No. 17-1206

United States Court of Appeals
For The Seventh Circuit

DALE E. KLEBER, Plaintiff-Appellant, v. CAREFUSION CORP., Defendant-Appellee.	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 15-cv-01994 Honorable Judge Sharon Johnson Coleman

BRIEF OF DEFENDANT-APPELLEE CAREFUSION CORP.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 17-1206

Short Caption: Kleber v. CareFusion Corp.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):
CareFusion Corp.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
CareFusion Corp. is a wholly-owned subsidiary of Becton, Dickinson and Company.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
Becton, Dickinson and Company owns 10% or more of CareFusion Corp.'s stock.

Attorney's Signature: /s/ Tobias E. Schlueter Date: 6/21/2017

Attorney's Printed Name: Tobias E. Schlueter

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes

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Attorney's Signature: /s/ Colleen G. DeRosa Date: 6/21/2017

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STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is not appropriate under Fed. R. App. P. 34(a) because the issues presented are straightforward and adequately presented in the briefs and record.

JURISDICTIONAL STATEMENT

The jurisdictional statement of Plaintiff-Appellant Dale E. Kleber ("Kleber") is complete and correct. (App. Br. 2.)[1] Kleber sued Defendant –Appellee CareFusion Corp. ("CareFusion") in the United States District Court for the Northern District of Illinois alleging violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a). (R.1, 22.)[2] The district court had original jurisdiction over his claims under 28 U.S.C. §§ 1331 and 1343.

On November 23, 2015, the district court dismissed Kleber's disparate impact claim under § 4(a)(2) of the ADEA (Count I of his First Amended Complaint). (SA1-6.) On January 30, 2017, the district court dismissed the action with prejudice. (SA7.) On February 1, 2017, Kleber filed a Notice of Appeal of the district court's November 23, 2015 Order

[1] References to "App. Br. __" are to Kleber's appellate brief and references to "SA__" are to Kleber's short appendix, Doc. 13, and related page numbers.

[2] References to "R.__" are to the district court's docket entries and related page numbers or paragraphs.

dismissing his disparate impact claim under the ADEA (Count II of his First Amended Complaint). (R.108.) The Court has jurisdiction over Kleber's appeal from a final judgment under 28 U.S.C. § 1291(a).

STATEMENT OF THE ISSUES

1. Whether applicants for employment may bring disparate impact claims under § 4(a)(2) of the ADEA, 29 U.S.C. § 623(a).

2. Whether Kleber can pursue his disparate impact claim under the ADEA in federal court where he failed to raise it in his administrative charge.

STATEMENT OF THE CASE

A. Kleber applies for a position for which he did not meet the qualifications.

On March 5, 2014, Kleber applied online for a "Senior Counsel, Procedural Solutions" position in CareFusion's internal legal department. (R.22, ¶21.) The job description included as one of the qualifications for the position, "3 to 7 (no more than 7 years) of relevant legal experience." (Id.) This was an entry-level attorney position that would have less complex job duties and would work under the supervision of a higher-level attorney, the Assistant General Counsel, Commercial. (Id. ¶45, Ex. 5.) Although Kleber had more than 25 years

of legal experience at the time, he chose to apply for the position. (Id. ¶24.)[3]

On March 6, 2014, CareFusion confirmed its receipt of Kleber's application, stating: "If your qualifications meet the basic requirements, your application will be considered for the position. You will be contacted if you're selected for an interview." (Id. ¶25 Ex. 2.)

B. The day after Kleber applied for the position, he tried to file an EEOC charge.

Also on March 6, 2014, Kleber downloaded and completed an EEOC intake questionnaire, prepared a supplement to the intake questionnaire, and mailed them both to the EEOC's Chicago District Office. (Id. ¶34.) Kleber stated in his intake questionnaire and supplement that CareFusion discriminated against "older workers" when it set a "maximum for years of legal experience." (Id. ¶36.) On March 17, 2014, an EEOC representative instructed Kleber to wait at least 90 days before filing his Charge. (Id. ¶37.)

[3] Kleber alleges CareFusion also posted a "Senior Counsel, Labor and Employment" position with one of the qualifications including "3-5 (no more than 5 years) of legal experience." (*Id.* ¶¶ 22, 23.) Kleber never applied for this position. (*Id.*)

C. Kleber's EEOC charge does not state a disparate impact claim.

On or about August 8, 2014, Kleber met with an EEOC investigator, Greg Mucha. (Id. ¶38.) Kleber alleges that Mr. Mucha's notes state that CareFusion "has a policy on its face that they will not hire anyone with more than 7 years of legal experience." (Id.) According to Kleber, Mr. Mucha prepared Kleber's EEOC No. 440-2014-02884 (the "Charge"). (Id. ¶39.) The Charge states;

> I applied for a Senior Counsel position with Respondent in or around March 2014. I was not hired. I believe that I have been discriminated against because of my age, 58 (Date of Birth: … 1956), in violation of the Age Discrimination in Employment Act of 1967, as amended.

(Id. Ex. 3.) The Charge does not allege a disparate impact claim under the ADEA, but Kleber assumed the Charge was sufficient. (Id. ¶40.)

D. CareFusion does not interview or hire Kleber.

CareFusion reviewed Kleber's online application and determined that he did not meet the qualifications for the position. (R.22, Ex. 5.) CareFusion did not select Kleber for an interview or hire him. (Id.) CareFusion hired an applicant with more than three years and fewer than seven years of experience for the position. (Id.)

On or about September 17, 2014, CareFusion submitted its response to Kleber's Charge to the EEOC. The Company explained that it required no more than 7 years of legal experience for the Senior Counsel, Procedural Solutions position "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." (Id. ¶45, Ex. 5.) In any event, neither the recruiter nor the hiring manager was aware of Kleber's age when they reviewed his résumé and the hiring manager decided not to consider him for the position. (Id. Ex. 5.) CareFusion's response addressed only the allegations of disparate treatment in the Charge. (Id.)

E. The EEOC issues Kleber a Notice of Right to Sue.

Kleber alleges that an EEOC investigator discussed CareFusion's response to the Charge with him and the investigator's notes include statements that, though there are exceptions, most attorneys over 40 would have more than 7 years' legal experience and would be affected by the job requirements. Kleber alleges the investigator noted there was discrimination based on age. (Id. ¶42.) On December 2, 2014, the EEOC

issued a Notice of Right to Sue on the Charge. (Id. ¶43.) Kleber is not certain when he received the Notice of Right to Sue. (Id.)

F. The District Court dismisses Kleber's disparate impact claim.

Applying the Court's binding precedent in EEOC v. Francis W. Parker School, 41 F.3d 1073, 1077 (7th Cir. 1994) the district court dismissed Kleber's disparate impact claim because § 4(a)(2) of the ADEA expressly omits "applicants for employment" from its coverage. (Sh. App. 4.) In Francis Parker, the Court interpreted § 4(a)(2)'s exclusion of job applicants as demonstrating that the ADEA was not intended to allow disparate impact claims by job applicants. (Id.) "[B]ecause § 4(a)(2) does not authorize disparate impact claims premised on an alleged failure to hire, Kleber's disparate impact claim (Count II) fails as a matter of law." (Id. at 5.)

STATEMENT OF THE STANDARD OF REVIEW

The Court reviews a district court's order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6) de novo and assumes well-pleaded allegations are true and draws reasonable inferences in the light most favorable to the plaintiff. Tamayo v. Blagojevich, 526 F.3d 1074, 1081 (7th Cir. 2008). A district court may dismiss a claim under Fed. R. Civ.

P. 12(b)(6) where the allegations fail to state a plausible claim and suggest a right to relief beyond the speculative level. Atkins v. City of Chicago, 631 F.3d 823, 831 (7th Cir. 2011).

SUMMARY OF ARGUMENT

The plain text of § 4(a)(2) of the ADEA applies only to employees:

> It 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)(2) (emphasis supplied). Read in context, this provision prohibits actions that deprive or adversely affect employees' opportunities or status on account of their age, such as internal transfers or promotions, or changes in pay or benefits.

In other places, the ADEA intentionally distinguishes between actions affecting applicants versus employees. It also precisely uses the terms "applicants for employment" as distinct from "employees." Compare 29 U.S.C. §§ 623(a)(2)) with §§ 623(a)(1), (3), (c)(2), (d). 631(b). This demonstrates Congress's intent for § 4(a)(2) to be limited to employees – not job applicants. It is also instructive that Congress amended Title VII's parallel provision to expressly include "applicants

for employment" in the plain text, but did not similarly amend the ADEA. Congress intended to limit § 4(a)(2) to employees.

The Supreme Court's decision in Smith v. City of Jackson, 544 U.S. 228 (2005) confirms this reading. While that case did not address whether § 4(a)(2) applies to applicants, three Justices squarely read the provision to preclude job applicants' disparate impact claims. Justice O'Connor's concurrence, joined by Justices Thomas and Kennedy, explained that "of course," § 4(a)(2) "does not apply to 'applicants for employment' at all – it is only § 4(a)(1) that protects that group." Id. at 266 (O'Connor, J., joined by Thomas, Kennedy, JJ., concurring). The plurality assumed that § 4(a)(2) only applied to employees, stating that it "focuses on the effects of the action on the employee." Id. at 236 (second emphasis supplied). No Justice expressed a contrary view.

Consistent with Smith, this Court in EEOC v. Francis W. Parker School, 41 F.3d 1073, 1077 (7th Cir. 1994), cert. denied, 515 U.S. 1142 (1995) held that § 4(a)(2) does not authorize disparate impact claims by job applicants. Though Smith overruled Francis Parker to the extent it held that the ADEA authorizes disparate impact claims for employees, numerous Justices in Smith agreed with this Court that § 4(a)(2)

expressly does not include applicants for employment. Francis Parker remains good law on that point, and the district court properly relied on it as binding precedent to dismiss Kleber's disparate impact claim under the ADEA.

Kleber offers no reason to depart from Francis Parker. In that case, the Court interpreted the plain language of § 4(a)(2) – which is the same today. Francis Parker, 41 F.3d at 1077. Not only is there no conflicting authority in this Circuit, but every other court of appeals to address the issue has agreed that § 4(a)(2) disparate impact claims are not available to job applicants. See Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 963 (11th Cir. 2016) (en banc), pet. for cert. pending, Case No. 16-971 ("The plain text of § 4(a)(2) covers discrimination against employees. It does not cover applicants for employment."); Smith v. City of Des Moines, 99 F.3d 1466, 1470 n.2 (8th Cir. 1996) (§ 4(a)(2) "governs employer conduct with respect to 'employees' only, while the parallel provision of Title VII protects 'employees or applicants for employment'"); Ellis v. United Airlines, Inc., 73 F.3d 999. 1007 n.2 (10th Cir. 1996) (job applicants may sue only under § 4(a)(1) of the ADEA).

The Court does not need to look beyond the plain language of § 4(a)(2) to affirm the district court's dismissal. Legislative history and the EEOC's guidance cannot trump the unambiguous text of the statute. And even if they could, the legislative history is uncertain and the EEOC's view has significantly wavered. Before the Court in Francis Parker, the EEOC essentially conceded that § 4(a)(2) does not provide disparate impact claims for job applicants, stating, "it is of no consequence to this case that § 4(a)(2) does not refer to applicants. Even if applicants are not covered by § 4(a)(2), disparate impact theory applies to them by virtue of § 4(a)(1)." EEOC Reply Br., 1994 WL 16045193, at *4 (Jan. 31, 1994). Since Smith ruled out § 4(a)(1) as a path for job applicants to claim disparate impact discrimination, the EEOC began to argue that § 4(a)(2) must provide that relief – despite its plain language to the contrary.

Kleber asks this Court to reverse the district court's decision that comports with the plain text of the statute, binding precedent in this Circuit, subsequent Supreme Court guidance, and every other court of appeal's reading of § 4(a)(2). CareFusion asks the Court to reject Kleber's request, and affirm the dismissal of his disparate impact claim.

ARGUMENT

I. The ADEA Does Not Recognize Disparate Impact Failure-to-hire Claims By Applicants For Employment.

A. The plain text of § 4(a)(2) applies to employees – not job applicants.

The plain language of the ADEA authorizes only existing employees to assert disparate impact claims.

Section 4(a) of the ADEA provides:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) 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; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a).

Section 4(a)(2) is predicated on making unlawful any act to "limit, segregate, or classify his employees." The verbs "deprive or tend to deprive" and "adversely affect" are connected by the phrase "or

otherwise." In that way, "or otherwise" makes "deprive or tend to deprive . . . employment opportunities" a subset of "adversely affect his status as an employee." Villarreal, 839 F.3d at 963. Because the text limits "any individual" with the phrase "or otherwise affect his status as an employee," the "individuals" covered by this subsection are those with "status as an employee." Id.

Taken as a whole, the plain meaning of the text of § 4(a)(2) prohibits an employer from taking actions that adversely affect an employee's opportunities within the company, such as promotions, pay increases, and transfers. It does not authorize disparate impact claims for job applicants.

B. Congress intentionally distinguished between "applicants for employment" and employees throughout the ADEA.

Reading § 4(a)(2) in context of the rest of the ADEA shows that Congress intentionally distinguished applicants for employment from current employees. Under the established canons of statutory construction, "Congress generally acts intentionally when it uses particular language in one § of a statute but omits it from another." Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 919 (2015). This

canon "applies with particular force" where, as here, Congress "repeatedly" used the omitted phrase in "close proximity" in other provisions. See id.

Congress repeatedly distinguished between actions affecting applicants and those affecting employees under the ADEA. For example, § 4(a)(1) makes it unlawful "to fail or refuse to hire" on account of age, while § 4(a)(2) specifically prohibits unlawful acts that "limit, segregate, or classify his employees" and adversely affecting an employee's "status as an employee." Id. §§ 623(a)(1)-(2) (emphasis supplied); Villarreal, 839 F.3d at 967. Section 4(a)(3) prohibits unlawful acts that "reduce the wage rate of any employee." Id. (emphasis supplied.) Congress's use of these differing terms within the same section of the statute clearly demonstrates its intent to distinguish between job applicants and employees.

Congress also precisely used the terms "employees" and "applicants for employment" throughout the ADEA. Section 4(c)(2) tracks § 4(a)(2)'s language, but adds "applicants for employment." That section prohibits labor organizations from acting:

> to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

Id. §623(c)(2) (emphasis supplied); see also Villarreal, 839 F.3d at 966. Section 4(d), containing the ADEA's retaliation protections, specifically extends protection to "applicants for employment." Id. § 623(d). Section 12(b) contains the age limits for personnel actions affecting employees or "applicants for employment." Id. § 631(b). And §§ 15(a)-(b) contain protections for "applicants for employment" with the federal government. Id. §§ 633a(a), (b). Congress's omission of "applicants for employment" from § 4(a)(2), but expressly including them in other parts of the ADEA, demonstrates its intent to exclude job applicants from the protections of § 4(a)(2).

C. Congress also intentionally distinguished between "applicants for employment" and employees in the parallel provision of Title VII.

The ADEA's prohibitions are modeled after those of Title VII, but the ADEA substitutes age as a protected category. Smith, 544 U.S. at 233. Section 703(a)(1) of Title VII and § 4(a)(1) of the ADEA prohibit

disparate-treatment, or intentional, discrimination. Both of those provisions apply to job applicants because they make it unlawful for an employer "to fail or refuse to hire . . . any individual" on account of the protected trait. 42 U.S.C. § 2000e-2(a)(1); 29 U.S.C. § 623(a)(1).

Section 703(a)(2) of Title VII and § 4(a)(2) prohibit disparate-impact discrimination. Smith, 544 U.S. at 240. But unlike § 4(a)(2) of the ADEA, Congress amended § 703(a)(2) of Title VII to expressly include "applicants for employment." 42 U.S.C. § 2000e-2(a)(2). Congress never amended § 4(a)(2) of the ADEA to match the language of Title VII. Francis Parker, 41 F.3d at 1077.

The plain text of the statute illustrates this meaningful difference. Section 703(a)(2) of Title VII states:

> 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 supplied). In contrast, § 4(a)(2) of the ADEA states:

> It 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. § 603(a)(2) (emphasis supplied). This unambiguous textual difference shows Congress's intent to authorize disparate impact claims for "applicants for employment" under Title VII and not under the ADEA. Francis Parker, 41 F.3d at 1077.

Where Congress amends Title VII and does not amend the parallel provision of the ADEA, it does so intentionally. See Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009). Courts "cannot ignore Congress's decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." Id. In Gross, because Congress added mixed-motive claims to Title VII and not the ADEA, the Supreme Court held the ADEA does not recognize mixed-motive claims. Id.

Many other well-accepted differences demonstrate Congress intended the ADEA to be different from Title VII. For example, Title VII prohibits discrimination based on anyone's sex, race, national origin, etc., while the ADEA does not prohibit discrimination against the young in favor of the old. Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 587

(2004). The ADEA provides additional defenses for reasonable factors other than age and bona fide occupational qualifications, which are not available under Title VII. Smith, 544 U.S. at 240. The ADEA incorporates remedies from the Fair Labor Standards Act, while Title VII does not. EEOC v. O&G Spring and Wire Forms Specialty Co., 38 F.3d 872, 882 n.10 (7th Cir. 1992).

When Congress amended § 703(a) of Title VII to include "applicants for employment" and did not similarly amend the ADEA, it acted intentionally. Francis Parker, 41 F.3d at 1078. The Court cannot ignore this Congressional action, which further demonstrates that the ADEA does not recognize disparate impact claims by applicants for employment. That ADEA does not provide disparate impact claims for job applicants "is a result dictated by the statute itself." Francis Parker, 41 F.3d at 1078.

II. Supreme Court and Seventh Circuit Precedent Support the Plain Meaning of § 4(a)(2) To Apply To Employees and Not To Job Applicants.

A. Smith supports that § 4(a)(2) is limited to employees.

The Supreme Court in Smith did not specifically address whether the ADEA authorizes disparate impact claims for job applicants. Rather, it resolved a Circuit split on the issue of whether the ADEA authorizes

disparate impact claims at all. And it held that current employees of the City of Jackson, Mississippi could state a discrimination claim under the ADEA based on a disparate impact theory that they received less generous salary increases than younger employees. 544 U.S. at 230.

Still, the plurality and concurring opinions in Smith confirm that § 4(a)(2)'s plain text applies only to employees – not applicants. The plurality opinion analyzed § 4(a)(2)'s focus on "the effects of the action on the employee" as opposed to § 4(a)(1)'s focus on "the motivation for the action of the employer." Smith, 544 U.S. at 236 (emphasis supplied). The plurality further described § 4(a)(2) as a provision that covers employees: "Thus, an employer who classifies his employees without respect to age may still be liable under the terms of [§ 4(a)(2)] if such classification adversely affects the employee because of that employee's age." Id. at 236 n.6 (emphasis supplied).

Justice O'Connor's concurrence, joined by Justice Kennedy and Justice Thomas, found that "Section (4)(a)(2), of course, does not apply to 'applicants for employment' at all – it is only section 4(a)(1) that protects that group." Id. at 266; Mays v. BNSF R.R. Co., 974 F. Supp. 2d 1166, 1176-77 (N.D. Ill. 2013) (discussing Smith, "[b]oth [the plurality

and Justice O'Connor's concurrence] treat the term 'any individual' as synonymous with an 'employee' of the employer . . . the best and likely only possible way to read the provision.").

Justice Scalia's concurrence gave deference to the EEOC's interpretation that the ADEA authorizes disparate impact claims, but recognized the language of § 4(a)(2) does not support disparate impact claims for job applicants. Specifically, he stated:

> Perhaps applicants for employment are covered only when (as Justice O'CONNOR posits) disparate treatment results in disparate impact; or perhaps the agency's attempt to sweep employment applications into the disparate-impact prohibition is mistaken.

Id. at 246 n.3.

The fact that the Smith majority did not specifically analyze the omission of "applicants" from § 4(a)(2) does not suggest that applicants are protected under that provision. Contrary to Kleber's argument, Smith did not engage in an exhaustive review of the textual differences between § 4(a)(1) and § 4(a)(2) or between the ADEA and Title VII. Rather, the Court focuses on textual differences pertaining to the specific question at issue in the case: whether the ADEA recognizes a theory of disparate impact at all. Because the majority did not reach the

question of whether applicants could bring such claims, it had no reason to analyze the omission of "applicants for employment" from § 4(a)(2).

Moreover, Smith did not rely on any ADEA disparate impact hiring cases under § 4(a)(2). The two cases Kleber references, Wooden v. Bd. of Ed. of Jefferson Cnty., 931 F.2d 376 (6th Cir. 1991) and Faulkner v. SuperValu Stores, Inc., 3 F.3d 1419 (10th Cir. 1993), were both decided before Smith, and wrongly assumed that disparate impact claims were available under § 4(a)(1). Neither the parties nor the courts in those cases addressed the scope of § 4(a)(2).

To the extent the Justices in Smith commented on job applicants at all, they confirmed that § 4(a)(2), by its plain meaning, does not include them. The Supreme Court further confirmed this reading in Meacham v. Knolls Atomic Power Laboratory, 554 U.S. 84, 96 n.13 (2008). That case assumed that § 4(a)(2) applies only to employees and explained that "[t]he factual causation that § [4](a)(2) describes as practices that 'deprive or tend to deprive . . . or otherwise adversely affect [employees] . . . because of . . . age' is typically shown by looking to data revealing the impact of a given practice on actual employees." Id. (bracketed "employees" in original, emphasis supplied).

B. The Court in Francis Parker correctly read § 4(a)(2) as excluding applicants for employment.

Though Smith overruled Francis Parker to the extent it held that the ADEA authorizes disparate impact claims for employees, numerous Justices in Smith agreed with this Court that § 4(a)(2) expressly does not include applicants for employment. Francis Parker remains good law on that point.

Francis Parker squarely addressed whether a job applicant could allege a disparate impact under the ADEA. 41 F.3d at 1076. In that case, the EEOC filed disparate treatment and disparate impact claims on behalf of a job applicant for a teaching position who had 30 years of experience. Id. at 1075. The school did not hire the applicant in part because he qualified for a higher salary than the school could afford, based on his level of experience. Id. The EEOC appealed the district court's summary judgment ruling, and argued that § 4(a)(1) of the ADEA authorized disparate impact claims brought by job applicants. Id.

The Court in Francis Parker analyzed the significant difference between Title VII's disparate impact provision, § 703(a), and the ADEA's parallel provision, § 4(a)(2). While Title VII "proscribes any actions by employers which 'limit, segregate, or classify employees or

applicants for employment in any way . . .," the "mirror provision in the ADEA omits from its coverage, 'applicants for employment.'" Id. at 1077-78. Thus, the plain text of § 4(a)(2) shows that it authorizes disparate impact claims only for employees. Id. (precluding disparate impact claims by job applicants is "a result dictated by the statute itself").

The EEOC also confirmed this reading of § 4(a)(2). In its appeal in Francis Parker, the EEOC essentially conceded that § 4(a)(2) does not provide disparate impact claims for job applicants, stating, "it is of no consequence to this case that § 4(a)(2) does not refer to applicants. Even if applicants are not covered by § 4(a)(2), disparate impact theory applies to them by virtue of section 4(a)(1)." EEOC Reply Br., 1994 WL 16045193, at *4 (Jan. 31, 1994).

Kleber provides no reason for the Court to depart from its prior interpretation of § (4)(2) in Francis Parker. The language of § 4(a)(2) is the same today as it was when the Court read it in Francis Parker. Congress has not amended the ADEA to match the parallel disparate impact provision in Title VII. To the extent Justices interpreted § (4)(2) related to job applicants in Smith and following Smith, their reading

comports with Francis Parker that § 4(a)(2) does not apply to job applicants. See Castellanos v. Holder, 652 F.3d 762, 765 (7th Cir. 2011) (following precedent because intervening Supreme Court decision did "not call into question our earlier decisions").

There also is no circuit split on this question. Every other court of appeals to consider the statute reached the same conclusion as this Court. See Villarreal, 839 F.3d at 963 ("The plain text of section 4(a)(2) covers discrimination against employees. It does not cover applicants for employment."); Smith, 99 F.3d at 1470 n.2 (§ 4(a)(2) "governs employer conduct with respect to 'employees' only, while the parallel provision of Title VII protects 'employees or applicants for employment'"); Ellis, 73 F.3d at 1007 n.2 (job applicants may sue only under § 4(a)(1) of the ADEA).

III. Kleber's Arguments Are Ineffective.

A. Robinson requires § 4(a)(2) to be read in context.

Kleber urges the Court to rely on the Supreme Court's interpretation of an unrelated provision of Title VII that the term "employees" also intended to include "former employees" in Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). But Robinson did not authorize reading the term

"employees" to include "applicants for employment" who, unlike employees or former employees, were never employed.

As the Court previously acknowledged, Robinson confirms that statutes must be read in context. Morgan v. Joint Admin. Bd. Retirement Plan of Pillsbury Co., 268 F.3d 456, 458 (7th Cir. 2001). In Morgan, the Court declined to overrule precedent that former employees could not claim discrimination under the Americans with Disabilities Act ("ADA"). Id. The Court noted the practical effect of providing the ADA's protections to former employees would be unworkable. Any former employee, who could no longer work due to disability, could claim discrimination. Similarly, here, Robinson does not justify any departure from the Court's precedent in Francis Parker that § 4(a)(2) of the ADEA does not apply to job applicants. 41 F.3d at 1077-78. Read in context, the term "employees" in § 4(a)(2) means "employees," not "applicants for employment."

Applying § 4(a)(2) to job applicants is also practically unworkable. As the Court in Smith recognized, "age, unlike Title VII's protected classifications, not uncommonly has relevance to an individual's capacity to engage in certain types of employment." 544 U.S. at 240.

And legitimate hiring criteria – like applicants' experience levels – are "empirically correlated with age" but not with traits protected by Title VII. Hazen Paper Co. v. Biggins, 507 U.S. 604, 608-11 (1993). If the ADEA authorized disparate impact failure-to-hire claims, for example, any employer recruiting for lower-level positions, or recruiting on campus at colleges or professional schools, would face potential liability by an older job applicant who submits an application and is not hired – regardless of the legitimate, non-discriminatory business purpose for which he is not hired.

The plain text of § 4(a)(2), as interpreted by the Supreme Court and this Court, demonstrates that this was not Congress's intent.

B. Griggs did not authorize Title VII disparate claims for job applicants.

Kleber misconstrues the Supreme Court's holding in Griggs v. Duke Power Co., 401 U.S. 424 (1971) to argue that § 703(a) of Title VII authorized disparate impact claims for job applicants before Congress intentionally acted to add "applicants for employment" to its protections.

Like the petitioners in Smith, the petitioners in Griggs were current employees. The Supreme Court described them as "a group of

incumbent [] employees against Duke Power Co." who were "employed at the Company's Dan River Steam Station." Id. at 426. Those incumbent employees sought to apply for job transfers and promotions. They were internal applicants – not applicants for new employment. Id.

The petitioners and amici (the EEOC and the Solicitor General) in Griggs characterized the case as brought by employees who alleged that the company's testing, transfer, and seniority practices violated Title VII. And the petitioners expressly stated, "[t]he legality of [the testing] requirement for new employees is not at issue in this case." See Brief for Petitioners at 4, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (No. 70-124), 1970 WL 122448, at *4-5; Brief for United States, et al. as Amicus Curiae Supporting Petitioners at 7, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (No. 70-124), 1970 WL 122637, at *9-10.

The Supreme Court in Griggs did not say the case involved hiring criteria for first-time job applicants. Villarreal, 839 F.3d at 969. And since Griggs, the Supreme Court has described in numerous decisions that Griggs is a case about employees. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 426 (1975) (Griggs is about "transferees"); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 664 (1989) (Stevens, J., joined

by Brennan, Marshall, and Blackmun, J.J., dissenting) (in Griggs, "utility company employees challenged the conditioning of entry into higher paying jobs upon a high school education or passage of two written tests").

Kleber relies on the Fourth Circuit's opinion in Griggs to argue the petitioners were job applicants. But the district court, on remand after that Fourth Circuit opinion, explained that the Griggs case "is no longer, if it ever was, a class action." Griggs v. Duke Power Co., No. C-210-G-66, 1974 WL 146, at *1 (M.D.N.C. Jan. 10, 1974). The holding, then, applied only to the company's selection of employees for promotion, transfer, demotion, lay off, and training for job vacancies. Griggs v. Duke Power Co., No. C-210-G-66, 1972 WL 215, at *1 (M.D.N.C. Sept. 25, 1972). The Fourth Circuit affirmed, stating that the "Supreme Court granted relief" only to "four plaintiffs." Griggs v. Duke Power Co., 515 F.2d 86-87 (4th Cir. 1975).

Griggs therefore did not authorize disparate impact claims for job applicants under § 703(a) of Title VII at the time that statute mirrored § 4(a)(2) of the ADEA. This only strengthens the impact of Congress's

decision to amend Title VII to include job applicants, and not to similarly amend § 4(a)(2) of the ADEA.

C. The legislative history does not support Kleber's claim.

Because, as discussed above, § 4(a)(2)'s plain text excludes "applicants for employment" and failure-to-hire claims, the Court need not refer to the ADEA's legislative history. Even if it does, however, such legislative history is unhelpful and cannot be used to "muddy clear statutory language." Milner v. Dep't of Navy, 562 U.S. 562, 572, (2011).

The Supreme Court has long debated how best to evaluate legislative history – to the extent of questioning "whether legislative history is ever relevant." United States v. Woods, 134 S.Ct. 557, 567 n.5 (2013). In any event, legislative history cannot trump the clear and unambiguous language of the statute. Id.; Ali v. Fed. Bureau of Prisons, 552 U.S. 214 214, 228 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted …"); Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it."); EEOC v. City of Janesville, 630 F.2d 1254, 1258 (7th Cir. 1980) (declining to review legislative history of the ADEA).

In this case, the legislative history is indefinitive and unhelpful. Legislative documents demonstrate Congress intended § 4(a)(2) of the ADEA to apply to current employees. 113 Cong. Rec. 31, 250 (1967) (the provision would make it unlawful "[t]o limit, segregate, or classify employees so as to deprive them of employment opportunities or adversely affect their status.") (emphasis supplied); S. Rep. No. 90-723, at 4 (1967) ("summary of major provisions" describing § 4(a)(2) as making it unlawful "[t]o limit, segregate, or classify employees so as to deprive them of employment opportunities or adversely affect their status . . .") (emphasis supplied); 113 Cong. Rec. 34, 752 (1967) (§ 4(a)(2) would make it unlawful for employers "to classify employees by age if it would adversely affect their employment opportunities") (emphasis supplied).

Legislative documents are also unclear about whether Congress's amendment to Title VII to add "applicants for employment" under § 703(a) was, as Kleber asserts, "declaratory of present law." Senate Report No. 92-415 does not mention the Griggs opinion. And the Conference Report the Senate later adopted also does not cite Griggs. It cites three other cases, none of which applied § 703(a). Conf. Rep. on

H.R. 1746, reprinted in 118 Cong. Rec. 7166, 7169 ("This subsection is merely declaratory of present laws as contained in the decisions Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971); U.S. Sheet Metal Workers Int'l Assn. Local 36, 416 F.2d 123 (8th Cir. 1969); Asbestos Workers, Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969)."). This murky legislative history cuts against Kleber's interpretation of § 4(a)(2).

Kleber relies heavily on the Wirtz Report to argue that the ADEA intended to provide disparate impact claims for job applicants. But the Wirtz Report did not recommend Congress create a disparate impact cause of action by applicants for employment. In fact, the Wirtz Report recommended noncoercive approaches when employment practices "unintentionally lead to age limits in hiring." Wirtz Rep. at 22. Such approaches might include, according to the Wirtz Report, considering pension proposals and comprehensively reviewing workers' compensation and disability insurance. Id.

The plain language of the enacted statute far outweighs any marginal relevance of the Wirtz Report. And the Wirtz Report recognizes there may be non-arbitrary, non-discriminatory actions –

such as pension and insurance programs – that justifiably impact older workers differently. Hiring based on experience level is a similarly justifiable employment practice that may impact older workers differently.

D. The EEOC's interpretation of § 4(a)(2) has been inconsistent and its current position contravenes the plain textual meaning of the statute.

Kleber urges deference to the EEOC's current position that § 4(a)(2) provides disparate impact claims for job applicants. But the Court need not defer to the EEOC because the plain language of § 4(a)(2) is unambiguous and applies only to employees. Deference here is also unnecessary because the EEOC itself has changed its mind about whether § 4(a)(2) authorizes disparate impact claims for applicants.

"If the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 368 (1986) (internal quotations omitted). "[D]eference to [any agency's] statutory interpretation is called for only [after] the devices of judicial construction have been tried." Gen. Dynamics Land. Sys., Inc., 540 U.S.

at 581; see Brumfield v. City of Chicago, 735 F.3d 619, 627 (7th Cir. 2013) (finding Title II of the ADA unambiguous and not deferring to agency interpretation); Schaefer-LaRose v. Eli Lily & Co., 679 F.3d 560, 572, n. 20 (7th Cir. 2012) (unambiguous regulation did not require the Court's review of agency interpretation). Here, as discussed above, the plain language of § 4(a)(2) is unambiguous and does not authorize disparate impact claims by job applicants.

Even if the statute was ambiguous, EEOC regulation § 1625.7(c) does not, as Kleber suggests, clarify whether job applicants can bring disparate impact claims under § 4(a)(2). By its terms, §1625.7(c) interprets only § 4(f)(1) of the ADEA:

> 29 C.F.R. section 1625.7 – Differentiations Based On Reasonable Factor Other Than Age.
>
> (a) Section 4(f)(1) of the Act provides that * * * it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * *.
>
> * * *

> (c) Any 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." An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that allegedly causes any observed statistical disparities.

29 C.F.R. § 1625.7. Because the regulation is limited to defining § 4(f)(1)'s reasonable factor other than age ("RFOA") defense, it does not apply to the scope of § 4(a)(2) and has no bearing on the issue of who can bring claims under § 4(a)(2). See Smith, 544 U.S. at 265 ("the EEOC statement does not purport to interpret the language of § 4(a) at all") (O'Connor, J. concurring); EEOC v. Shell Oil Co., 466 U.S. 54, 74 (1984) (noting "regulations more carefully tailored to the varying characteristics of different kinds of charges would facilitate the task of courts trying to give effect to the Commission's rules)).

In Smith, the RFOA provision was relevant to the Supreme Court's determination that the ADEA provides for disparate impact claims for employees. The RFOA defense is central to disparate impact claims. But the RFOA regulation certainly does not demonstrate that the ADEA provides disparate impact claims for job applicants. Justice

Scalia reached the same conclusion in Smith, when he noted that "perhaps the [EEOC's] attempt to sweep applications into the disparate impact prohibition is mistaken." Id. at 246 n.3.

Kleber incorrectly argues that the EEOC's position on disparate impact claims for job applicants has been "consistent" and "longstanding" since Francis Parker. In fact, prior to Smith, the EEOC interpreted § 4(a)(1) as authorizing disparate impact claims for job applicants. The EEOC decided only very recently that §4(a)(2) must provide disparate impact claims for job applicants – because Smith held § 4(a)(1) clearly does not.

Most tellingly, before the Court in Francis Parker, the EEOC essentially conceded that § 4(a)(2) does not provide disparate impact claims for job applicants, stating, "it is of no consequence to this case that § 4(a)(2) does not refer to applicants. Even if applicants are not covered by § 4(a)(2), disparate impact theory applies to them by virtue of § 4(a)(1)." EEOC Reply Br., 1994 WL 16045193, at *4 (Jan. 31, 1994). Only after Smith did the EEOC switch gears to argue "any individual" in § 4(a)(2) means Congress intended to provide disparate impact claims

to job applicants. See, e.g., EEOC Amicus En Banc Br., Villarreal, 2016 WL 1376062, at *6 (Mar. 24, 2016).

Also after Smith, the EEOC significantly amended the RFOA regulation (codified in § 1625.7(d) at the time), that referred to "employees or applicants" and was consistent with the agency's view that § 4(a)(1) provided for disparate impact claims. 29 C.F.R. § 1625.7(d) (1981). The EEOC amended that regulation (now § 1625.7(c)) to refer to "individuals" in order to align with the EEOC's new position that § 4(a)(2) allows disparate impact claims for applicants.

The EEOC's wavering interpretation of § 4(a)(2) is not entitled to deference.

IV. Alternatively, Kleber's Disparate Impact Claim Is Barred Because It Is Beyond The Scope Of His Administrative Charge.

The district court dismissed Kleber's disparate impact claim without reaching CareFusion's alternative argument for dismissal. To the extent the Court departs from binding precedent in Francis Parker to hold that the ADEA authorizes Kleber's claim, it should affirm the dismissal on other grounds: Kleber failed to exhaust his administrative

remedies with respect to his disparate impact claim because he did not state that claim in his EEOC Charge.

A. Kleber cannot pursue the disparate impact claim that he did not identify in his Charge.

Kleber is limited to pursuing in federal court only those claims he included in the Charge. See 29 U.S.C. § 626(d). This is because "only the charge is sent to the employer, and therefore only the charge can affect the process of conciliation." Novitsky v. Am. Consulting Engineers, 196 F.3d 699, 702 (7th Cir. 1999). Indeed, the "basic purpose of requiring a charge," is to give the employer warning of the complained-of conduct against it to further the conciliation process. Ajayi v. Aramark Business Servs., 336 F.3d 520, 528 (7th Cir. 2003). As the Court held in Novitsky, "complainants are free to draft and file charges on their own, or hire attorneys to do so, and a charge drafted by the EEOC's staff is not filed unless the complainant signs it." 196 F.3d at 702. As a result, complainants are expected to know and understand the contents of the Charge, and they are limited to pursuing only those claims stated in the Charge. Id.

Kleber cannot pursue his disparate impact claim because it not like or reasonably related to his individual age discrimination claim stated

in his Charge. ADEA claims are cognizable only if they are "like or reasonably related to the allegations of the charge and growing out of such allegations." Noreuil v. Peabody Coal Co., 96 F.3d 254, 258 (7th Cir. 1996). In Noreuil, the Court explained that disparate impact claims are not "like or reasonably related to" disparate treatment claims because they have different standards of proof. Id. While a disparate treatment claim focuses on whether the employment decision at issue was motivated by the plaintiff's age, a disparate impact claim focuses on a statistical showing that neutral employment practices disproportionately, negatively affects the protected class. Id.; see also Jagla v. Harris Bank, No. 05 C 5422, 2007 WL 433112, at *3 (N.D. Ill. Feb. 2, 2007) (holding plaintiff failed to exhaust administrative remedies on disparate impact claim where charge alleged disparate treatment because "[t]he proof of these two types of claims is in fact quite different."); Lumsden v. Campbell Taggart Baking Co., No. 95 C 4362, 1997 WL 610059, at *3 (N.D. Ill. Sept. 26, 1997) (disparate impact claim not within scope of charge where it contained "no indication whatsoever that Plaintiff was complaining of one or more of Defendant's

policies, rather than just Defendant's discrete and, apparently, individualized decisions.").

Nor can Kleber rely in his questionnaire to spare his disparate impact claim. As the Court has often recognized, it is not enough to make assertions in the questionnaire, because the respondent does not receive the questionnaire and therefore does not have notice of claims asserted within it. Tamayo, 526 F.3d at 1089 ("assertions in the questionnaire, without more, are not enough to put [defendant] on notice of the charge"); Geldon v. S. Milwaukee Sch. Dist., 414 F.3d 617, 820 (7th Cir. 2005) (plaintiff could not pursue failure-to-hire claim for position not identified in the charge because employer had no notice of that claim); McGowen v. Vigo Cnty. Div. of Family and Children, 389 F.3d 750, 752 (7th Cir. 2004) (vague allegations regarding positions for which plaintiff applied were insufficient to place employer on notice).

B. Kleber did not administratively exhaust his disparate impact claim.

Kleber's Charge did not provide CareFusion with notice that he intended to pursue anything other than individual relief for alleged age discrimination. It stated only one claim for intentional discrimination on account of his age:

> I applied for a Senior Counsel position with Respondent in or around March 2014. I was not hired. I believe that I have been discriminated against because of my age, 58 (Date of Birth: … 1956), in violation of the Age Discrimination in Employment Act of 1967, as amended.

(R. 22, Ex. 3.) It provided no information about any specific employment policy or practice that resulted in any statistical disparity in hiring applicants over 40 years old. And therefore it did not encompass a claim for disparate impact. See Smith, 544 U.S.at 241 (a disparate impact claim requires the plaintiff to identify and isolate "the specific employment practices that are allegedly responsible for any observed statistical disparities"); Diersen v. Walker, 117 Fed. App'x 463, 465-66 (7th Cir. 2004) (unpublished) (disparate impact claim was "conceptually and factually distinct from his allegations of disparate treatment" and therefore not exhausted where the charge alleged disparate treatment).

Kleber should not be excused from the requirement that his Charge state his claim. He is not an unsophisticated litigant, but a licensed attorney with extensive in-house and law firm experience. (Id. ¶ 10.) Kleber does not allege that the EEOC made misrepresentations to him about the nature of its investigation, and he submitted his intake questionnaire and supplement months before he signed the

Charge. (Id. ¶¶ 35, 37, 40.) Kleber had the opportunity to review his Charge, or to have his Charge reviewed by counsel, before signing and submitting it. And CareFusion's response to the Charge indicates that it viewed the Charge narrowly. It responded to allegations involving only the position for which Kleber applied and the reason it did not select Kleber, individually, for an interview. (Id. Ex. 5.)

This Court should also affirm dismissal of Kleber's disparate impact claim because he failed to include allegations of disparate impact in the Charge and did not exhaust his administrative remedies.

CONCLUSION

The district court properly dismissed Kleber's disparate impact failure-to-hire claim based on (a) the plain language of § 4(a)(2) of the ADEA that applies only to "employees"; (b) long-standing Seventh Circuit precedent in Francis Parker reading § 4(a)(2) as excluding job applicants from bringing disparate impact claims; and (c) the Supreme Court's confirmation in Smith that § 4(a)(2) applies only to employees.

This Court should alternatively affirm dismissal on different grounds – that Kleber failed to exhaust his administrative remedies because he did not state a disparate impact claim in his administrative charge.

Kleber should be precluded from bringing his disparate impact claim in federal court.

For these reasons, Defendant-Appellee CareFusion Corp. respectfully requests that this Court affirm the district court's dismissal order.

Respectfully submitted,

Defendant-Appellee CareFusion Corp.

By: /s/ Tobias E. Schlueter
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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7) and Cir. R. 32(c)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(A), FED. R. APP. P. 32(a)(7)(B), and Cir. R. 32(c), because this brief contains 7,792 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and Cir. R. 32, and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook font.

Date: June 21, 2017.

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CERTIFICATE OF SERVICE

The undersigned counsel for Defendant-Appellee CareFusion Corp. certifies that on June 21, 2017, he electronically filed the foregoing Brief of Defendant-Appellee CareFusion, Corp., and electronic service of that filing will be made on all participants via the CM/ECF system of the Clerk of Court for the United States Court of Appeals for the Seventh Circuit.

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