

# Client Alert **Employment & Labor**

## *Third Circuit Decision Potentially Expands the Reach of the Age Discrimination in Employment Act*

On January 10, 2017, the Third Circuit determined that a disparate impact age discrimination claim under the Age Discrimination in Employment Act (ADEA) may be brought by a subgroup of the protected class, creating a circuit split on the issue. In the decision, *Karlo v. Pittsburgh Glass Works*, No. 15-3435 (3d Cir., Jan. 10, 2017), the Third Circuit found a cognizable age discrimination claim brought by former Pittsburgh Glass Works employees who claimed that their employer's reduction in force (RIF) disproportionately impacted employees age fifty and over in favor of those in their forties. Prior decisions had found such claims to be viable only when based on the entire protected group (age forty and over). However, the Third Circuit's ruling now permits the so-called "subgroup" disparate impact claims under the ADEA.

The plaintiffs consisted of workers in the employer's manufacturing technology division who were terminated as part of a RIF and were each over fifty years old at the time of termination. While disparate-impact claims in ADEA cases ordinarily evaluate the effect of a policy on all employees who are at least forty years of age, in this case plaintiffs identified a policy that impacted only a subgroup of that population – employees older than fifty. On summary judgment, the district court held that the subgroup fifty-and-older disparate impact claim was not cognizable under the ADEA. However, the Third Circuit reversed the ruling based on the plain text of the statute as interpreted by the Supreme Court. Specifically, the panel determined that the ADEA prohibits disparate impact claims based on age, not just against individuals who are forty and older. The Court bolstered its statutory construction with

J a n  
**2017**

This Client Alert has been prepared by Sills Cummis & Gross P.C. for informational purposes only and does not constitute advertising or solicitation and should not be used or taken as legal advice. Those seeking legal advice should contact a member of the Firm or legal counsel licensed in their state. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. Confidential information should not be sent to Sills Cummis & Gross without first communicating directly with a member of the Firm about establishing an attorney-client relationship.

“the ADEA’s remedial purpose,” explaining that “[r]efusing to recognize subgroup claims would deny redress for significantly discriminatory policies that affect employees most in need of the ADEA’s protection.”

The Third Circuit acknowledged that several other circuit courts have issued contrary holdings (the Second, Sixth, and Eighth Circuits), but stated that these courts’ reasoning relied on policy arguments that it found unpersuasive.

### Employer Tip

The *Karlo* ruling will create a greater challenge in defending against ADEA claims. The circuit split may also lead to Supreme Court review of the issue. In the meantime, employers should analyze the impact of a new policy or RIF across multiple different age groups of employees to ensure that they are not potentially opening themselves up to claims under the ADEA.

---

The following attorneys in our Employment and Labor Law Practice Group can assist employers regarding the issues raised in this alert or other employment and labor issues.

---

#### David I. Rosen, Esq.

Chair, Employment and Labor Practice Group  
[drosen@sillscummis.com](mailto:drosen@sillscummis.com) | (973) 643-5558

#### Galit Kierkut, Esq.

Client Alert Editor; Member, Employment and Labor Practice Group  
[gkierkut@sillscummis.com](mailto:gkierkut@sillscummis.com) | (973) 643-5896

#### Charles H. Kaplan, Esq.

Member, Employment and Labor Practice Group  
[ckaplan@sillscummis.com](mailto:ckaplan@sillscummis.com) | (212) 500-1563

#### A. Sonu Ray, Esq.

Client Alert Author; Associate, Employment and Labor Practice Group  
[sray@sillscummis.com](mailto:sray@sillscummis.com) | (973) 643-7000