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Are Employers Discriminating Against Unemployed Job Applicants?

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Are employers unlawfully discriminating against job applicants who are unemployed? The Equal Employment Opportunity Commission, or EEOC, is making an inquiry into this issue, in particular into whether those in protected classes are being subject to disparate treatment by employers not considering job applicants who are not currently working.

The EEOC has not made any findings on the matter yet, but on Feb. 16 it held a public meeting at the agency's headquarters in Washington, D.C., where it heard testimony from human resources professionals, employment law attorneys, and nonprofits. In a press release, EEOC Chair Jacqueline A. Berrien said: "Today's meeting gave the commission an important opportunity to learn about the emerging practice of excluding unemployed persons from applicant pools."

While the transcript of the Feb. 16th meeting is not yet available, prepared written statements by those speaking at the meeting are available on the EEOC website. This article discusses the varying accounts of the situation under review, based on the written

testimonies found at <http://www.eeoc.gov/eeoc/meetings/2-16-11/index.cfm>.

To illustrate the perceived problem, Christine L. Owens, executive director of the National Employment Law Project, provided some specific examples of job advertisements that explicitly disqualify those who are not currently employed:

- An ad posted on The People Place (a job recruiting website) by an anonymous Angleton, Texas electronics firm seeking a "quality engineer;" the ad specified the company would "not consider/review anyone NOT currently employed regardless of the reason;"
- A Craigslist posting for assistant restaurant managers in Edgewater, N.J., flatly requiring that applicants "Must be currently employed;"
- Numerous listings for grocery store managers throughout the Southeast posted in the spring by a South Carolina recruiting firm, Latro Consulting Group, which included restrictions against considering unemployed applicants; the restrictions were removed after CNN Money.com inquired about the practice.

Owens reported that job postings like these began to get noticed and reported on in the news in about May 2010. Owens also provided anecdotal evidence that recruiters and staffing agencies have been informed by their clients

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that they will not be considering people who have been out of work for more than a specified period of time.

The existence of these types of advertised requirements certainly suggests that there is some discrimination going on. It also causes one to wonder whether businesses are maintaining these types of requirements as internal methods of screening out applicants.

However, not everyone at the EEOC meeting believed that this is a prevalent problem. Fernan R. Cepero, vice president for human resources at the YMCA of Greater Rochester, denied that employers are doing this, and even explained that it is an impractical method of screening out job applicants. Likewise, James S. Urban, an attorney with Jones Day in Pittsburgh, reported that he works with many businesses and has not heard of or observed any of them engaging in these types of practices.

Cepero suggested that if this is going on, some businesses may not be hiring the unemployed due to "business necessity." He explained, "a candidate who has been out of the workforce for a time may have skills that are stale or obsolete compared with a candidate whose skills are fresh, whether honed through a paid position or volunteer experience." Others disputed that current work status is a good indicator of how "up to date" one's skills are, as skills can be acquired and maintained without a job and oftentimes skills are learned on the job.

If the unemployed are being discriminated against, why is it of concern to the EEOC? The EEOC is looking at whether: (1) there is a trend of discriminating in hiring decisions against those not currently working, and (2) this discrimination results in disparate treatment against protected classes. The "protected classes" that the EEOC is concerned with are those protected under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. Specifically, whether there is a disparate impact on people of a certain sex, race, color, nationality, religion, age or disability.

Many of those testifying at the meeting explained that certain groups are disproportionately represented in the unemployed population. For example, Algernon Austin, director of the program on Race, Ethnicity and the Economy at the Economic Policy Institute, provided statistics that show certain minorities, such as African-Americans and Hispanics, are generally a large component of the unemployed, in part because of less college education. He also said that, curiously, while Asian-Americans "have a low overall unemployment rate," those who become unemployed "are not as successful at finding work as their white peers."

Fatima Goss Graves, vice president for Education and Employment at the National Women's Law Center, pointed to how discrimination against the unemployed may have a large impact on women. One reason for this is that more women than men take a voluntary hiatus from work to engage in caregiving activities for families. Thus, on the whole, there are more unemployed women than men for reasons that have nothing to do with their qualifications for a job.

The EEOC has not made any findings on this matter yet, but it is apparently an issue that has received recognition by others. In October 2010, a bill was introduced in New Jersey to prohibit employers from publishing job postings that limit consideration to those currently employed. The legislation was passed by the legislature, but at this point it has received a conditional veto by the governor and changes are under review.

Whether or not the EEOC finds that this is a pervasive, national problem for which it needs to take action, discriminatory hiring practices are unlawful, as are employment practices that have a disparate impact on protected classes. To avoid any allegations of discrimination, employers should be careful about publishing job listings that state or suggest unemployed candidates will not be considered, and should curtail any internal processes of screening out those that are not currently working. •

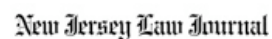
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