No. 17-1206

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DALE E. KLEBER,

Plaintiff-Appellant,

v.

CAREFUSION CORP.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
Civ. No. 1:15-cv-01994, Hon. Sharon Johnson Coleman

BRIEF AND SHORT APPENDIX OF APPELLANT DALE E. KLEBER

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1206

Short Caption: Kleber v. CareFusion Corp.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

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Attorney's Signature: /s/ *Paul Strauss* Date: April 10, 2017

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INTRODUCTION

This is a case of first impression concerning an exceptionally important question: whether job applicants may bring disparate impact claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34 (2012). The district court answered this question in the negative because of a passage in this Court's decision in *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994) ("*Francis Parker*"), which indicates that section 4(a)(2) of the ADEA excludes job applicants. SA2.[1]

The district court was wrong. The language on which the district court relied was inaccurate dicta in a decision whose holding has now been overruled by the Supreme Court. *Francis Parker* held that the ADEA did not create a disparate impact cause of action *at all*—a conclusion squarely rejected in *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005). In the wake of *Smith*, this Court is free to conclude that section 4(a)(2) includes disparate impact claims by job applicants. In accordance with the text, history, and purpose of the ADEA, as well as administrative agency interpretations of the statute, it should do so.

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[1] Citations to documents in the Short Appendix are "SA_." Citations to documents in the Record on Appeal are "ECF __," referencing the Document Number in the CM/ECF system in the district court docket.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(1) and Circuit Rule 34(f), Plaintiff-Appellant Dale Kleber submits that oral argument would significantly aid the Court in this case. The case presents a novel issue of statutory interpretation that only one other court of appeals has squarely addressed. In addition, it may be necessary for the Court to overrule *Francis Parker* if the Court believes it to be binding precedent. This case is likely to involve consideration of not only the ADEA's text, but also several Supreme Court decisions and extensive legislative and regulatory history. The complexity, novelty, and importance of the issue presented here therefore warrants oral argument.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Dale E. Kleber ("Kleber") brought this action against Defendant CareFusion Corporation ("CareFusion") pursuant to ADEA. ECF 22. The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 (2012) and 28 U.S.C. § 1343(4) (2012). ECF 22 at 3. The district court issued a final judgment as to all claims and parties on January 30, 2017. SA7. Kleber timely appealed on February 1, 2017. ECF 108; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over this appeal from a final judgment under 28 U.S.C. § 1291(a) (2012).

STATEMENT OF THE ISSUE

Plaintiffs may bring disparate impact claims under section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a). *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005). CareFusion's use of a hard rule that the company would not hire anyone with more than seven years of experience for one of its open positions had an adverse disparate impact on job applicants within the ADEA's protected group, including Kleber himself. Do job applicants like Kleber have a cause of action under the ADEA?

STATEMENT OF THE CASE

A. Procedural History

Kleber brought this employment discrimination case in the U.S. District Court for the Northern District of Illinois against CareFusion, alleging that the company's use of a seven-year experience cap in one of its job postings violated the ADEA.[2] ECF 22 at 1-2. CareFusion moved to dismiss the Complaint in its entirety. ECF 25. The district court dismissed Kleber's disparate impact claim, but denied the motion to dismiss his disparate treatment claim. SA2-6. Kleber moved to reconsider or to certify interlocutory appeal, ECF 55, and the court denied the motion. ECF 65. After a period of discovery, the parties stipulated to dismissal of

[2] Kleber filed his initial Complaint pro se and subsequently filed a First Amended Complaint, which is the only Complaint referred to in this brief.

Kleber's disparate treatment claim. SA7. The district court issued a final judgment as to all claims on January 30, 2017, *id.*, and this appeal followed.

B. Relevant Factual History[3]

Kleber's background and application to CareFusion

When Kleber applied to work at CareFusion, he was a 58-year-old attorney with extensive law firm and in-house counsel experience. ECF 22 at 4. He had been married for over 25 years, with four children, three of whom depend on Kleber and his wife for financial support. *Id.* at 5-6. Since his involuntary separation from his job in 2011, Kleber had applied for at least 150 jobs, primarily online. *Id.* at 4. Initially, the legal jobs for which Kleber applied were primarily General Counsel or Division Counsel positions, since he had previously worked as the General Counsel of Dean Foods, a Fortune 500 company. *Id.* However, as time passed, and he did not receive any job offers, he began to expand his job search by applying for progressively less senior legal in-house positions. *Id.* To obtain health insurance for the family, which Kleber had previously obtained through his work, Kleber's wife returned to full-time employment after being a full-time mother for most of their

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[3] Because the district court dismissed Kleber's disparate impact claim under Fed. R. App. P. 12(b)(6), the Court accepts all well-pleaded facts as true. *Bonnstetter v. City of Chicago*, 811 F.3d 969, 973 (7th Cir. 2016). These facts therefore reflect the allegations set out in Kleber's First Amended Complaint, ECF 22, and are based only on that Complaint and attachments thereto.

marriage. *Id.* at 6. Since July 2011, Kleber and his family have had to use a significant amount of their savings, including retirement savings, to support themselves and their children. *Id.* at 5.

After a frustrating and unsuccessful job search, Kleber applied for a position as "Senior Counsel, Procedural Solutions" on March 5, 2014, through CareFusion's website. *Id.* at 5-6. The job description for the position included a requirement that any applicant have "3 to 7 years (no more than 7 years) of relevant experience." *Id.* At least two other posted Senior Counsel positions at the time contained similar hard experience caps. *Id.* While Kleber's experience exceeded the seven-year experience cap for the Senior Counsel, Procedural Solutions position, he decided to apply for it anyway due to his family's increasing financial strain and his genuine interest in the position. *Id.* at 6-7. Despite the maximum years of experience requirement, the job announcement described what appeared to be an advanced position, indicating that the person selected would be required to "[p]erform[] special assignments or projects without significant supervision" and "advise clients on complex business and legal transactional risks," "work autonomously," and have the "ability to synthesize complex legal issues to essential elements for clients throughout the organization." *Id.* at 7. Accordingly, he applied. *Id.* at 6.

The next day, CareFusion sent Kleber an automated electronic response to his application stating, "If your qualifications meet the basic requirements, your application will be considered for the position," and he would "be contacted if you are selected for an interview." ECF 22 at 7; ECF 22, Attachment 1 at 6. CareFusion has stated that it never contacted Mr. Kleber to schedule an interview because it was clear from his resume that he had more than the maximum seven years of experience. ECF 22 at 8. The selected candidate was 29 years old. *Id.*

Proceedings Below

Kleber submitted an intake questionnaire to the Equal Employment Opportunity Commission ("EEOC") alleging that the Senior Counsel job posting's seven-year experience maximum systematically discriminated against workers over 40. *Id.* at 9. At an EEOC investigator's instruction, Kleber waited 90 days for CareFusion to make its hiring decision. *Id.* at 10. After Kleber explained his concerns about CareFusion's experience cap to another investigator, the investigator prepared an age discrimination charge, which Kleber signed. *Id.* The EEOC issued a right to sue letter on December 2, 2014, and Kleber subsequently brought the instant suit in district court. *Id.* at 11.

Kleber's Complaint alleged that: (1) CareFusion violated section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2), because the experience cap has a disparate impact on

job applicants within the ADEA's protected group; (2) CareFusion violated section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), because the company intentionally used the experience cap as a way of screening out older job applicants. *Id.* at 12-15. CareFusion moved to dismiss both claims, arguing that neither stated a claim under the ADEA and that Kleber had failed to exhaust his disparate impact claim. ECF 25, 26.

The district court denied the motion to dismiss as to Kleber's disparate treatment claim, ruling that Kleber had properly stated a claim that CareFusion had deliberately imposed an experience cap to screen out older applicants based on assumptions and stereotypes. SA5-6. The court granted the motion as to the disparate impact claim because in *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994), this Court "expressly noted that [section 4(a)(2) of the ADEA] omits 'applicants for employment' from its coverage." SA4. Kleber moved to reconsider or, in the alternative, for permission to seek interlocutory appeal, arguing that the Supreme Court overruled *Francis Parker* when it decided in *Smith v. City of Jackson*, 544 U.S. at 232, that the ADEA does permit disparate impact claims. ECF 55, 64. The district court denied the motion. ECF 65.

SUMMARY OF ARGUMENT

The ADEA permits job applicants to bring disparate impact claims. The text of section 4(a)(2) of the ADEA plainly covers "any individual" adversely affected by employment policy, rather than just current employees. Additionally, section 4(a)(2)'s final phrase, "because of such individual's age," makes unequivocally clear that the provision as a whole applies to all adversely-affected individuals. In any event, in context, the term "employees" should be read to include prospective employees. Finally, the provision's prohibition on practices that "deprive any individual of employment opportunities" evokes the hiring context, and the phrase "or otherwise affects his status as an employee" broadens the statute's coverage.

In addition to the text itself, Supreme Court precedent makes clear that section 4(a)(2) covers applicants for employment. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court construed identical language in Title VII of the Civil Rights Act of 1964 to create a disparate impact claim for job applicants. Indeed, in concluding that the ADEA creates a disparate impact cause of action in *Smith v. City of Jackson*, 544 U.S. 228, 234 (2005), the Court called *Griggs* "a precedent of compelling importance" in interpreting the ADEA. Moreover, *Smith* pointed to two and only two textual differences between Title VII's and the ADEA's disparate impact provisions, neither of which suggested that only one of the statutes

covered job applicants. 544 U.S. at 240. *Griggs* and *Smith* make clear that section 4(a)(2) of the ADEA must be read to cover job applicants. Furthermore, *Smith* overruled this Court's decision in *Francis Parker*, which reached the contrary conclusion.

In addition to the statutory text and precedent, it is eminently clear from the ADEA's legislative history that Congress' primary purpose in enacting the statute was to eradicate both express and subtle forms of age discrimination in hiring. The statute's creators and other legislators were deeply concerned about unemployment among older workers, and they sought to remedy that problem, in part, by eliminating arbitrary, facially-neutral barriers to entering employment. It would make no sense to twist the ADEA's language to avoid protecting precisely the individuals about whom Congress was most concerned.

Finally, if there is any question that section 4(a)(2) covers applicants for employment, that question is answered by decades of interpretations by federal administrative agencies consistently taking this position. Since very shortly after the ADEA's initial enactment, guidance, regulations, and litigation positions alike have universally construed the ADEA to cover job applicants' disparate impact claims. Any remaining ambiguity should be resolved in favor of the enforcing agencies'

interpretations. Consequently, from any angle, it is clear that section 4(a)(2) must be read to cover disparate impact claims by job applicants.

ARGUMENT

I. Section 4(a)(2) Of The ADEA Clearly Encompasses Disparate Impact Claims By Job Applicants

The ADEA allows for challenges to age discrimination under both the disparate treatment and disparate impact theories. While section 4(a)(1) applies to disparate treatment claims, section 4(a)(2) houses the disparate impact claim, making 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) (2012). In *Smith*, the Supreme Court explained that this provision "focuses on the *effects* of [an employer's] action . . . rather than the motivation for the action of the employer," and permits challenges to employment practices "'that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another.'" 544 U.S. 228, 236 (2005) (plurality opinion) (emphasis in original) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977)). This case raises the natural successor

issue to that holding: whether job applicants may challenge practices that have such a disparate impact.

In analyzing the meaning of a statutory provision, courts look to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," as well as whether a given interpretation is consistent with the statute's purpose. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 345 (1997); *Hively v. Ivy Tech. Comty. Coll.*, No. 15-1720, 2017 U.S. App. LEXIS 5839, *8 (7th Cir. April 4, 2017) (en banc) ("Even if [a provision's language] is not pellucid, the best source for disambiguation is the broader context of the statute that the legislature—in this case, Congress—passed."). Here, all of these sources point inexorably to the conclusion that section 4(a)(2) encompasses a disparate impact claims for job applicants.

A. Section 4(a)(2)'s Text Covers Disappointed Job Applicants That Have Been Deprived Of Employment Opportunities Because Of Their Age

The reading of section 4(a)(2) that yields the most "coherent and consistent" statutory scheme, *Robinson*, 519 U.S. at 340 (internal citations omitted), covers applicants for employment. A careful reading of the statutory terms in context supports this interpretation.

i. "individual"

First and foremost, in defining the group of people protected from facially age-neutral but nonetheless discriminatory conduct, Congress used the phrase "individual" twice ("deprive any individual of employment opportunities," "because of such individual's age"). 29 U.S.C. § 623(a)(2). As the Supreme Court explained in the analogous Title VII context, "'individual' is a broader term than 'employee,'" which would encompass "persons who have never had an employment relationship with the employer at issue." *Robinson*, 519 U.S. at 345. The use of "individual" instead of "employee" in section 4(a)(2) is particularly significant because "elsewhere in the same provision, Congress chose the word 'employees' to refer to the people an employer may not 'limit, segregate, or classify.'" *Rabin, et al. v. PricewaterhouseCoopers, LLP*, No. 16-2276, 2017 U.S. Dist. LEXIS 23224, *4 (N.D. Cal. Feb. 17, 2017). It makes sense to conclude that "this variation in language was a deliberate choice, and one that reflects Congress's intent to include all 'individuals' within section 4(a)(2)'s ambit." *Id.* at *4-5 (citing *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.")).

Moreover, section 4(a)(2) refers to employment practices negatively affecting "any" individual. 29 U.S.C. § 632(a)(2). Congress' use of the word "any" is significant because of this term's inclusive character. Congress could have used an internally-referential demonstrative adjective like "these" or "those," referring back to the term "employees" that appears earlier in the section, to indicate that "individuals" only refers to people within the class of "employees" (e.g., "limits, segregates, or classified his employees . . . to deprive *such individuals* of employment opportunities . . . "). Instead, Congress chose "any," a broad, unqualified modifier denoting broad coverage. With this terminology alone, Congress made plain its intent to cover applicants for employment, as they are within the class of "any individual[s]."

ii. "employees"

Even if the Court is convinced that section 4(a)(2)'s use of the term "his employees" and "status as an employee" somehow limits the broad scope of the term "individuals," *see Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 963 (11th Cir. 2016) —despite the fact that this would effectively read the latter term out of section 4(a)(2)—that, nonetheless, does not end the inquiry. In context, "employee" should be read to encompass job applicants—that is, section 4(a)(2) should be read as forbidding employers from limiting, segregating, or classifying their *prospective*

employees in an age-discriminatory manner, and as prohibiting practices adversely affecting *prospective* employees because of age.

As Justice Thomas explained when the Supreme Court unanimously found the word "employee" in Title VII's retaliation prohibition ambiguous, if the statutory term "lacks any temporal qualifier," it need not be limited to current employees. *Robinson*, 519 U.S. at 342. The Court concluded that "employee" applied to former as well as current employees, and it implied that, in context, "employee" could just as easily cover prospective employees. *See id.* at 343 n.3.

Like Title VII, the ADEA at times uses "employee" to mean only current employees, where that is the only interpretation that makes sense. For example, in section 4(a)(3), which prohibits "reduc[ing] the wage rate of any *employee* in order to comply with this chapter," 29 U.S.C. § 623(a)(3) (emphasis added), Congress must have meant current employees because it is impossible to reduce the wage rate of anyone else. Likewise, in section 4(m), Congress used "employees" in addressing whom can be offered age-based early retirement incentives at institutions of higher education, covering only current employees. 29 U.S.C. § 623(m). In contrast, in section 11(e), Congress used "employees" in a manner that *must* include applicants for employment, because this section provides that a labor organization affects commerce if it "operates a hiring hall or hiring office which *procures employees for an*

employer or *procures for employees opportunities to work for an employer . . . .* " 29 U.S.C. § 630(e) (emphasis added). In section 4(a)(2), read in context, the term "employees" properly includes prospective employees—i.e., applicants for employment. *See Rabin*, 2017 U.S. Dist. LEXIS 23224 at *6 (citing *Villarreal*, 839 F.3d at 984 (Martin, J., dissenting)).

iii. "employment opportunities"

Section 4(a)(2) forbids practices that "deprive" any individual of "employment opportunities." 29 U.S.C. § 623(a)(2). An ordinary, intuitive understanding of this phrase is that employers deprive individuals of employment opportunities when they refuse to hire those individuals. A simple web search for the phrase "employment opportunities" returns pages and pages of hits for job search boards and services, where jobseekers may apply to open positions.[4] These are not internal postings only available to employers' current employees, but sites listing "job opportunities," "career opportunities," "current openings," and other "employment opportunities" available to job applicants. Accordingly, it is logical to conclude that section 4(a)(2)'s use of the phrase "employment opportunities" points to practices that negatively affect older jobseekers in the initial hiring context.

[4] Search for "employment opportunities," Feb. 26, 2017, https://www.google.com/ webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=employment+opportunities+

iv. "otherwise"

Section 4(a)(2)'s use of "otherwise " in the phrase "otherwise adversely affects his status as an employee" supports a construction that includes job applicants. Based almost solely on this phrase, the Eleventh Circuit held in *Villarreal v. R.J. Reynolds Tobacco Co.* that section 4(a)(2) does not cover applicants. 839 F.3d 958, 963 (11th Cir. 2016) (citing 29 U.S.C. §623(a)(2)). The Eleventh Circuit reasoned that the statutory text preceding the word "otherwise" (i.e., the portion describing prohibited practices and including "any individual") must be construed as a "subset" of the subsequent text. *Id.* Consequently, the court of appeals stated that "section 4(a)(2) protects an individual only if he has a 'status as an employee,'" and that "[a]pplicants who are not employees when alleged discrimination occurs do not have a 'status as an employee,'" and therefore cannot pursue claims under section 4(a)(2). *Id.* at 964.

The Eleventh Circuit's reasoning is fundamentally flawed. The Supreme Court recently explained that the "otherwise" phrase in section 4(a)(2) *expands* the scope of that provision rather than limiting its protections. *Tex. Dept. of Hous. & Comm. Affairs v. Inclusive Comms. Project, Inc.*, 135 S. Ct. 2507, 2519 (2015). Considering section 4(a)(2) and comparable language in Title VII and the Fair Housing Act, the Court reasoned that "'[o]therwise' means 'in a different way or

manner,'" and that the "otherwise adversely affect" language serves as a "catchall phrase[]" that "signal[s] a shift in emphasis" from the preceding statutory text, which is narrower. *Id.* Accordingly, reading "or otherwise adversely affect" as limiting the preceding language would accomplish precisely the opposite of the result called for by the Supreme Court's reasoning.

Moreover, the "otherwise" clause is not the end of section 4(a)(2). The provision's last phrase is "because of *such individual's* age." 29 U.S.C. § 623(a)(2) (emphasis added). Concluding with this language, Congress referenced back to the provision's previous language "any individual," indicating that the provision applies to all adversely individuals adversely affected because of age, not just current employees.

In any event, the Eleventh Circuit's conclusion that no individuals other than current employees could have a "status as an employee" is a logical leap with no particular support. Certainly, refusal to hire an applicant adversely affects his "status as an employee" by denying him that status entirely. *Rabin,* 2017 U.S. Dist. LEXIS 23224 at *8 (defendant's refusal to hire plaintiff "deprived [plaintiff] of his status an employee").[5] The *Villarreal* majority attempts to circumvent this logic by pointing to

[5] Moreover, as discussed above, *see supra at* 13-14, "employee" easily encompasses prospective employees; indeed, it unambiguously does so in some sections of the

section 4(c)(2) of the ADEA, which uses the words "status as an employee or as an applicant for employment" rather than "status as an employee" like section 4(a)(2). But, as the dissent in that case explained, there is a clear explanation for this variation that has nothing to do with deliberately excluding jobseekers from section 4(a)(2)'s protection:

> [Section 4(c)(2)] governs a labor organization's ability to "refuse *to refer for employment*." This part of the statute targets the unique way in which labor organizations can discriminate when they "refer" "applicants" to employers, such as through union hiring halls. None of the other parts of the ADEA that govern employers say anything about "referring" anyone for employment. Employers, after all, don't "refer applicants." But labor organizations, by virtue of their unique referral role, are sometimes the sole conduit by which an employer can get potential job applicants. And § 4(c)(2) prohibits labor organizations from "refus[ing] to refer" a person for employment *at all* because of her age and thereby denying her "status . . . as an applicant for employment." In other words, the statute protects someone who sought work but was denied status as an applicant—that is, being allowed to apply at all—due to labor organizations' control of the hiring process.

Villarreal, 839 F.3d at 985 (Martin, J., dissenting) (emphasis original) (internal citations omitted).

In sum, section 4(a)(2) contains no language that excludes applicants, and it is most naturally read to include them. Specifically, here, Kleber "is an 'individual' who was 'deprive[d]' 'of employment opportunities' and denied any 'status as an

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ADEA as well as Title VII. Consequently, "status as an employee" is properly read to refer to status as a prospective employee.

employee' because of something an employer did to 'limit . . . his employees.'" *Id.* at 982 (Martin, J., dissenting). To twist this language to deny Kleber and other job applicants the right to pursue the disparate impact theory "would turn the ADEA on its head." *Rabin*, 2017 U.S. Dist. LEXIS 23224 at *8.

B. Section 4(a)(2)'s Language Originates In Title VII, Whose Corresponding Provision Has Covered Job Applicants' Disparate Impact Claims Since The Statute's Initial Enactment

Section 4(a)(2)'s origins shed further light on why the provision must be construed to cover applicants. Congress did not create this language in a vacuum while drafting the ADEA, but incorporated it *in haec verba* from Title VII. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). The original language of Title VII and section 4(a)(2) of the ADEA are identical "[e]xcept for substitution of the word 'age' [in the ADEA] for the words 'race, color, religion, sex, or national origin' [in Title VII]." *Smith*, 544 U.S. at 233.

As the Supreme Court explained in *Smith*, Congress' use of the identical language in the ADEA and Title VII shows that Congress intended the two statutes' protections to be the same as to both (1) whom they protect and (2) what they protect. 544 U.S. at 233. First, as to whom, both statutes protect a broad group: "any individual." 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2). Second, as to what, both statutes protect against practices with an adverse disparate impact (not

just disparate treatment). As *Smith* explained, "[n]either § 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that 'limit, segregate, or classify' persons; rather the language prohibits actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race or age.'" *Smith*, 544 U.S. at 235 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991(1988)) (emphasis in original). Consequently, it is only logical to interpret the two statutes as protecting the same people – including job applicants – from the same illegal conduct – practices that have a disparate impact on the protected group.

The Supreme Court addressed the meaning of this language in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), considering whether section 703(a)(2) of Title VII at that time prohibited an employer:

> from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.

Id. at 425 n.1.

Most relevantly, *Griggs* held that hiring practices and policies that have a disparate impact on a protected class and lack a relationship to the jobs in question

cannot be imposed as "condition[s] of employment" for those jobs. *Id.* at 426, 436; *see also id.* at 427-28 (employer required high school education "for initial assignment to any department except Labor" and required that "new employees . . . register satisfactory scores on two professional prepared aptitude tests"). *Griggs* nowhere limited its decision to policies and practices that adversely impacted only current employees, and it nowhere suggested that the employer defendant could continue to apply the requirements challenged therein when hiring new employees. In fact, the Court described its review as addressing "a condition of *employment in or transfer to* jobs" having a disparate impact, encompassing both initial hiring and internal transfer or promotion. *Id.* at 426 (emphasis added). Furthermore, the employees who filed the suit brought it as a class action on behalf of a class that included, among others, "all Negroes who may hereafter seek employment" at the employer's power station. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1227-28 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971); *see also Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (describing *Griggs* as protecting "applicants for hire").

The Supreme Court's post-*Griggs* decisions have consistently supported *Griggs*' interpretation of language identical to that in section 4(a)(2) as covering initial hiring claims. *See Smith*, 544 U.S. at 237 n.8 (plurality opinion); *Dothard*, 433 U.S. at 329. Furthermore, as the Supreme Court has emphasized, *Griggs* is "a precedent of

compelling importance" in interpreting the ADEA. *Smith*, 544 U.S. at 234. Because *Griggs* holds that language identical to that of section 4(a)(2) permits challenges by applicants – specifically, challenges to requirements imposed by an employer as a "condition of employment in or transfer to" a particular job, *Griggs*, 401 U.S. at 426, this Court should construe section 4(a)(2) in the same manner and hold that section 4(a)(2) permits claims by prospective employees, like Kleber, challenging conditions for "employment in" a particular job, as well as claims by current employees challenging the conditions for "transfer to" a different job.

Nevertheless, one of the two concurrences in *Villarreal* suggests that *Griggs* is irrelevant because of Title VII's subsequent history: section 703(a)(2) was amended to add the phrase "applicants for employment," after it was incorporated *in haec verba* into the ADEA . *Villarreal*, 839 F.3d at 979 (Rosenbaum, J., concurring). Judge Rosenbaum reasoned that by not similarly amending the ADEA in 1972, Congress intentionally narrowed the scope of section 4(a)(2) to exclude prospective employees from its protections and correspondingly bless an employer's actions "to limit, segregate or classify his employees" in ways that deprive older job applicants of the opportunity to be hired by that employer. *Id.*

This conclusion, however, is based on the flawed premise that the 1972 amendment to Title VII expanded the statute's coverage. Quite the opposite: the

amendment confirmed *Griggs*' interpretation of Title VII. As the Senate Report explained, it was "merely . . . declaratory of present law," S. Rep. No. 92-415, at 43 (1971), and "fully in accord with the decision of the Court" in *Griggs*. H.R. Rep. No. 92-238, at 21-22 (1971); *see also Rabin*, 2017 U.S. Dist. LEXIS 23224 at *12. The 1972 amendment thus has no meaningful effect here: like section 703(a)(2) of Title VII, section 4(a)(2) of the ADEA does now and has always covered applicants.

C. *Smith v. City of Jackson*, Which Overruled *Francis Parker*, Supports The Conclusion That Section 4(a)(2) Covers Applicants' Disparate Impact Claims

1. *Smith* supports a disparate impact theory for job applicants

In addition to *Griggs*, the majority opinion in *Smith v. City of Jackson*[6] strongly supports the conclusion that section 4(a)(2) covers job applicants. First, the Court's textual analysis of the differences between sections 4(a)(1) and 4(a)(2) of the ADEA inferred no significance from the absence of the term "applicants" in section 4(a)(2). That is to be expected, as "individuals" is plainly broad enough to make enumeration of which types of individuals unnecessary.

Second, the *Smith* majority noted two, and only two, textual differences between the ADEA and Title VII that make the scope of disparate impact claims

[6] Because Justice Scalia joined Parts I, II, and IV, these parts constitute majority holdings. *Smith*, 544 U.S. at 229 (referring to the opinion of the Court with respect to Parts I, II, and IV).

narrower under the ADEA than under Title VII: (1) ADEA defendants can invoke the "reasonable factors other than age" ("RFOA") defense, whereas Title VII defendants must satisfy the "business necessity" defense; and (2) the "*Wards Cove*[7] pre-1991 interpretation of Title VII's identical language [referring to section 4(a)(2) and section 703(a)(2)] remains applicable to the ADEA." 544 U.S. at 240. Again, the absence of "applicants" in 4(a)(2)'s language was not a difference that the Supreme Court described as narrowing the ADEA's disparate impact provision relative to Title VII. Because Congress and the Supreme Court have left no room for additional limitations, none should be created. *See Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

Finally, the *Smith* majority made explicit its implicit view that section 4(a)(2) covers applicants when it cited two applicant disparate impact cases with approval, calling them "appropriate" ADEA cases. 544 U.S. at 237, 238 n.8 (plurality opinion) (citing *Wooden v. Bd. of Educ. of Jefferson County*, 931 F.2d 376 (6th Cir. 1991), and *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993)). In short,

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[7] *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). This case addressed the burden-shifting framework for discrimination cases, and *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008), later clarified that the RFOA provision in the ADEA is an affirmative defense.

Smith supports applying the disparate impact theory to combat age discrimination in hiring and in no way suggests the contrary.

2. *Smith* overruled *EEOC v. Francis Parker School*

This Court is not bound to affirm the district court's decision because *Smith*'s holding that section 4(a)(2) of the ADEA creates a disparate impact claim overruled contrary prior precedent, including this Court's decision in *EEOC v. Francis Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994) ("*Francis Parker*"). *See Rabin*, 2017 U.S. Dist. LEXIS 23224 at *14 n.6 ("Both the Tenth and Seventh Circuits held that disparate claims were not available at all under the ADEA. The Supreme Court overruled that holding in *Smith*. The fact that *Ellis* [*v. United Airlines, Inc.*, 73 F.3d 999, 1009 (10th Cir. 1996)] and *Francis W. Parker* involved claims by job applicants does not change the fact that their central holdings are no longer good law and cannot support Defendant's argument here."). The district court relied on dicta from *Francis Parker* stating that section 4(a)(2) excludes job applicants,[8] SA4, which is wholly irrelevant

[8] Notably, this peripheral comment is also inaccurate. The *Francis Parker* Court determined that the ADEA excludes job applicants based on a comparison between section 4(a)(2) of the ADEA and the parallel provision of Title VII. 41 F.3d at 1077. But, in doing so, the Court indicated that the Supreme Court had construed the *post*-1972-amendment provision in *Griggs v. Duke Power Co.*, rather than recognizing that *Griggs* actually interpreted the pre-amendment version, which was identical to section 4(a)(2) of the ADEA. *Id.* The lack of thorough consideration of this comment underscores that *Francis Parker*'s language regarding section 4(a)(2) is dicta.

to the basis of the Court's decision in that case—a holding that has now been overruled by Supreme Court precedent.

The issue in *Francis Parker* was whether, in the wake of the U.S. Supreme Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the disparate impact theory of liability remained available *at all* under the ADEA. As the Supreme Court noted in *Smith*, prior to *Hazen Paper*, every appellate court – including the Seventh Circuit, *Monroe v. United Air Lines*, 736 F.2d 394, 404 n.3 (7th Cir. 1984), had "uniformly interpreted the ADEA as authorizing recovery on a 'disparate impact' theory in appropriate cases," *Smith v. City of Jackson*, 544 U.S. 231. 237 (2005). At that time, cases alleging age discrimination in hiring practices, brought by job applicants, were among those cases considered appropriate for disparate impact analysis. *See, e.g., Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980). The *Francis Parker* opinion interpreted *Hazen Paper* as changing this paradigm by making clear that "decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited." *Francis Parker*, 41 F.3d at 1077. In addition, the Court held that the ADEA's "reasonable factor other than age provision," 29 U.S.C. 623(f)(1), which the majority found "particularly noteworthy," 41 F.3d at 1077, "[suggest[ed] that decisions which

are made for reasons independent of age but which happen to correlated with age are not actionable under the ADEA." *Id.*

The U.S. Supreme Court explicitly discredited both of these reasons in *Smith*. With regard to *Hazen Paper*, the Supreme Court declared that "there is nothing in our opinion . . . that precludes an interpretation of the ADEA that parallels our holding in *Griggs*." 544 U.S. at 238. As to the RFOA provision, the Court unequivocally stated, "Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion." *Id.* at 239. In sum, the holding and the arguments that the *Francis Parker* majority used to support its holding were specifically quashed by the *Smith* Court. Nothing of precedential value remains from the *Francis Parker* decision, and this Court need not follow it.[9] Rather, the Court is free to conclude that section 4(a)(2) covers disparate impact by job applicants. *See Castellanos v. Holder*, 652 F.3d 762, 765 (7th Cir. 2011) (explaining that "an intervening on-point Supreme Court decision" is a "compelling circumstance[]" that can disturb circuit precedent).; *United States v. Reyes-Hernandez*, 624 F.3d 405, 412 (7th Cir. 2010) (internal citations omitted) (explaining that prior decisions in a given jurisdiction retain their authority

[9] If the Court, nonetheless, believes that it is bound by *Francis Parker*, the Court may circulate this case and conclude that expressly overruling *Francis Parker* is now appropriate. Cir. R. 40.

"unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling").

D. The ADEA's Prohibitions Are Properly Read To Cover Applicants' Disparate Impact Claims To Effectuate Congress' Primary Goal Of Eradicating Both Overt And Subtle Methods Of Age Discrimination In Hiring

As *Robinson* indicates, if there is any question about a provision's meaning, the Court should interpret it in accordance with its purpose. 519 U.S. at 345. The Supreme Court has repeatedly emphasized that that the ADEA's legislative history reveals its "primary purpose" to be "the hiring of older workers." *Pub. Emps. Ret. Sys. v. Betts*, 492 U.S. 159, 179 (1989); *United Airlines v. McCann*, 434 U.S. 192, 202 (1977) (both cases superseded by statute on other grounds). Indeed, Congress enacted the ADEA in large part because of its concern that "older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs[,]" and that "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)(1), (a)(3). Section 4(a)(2)'s protections were then, and still are now, necessary to combat unemployment among older workers that persists because of subtle bias. Thus, to fulfill Congress' intent, the ADEA's disparate impact provision must cover applicants.

The ADEA's legislative record reflects that Congress' purpose in enacting the statute included eliminating overt and subtle age bias in hiring. The Supreme Court has long looked to the "Wirtz Report," a 1965 report to Congress, produced by U.S. Labor Secretary Willard Wirtz,[10] as the preeminent source for construing the legislative intent behind the ADEA. In *Smith*, a majority of Justices found the Wirtz Report highly persuasive in establishing that the ADEA encompasses disparate impact hiring claims. *Smith*, 544 U.S. at 238 ("[W]e think the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports the pre-*Hazen Paper* consensus concerning disparate-impact liability.").

Specifically, *Smith* suggests that the Wirtz Report anticipated the ruling in *Griggs* in the context of unjustified hiring criteria:

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[10] The Department of Labor compiled the Wirtz Report after Congress directed the Secretary to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected," in Section 715 of the 1964 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964). In *EEOC v. Wyo.*, 460 U.S. 226, 230-32 (1983), the Supreme Court explained that the Report's "findings were confirmed throughout the extensive fact-finding undertaken by the Executive Branch and Congress," and that after the Report's submission, Congress directed the Secretary "to submit specific legislative proposals for prohibiting age discrimination."; President Johnson endorsed these proposals, and they culminated in the 1967 law enacted by Congress. *See also Gen. Dynamics Land Sys. Inc. v. Cline*, 540 U.S. 581, 587-91 (2004) (discussing the strong influence of the Wirtz Report on the ADEA's text).

> The congressional purposes on which we relied in *Griggs* have a striking parallel to an important point made in the Wirtz Report . . . [J]ust as *Griggs* recognized that the high school diploma requirement, which was unrelated to job performance, had an unfair impact on African-Americans who had received inferior educational opportunities in segregated schools . . . [T]he Wirtz Report identified the identical obstacle to the employment of older workers. "Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers—unfairly if, despite his [or her] limited schooling, an older worker's years of experience have given him [or her] the relevant equivalent of a high school education." Thus, just as the statutory text is identical, there is a remarkable similarity between the congressional goals we cited in *Griggs* and those present in the Wirtz Report.

Smith, 544 U.S. at 235 n.5 (internal citations omitted). While the origins of race-related and age-related inequity attributable to an unnecessary high school diploma requirement differ, the impact is the same: poorer prospects of securing jobs, frequently unrelated to a worker's ability to perform.

Another "striking parallel" between the Wirtz Report and *Griggs*, also involving hiring discrimination, involves the disparate impact of testing requirements that are unrelated to job qualifications and performance. The Wirtz Report objected to arbitrary requirements that some job applicants "pass a variety of aptitude and other entrance tests." *Id.* at 14. Specifically, it noted that younger workers' "recency of education and testing experience," rather than any strong connection between test results and "average performance" or "steadiness of output," explained younger applicants' greater success in securing some jobs. *Id.* at

14-15. It reasoned that some jobs genuinely require workers with "better" or more "recent" education, but others do not. For instance, "average performance of older workers compares most favorably in office jobs, where productivity . . . r[i]se[s] with age." *Id.* at 14. Likewise, in *Griggs*, the Supreme Court faulted Duke Power for relying on aptitude test results as hiring criteria because of their lack of a "demonstrable relationship" to job performance, and grossly disparate pass rates favoring whites and disfavoring black applicants. 401 U.S. at 430-31, 430 n.6.

Thus, six years prior to *Griggs*, the Wirtz Report described as unjust the precise hiring criteria the Supreme Court later held unlawful on a theory of disparate impact. The Wirtz Report's prescience should not be casually dismissed as coincidence. Its consistent and repeated attention to inequities that disadvantaged older applicants belies the notion that the ADEA may be reasonably read to disallow hiring claims brought pursuant to the disparate impact theory.

Later, in committee hearings, prominent ADEA supporters echoed themes in the Wirtz Report indicating that the proposed law was designed to address covert or indirect age hiring restrictions. The chief sponsor of the ADEA, Senator Yarborough, declared: "It is time that we turn our attention to the older worker who is not ready for retirement – but who cannot find a job because of his age, despite the fact that he is able, capable, and efficient. He is not ready for retirement – but

he is, in effect, being retired nonetheless, regardless of his ability to do the job." Age Discrimination in Employment: Hearing on S. 830 and S. 788 before the S. Subcomm. on Labor, Comm. on Labor and Public Welfare, 90th Cong. 22 (1967) [hereinafter 1967 Senate Hearings].

More specifically, one committee witness, testifying regarding disparate impact claims, spoke to the lack of empirical evidence that non-discriminatory factors other than age explain age-based disparities in hiring data. *Id.* at 175-89 (Statement of Dr. Harold L. Sheppard, Social Scientist, Upjohn Institute for Employment Research). Dr. Sheppard described what he called the "obstacle course set up by our public institutions and private employers" confronting older workers "becoming unemployed after many years of continuous employment." *Id.* at 176. The obstacle course, he said, "includes . . . conscious and unconscious patterns of discrimination against older jobseekers." *Id.*

Finally, just days before the House agreed to final changes to the ADEA passed by the Senate, Rep. Burke offered grounds for Congress to conclude that age bias in hiring is especially serious:

> It is one of the cruel paradoxes of our time that older workers holding jobs are considered invaluable because of their experience and stability. But let that same worker become unemployed and he is considered "too old" to be hired. Once unemployed, the older worker can look forward to longer stretches between jobs than a young worker in the same position.

113 Cong. Rec. 34742 (daily ed. Dec. 4, 1967). Nowhere in the record of the ADEA's enactment is there a hint that Congress intended older applicants to have less legal protection than incumbent older workers. The evidence is entirely to the contrary. It makes no sense to interpret the ADEA to deny applicants a disparate impact claim.

II. Administrative Agencies Enforcing the ADEA Have Consistently And Reasonably Interpreted The Statute As Permitting Disparate Impact Claims For Job Applicants For Forty Years

Congress delegated first to the Department of Labor and then to the Equal Employment Opportunity Commission (EEOC) the authority to issue rules and regulations to carry out the ADEA.[11] 29 U.S.C. § 628. For decades, these agencies have interpreted the ADEA to permit applicants' disparate impact claims. Accordingly, if the Court finds any ambiguity in the statute,[12] the issue becomes "an

[11] On July 1, 1979, responsibility and authority for enforcement of the ADEA was transferred from the Secretary of Labor to the EEOC pursuant to Reorganization Plan No. 1 of 1978, 92 Stat. 3701; 43 Fed. Reg. 19807 (May 9, 1978).

[12] While Plaintiffs believe that the plain language of section 4(a)(2) confirms the availability of applicant disparate impact claims, it is true that other statutory interpretations have been offered. Indeed, as Judge Martin's *Villarreal* dissent points out, "[e]leven judges interpret § 4(a)(2) in today's ruling. Among the eleven of us, we read the statute to mean at least three different things." *Villarreal*, 839 F.3d at 988 (Martin, J., dissenting).

absolutely classic case for deference to agency interpretation." *Smith*, 544 U.S. at 243 (Scalia, J., concurring).

The EEOC first addressed the relevant statutory language in Title VII in its 1966 Guidelines requiring that ability tests "fairly measure[] the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly afford[] the employer a chance to measure the applicant's ability to perform a particular job or class of jobs." *See Griggs*, 401 U.S. at 433 n.9 (quoting Aug. 24, 1966 Guidelines). The Supreme Court relied on the EEOC's interpretation in *Griggs*. *Id.* at 433-34 (according EEOC interpretation "great deference").

Within days after the ADEA went into effect, the Department of Labor (DOL), which then had rulemaking authority under the ADEA, promulgated interpretive regulations. *See* 29 C.F.R. pt. 860 (1968). With regard to physical requirements for job applicants and incumbents, the DOL regulations provided that: (a) age-neutral fitness standards be "reasonably necessary for the specific work to be performed"; (b) a "differentiation based on a physical examination, but not one based on age" was "reasonable" only for positions which "necessitate" stringent physical requirements; and (c) pre-employment physical examinations must

distinguish among the physical demands of various jobs.[13] In addition, the regulations provided that age-neutral employment criteria, including educational level, had to have "a valid relationship to job requirements."[14] 29 C.F.R. § 860.103(f)(1)-(2).

Also in 1968, Secretary Wirtz's Labor Department issued advisory opinions confirming that the ADEA applied to age-neutral employer practices, including hiring criteria. The DOL declared that "'facially-neutral job requirements and employment practices, such as testing, must be validated and job-related.'" Fentonmiller, *supra* note 13, at 11045 and n.204.

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[13] These provisions "were entirely consistent with Secretary Wirtz's findings three years earlier that physical requirements (i.e., strength, speed, dexterity, quantity of work) were employers' most frequently mentioned consideration for restrictions on the hiring of older workers, but that many of these requirements had 'no studied basis.'" Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1104, n.195, 196 (1998) (quoting Wirtz Report at 8, and referring to the Secretary's Research Materials at 4, 11-12). The Secretary submitted the "Research Materials" along with, and in support of, the Report. *See* Wirtz Report at ii.

[14] In this respect, the regulations also "echoed the Secretary's prior criticism of unfair educational requirements that 'penalize' the older worker, [and] his finding that written tests with 'little direct relationship to the jobs' tended to preclude the employment of otherwise qualified older applicants . . . ." Fentonmiller, *supra* note 13, at 1104-05, nn. 198-200 (citing Research Materials at 81 and at 14, and Wirtz Report at 3); *see also* 29 C.F.R. § 860.104(b) (1969) (ADEA rule revised to clarify that even a validated employee test had to be "specifically related to the requirements of the job," as well as "fair and reasonable.").

Upon assuming enforcement authority for the ADEA, the EEOC promulgated a regulation in 1981 stating that when "an employment practice, including a test, is claimed as a basis for different treatment of *employees or applicants* for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on *individuals* within the protected age group," employers must provide a sufficient justification for that practice. 29 C.F.R. § 1625.7(d) (1981) (emphasis added); *see* 46 Fed. Reg. 47724, at *47727 (1981); *see also Smith*, 544 U.S. at 243-44 (Scalia, J., concurring) (quoting 29 C.F.R. §1625.7(d) and recognizing that the EEOC's regulation affirmed the longstanding position of the Secretary of Labor).

In the wake of the Supreme Court decisions in *Smith* and *Meacham*, the EEOC once again engaged in notice-and-comment rulemaking and issued a new regulation to clarify that the defense to an ADEA disparate impact claim is a "reasonable factor other than age." 29 C.F.R. § 1625.7(c) (2012); *see* 77 Fed. Reg. 19080 (2012). The EEOC's current ADEA disparate impact regulations, which use even broader language than the 1981 regulations, provide that "[a]ny employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a 'reasonable factor other than age.'" *Id.* The EEOC issued these regulations under its statutory

rulemaking authority, 29 U.S.C. § 628, and therefore, as the agency's consistent longstanding interpretation of the ADEA that have the force of law, they are entitled to *Chevron* deference. *See Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (agency regulations given deference "unless they are arbitrary, capricious, or manifestly contrary to the statute").

The current regulation, 29 C.F.R. § 1625.7(c), refers to "individuals," which encompasses the "employees or applicants" language of former section 1625.7(d) and poses numerous examples of cases involving applicants. *See* 77 Fed. Reg. 19080, at *19084 ("candidates for jobs" in meat-processing industry); *id*. at *19086 ("applicants for security guard positions"); *id*. at *19087 ("an employer seeking to hire"); *see also id*. at *19092 ("Data show that older individuals who become unemployed have more difficulty finding a new position and tend to stay unemployed longer than younger individuals. To the extent that the difficulty in finding new work is attributable to neutral practices that act as barriers to the employment of older workers, the [EEOC's] regulation [concerning disparate impact claims under section 4(a)(2)] should help to reduce the rate of their unemployment and, thus help to reduce those unique burdens on society.") (internal footnote omitted).

Finally, in its enforcement litigation, the EEOC has consistently taken the same position – that section 4(a)(2) protects job applicants as well as current employees – adding even more support for deference. *See EEOC v. Francis W. Parker Sch.*, No. 94 Civ. 1558, 1995 WL 17047545, at *13-14 (S. Ct. March 20, 1995) (EEOC petition for certiorari), *EEOC v. Allstate Ins. Co.*, No. 07 Civ. 1559, 2007 WL 6604487, at n.2 (8th Cir. 2007) (EEOC brief as appellee); *see also Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) ("[W]e defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'").

Accordingly, if there is any question about section 4(a)(2)'s meaning, deference to administrative agencies' longstanding interpretations in many forms, including those having the force of law, definitively resolves that question in favor of job applicants like Kleber.

CONCLUSION

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

Dated: April 10, 2017

Respectfully submitted,

/s/ Dara S. Smith

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,738 of words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements to Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in font size 14.

Dated: April 10, 2017

/s/ Dara S. Smith
Dara S. Smith

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Dara S. Smith
Dara S. Smith

STATEMENT PURSUANT TO CIRCUIT RULE 30(d)

Pursuant to Circuit Rule 30(d), undersigned counsel states that all materials required by Circuit Rule 30(a) and 30(b) are included in the Short Appendix. Pursuant to Rule 30(a), the Short Appendix contains all judgments, orders, and/or opinions under review, including: Minute Entry for Order Granting in Part and Denying in Part Defendant's Motion to Dismiss; Memorandum and Order Granting in Part and Denying in Part Defendant's Motion to Dismiss; and Minute Entry Granting Motion for Entry of a Final Judgment Order. There are no other opinions or orders with any content that must be submitted in an appendix pursuant to Rule 30(b), and no portions of pleadings were submitted as especially relevant under Rule 30(b).

/s/ Dara S. Smith
Dara S. Smith

Dated: April 10, 2017

No. 17-1206

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DALE E. KLEBER,

Plaintiff-Appellant,

v.

CAREFUSION CORP.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
Civ. No. 1:15-cv-01994, Hon. Sharon Johnson Coleman

SHORT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 6,1
Eastern Division

Dale E Kleber

Plaintiff,

v.

Case No.: 1:15–cv–01994
Honorable Sharon Johnson Coleman

CareFusion Corporation

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, November 23, 2015:

MINUTE entry before the Honorable Sharon Johnson Coleman: For the foregoing reasons, CareFusion's motion to dismiss [25] is granted with respect to Count I and denied with respect to Count II. Enter Memorandum Opinion and Order.Mailed notice(rth,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DALE E. KLEBER	)	
	)	
Plaintiffs,	)	Case No. 15-cv-1994
	)	
v.	)	Judge Sharon Johnson Coleman
	)	
CAREFUSION CORP.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Dale E. Kleber ("Kleber") filed a two count amended complaint against CareFusion Corp. ("CareFusion") alleging the unlawful use of hiring criteria with a disparate impact on job applicants over 40 years of age (Count I) and unlawful discriminatory treatment based on his age (Count II) in violation of the Age Discrimination in Employment Act. CareFusion moved to dismiss all counts for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth herein, CareFusion's motion to dismiss [25] is granted in part and denied in part.

Background

The following facts are taken from the amended complaint and its attachments, and are accepted as true for the purposes of ruling on the instant motion.[1] Kleber is a fifty-nine year old attorney. (Dkt. 22 ¶ 10). Although currently unemployed, Kleber has previously served as the CEO of a national dairy trade association, as the General Counsel of a Fortune 500 company, and as the Chairman and Interim CEO of a medical device manufacturer. (*Id.* ¶¶ 11–12, 24).

[1] *See Beanstalk Grp., Inc. v. AM Gen. Corp.*, 283 F.3d 856, 858 (7th Cir. 2002) (holding that documents attached to a pleading may be considered as part of the pleadings without converting a motion to dismiss into one for summary judgment).

On March 5, 2014, Kleber applied for the position of "Senior Counsel, Procedural Solutions" in CareFusion's legal department. (*Id.* ¶ 21). The online job description for the position listed, as one of the qualifications, "3 to 7 years (no more than 7 years) of relevant legal experience." (*Id.* Ex. 1). At that time, CareFusion also advertised the position of "Senior Counsel, Labor and Employment," which was open to applicants with between "3–5 years (no more than 5 years) of legal experience." (Dkt. 22 ¶¶ 22, 23).

CareFusion confirmed that it received Kleber's application but did not invite him to interview for the position. (Dkt. 22 ¶ 25). Of the one hundred and eight applicants for the position, CareFusion interviewed ten candidates, all of whom had seven years or less of legal experience, and ultimately hired an applicant who was twenty-nine years old. (*Id.* ¶ 26). Kleber believes that CareFusion's requirement that applicants have seven years or less of legal experience was based on the correlation between age and years of experience and was intended to weed out older applicants such as himself. (*Id.* ¶¶ 28–29).

Legal Standard

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint, not the merits of the allegations. The allegations must contain sufficient factual material to raise a plausible right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n.14, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Although Rule 8 does not require a plaintiff to plead particularized facts, the complaint must allege factual "allegations that raise a right to relief above the speculative level." *Arnett v. Webster*, 658 F.3d 742, 751–52 (7th Cir. 2011). Put differently, Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), *see also* Fed. R. Civ. P. 8(a). When ruling on a motion to dismiss, the Court must accept all well-pleaded factual allegations in the complaint as true and draw all reasonable

inferences in the plaintiff's favor. *Park v. Ind. Univ. Sch. of Dentistry*, 692 F.3d 828, 830 (7th Cir. 2012).

Discussion

1. Disparate Impact Claim

CareFusion contends that Kleber's disparate impact claim must be dismissed because the Age Discrimination in Employment Act (ADEA) does not provide for disparate impact claims by job applicants. The ADEA's disparate impact provision states, in pertinent part, that "[i]t shall be 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).

The Seventh Circuit has expressly noted that this provision omits "applicants for employment" from its coverage. *E.E.O.C. v. Francis W. Parker School*, 41 F.3d 1073, 1077 (7th Cir. 1994). In reaching that conclusion, the Circuit Court compared the language of section 623 and the similar provision from Title VII permitting disparate impact claims under that statute. The Title VII provision states, in pertinent part, that "It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees *or applicants for employment* 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 race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (emphasis added). In light of the ADEA's near verbatim adoption of Title VII's language, the Seventh Circuit interpreted Congress's exclusion of "job applicants" from subsection 2 of the ADEA as demonstrating that the ADEA was not intended to allow disparate impact claims against by job applicants. *Francis W. Parker School*, 41 F.3d at 1077; *see also Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167, 174, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009) ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar

changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."). Accordingly, because Section 623(a)(2) does not authorize disparate impact claims premised on an alleged failure to hire, Kleber's disparate impact claim (Count I) fails as a matter of law.

2. Disparate Treatment Claim

CareFusion contends that Kleber's disparate treatment claim must be dismissed because failing to hire an overqualified applicant does not constitute age discrimination. To succeed on a disparate treatment theory, an ADEA plaintiff must show that his age played a role in the decision-making process. Here, it is undisputed that Kleber has more legal experience than was permitted for the position that he was applying for. An employer does not commit age discrimination when it declines to hire an overqualified applicant. *See, e.g., Johnson v. Cook Inc.*, 327 Fed. App'x 661, 663–64 (7th Cir. 2009) (affirming summary judgment where an employer rejected a job application for an entry level position from an applicant with excess experience because he did not meet the job requirements); *Sembos v. Philips Components*, 376 F.3d 696, 701 n.4 (7th Cir. 2004) (recognizing that an applicant's over-qualification constitutes a legitimate, non-discriminatory reason not to hire him).

Here, however, Kleber alleges that CareFusion's cap on the amount of legal experience that applicants could possess was "a way of intentionally weeding out older applicants . . . [because] CareFusion believed that these workers were not desirable, qualified candidates because of stereotypes and unfounded assumptions regarding older workers' commitment and their willingness to be managed by younger, less-experienced supervisors." This Court finds *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) to be informative in considering this allegation. In that case, the Supreme Court held that an employer did not violate the ADEA when it fired an employee whose pension was soon to vest, because "age and years of service are analytically

distinct" such that "an employer can take account of one while ignoring the other." *Id.* at 611. The Court cautioned, however, that:

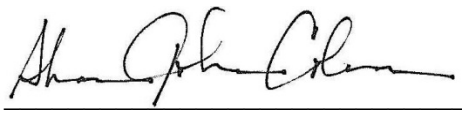
> We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, but in the sense that the employer may suppose a correlation between the two factors and act accordingly.

Id. at 612–13. Kleber's claim appears to fit the hypothetical possibility discussed by the Court. An employer could use experience, like pension status, as a proxy for age if it supposed a correlation between the two factors and accordingly made decisions based on experience but motivated by assumptions about the age of those who would be impacted. This Court cannot reject the possibility that such conduct could constitute age discrimination. As courts routinely state, motions to dismiss are not intended to test the merits of a claim and are construed in favor of the non-moving party. Based on the allegations contained in his complaint, this Court therefore finds that Kleber has adequately pled a claim for disparate treatment under the ADEA.

Conclusion

For the foregoing reasons, CareFusion's motion to dismiss [25] is granted with respect to Count I and denied with respect to Count II.

SO ORDERED.



Sharon Johnson Coleman
United States District Court Judge

DATED: November 23, 2015

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 6.1.1
Eastern Division

Dale E Kleber

Plaintiff,

v.

Case No.: 1:15–cv–01994
Honorable Sharon Johnson Coleman

CareFusion Corporation

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, January 30, 2017:

MINUTE entry before the Honorable Sharon Johnson Coleman: The plaintiff's motion for entry of a final judgment order [105] is granted. Pursuant to Fed. R. Civ. P. 41(a)(1) and the parties' stipulation of dismissal, this action is dismissed with prejudice. No appearance necessary on 2/1/2017. Mailed notice(rth,)

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