No. 15-10602

United States Court of Appeals

for the

Eleventh Circuit

RICHARD M. VILLARREAL, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

– v. –

R.J. REYNOLDS TOBACCO COMPANY, PINSTRIPE, INC.,

Defendants-Appellees,

CAREERBUILDER, LLC,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA IN CASE NO. 12-CV-00138 HONORABLE RICHARD W. STORY

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PLAINTIFF-APPELLANT

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Villareal v. R.J. Reynolds Tobacco Company, et al., No. 15-10602

CERTIFICATE OF INTERESTED PERSONS and CORPORATE DISCLOSURE STATEMENT

The following is a complete list of persons and entities who, to the best of *Amicus Curiae* the NAACP Legal Defense and Education Fund, Inc.'s knowledge, have an interest in the outcome of this case, pursuant to Eleventh Circuit Rule 26.1-1:

1. AARP - Amicus curiae in support of Plaintiff–Appellant Richard M. Villarreal
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9. Brown & Williamson Holdings, Inc. - Private company and holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellee R.J. Reynolds Tobacco Company

10. Brusoski, Donna J., attorney for amicus curiae U.S. Equal Employment Opportunity Commission

11. Campbell, R. Scott - Former Attorney for Defendant-Appellee Pinstripe, Inc.

12. CareerBuilder, LLC - Private company and former Defendant

13. Carson, Shanon J. - Attorney for Plaintiff-Appellant Richard M. Villarreal

14. Chamber of Commerce of the United States of America- Amicus curiae in support of Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

15. Chen, Z.W. Julius - Attorney for amicus curiae Chamber of Commerce of the United States

16. Cielo, Inc. - Name under which Defendant-Appellee Pinstripe, Inc. now operates

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18. Dreiband, Eric S. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.
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43. Nilan Johnson Lewis PA - Law firm for amicus curiae Retail Litigation Center, Inc.

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46. Pinstripe, Inc. - Private company and Defendant-Appellee, now operating as Cielo, Inc.

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51. R.J. Reynolds Tobacco Company - Private company and Defendant- Appellee

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53. Rogers & Hardin LLP - Law firm for Plaintiff-Appellant Richard M. Villarreal

54. Schalman-Bergen, Sarah R. - Attorney for Plaintiff-Appellant Richard M. Villarreal

55. Schmitt, Joseph G. - Attorney for amicus curiae Retail Litigation Center, Inc.

56. Schneider, Todd M. - Attorney for Plaintiff-Appellant Richard M. Villarreal

57. Schneider Wallace Cottrel Brayton Konecky, LLP - Law firm for Plaintiff-Appellant Richard M. Villarreal

58. Seyfarth Shaw LLP - Law firm for former Defendant CareerBuilder, Inc.

59. Smith, Dara - Attorney for amicus curiae AARP

60. Smith, Frederick T. - Attorney for former Defendant CareerBuilder, LLC

61. Story, Richard W. - Trial Judge, U.S. District Court for the Northern District of Georgia

62. Stroup, Robert H. – Attorney for amicus curiae the NAACP Legal Defense and Education Fund, Inc.

63. Sudbury, Deborah A. - Attorney for Defendants-Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

64. Swarns, Christina – Attorney for amicus curiae the NAACP Legal Defense and Education Fund, Inc.

65. Todd, Kate Comerford - Attorney for amicus curiae Chamber of Commerce of the United States

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67. Vann, Rae T. – Attorney for amicus curiae Equal Employment Advisory

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70. White, Deborah R. - Attorney for amicus curiae Retail Litigation Center, Inc.

71. Wojdowki, Haley A. – Attorney for Defendants- Appellees R.J. Reynolds Tobacco Company and Pinstripe, Inc.

Dated: March 24, 2016

/s/ Christina Swarns

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Villareal v. R.J. Reynolds Tobacco Company, et al., No. 15-10602

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rules 26.1 and 29(c), *Amicus Curiae* the NAACP Legal Defense and Education Fund, Inc. discloses the following:

1. The NAACP Legal Defense and Education Fund, Inc. has no parent corporations and no subsidiary corporations.
2. No publicly held company owns 10% or more stock in the NAACP Legal Defense and Education Fund, Inc.

Dated: March 24, 2016

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Christina Swarns
Director of Litigation
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New York, NY 10006

To the Honorable Judges of the United States Court of Appeals for the Eleventh Circuit:

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rule 35-6, the NAACP Legal Defense and Education Fund, Inc. (LDF) respectfully requests leave to file the accompanying brief as *amicus curiae* in support of Plaintiff/Appellant Richard M. Villarreal's En Banc Brief. In support of its motion, LDF offers the following:

1. The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization that, for more than seven decades, has fought to achieve racial justice and ensure that America fulfills its promise of equality for all. Since 1964, LDF has worked ceaselessly to enforce Title VII of the Civil Rights Act, litigating on behalf of individual plaintiffs and plaintiff classes against private and public employers to challenge discriminatory employment practices in such cases as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). LDF's victories in these cases were ultimately codified in the Civil Rights Act of 1991. More recently, LDF has served as counsel of record or *amicus curiae* in a range of employment discrimination cases brought under Title VII in the United States Supreme Court

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and the lower courts. *See, e.g., Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Ricci v. DeStefano*, 557 U.S. 557 (2009).

2. Given its expertise in employment discrimination matters, LDF believes its perspective will assist this Court in resolving the issues presented by this case, particularly with respect to the Eleventh Circuit's equitable tolling standard.

WHEREFORE, the NAACP Legal Defense and Education Fund, Inc. respectfully requests leave of the Court to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

Dated: March 24, 2016

/s/ Christina Swarns
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March 2016, I electronically filed the foregoing Motion for Leave to File Brief *Amicus Curiae* of the NAACP Legal Defense and Education Fund, Inc. in Support of Plaintiff-Appellant's En Banc Brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter. On the same date, I sent paper copies of the foregoing via UPS Overnight Delivery to the Clerk of this Court and to counsel of record for the parties.

/s/ Christina Swarns _____
Christina Swarns

No. 15-10602

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Dated: March 24, 2016

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STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization that, for more than seven decades, has fought to achieve racial justice and ensure that America fulfills its promise of equality for all. Since 1964, LDF has worked ceaselessly to enforce Title VII of the Civil Rights Act, litigating on behalf of individual plaintiffs and plaintiff classes against private and public employers to challenge discriminatory employment practices in such cases as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). LDF's victories in these cases were ultimately codified in the Civil Rights Act of 1991. More recently, LDF has served as counsel of record or *amicus curiae* in a range of employment discrimination cases brought under Title VII in the United States Supreme Court and the lower courts. *See, e.g.*, *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Ricci v. DeStefano*, 557 U.S. 557 (2009).

Given its expertise in employment discrimination matters, LDF believes its perspective will assist this Court in resolving the issues presented by this case, particularly with respect to the Eleventh Circuit's equitable tolling standard.

---

[1] LDF certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than LDF and its members, contributed money intended to prepare or submit this brief. Fed. R. App. P.29(c)(5). Both parties have consented to the filing of LDF's brief.

STATEMENT OF THE ISSUES

1. Whether this Court should continue to apply the equitable tolling standard set out in *Reeb v. Economic Opportunity Atlanta, Inc*., 516 F.2d 924 (5th Cir. 1975), and repeatedly reaffirmed by this Court, in which the EEOC charge-filing deadline is tolled while the charging party did not know and could not reasonably have learned that he had been a victim of unlawful discrimination.

2. Whether, under that standard, Plaintiff-Appellant Richard M. Villarreal adequately pleaded a claim for equitable tolling by alleging facts which establish that a reasonably prudent person could not have become aware of the basis for his charge until less than one month before the charge was filed.

STATEMENT OF THE FACTS

Amicus curiae the NAACP Legal Defense and Education Fund, Inc. incorporates by reference the "Statement of the Case" contained in the En Banc Brief of Plaintiff-Appellant Richard M. Villarreal.

SUMMARY OF ARGUMENT

Employment discrimination against older workers and workers of color remains entrenched within the American labor market, in spite of Congress's intention to eradicate such forms of invidious discrimination through the enactment of federal anti-discrimination laws. The procedural rules governing the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* ("ADEA"), (ADEA)

and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII") should not be contorted to provide protection to employers whose secret and unlawful hiring preferences are undermining Congressional purposes. As this Court recognized more than forty years ago in *Reeb v. Economic Opportunity Atlanta, Inc*., 516 F.2d 924 (5th Cir. 1975), until such secret preferences became apparent, or should become apparent, to reasonably prudent employees and applicants, the statute of limitation for bringing a charge of discrimination should be equitably tolled. This tolling standard, which has been consistently reaffirmed by this Court for decades, is the only means by which to effectively combat employment discrimination.

Departure from the *Reeb* standard would undermine Congressional intent by improperly burdening job seekers with diligence requirements – before they have even a mere suspicion of discrimination – that are certain to prove futile. It would also place unwelcome burdens upon employers, who would experience an increase in requests for application, hiring, promotion and retention data. And, it would drain the already limited resources of the EEOC by prompting unsuccessful job applicants to seek to preserve their rights by filing speculative claims, before any facts supporting a charge of discrimination have become apparent.

Where, as here, the plaintiff had no reason to believe discrimination had occurred until shortly before the filing of his charge, this Court should – as it has for decades – apply the *Reeb* standard and grant equitable tolling.

ARGUMENT

I. THE *REEB* STANDARD FOR EVALUATING EQUITABLE TOLLING CLAIMS EFFECTIVELY COMBATS UNLAWFUL EMPLOYMENT DISCRIMINATION.

Employment discrimination continues to be a deep-rooted problem for the American economy and for individual workers and job-seekers. Discriminatory policies and practices by employers distort the functioning of the labor market, depriving American industry of the most qualified workforce, while simultaneously inflicting direct economic harm upon innocent men, women, and families. In particular, race and age discrimination in the workplace remain disconcertingly prevalent. In 2015, more than 31,000 charges of race discrimination and more than 20,000 charges of age discrimination were filed with the Equal Employment Opportunity Commission (EEOC). *See* Charge Statistics, FY 1997 – FY 2015, EEOC, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited March 24, 2016). In the next several decades, the older population of the United States is expected to become more racially and ethnically diverse. *See* Ortman, et al., An Aging Nation: The Older Population in the United States, *Current Population Reports*, P25-1140. U.S.

Census Bureau, Washington, DC. 2014, *available at* www.census.gov/prod/2014pubs/p25-1140.pdf (last accessed on March 24, 2016). Experience and history dictate that these older workers of color will face multiple dimensions of disadvantage based on both age and race stereotypes. As a result, these workers, as well as the American economy and labor force, will need the strong protections of the federal anti-discrimination laws.

In enacting the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq*. ("ADEA"), Congress noted that "older workers find themselves disadvantaged in their efforts . . . especially to regain employment when displaced from jobs" and "the incidence of unemployment, especially long-term unemployment . . . is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave." 29 U.S.C. § 621(a). Likewise, Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII") in order to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)). In enacting Title VII, Congress was intent upon "eradicating discrimination throughout the economy." *Albemarle*, 422 U.S. at 421. *See also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977) (couching primary objective of Title VII as "to achieve equal employment

opportunity and to remove the barriers that have operated to favor white male employees over other employees") (citing *Griggs*, 401 U.S. at 427; *Albemarle*, 422 U.S. at 416). In order to achieve this goal, Title VII not only prohibits discriminatory employment practices that are express and direct, but also those that are subtle and indirect. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination, subtle or otherwise.").

As employers attempt to evade liability under the ADEA and Title VII, the discriminatory hiring preferences confronting older workers – and particularly older workers of color – often take the form of subtle or indirect "secret preferences" that are unknown to the applicants and employees whose opportunities they constrain. For this reason, in *Reeb v. Economic Opportunity Atlanta, Inc.*, the court recognized that the deadline for filing a charge of discrimination with the EEOC is equitably tolled until a plaintiff knows or reasonably should have known the facts necessary to support a claim of discrimination. 516 F.2d 924, 931 (5th Cir. 1975). The equitable tolling standard set forth in *Reeb*, which has been followed by this Circuit in employment discrimination cases for more than forty (40) years, is a critical vehicle for ensuring that secret and unlawful hiring preferences are not shielded from legal challenge by the procedural rules governing the federal anti-discrimination statutes.

A. THE REMEDIAL PURPOSES OF THE ADEA AND TITLE VII STRONGLY SUPPORT REAFFIRMING THE *REEB* STANDARD.

Courts in this Circuit "look to the relevant statute for guidance in determining whether equitable tolling is appropriate in a given situation." *Arce v. Garcia*, 434 F.3d 1254, 1261 (11th Cir. 2006); *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398, 102 S. Ct. 1127, 1135 (1982) (in applying charge-filing deadlines, courts must "honor the remedial purpose of the legislation as a whole"). In enacting the ADEA, Congress sought "to promote employment of older persons based on their ability rather than age." 29 U.S.C. §621(b). "In any action brought to enforce [the ADEA] the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act." 29 U.S.C. §626(b). *See also Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1338 (11th Cir. 1999) ("The central purpose of [the ADEA] is to 'make the plaintiff 'whole,' to restore the plaintiff to the economic position the plaintiff would have occupied but for the illegal discrimination of the employer.'") (quoting *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988)); *Wood v. Southern Bell Tel. & Tel.* Co., 725 F. Supp. 1244, 1251 (N.D. Ga. 1989) ("Defendant's hyper-technical reading of the 180 day rule does not comport with the quintessentially remedial purpose of the ADEA."); *Blankenship v. Ralston Purina Co.*, 62 F.R.D. 35, 38 (N.D. Ga. 1973) ("Since Congress clearly defined its policy as remedial with respect to such social problems, the courts have generally

looked to the Congressional intent behind the law rather than to procedural restrictions which might impair the law's effectiveness.")

"The [ADEA] is remedial and humanitarian in its nature as is Title VII. Courts construing Title VII's procedural limitations have been extremely reluctant to allow technicalities to bar claims brought under that statute." *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911 (N.D. Ga. 1973). "In fact, courts confronted with procedural ambiguities in Title VII's statutory framework have with virtual unanimity resolved them in favor of the complaining party." *Id.*, citing *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970); *see also Franks v. Bowman Transp. Co.*, 495 F.2d 398, 404 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976) ("Congress did not intend to condition a claimant's right to sue under Title VII on fortuitous circumstances or events beyond his control which are not spelled out in the statute.")

In fashioning a standard for equitable tolling that is consistent with Congressional intent, this Court has rightly considered the particular context of employment discrimination, and, in particular, situations where "[s]ecret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the individual discriminated against." *Reeb*, 516 F.2d at 931. Accordingly, the standard set forth

in *Reeb* is the only tolling rule that gives proper effect to the remedial purposes served by Title VII and the ADEA.

B. THIS COURT SHOULD NOT DEPART FROM ITS FORTY-YEAR HISTORY OF APPLYING THE *REEB* STANDARD.

1. The Equitable Tolling Standard Ensures that Plaintiffs' Obligations Are Not Triggered Before There Is Reason to Believe That Discrimination Occurred.

Since 1975, this Court has held that the limitations period in employment discrimination cases is properly tolled "until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Reeb*, 516 F.2d at 930. Thus, in *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1267 (11th Cir. 2003), this Court held that an employee who had only a "mere suspicion" of age discrimination was not obligated to take legal action, because she lacked sufficient factual basis to make out a *prima facie* case of unlawful conduct. It was only once she became aware that her employer had hired a younger worker to fill her former position that she was in a position to make out a claim; it was the receipt of this information that triggered her obligation to make a timely complaint to the EEOC. *Id*. at 1268; *see also Sturniolo v. Sheaffer, Eaton, Inc*., 15 F.3d 1023, 1026 (11th Cir. 1994).

For decades, the law of this Circuit has held that an applicant for employment does not need to file a charge – or take any other step – where, as here, there was "no reason to believe" discrimination had occurred. *Ross v.*

Buckeye Cellulose Corp., 980 F.2d 648 (11th Cir. 1993) *cert. denied*, 513 U.S. 814, 115 S. Ct. 69, 130 L. Ed. 2d 24 (1994). It is only once facts that would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights that the obligations of due diligence are triggered. *Id*. at 660, citing *Reeb*, 516 F.2d at 931.[2]

In arguing that Mr. Villarreal's claims should not be equitably tolled, the panel dissent fails to cite a single Eleventh Circuit employment discrimination case in which the plaintiff had "no reason to believe" he was the victim of discrimination. *Ross*, 980 F.2d at 660; *Villarreal*, 806 F.3d at 1311-16. Instead, to reach his conclusion that the facts here do not support use of this "extraordinary" remedy, Judge Vinson relies upon cases that are either outside the employment discrimination context or cases involving employees who *already believed*, based on facts *already in their possession*, that discrimination had occurred.[3] *Villarreal*,

[2] This Court has applied this distinction even outside the context of employment discrimination claims. *See, e.g., Brotherhood of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment CSX Transp. N. Lines v. CSX Transp., Inc.*, 522 F.3d 1190, 1197 (11th Cir. 2008) ("'[F]or statute of limitations purposes[,] a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should [not] receive identical treatment.' The determinative fact is whether the plaintiff had knowledge of the harm incurred.") (quoting *United States v. Kubrick*, 444 U.S. 111, 122, 62 L. Ed. 2d 259, 100 S. Ct. 352 (1979)).

[3] Among the five unpublished employment discrimination cases cited by the panel dissent, not a single case involves a situation in which an applicant or employee was found to have had "no reason to believe" that employment discrimination had

806 F.3d at 1311-16. For example, in *Ross*, 980 F.2d at 660, this Court found that the plaintiffs – far from having no suspicion of employment discrimination – alleged race discrimination in "numerous confrontations" with the employer over roughly a decade. In such a case, where the facts that would support a charge already were already "apparent" to the potential plaintiffs, it *was* appropriate to require evidence of diligence and of extraordinary circumstances before granting a request for equitable tolling.

The *Ross* court itself took care to draw this distinction, noting that "[i]n order for equitable tolling to be justified in this case, the facts must show that, in the period more than 180 days prior to filing their complaints with the EEOC, appellants ***had no reason to believe that they were victims of unlawful discrimination***." *Ross*, 980 F.2d at 660 (emphasis added).

Likewise, *Bost v. Fed. Express Corp*., 372 F.3d 1233, 1242 (11th Cir. 2004), which was relied upon by the panel dissent for the proposition that equitable tolling "is an extraordinary remedy which should be extended only sparingly," also concerns a situation in which "the facts which would support a cause of action"

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occurred. *Ross*, 980 F.2d at 660; *Villarreal*, 806 F.3d at 1312 n.10. Rather, all were cases in which the plaintiffs already strongly believed they had been victims of discrimination based upon facts in their possession, but who failed, without good cause, to act within required timeframes. *Id.* Those cases are therefore not relevant to the circumstances of the instant case.

were already very much apparent to the plaintiffs, who had already filed a charge of discrimination but were seeking to toll the 90-day period to file suit after receiving their right-to-sue letter from the EEOC. The circumstances in *Bost* are entirely different from those presented here, where Mr. Villarreal had "no reason to believe" that age discrimination had occurred. *Ross*, 980 F.2d at 660.

The District Court below made the same error in relying primarily upon *Bond v. Roche*, 2006 U.S. Dist. LEXIS 1684 (M.D. Ga. Jan. 9, 2006). In that case, as this Court later held, the plaintiff "reasonably ***should*** have known" before the expiration of the charge-filing period "that he might have a discrimination claim." *Bond v. Dep't of the Air Force*, 202 Fed. Appx. 391 (11th Cir. Ga. 2006) (unpublished) (emphasis added). As discussed below, in this case, Mr. Villarreal could not reasonably have known that he might have a discrimination claim, and he properly pled his lack of knowledge.

2. The *Reeb* Standard Should Apply Here to Equitably Toll Mr. Villarreal's Claims.

Plaintiff applied for a Territory Manager position at RJ Reynolds by personally uploading his resume to the company website. App. Vol. II, Dkt. No. 61-1, at 5 ¶10. RJ Reynolds's job posting did not specify a preference for candidates who were "2-3 years out of college," nor did it notify applicants that those with "8-10 years" of prior sales experience need not apply. App. Vol. I, Dkt.

No. 1, at 7 ¶15 & Exh. A; App. Vol. II, Dkt. No. 61-1, at 7 ¶14 & Exh. A. However, unbeknownst to Mr. Villarreal, these preferences were included in the "Resume Review Guidelines" that RJ Reynolds provided to its recruiting services. App. Vol. I, Dkt. No. 1, at 7 ¶15 & Exh. A; App. Vol. II, Dkt. No. 61-1, at 6-7 ¶14 & Exh. A. The guidelines instructed the recruiting services to "stay away from" various applicants, including those who had been "in sales for 8-10 years." App. Vol. I, Dkt. No. 1, at 7 ¶15 & Exh. A; App. Vol. II, Dkt. No. 61-1, at 7 ¶14 & Exh. A. Thus, as a direct result of the employer's "***secret preferences***" in hiring, when Mr. Villarreal was not contacted about the position, he accepted it as a matter of course. He had "no reason to believe" – or even suspect – unlawful discrimination, because RJ Reynolds never told the applicants what standards it was applying.[4] *Ross*, 980 F.2d at 660.

In every equitable tolling case decided by this Court, the *Reeb* standard was applied when the plaintiff had "no reason to believe" that employment

[4] There is reason to believe that RJ Reynolds kept this preference secret by design: it received thousands of applications from individuals who did *not* meet its profile of an ideal candidate, and yet it took no steps to clarify its "ideal candidate" in its vacancy notice or to alert prospective applicants who did not meet its secret qualifications (e.g., those with lengthier sales histories) that they need not apply. App. Vol. I, Dkt. No. 1, at 12 ¶25; App. Vol. II, Dkt. No. 61-1, at 11 ¶24. To the contrary, Mr. Villarreal received an email from RJ Reynolds in 2010 soliciting applications for Territory Manager positions, even though the company was not looking for 52-year old applicants and never had been. *See Villarreal v. R.J. Reynolds Tobacco Co.*, 2013 U.S. Dist. LEXIS 30018, *4 (N.D. Ga. Mar. 6, 2013).

discrimination had occurred. *See, e.g.*, *Jones*, 331 F.3d at 1268; *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1435 (11th Cir. 1998); *Hargett v. Valley Fed. Sav. Bank*, 60 F.3d 754, 765 (11th Cir. 1995); *Sturniolo*, 15 F.3d at 1025; *Ross*, 980 F.2d at 660; *Hill v. Metro. Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1545 (11th Cir. 1988); *Cocke v. Merrill Lynch & Co., Inc.*, 817 F.2d 1559, 1561 (11th Cir. 1987); *Nelson v. U.S. Steel Corp*., 709 F.2d 675, 677 n.3 (11th Cir. 1983); *see also Calhoun v. Ala. Alcoholic Beverage Control Bd.*, 705 F.2d 422, 425 (11th Cir. 1983). Accordingly, because Mr. Villarreal properly pled that he had no reason to believe that employment discrimination had occurred until shortly before his charge was filed, *Villarreal v. R.J. Reynolds Tobacco Co.*, 2013 U.S. Dist. LEXIS 30018, *7 (N.D. Ga. Mar. 6, 2013), he had no obligation to plead additional facts concerning diligence.

The District Court below erred in holding that Mr. Villarreal was required to plead the facts that "alerted Plaintiff to his discrimination claim [and] how he learned those facts." *Villarreal*, 2013 U.S. Dist. LEXIS 30018, *20. Rather, at most and as explained by the panel majority, "[a]t this early stage, Mr. Villarreal is simply required to 'plead the applicability of the doctrine.'" *Villarreal*, 806 F.3d at 1303 (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1391 (3d Cir. 1994)). Even if Mr. Villarreal were required to plead more specific facts about when and how the facts supporting his charge became apparent to him –

which Eleventh Circuit precedent does not require him to do – he should have been granted permission to amend his complaint to explain that in April 2010, attorneys from Altshuler Berzon LLP contacted him and informed him, for the first time, that RJ Reynolds had used the discriminatory Resume Review Guidelines when screening his November 2007 application. App. Vol. II, Dkt. No. 61-1, at 12-13 ¶¶29-30. These factual allegations would plainly meet and exceed the pleading standards of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

II. DEPARTURE FROM THE *REEB* STANDARD WOULD UNDERMINE CONGRESSIONAL INTENT, BURDEN JOB SEEKERS AND EMPLOYERS, AND SWAMP THE EEOC WITH SPECULATIVE CLAIMS.

The *Reeb* standard – applied consistently by courts in this Circuit for more than forty years – has effectuated the Congressional purposes in enacting the ADEA and Title VII while also limiting the burdens upon employers, applicants, and the EEOC. As discussed below, the instant case demonstrates how a modification to the current rule would have negative consequences both for businesses and job seekers.

Mr. Villarreal applied for the position of Territory Manager at RJ Reynolds but received no response from the company. *See Villarreal*, 2013 U.S. Dist. LEXIS 30018, *2-3. The lack of response from an uninterested employer is a common experience for virtually anyone who has ever been in search of work,

including those who are well-qualified for the positions they seek. Even if Mr. Villarreal had inquired about "whether his application had been reviewed," as the dissent suggests he should have done, *Villarreal*, 806 F.3d at 1292, and even if RJ Reynolds had acknowledged that it had reviewed his application, the legally relevant facts would have remained the same: Mr. Villarreal would have "no reason to believe" that he was the victim of unlawful discrimination. *Ross*, 980 F.2d at 660.

Likewise, if Mr. Villarreal had inquired about the status of his application and been informed, as he was in 2010, 2011 and 2012, that the company intended to pursue other candidates, *Villarreal*, 2013 U.S. Dist. LEXIS 30018, *4, he would still have had "no reason to believe" that his application was rejected on account of age discrimination. *Ross*, 980 F.2d at 660. *See also Jones*, 331 F.3d at 1267 (plaintiff's claims were equitable tolled when she had a "mere suspicion" of discrimination). Even if Mr. Villarreal had, for some reason, strongly suspected age discrimination – although he had no basis for such a suspicion – he would not have had sufficient information upon which to state a cause of action. *Id.* at 1266 ("*Sturniolo*[, 15 F.3d at 1026] teaches that [plaintiff's] suspicion, without more, is insufficient to establish pretext.").

This Circuit does *not* require unwarranted or unprompted investigations on the part of applicants who have no reason to suspect that they have been

discriminated against. Such a standard, which would first require applicants to inquire whether their applications have been received or to ask whether they have been rejected for the job, would be entirely impractical. Even with these facts, an applicant would have insufficient information to pursue a claim of discrimination. If an applicant was no longer able to rely on the Circuit's equitable tolling standard and was required to take action on entirely speculative claims, he would be required – for each of the perhaps dozens or scores of position for which he applies and is rejected (or hears nothing) – to endeavor to obtain the following information from the employer: (1) the demographic characteristics of fellow applicants, both successful and unsuccessful, and (2) the internal procedures and criteria used in the employer's hiring process in order to support a viable claim of employment discrimination. These efforts would be required even in circumstances where the applicant has no reason to suspect discrimination. Otherwise, the applicant, who may later learn facts that would support a *prima facie* case of employment discrimination, would have forfeited his claim.

Such efforts at diligence would, as recognized by the majority, be futile. *Villarreal*, 806 F.3d at 1305. Prospective employers have no legal obligation, and no incentive, to provide such information, and they would certainly refuse to do so. Employers who are actually motivated by "secret preferences," *Reeb*, 516 F.2d at 31, would be even more likely to deny applicants access to evidence sufficient to

make out a *prima facie* case of age discrimination. Requiring applicants to seek such information from employers is pointless.[5]

Without the equitable tolling standard, applicants who have no reason to suspect employment discrimination would be required, in order to protect their rights to obtain relief for later-discovered discrimination, to: (1) make impractical, and perhaps costly, efforts to gather information to prove a phantom claim, which would undoubtedly alienate prospective employers, or, even more absurdly, to (2) file a speculative charge of discrimination with the EEOC to avoid the running of the statute of limitations for the phantom claim. Under the diligence scheme suggested by the panel dissent, this would be the only way for such applicants to protect their rights.

Such a framework would likely have damaging ripple effects throughout the economy. Employers would find themselves receiving additional requests for data and other information from applicants. Employers who opted not to respond to such requests, or who responded by refusing to provide the requested information, would fear opening their businesses up to possibly unwarranted, negative

[5] The Oxford English Dictionary defines "futile" as "Incapable of producing any useful result; pointless." Oxford University Press, 2016, available at: http://www.oxforddictionaries.com/us/definition/american_english/futile.

inferences. Employers who *did* respond to such requests would do so at considerable expense of money, time, and human resources.

Applicants themselves would spend time and resources on the unproductive task of requesting information, rather than devoting their efforts to seeking employment. Alternately, applicants who opted not to engage in futile fact-gathering efforts and instead filed premature and unsupported charges of discrimination, would significantly burden the EEOC's already limited resources. Moreover, this scheme would harm the Congressional purpose of eradicating age discrimination, because once the premature and unsupported charges of discrimination were dismissed by the EEOC, applicants who later became aware of facts supporting a charge of unlawful age discrimination would likely be time barred – by the 90-day period in which to bring suit – from raising supportable and meritorious claims.

The absurdity of this result demonstrates the wisdom of the Circuit's current, long-standing framework for evaluating claims of equitable tolling in employment discrimination cases, in which diligence is required only *after* the facts that would support a charge of discrimination are apparent or should have become apparent to a potential plaintiff with a reasonably prudent regard for his rights. *Reeb*, 516 F.2d at 931.

CONCLUSION

For the foregoing reasons, the district court's decision should be REVERSED.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,680 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

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March 24, 2016

/s/ Christina Swarns
Christina Swarns

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2016, I electronically filed the foregoing brief of the NAACP Legal Defense and Education Fund in Support of Plaintiff-Appellant with the Clerk of Court for United States Court of Appeals for the Eleventh Circuit by using the Court's CM/ECF electronic filing system, and that all participants in the case are registered CM/ECF users and service will be accomplished by the Court's CM/ECF system.

March 24, 2016 /s/ Christina Swarns
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