

Employment Practices Liability

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Seventh Circuit Holds Distressed County Did Not Violate ADEA When It Terminated Rehired Retirees to Preserve Supplemental Health Insurance Coverage and Avoid Additional Costs

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Executive Summary: On July 26, 2017, the United States Court of Appeals for the Seventh Circuit in *Carson v. Lake County, Indiana* affirmed the district court's order granting summary judgment to the employer on the plaintiffs' Age Discrimination in Employment Act (ADEA) and Fourteenth Amendment Equal Protection claims, finding that they were not terminated because of their age, but because the employer needed to preserve supplemental insurance coverage for retirees and avoid incurring additional costs. The Court of Appeals found that the plaintiffs failed to establish a prima facie case of age discrimination under a disparate treatment theory since they did not identify younger employees who received more favorable treatment. The court also rejected the plaintiffs' age discrimination claim based on a disparate impact theory since they failed to demonstrate that a "specific, facially neutral employment practice caused a significantly disproportionate impact based on age." Finally, the Court of Appeals rejected the plaintiffs' Equal Protection claim under the Fourteenth Amendment, finding the employer's decision "was rationally related to a legitimate state interest: preserving supplemental insurance coverage for its retirees while avoiding further financial hardship."

Background: The employer, Lake County, Indiana, began to experience "an emergency cash shortage" in 2008, which turned into a deficit in 2009 that continued to get worse. By 2013, the employer's general fund had a deficit of more than one million dollars and its self-insurance fund had been "wiped out." In 2008 and 2010, the employer responded by offering "retirement incentives to employees age 65 or older." One package offered retirees "five years of supplemental health insurance (secondary to Medicare coverage)" and permitted them to return to work part-time. Several employees elected to take the package and elected to retire, but were hired back as part-time at-will employees. In 2013, the company providing the Medicare supplement advised the employer that current employees were ineligible for supplemental insurance coverage and that the plan would lose its special exemption under federal law if the retired, but rehired, part-time employees remained on the plan. In that event, insurance costs would go up substantially, which the employer could not afford. The employer's benefits attorney confirmed the predicament, and the employer terminated "all rehired retirees who were covered by both Medicare" and the supplement. The employer, in a letter to the affected employees, announced the termination decision and stated they "were selected because they met each of four criteria: (1) they had retired from County service and were later rehired part-time; (2) they were age 65 or older; (3) they were receiving Medicare as their primary insurance; and (4) they were enrolled in the ... supplement."

The terminated employees then sued the employer claiming their termination violated the ADEA and Equal Protection clause. The lower court ruled in favor of the employer, and the plaintiffs appealed the court's ruling to the Seventh Circuit.

The Seventh Circuit's Decision: The Court of Appeals began its analysis by briefly reviewing the federal laws applicable to health insurance plans. The court noted that "retiree only" plans (that pay benefits secondary to Medicare) enjoy a special exemption from many of the requirements of HIPAA and the Affordable Care Act that apply to primary health insurance policies. The court further noted that "each plaintiff at the time of termination was employed part-time and was covered

by both Medicare" and supplemental insurance. However, a larger group of employees age 65 or older (approximately ten percent of the total workforce) were not enrolled in the supplemental plan and continued working for the employer.

The Court of Appeals next considered the legal framework and standards of proof applicable to ADEA claims, focusing first on the plaintiffs' disparate treatment claim and their argument that the "termination decision was discriminatory on its face ... since all part-time employees who were terminated on October 1, 2013 were age 65 or older, and since age was one of the criteria listed in the termination letter." The plaintiffs argued that since age "was a necessary condition for the defendant's decision to terminate them" that "age was a but-for cause" of the adverse employment decision. However, the Seventh Circuit rejected their position, finding that while "age over 65, [was] a characteristic common to all terminated employees, [age was] not the impetus for the County's decision." The Court of Appeals further stated:

The County did not terminate these employees because of their ages. It terminated them because they were enrolled in a retiree-only insurance plan in which current employees could not participate. If these rehired retirees had kept their jobs and remained on the ... supplemental health insurance plan in violation of federal law and the County's insurance contract, they would have—in attorney Larry Grudzien's words—blown the plan apart.

The court also rejected the plaintiffs' further argument that eligibility for Medicare (and a Medicare supplement plan) "may function as a proxy for age" and that a decision to terminate "based on such insurance coverage is a form of implicit age discrimination." After reviewing the Supreme Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), which left open the possibility of "treating pension status as a proxy for age" where "the employer ... suppose[d] a correlation between the two factors and act[ed] accordingly," the Court of Appeals found that the employer did not "suppose a correlation between Medicare status and age and act accordingly." Specifically, the court found the employer only fired employees who were enrolled in the supplement, "leaving unaffected a large number of employees age 65 or older who had not enrolled in the supplement." The Court of Appeals further stated that "[t]he combination of current employment and supplemental insurance participation — not age — was the decisive factor that distinguished the population of terminated employees from the larger County workforce." The court also noted that the undisputed facts showed that "economic and regulatory pressures — not generalizations about the capabilities of elderly employees — drove the County's decision." In fact, the court reasoned that the employer would have made the same decision absent the "65 or older criterion" in that "[e]xactly the same group of rehired retirees would [have] be[en] terminated." The Court of Appeals further noted that "[o]ther employees of a similar age who were not enrolled" in the supplement kept their jobs.

Moreover, the court found that the plaintiffs failed to establish a prima facie case of age discrimination since they failed to show they were "treated less favorably than similarly situated employees outside their pro-protected class, that is, younger employees." Without identifying "an appropriate comparator group" the court found that the plaintiffs "cannot prevail under the *McDonnell Douglas* framework."

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Next, the Court of Appeals rejected the plaintiffs' age discrimination claim under a disparate impact theory, finding they failed to "show that a 'specific, facially neutral employment practice caused a significantly disproportionate adverse impact based on age.'" quoting *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 68 (3d Cir. 2017) (emphasis added). The court further found that the plaintiffs failed to offer "statistical evidence that the policy caused a significant age-based disparity."

Finally, the court rejected the plaintiffs' claim under the Equal Protection Clause of the Fourteenth Amendment, finding that they did "not identif[y] a suitable comparator group." The Court of Appeals further reasoned that even if a comparator group had been identified, the employer had a rational basis for the termination decisions – "continued employment would have imperiled the County's already fragile financial situation or jeopardized an insurance plan that benefited plaintiffs and many other retirees."

Bottom Line: The Seventh Circuit's decision in *Carson* aptly illustrates the difficulty plaintiffs encounter in ADEA cases with the "but-for" standard of causation. *Carson* also underscores the importance of employers not making or acting on "stereotypical assumptions" about the capabilities of older employees based on their enrollment in Medicare or a Medicare supplemental insurance plan or pension eligibility or using age as the determining factor in employment decisions.

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