For the Commission:

***3** Stephen Llewellyn
Acting Executive Officer
Executive Secretariat

Footnotes

1 The MSPB's final order ruled on the consolidated claims of three petitioners, who filed a joint petition for review to the EEOC. The third petitioner raised race discrimination before the MSPB, but withdrew it. Because of the withdrawal, the MSPB did not make a determination on a discrimination claim on the third petitioner. For this reason, the EEOC issued a separate decision on the petition of the third petitioner. The EEOC petition number on that petition is 03A50039.

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