Plain Language vs. Purpose: *The Seventh Circuit Debates Statutory Interpretation*

Prepared by:
Ryan N. Parsons
Foley & Lardner LLP

Published on www.lorman.com - June 2019

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you UNLIMITED access to Lorman's ever-growing library of training resources:

- ☑ **Unlimited Live Webinars** - 120 live webinars added every month
- ☑ **Unlimited OnDemand and MP3 Downloads** - Over 1,500 courses available
- ☑ **Videos -** More than 1300 available
- ☑ **Slide Decks -** More than 2300 available
- ☑ White Papers
- ☑ Reports
- ☑ Articles
- ☑ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.

Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

Plain Language vs. Purpose: The Seventh Circuit Debates Statutory Interpretation

Written by Ryan N. Parsons – 2/4/19

Last week, in an 8-4 *en banc* decision, the Seventh Circuit held that the Age Discrimination in Employment Act does not provide a cause of action for outside job applicants on a "disparate impact" theory. *Kelber v. CareFusion Corp.*, No. 17-1206 (Jan. 23, 2019). Beyond the result, the court sharply divided over *how* to interpret the statute. Writing for the court, Judge Michael Scudder held that "plain language" dictated the outcome of the case, while Judge David Hamilton's principal dissent aggressively defended a purposivist approach to statutory interpretation.

Section 4(a)(2) of the ADEA makes it unlawful for an employer "to limit, segregate, or classify *his employees* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2) (emphasis added). Judge Scudder focused on the fact that the text limits itself to "employees," as distinct from "applicants," and concluded that the statute should be read according to its plain language. To reinforce this view further, his opinion examined analogous sections of the ADEA and Title VII. It noted that where Congress wished to provide protections for job applicants, as distinct from employees, it did so expressly. For example:

- Section 4(a)(1): The "disparate treatment" section of the ADEA expressly made it unlawful "*to fail or refuse to hire*. . . any individual" due to age.

- Section 4(c)(2): The section of the ADEA prohibiting labor unions from engaging in disparate impact expressly made it unlawful for a labor union to take actions that "adversely affect [any individual's] status as an employee *or as an applicant for employment*" due to age.

- Section 4(d): The "retaliation" provision of the ADEA made it unlawful for employers to retaliate against "employees *or applicants for employment*."

- Section 703(e)(2) of Title VII: In 1972, Congress amended the disparate impact section of Title VII, which was substantively identical to the ADEA, to make it unlawful for employers "to limit, segregate, or classify his employees *or applicants for employment*" in a way that tends to deprive individuals of employment opportunities based on any protected class under Title VII. Congress did not simultaneously amend the ADEA.

Against this backdrop, Judge Scudder concluded that the plain language of the statute controlled the outcome of the case. While acknowledging that an underlying purpose of the ADEA includes protecting job applicants from age discrimination, he pointed out that analyzing the purpose beyond the text can only occur when a statute is ambiguous. "There being no ambiguity in the meaning of § 4(a)(2) of the ADEA, our role ends."

"Congress, of course, remains free to do what the judiciary cannot—extend § 4(a)(2) to outside job applicants, as it did in amending Title VII."

In dissent, Judge Hamilton (joined in full by Chief Judge Diane Wood and Judge Ilana Rovner and in part by Judge Frank Easterbrook) argued that the better reading of the statute protected job applicants and that Supreme Court precedent controlled the outcome. Beyond this, however, he also made a full-throated purposivist defense of his interpretation: "I cannot imagine that when the ADEA was enacted, a reasonable person conversant with applicable social conventions would have understood the ADEA as drawing the line the majority adopts here." Because, he went on, no one had "offered a reason why Congress might have chosen to allow the inside applicant but not the outside applicant to assert a disparate impact claim," Judge Hamilton would read such protections into the statute.

Judge Easterbook did not join Judge Hamilton's purposivist approach, finding instead that Supreme Court precedent controlled the case. Though Judge Easterbook did not find that the text had an ascertainable "plain meaning" in this case, he reiterated the principle that the text of the law must control the outcome of the case:

The purpose of a law is imputed by judges; it is not a thing to be mined out of a statute. . . . Our job is to apply the enacted text, the only thing to which the House, the Senate, and the President all subscribed, not to plumb legislators' hopes and goals.

All four of President Trump's appointees to the court (Judges Scudder, Amy Barrett, Michael Brennan, and Amy St. Eve) voted with the majority. Just two years ago, before their confirmation and with Judges Richard Posner and Ann Claire Williams still on the bench, it's very easy to imagine that the case would have had a different outcome. For the foreseeable future, we can expect a textualist approach to continue to dominate the court's statutory-interpretation cases.