

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

DALE E. KLEBER,

Plaintiff,

v.

CAREFUSION CORP.,

Defendant.

Civil Action No. 1:15-cv-01994

**FIRST AMENDED COMPLAINT
AND
JURY DEMAND**

**FIRST AMENDED COMPLAINT FOR AGE DISCRIMINATION UNDER
THE AGE DISCRIMINATION IN EMPLOYMENT ACT**

Plaintiff Dale E. Kleber (“Plaintiff” or “Mr. Kleber”), by and through undersigned counsel, files this civil action Complaint and Jury Demand (“Complaint”) against Defendant CareFusion Corp (“Defendant”). The following allegations are based on personal knowledge as to Plaintiff’s own conduct and on information and belief as to the acts of others.

INTRODUCTION

1. This civil action challenges Defendant’s unlawful age discrimination with respect to its hiring policies and practices. On March 5, 2014, the Plaintiff submitted an online application for the “Senior Counsel, Procedural Solutions,” position after seeing its announcement on the Defendant’s website. The “Qualifications” for the position included the requirement that candidates have “3 to 7 years (no more than 7 years) of relevant legal experience.” A true and correct copy of the job announcement for the Senior Counsel, Procedural Solutions position for which Mr. Kleber applied is attached to the Complaint as Exhibit 1 and incorporated herein.

2. The Defendant's policy of establishing maximum years of experience for jobs, including the "Senior Counsel, Procedural Solutions," position that the Plaintiff applied for, discriminates against older workers in violation of the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. The policy is based on unfounded stereotypes and assumptions about older workers, deters older workers from applying for positions with maximum experience caps and has a disparate impact on qualified applicants over the age of 40.

3. Plaintiff brings this action seeking a declaration that Defendants' hiring policies and practices establishing maximum years-of-experience caps as eligibility criteria for positions, including the position of Senior Counsel, Procedural Solutions, violate the ADEA. Plaintiff also seeks a permanent injunction requiring that such policies and practices be eliminated. Finally, Plaintiff seeks an order requiring his reinstatement to the position of Senior Counsel, Procedural Solutions and back pay, or in the alternative, awarding him the appropriate front and back pay for the income he would have received, as Senior Counsel, Procedural Solutions, had Defendant not abided by its discriminatory policies and practices in violation of the ADEA..

PARTIES

4. Plaintiff Dale E. Kleber is a 59-year-old resident of Hinsdale, Illinois who applied for the Senior Counsel, Procedural Solutions position with Defendant on March 5, 2014. Mr. Kleber received an email confirmation of his application for the Senior Counsel position on March 6, 2014 stating that if CareFusion were interested he would be contacted for an interview, which is attached to the Complaint as Exhibit 2 and incorporated herein. Mr. Kleber was never contacted for an interview for the CareFusion Senior Counsel, Procedural Solutions position.

5. Defendant CareFusion Corporation is a publicly traded medical device/services company with over 14,000 employees worldwide headquartered in San Diego, California. CareFusion manufactures and distributes products including medication and supply dispensing products, infusion devices, ventilators, respiratory diagnostic instruments, surgical products and instruments. Defendant maintains a business office in Vernon Hills, Illinois where the position for which Mr. Kleber applied was located.

6. CareFusion Corporation is a wholly owned subsidiary of Becton, Dickinson, and Company (“BD”), a Delaware Corporation. BD filed a Merger Plan with the United States Securities and Exchange Commission providing that on October 5, 2014, BD “entered into an Agreement and Plan of Merger (the “Merger Agreement”) with CareFusion Corporation . . . and Griffin Sub, Inc., a Delaware corporation and wholly owned subsidiary of BD (“Merger Corp”). The Merger Agreement provides, among other things, that, upon the terms and subject to the conditions set forth therein, Merger Corp will merge with and into CareFusion, with CareFusion surviving as a wholly-owned subsidiary of BD.” Form 8-K, available at <http://goo.gl/D66txr/>

JURISDICTION AND VENUE

7. Because this case is brought under the ADEA, 29 U.S.C. § 621 *et seq.*, this Court has federal question jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(4).

8. Mr. Kleber’s job application with Defendant was made in the Northern District of Illinois, and the job with defendant that Mr. Kleber applied for was based in the Northern District of Illinois.

9. Venue is proper in the Northern District of Illinois because Plaintiff’s cause of action arose within this District and Division in that a substantial part of the acts and omissions

giving rise to the claims in this case occurred in this District. Venue also is proper in this District because the Defendant is subject to personal jurisdiction therein by virtue of their substantial, continuous, and systematic commercial activities in this District. *See* 28 U.S.C. § 1391(b), (c). Because the Defendant is subject to personal jurisdiction in this Division, it “resides” in this Division for venue purposes (*see* 28 U.S.C. § 1391(c)).

FACTS

Mr. Kleber’s Prolonged Job Search

10. Mr. Kleber is an unemployed 59- year-old attorney with extensive law-firm and in-house counsel experience.

11. In July 2011, Mr. Kleber involuntarily resigned from his position as the Chief Executive Officer of a national dairy trade association after being given only two weeks’ notice. He had received a 10% raise and excellent reviews three months earlier. Mr. Kleber received a three-month severance package and collected unemployment for 18 months following his separation from the association. Since his separation, he has engaged in an active search for employment, applying for both legal and executive management positions.

12. Initially, the legal jobs for which Mr. 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. However, as time passed, and he did not receive any job offers, he began to apply for progressively less senior legal in-house positions since most of his career experience has been working as an in-house legal generalist with a concentration in corporate and commercial transactions.

13. Since, July 2011, Mr. Kleber has applied for at least 150 jobs, primarily online. Occasionally, he has also mailed letters to hiring managers. Typically, he averages one or two

job applications per week. In response to an online application, he usually receives either no response or a form-generated email confirming his application. In a few instances, he has received a personalized emailed response.

14. To search for jobs, Mr. Kleber uses various employment-related websites and services, including Linked-In, Law-Crossing.com, the electronic job boards of the Association of Corporate Counsel, the Chicago Bar Association and the Illinois Bar Association, LawCrossing.com, LegalCareerSite.com, CareerBuilder.com, Monster.com, Indeed.com, SimplyHired.com, IHire.com, CyberCoders.com, The Ladders.com, and others.

15. His resume is also posted on selected web sites, including some of the above pages, which recruiters or potential employers can review.

16. After such a prolonged and frustrating job search, Mr. Kleber would be quite satisfied to work in a relatively junior-level legal position. He is motivated by his desire to be productive and provide financially for his family and is not driven to advance to the senior levels at which he served previously. However, he would be open to a promotion if offered by his employer. He would be quite willing to report to, and be supervised by, another lawyer who is younger than he is or has less legal experience.

17. His primary purpose for seeking employment is to obtain a steady income stream to meet current living expenses and avoid the continued depletion of his savings.

18. Mr. Kleber has been married for almost 30 years and has four children who range in age from 18 to 25, three of whom are still dependents. His two oldest children have graduated from college; the oldest is financially independent, and the second child graduated from college in May of 2014, but is in the process of obtaining various teaching licenses and still lives at home. His third child is currently a junior in college, and his youngest child recently graduated

from high school and will attend college next year, so he will be faced with two college tuition payments.

19. In order to obtain health insurance, Mr. Kleber's wife returned to full-time employment approximately three years ago after being a full-time mother for most of their marriage. She currently works as an executive assistant in a healthcare consulting firm based in downtown Chicago.

20. Mr. Kleber is in very good health and considers himself to be a "young 59." He has no plans to retire for the foreseeable future.

Mr. Kleber's Application for the Senior Counsel Position at CareFusion

21. On March 5, 2014, through Defendant's website, Mr. Kleber applied for the Senior Counsel, Procedural Solutions position at Defendant's Vernon Hills, Illinois location.

22. The job description for the Senior Counsel, Procedural Solutions position (Exhibit 1) included a requirement that any applicant have "3 to 7 years (no more than 7 years) of relevant experience." Another job announcement for a position within CareFusion's legal department, Senior Counsel – Labor & Employment, which was posted on the Defendant's website at the same time the Senior Counsel, Procedural Solutions job was posted, was seeking candidates with "3-5 years (no more than 5 years) of legal experience"

23. At approximately the same time, defendant had another advertisement on its website for the job of Senior Counsel, Labor& Employment, which included a requirement that any applicant have "no more than 5 years of legal experience. . . ."

24. Although he was taken aback by a job requirement that purported to disqualify applicants with more than seven years of legal experience, Mr. Kleber still applied for the Senior Counsel, Procedural Solutions position for several reasons: First, as described in the paragraphs

above, Mr. Kleber has been out of work for over three years, and there are mounting strains on his family's financial situation. Second, the position genuinely interested him. Despite the maximum years of experience requirement, the job announcement described a position that appears anything but entry-level. For example, among other expectations, the person selected would be required to "[p]erform[] special assignments or projects *without significant supervision*;" and "[a]dvice clients on *complex* business and legal transactional risks." (emphasis added). The "Qualifications" section also described a challenging position where successful candidates would be expected to have the "[a]bility to assume *complex* projects . . . and *independently manage* or assist on projects to favorable resolution or conclusion." (emphasis added). The attorney ultimately hired for the position would be expected to "work *autonomously*," and have the "ability to synthesize *complex* legal issues to essential elements for clients throughout the organization." (emphasis added). Finally, earlier in his career, Mr. Kleber served as the Chairman and Interim CEO of a start-up manufacturer of a dental anesthesia delivery device which gave him the opportunity to do legal work related to healthcare and medical devices. Mr. Kleber believed he could expand on that experience in the CareFusion position.

25. On March 6, 2014, the Defendant sent Mr. Kleber an automated electronic response to his application (See Exhibit 2) stating that "If [his] qualifications me[t] the basic requirements, [his] application [would] be considered for the position," and he would "be contacted if [he was] selected for an interview." The message indicated that replies to it were "undeliverable and [would] not reach CareFusion." The Defendant never contacted Mr. Kleber to schedule an interview.

26. On information and belief, the Defendant received 108 applications for the Senior Counsel, Procedural Solutions position, and ten candidates were selected to be interviewed. The Defendant stated that Mr. Kleber was not selected for an interview because it was clear from his resume that he had more than the maximum seven years of experience. On information and belief, the selected candidate was 29 years old.

DEFENDANT'S AGE DISCRIMINATION

27. Defendant intentionally chose to limit applicants for the job of Senior Counsel, Procedural Solutions to persons with “no more than 7 years of relevant experience”.

28. Defendant limited applicants for the job of Senior Counsel, Procedural Solutions to persons with “no more than 7 years of relevant experience” to intentionally weed out older applicants. Defendant’s policy appears to be based on stereotypes and assumptions about older workers..

29. Defendant’s limiting applicants for the job of Senior Counsel, Procedural Solutions to persons with “no more than 7 years of relevant experience” had the effect of weeding out older applicants. The allegations of this paragraph will likely have evidentiary support after a reasonable opportunity for further investigation and/or discovery.

30. Defendant willfully violated the Age Discrimination in Employment Act of 1967, as amended.

31. Defendant’s act of limiting applicants for the job of Senior Counsel, Procedural Solutions to persons with “no more than 7 years of relevant experience” had a disparate impact on older applicants. The allegations of this paragraph will likely have evidentiary support after a reasonable opportunity for further investigation and/or discovery.

32. As a proximate result of defendant's age discrimination, Mr. Kleber was deprived of the opportunity to interview for a job, deprived of the opportunity to earn wages, and deprived of the opportunity to earn employment benefits.

ADEA COVERAGE

33. When defendant advertised on its website for applicants for the job of Senior Counsel, Procedural Solutions at defendant's Vernon Hills, Illinois, facility, among other times, defendant was an "employer" as defined by §11(b) of the Age Discrimination in Employment Act, as amended [29 U.S.C. §630(b)].

34. At all relevant times, Mr. Kleber was over 40 years of age, *see* 29 U.S.C. § 631(a), and Defendant denied him employment, *see* 29 U.S.C. § 623(a)(1), (2).

EEOC PROCEEDINGS

35. On March 6, 2014, Mr. Kleber downloaded and completed an EEOC Intake Questionnaire and mailed it to the EEOC Chicago Office. A true and correct copy of the Mr. Kleber's Intake Questionnaire and Supplement are attached as Exhibit 4 to this Complaint and incorporated herein. In addition to the form, Mr. Kleber wrote a two-page "Supplement to EEOC Intake Questionnaire of Dale E. Kleber," and mailed it along with the actual Questionnaire.

36. Mr. Kleber wrote on the Intake Questionnaire that the Senior Counsel job posting "discriminates against older workers by establish[ing] a maximum of seven years of legal experience" and that "setting a maximum for years of legal experience is the equivalent of restricting the job to applicants under the age of 40." Exhibit 4 at 2. He wrote in the Supplement to the Intake Questionnaire that the experience maximum on the Senior Counsel position's job posting "is the legal equivalent of stating, 'No older attorneys need apply[]'" and that Carefusion posted multiple job descriptions with experience maximums, which "suggest[s] that Carefusion

is systematically discriminating against older applicants by placing a maximum on the required level of experience.” Exhibit 4 at 5.

37. On March 17, 2014, EEOC employee Donald Marvin advised Mr. Kleber to wait at least 90 days to file an actual charge of discrimination to allow time for the Defendant to make a hiring decision so that it could be determined if CareFusion hired someone younger than him.

38. On August 8, 2014, Mr. Kleber met with Greg Mucha, an EEOC investigator in the Chicago office, for an intake appointment. Mr. Mucha’s notes from that day state that Mr. Kleber “has over 20 years experience. [Carefusion] has a policy on its face they will not hire anyone with more than 7 years of experience.” A true and correct copy of Mr. Mucha’s notes is attached as Exhibit 6 and incorporated herein.

39. Mr. Mucha typed a Charge of Discrimination for Mr. Kleber to sign, which stated only Mr. Kleber’s name, his age, the position and date on which he applied, and the belief that he had been discriminated against because of his age, in violation of the ADEA. A true and correct copy of the EEOC Charge is attached as Exhibit 3 and incorporated herein.

40. Mr. Kleber signed the Charge of Discrimination as Mr. Mucha instructed, assuming that Mr. Mucha’s generalized description of discrimination in violation of the ADEA cited in the Charge was sufficient to incorporate Mr. Kleber’s more specific allegations of discrimination outlined in his responses to the intake questionnaire. At no time did Mr. Mucha or any other EEOC personnel give Mr. Kleber an opportunity to revise or add to the language drafted by Mr. Mucha, or inform Mr. Kleber that the Defendant would not receive a copy of the completed intake questionnaire. Mr. Kleber intended for the EEOC to pursue the allegations in the intake questionnaire regarding the Defendant’s maximum experience requirement and its discriminatory intent and effect on older workers. Mr. Kleber assumed that the Charge prepared

by Mr. Mucha was sufficient for this to occur. A true and correct copy of an email sent by Mr. Kleber to the EEOC during the investigation, which discusses Mr. Kleber's understanding of the investigation, is attached as Exhibit 7 and incorporated herein.

41. In its September 17, 2014 response to Mr. Kleber's charge of age discrimination, attached to the Complaint as Exhibit 5 and incorporated herein, the Defendant stated that it set a maximum of years of legal experience for the position of Senior Counsel, Procedural Solutions "based on the reasonable concern that an individual with many more years of experience would not be satisfied with less complex duties or comfortable taking direction from an attorney with less experience which could lead to issues with retention."

42. An EEOC investigator discussed with Mr. Kleber Carefusion's response to his charge. Mr. Kleber explained that, as the investigator's notes state, "there are exceptions but that it was more likely than not that most attorneys with more than 7 years experience will be over 40, which results in those who are over 40, are affected by the 7-year experience requirement, therefore, there is discrimination based on age." A true and correct copy of this note is attached as Exhibit 8.

43. On December 2, 2014, the EEOC issued a Notice of Right to Sue letter to Mr. Kleber, thereby allowing him to go forward with filing suit against defendant. The Notice is attached to the Complaint as Exhibit 9 and incorporated herein. The Notice letter was inadvertently set aside in a pile of holiday mail and, therefore, Mr. Kleber is not certain of the specific day he actually received the Notice. However, in the Seventh Circuit, a plaintiff is presumed to receive notice five days after it is mailed from an administrative agency like the EEOC. *Odeen v. Centro, Inc.*, 2014 U.S. Dist. LEXIS 40306, 10-11 (C.D. Ill. Mar. 26, 2014) citing *Loyd v. Sullivan*, 882 F.2d 218, 218 (7th Cir. 1989).

COUNT ONE

**Unlawful Use of Hiring Criteria Having Disparate Impact
on Applicants Over 40 Years of Age in Violation of the ADEA, 29 U.S.C. § 621 et seq.**

44. Mr. Kleber realleges and incorporates herein by reference the foregoing paragraphs.

45. Mr. Kleber filed a timely charge of age discrimination with the EEOC, and has satisfied all preconditions to bringing this action Mr. Kleber's EEOC intake questionnaire made clear that he was also pursuing a disparate impact theory. Mr. Kleber has exhausted his administrative remedies. Mr. Kleber timely files this suit following notice of his right to sue.

46. At all relevant times, the Defendant has been, and continues to be, an employer within the meaning of the ADEA, 29 U.S.C. § 630. At all relevant times, the Defendant has been engaged in interstate commerce within the meaning of the ADEA, *id.*, and has employed, and continues to employ, twenty or more employees.

47. As confirmed by the U.S. Supreme Court in *Smith v. City of Jackson*, 544 U.S. 228 (2005) and *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008), the ADEA prohibits employers from utilizing facially age-neutral policies that have a significant adverse disparate impact on qualified workers over the age of 40, such as Mr. Kleber, unless the employer can prove that disparate impact caused by the challenged policies and practices was premised on a "reasonable factor other than age."

48. On information and belief, the experience cap of seven years imposed by Defendant CareFusion on persons seeking to fill the position of Senior Counsel, Procedural Solutions, had a significant adverse disparate impact on Plaintiff and other qualified applicants for employment over the age of 40 in violation of the ADEA. The maximum years of service

requirement excluded the Plaintiff and other similarly situated qualified older workers with more than seven years of job experience from consideration for the Senior Counsel position without any reasonable basis for such a categorical exclusion and without individualized review of Plaintiff's qualifications.

49. While the Plaintiff cannot provide the exact statistical impact without the benefit of discovery, the likelihood of a person over 40 being selected for the available position given the Defendant's maximum years of service requirement would be substantially less than that of a person under age 40.

50. By imposing a years-of-experience cap on applicants for employment as Senior Counsel, and on applicants for other attorney and non-legal positions, Defendant CareFusion discriminated against qualified applicants over the age of 40 in contravention of the prohibitions on age discrimination set forth in the ADEA.

51. As a direct and proximate result of the foregoing violations of the ADEA, Mr. Kleber has sustained injury, including, but not limited to: denial of the wages and other benefits provided to Senior Counsels employed by Defendant CareFusion, lost interest on those wages and other benefits, and loss of any potential opportunity to advance within CareFusion.

Wherefore, plaintiff Dale E. Kleber prays for:

- a. Lost wages, employment benefits, and other compensation lost to him as a result of defendant's discriminating against him on the basis of his age, and prejudgment interest;

- b. Liquidated damages doubling the award of interest, wages, lost employment benefits, and other compensation lost to him as a result of defendant's discriminating against him on the basis of his age;
- c. Instatement to the job of Senior Counsel, Procedural Solutions (or to a comparable job) and back pay or, in the alternative, pay for such a job beginning on the date the position in question was filled and extending for a reasonable time into the future;
- d. Reasonable attorney's fees, expert witness fees, expenses, and costs of this action and of prior administrative actions; and
- e. Such other relief that this Court deems just and appropriate.

COUNT TWO

Unlawful Intentional Age Discrimination (Disparate Treatment) in Violation of the ADEA, 29 U.S.C. § 621 et seq.

52. Mr. Kleber realleges and incorporates by reference the foregoing paragraphs.

53. The ADEA makes it unlawful for employers and their agents "to fail or refuse to hire . . . any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1).

54. Mr. Kleber was 58 years old at the time he applied for the Senior Counsel, Procedural Solutions position with the Defendant.

55. Mr. Kleber was qualified for the position of Senior Counsel, Procedural Solutions.

56. A significantly younger, less qualified individual was hired instead of Mr. Kleber.

57. Refusing to consider an applicant on the grounds that the applicant has more experience than an arbitrarily determined maximum was a way of intentionally weeding out older applicants like Mr. Kleber. 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. Age-based stereotypes manifested by euphemisms such as “overqualified” deprive qualified older workers of job opportunities.

58. The Defendant’s violations of the ADEA were intentional and willful.

59. As a direct and proximate result of the foregoing violations of the ADEA, Mr. Kleber has sustained economic and non-economic damages, including, but not limited to, denial of the wages and other benefits, lost interest on those wages and other benefits, and loss of any potential opportunity to advance within CareFusion.

Wherefore, plaintiff Dale E. Kleber prays for:

- a. Lost wages, employment benefits, and other compensation lost to him as a result of defendant’s discriminating against him on the basis of his age, and prejudgment interest;
- b. Liquidated damages doubling the award of interest, wages, lost employment benefits, and other compensation lost to him as a result of defendant’s discriminating against him on the basis of his age;
- f. Instatement to the job of Senior Counsel, Procedural Solutions (or to a comparable job) and back pay or, in the alternative, pay for such a job beginning on the date the position in question was filled and extending for a reasonable time into the future;
- g. Reasonable attorney’s fees, expert witness fees, expenses, and costs of this action and of prior administrative actions; and
- i. Such other relief that this Court deems just and appropriate.

DEMAND FOR JURY TRIAL

Under Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury of all issues so triable in this action.

Respectfully submitted,

/s/ Paul Strauss

Paul Strauss
Chicago Lawyers' Committee for Civil Rights Under Law, Inc
100 N. LaSalle St., Suite 600
Chicago, IL 60602
(773) 551-5350

Daniel B. Kohrman (application for admission pro hac vice pending)
Laurie A. McCann (application for admission pro hac vice pending)
Dara S. Smith (application for admission pro hac vice pending)
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
202-434-6280

Date: July 7, 2015

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2015, a true and accurate copy of the foregoing was served on the following counsel through the Court's electronic filing system:

Tobias Edward Schlueter

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
155 N. Wacker Drive
Suite 4300
Chicago, IL 60606
(312) 673-7800

Colleen Grace DeRosa

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
155 North Wacker Drive
Suite 4300
Chicago, IL 60606
(312) 558-3028

Counsel for Defendant

/s/ Paul Strauss

Paul Strauss
Chicago Lawyers' Committee for Civil Rights Under Law, Inc
100 N. LaSalle St., Suite 600
Chicago, IL 60602
(773) 551-5350