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

PLAINTIFF-APPELLANT DALE E. KLEBER'S OPPOSITION TO DEFENDANT-APPELLEE CAREFUSION CORPORATION'S PETITION FOR REHEARING EN BANC

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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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Dale E. Kleber

(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:

AARP Foundation Litigation, Chicago Lawyers' Committee for Civil Rights Under Law, Inc.

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

i) Identify all its parent corporations, if any; and

None

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

None

Attorney's Signature: /s/ Dara S. Smith Date: June 4, 2018

Attorney's Printed Name: Dara S. Smith

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Attorney's Printed Name: Laurie A. McCann

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Attorney's Signature: /s/ William Alvarado Rivera ith Date: June 4, 2018

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None

Attorney's Signature: /s/ Paul Strauss Date: June 4, 2018

Attorney's Printed Name: Paul Strauss

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INTRODUCTION AND SUMMARY OF ARGUMENT

The panel held that section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2), "protects both outside job applicants and current employees" because "[t]hat is the better reading of the statutory text," and is "more consistent with the purpose of the Act and nearly fifty years of case law interpreting the ADEA and similar language in other employment discrimination statutes." Op. at 2. Defendant CareFusion Corp. ("CareFusion") disagrees with this conclusion, contending that the Court should have sided with the outcome of the fractured *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2292 (U.S. 2017). The vast majority of the company's Petition for Rehearing En Banc is devoted to its disagreement with the panel's decision. Def. Appellee's Pet. For Reh'g En Banc ("Pet.") at 7-17. The Court should not disturb the panel's thoroughly considered opinion to resolve the company's dissatisfaction with the result.

Nor is the full Court's review necessary or sufficient to resolve inter-jurisdictional conflict on the meaning of section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2). Contrary to CareFusion's argument, the Eleventh Circuit has issued the *only* authoritative decision on this issue—a divided decision that yields no consensus or clarity on section 4(a)(2)'s scope. The other decisions CareFusion musters to characterize the panel opinion as an outlier were thoroughly discredited

by the Supreme Court in *Smith v. City of Jackson*, 544 U.S. 228 (2005). In addition, the issue of whether external applicants may bring disparate impact claims under section 4(a)(2) is already percolating in other jurisdictions, including the Fifth and Ninth Circuits, where district courts have declined to follow *Villarreal* and permitted external applicants to proceed with a disparate impact theory under ADEA section 4(a)(2). *Champlin v. Manpower, Inc.*, Nos. 4:16-cv-02987, 4:16-cv-00421, 2018 U.S. Dist. LEXIS 13450 (S.D. Tex. Jan. 24, 2018); *Rabin v. PricewaterhouseCoopers LLP*, 236 F. Supp. 3d 1126 (N.D. Cal. 2017). Consequently, rehearing this case en banc to pursue inter-jurisdictional harmony would be futile.

Finally, CareFusion's newly elevated concern that the panel decision will jeopardize vast swaths of hiring and recruiting practices is wholly unwarranted. Because ADEA section 4(a)(2) indisputably permits *current employees* to bring disparate impact claims regarding hiring practices, the practices CareFusion seeks to protect would be vulnerable to challenge even under the company's preferred interpretation of the statute. Moreover, because companies may defend practices with a disparate age impact simply by showing that they relied on "reasonable factors other than age," 29 U.S.C. § 623(a)(2), truly "legitimate" practices are not at risk. The Court should not rehear this case en banc to protect unreasonable hiring practices from challenges by a subclass of job applicants.

FACTUAL AND PROCEDURAL BACKGROUND

When Plaintiff-Appellant Dale E. Kleber ("Kleber") applied to work at CareFusion, he was a 58-year-old attorney with extensive law firm and in-house counsel experience. ROA.162.[1] Since his involuntary separation from his job in 2011, Kleber had applied for at least 150 jobs. *Id.* After a frustrating and unsuccessful job search, Kleber applied for a "Senior Counsel, Procedural Solutions" position at CareFusion on March 5, 2014. ROA.163-64. 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." ROA.164. Despite the mandatory 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." ROA.165. Accordingly, Kleber applied. ROA.164. CareFusion never contacted Kleber to schedule an interview because it was clear from his resume that he had more than the maximum seven years of experience. ROA.166. The selected candidate was 29 years old. *Id.*

[1] The record is cited herein as "ROA.#" using the continuously paginated record.

After filing a charge with the Equal Employment Opportunity Commission ("EEOC"), Kleber filed this suit, alleging, *inter alia*, that the maximum experience cap had a disparate impact on qualified applicants over the age of 40. ROA.170-73. CareFusion moved to dismiss the complaint. ROA.209-11. The district court dismissed Kleber's disparate impact claim, relying on *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994) ("*Francis Parker*"). ROA.403-07. Kleber then appealed. ROA.743.

On April 26, 2018, a panel of this Court reversed, holding that ADEA section 4(a)(2) permits external job applicants to raise a disparate impact claim. Op. at 2. Judge Bauer dissented. *Id.* at 41-42. The Court circulated the opinion before release to all active judges on the Circuit, and a majority of judges did not vote to rehear the case en banc. *Id.* at 40 n.10. CareFusion filed a petition for rehearing en banc on May 10, 2018, and the Court ordered Kleber to file a response on May 21, 2018.

ARGUMENT

I. CareFusion's Disagreement with the Panel is Not an Appropriate Basis for Seeking En Banc Review.

Approximately half of the petition's argument explains why, in CareFusion's opinion, "the panel majority's ruling is wrong on the merits." Pet. at 7. CareFusion enumerates ten arguments in support of its position that the correct reading of

ADEA section 4(a)(2) excludes external job applicants.[2] *Id.* This is a wholly improper basis for a petition for en banc rehearing. As this Court has explained:

> [E]n banc rehearing has a different focus than panel rehearing. Panel rehearings are designed as a mechanism for the panel to correct its own errors in the reading of the factual record or the law, rehearings en banc are designed to address issues that affect the integrity of the circuit's case law (intra-circuit conflicts) and the development of the law (questions of exceptional importance). Given the "heavy burden" that en banc rehearings impose on an "already overburdened court," such proceedings are reserved for the truly exceptional cases.

Easley v. Reuss, 532 F.3d 592, 594 (7th Cir. 2008) (citing *Roberts v. Sears, Roebuck & Co.*, 723 F.2d 1324, 1348 (7th Cir. 1983) (en banc) (separate opinion of Posner, J.)). Thus, "the function of en banc hearings is not to review alleged errors for the benefit of losing litigants." *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) (per curiam) (*citing Western Pacific R.R. Corp. v. Western Pacific RR. Co.*, 345 U.S. 247, 256-259 (1953)); *see also HM Holdings v. Rankin*, 72 F.3d 562, 563 (7th Cir. 1995) ("The only basis for the petition is that [Defendant] prefers this Court to find in her favor"); *Practitioner's Handbook for Appeals to the United States Court of Appeals*

[2] Notably, the petition does not engage with the panel opinion in each of these respects; rather, it presents the company's arguments on the merits as if this case were on *de novo* review. These arguments may preview CareFusion's intended arguments on rehearing, but they do not identify specific errors in the panel opinion or the reasons the petition ought to be granted under Fed. R. App. P. 35.

for the Seventh Circuit, 2017 Ed., at 176 (explaining difference between panel and en banc rehearing).

Half of CareFusion's petition simply reflects that the company "prefers this Court to find in [its] favor," *HM Holdings*, 72 F.3d at 563, rather than raising any reason why the case is worthy of en banc review. Consequently, this opposition does not address CareFusion's merits arguments.[3] The Court should not address them on rehearing either.[4]

[3] Instead, Plaintiff directs the Court to his briefing to the panel on: (1) the text of section 4(a)(2) (Opening Br. at 11-19 (ECF No. 13); Reply Br. at 2-4 (ECF No. 22)); (2) the text of other ADEA sections (Opening Br. at 18, 23; Reply Br. pp 3-5); (3) the 1972 amendment to Title VII (Opening Br. at 22-; Reply Br. at 6-8) and the import of *Gross v. FBL Fin. Servs.* (Reply Br. at 7-8); (4) the *Griggs* decision (Opening Br. at 20-21; Reply Br. at 11-12); (5) the *Smith* decision (Reply Br. at 8-11); (6) the Wirtz Report's embracing of disparate impact as a necessary means to combat age discrimination (Opening Br. at 29-31).

[4] Nor should the Court address the arguments CareFusion introduces or explains for the first time in its petition. *Easley*, 532 F.3d at 594. For instance, most conspicuously, the petition raises a supposed comparison to the Bankruptcy Code that does not appear at all in the company's Answering Brief. Pet. at 10-11. Like the petition's numerous other merits arguments, this facile comparison is easily answered by the panel's extensive discussion of numerous sections of the ADEA, Title VII, and Supreme Court precedent interpreting the text at issue in a way that dismantles CareFusion's position. Op. at 19-39.

II. CareFusion Overstates the Inter-Circuit Conflict, and in Any Event, En Banc Rehearing in this Case Cannot Effectively Bring Federal Courts into Harmony on the Proper Meaning of ADEA Section 4(a)(2).

CareFusion's petition purports to show a conflict with this Court's prior jurisprudence and with "authoritative decisions of all the other courts of appeals that have addressed the question at issue." Pet. at 1. Yet, the petition does not actually discuss any contrary decision other than *Villarreal*, 839 F.3d 958. Pet. at 12-15. In fact, no other case cited in the petition is actually "authoritative." The rest contain no more than passing references to the scope of ADEA section 4(a)(2) and do so only in dicta. Moreover, that dicta has been resoundingly rejected by subsequent Supreme Court precedent. Thus, CareFusion fails to show that, as Rule 35 requires, the panel's decision conflicts with other "authoritative *decisions*" of other courts of appeals. In truth, the decision differs from only *one* such decision, and that decision split four ways in its "plain-language" interpretations of the statute. Meanwhile, the panel opinion in this case sets forth reasoning consistent with two recent federal court decisions in other Circuits. En banc rehearing is, therefore, premature and unwarranted under Fed. R. App. P. 35.

A. The panel decision does not conflict with authoritative decisions of other courts of appeals because the decisions before *Smith v. City of Jackson* cited in CareFusion's petition are no longer good law.

First and foremost, CareFusion's reference to this Court's decision in *Francis Parker*, 41 F.3d at 1078, is yet another attempt to rehash arguments thoroughly argued before and decided by the panel. The panel opinion explains in great detail why *Smith*, 544 U.S. at 237 & nn.8-9, and not *Francis Parker*, 41 F.3d at 1078, governs the instant issue. Op. at 28-32 & nn.7-8. In short, *Smith* abrogated *Francis Parker*, which was based on an incorrect factual premise regarding Title VII. *Id.* *Francis Parker* is, therefore, anything but "authoritative," and CareFusion is not entitled to a second appellate opportunity to re-argue this point.

For essentially the same reasons, the other cases CareFusion cites in its attempt to expand the universe of cases supposedly disagreeing with the panel—*Smith v. City of Des Moines,* 99 F.3d 1466 (8th Cir. 1996), and *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996)—are not authoritative decisions. As in *Francis Parker*, those cases discuss the instant issue in peripheral comments in footnotes, and both footnotes are dicta: *Smith* concerned a current employee, and *Ellis* expressly based its holding on the conclusion that the ADEA did not give rise to a disparate impact cause of action for *anyone*, making its additional comments on applicants irrelevant to the result. *Smith*, 99 F.3d at 1470 n.2 (noting that the plaintiff was a current

employee and explaining that, in any event, the Court had held that ADEA section 4(a)(1) created a disparate impact cause of action and covered hiring); *Ellis*, 73 F.3d at 1007 ("*we now . . . hold* that disparate impact claims are not cognizable under the ADEA; *thus, we affirm* the district court's grant of summary judgment for United on that ground.") (emphasis added). These decisions and their reasoning do not merely resemble *Francis Parker*—they expressly rely on *Francis Parker*. *Smith*, 99 F.3d at 1470 n.2; *Ellis*, 73 F.3d at 1009. None of these cases survived the Supreme Court's decision in *Smith*, so none are authoritative decisions that the Court should consider relevant to achieving inter-jurisdictional harmony.[5]

CareFusion does not attempt to argue otherwise. In fact, the petition does not seriously engage with the *Smith* majority or plurality opinions at all, focusing solely on the minority opinions—and, even then, doing so only in the context of its merits arguments and making no effort to explain the supposed authoritativeness of abrogated cases.[6] Pet. at 3-4, 12, 14. The petition's avoidance of the most authoritative precedent on ADEA section 4(a)(2) is consistent with CareFusion's

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[5] Indeed, no opinion in *Villarreal*, 839 F.3d 958, referenced either decision or any other pre-*Smith* decision addressing applicant's disparate impact claims under ADEA section 4(a)(2).

[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). Part III represents the plurality view.

apparent attempt to revive a pre-*Smith* theory that only intentional discrimination claims are cognizable under the ADEA. That is, after all, the thrust of the company's cursory analysis of the legislative history, Pet. at 10 & 12, and the basis of the holdings in many pre-*Smith* cases, like *Francis Parker*, 41 F.3d at 1076-77, and *Ellis*, 73 F.3d at 1009, that misinterpreted the Supreme Court's opinion in *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), as limiting the ADEA to intentional discrimination cases.

The *Smith* majority reached a contrary conclusion. Moreover, the plurality expressly rejected the limiting view of *Hazen Paper* taken in some court of appeals cases and Justice O'Connor's concurrence, instead endorsing the Supreme Court's foundational interpretation in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), of language identical to that in ADEA section 4(a)(2): "Congress . . . 'directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.'" *Smith*, 544 U.S. at 234-37 (emphasis original). If that is not clear enough, the *Smith* plurality cited two disparate impact cases brought by external job applicants as "appropriate"—including a case in the Tenth Circuit, the court that issued *Ellis*, 73 F.3d 999. *Smith*, 544 U.S. at 237 n.8 (*citing Wooden v. Board of Ed. of Jefferson Cty., Ky.*, 931 F.2d 376, 379 (6th Cir. 1991) and *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993)). In sum, *Smith* made unmistakably clear that: (1)

ADEA section 4(a)(2) creates a disparate impact cause of action; (2) that cause of action applies to job applicants; and (3) cases holding otherwise were mistaken about the Court's prior jurisprudence. Thus, the Court need not and should not bring its precedent into line with discredited pre-*Smith* cases.

B. The Court should not rehear this case en banc to align itself with the fractured Eleventh Circuit, especially when two district courts in other Circuits have ruled that external job applicants *can* bring disparate impact claims under ADEA section 4(a)(2).

The only true authoritative decision with which the panel opinion differs is *Villarreal*, 839 F.3d 958. There is no reason for the Court to reverse the panel in an attempt to create consensus among the federal courts by aligning itself with that decision. It is not even clear how the Court *could* do so, given that the judges that ruled for the defendant in *Villarreal* did not achieve consensus among themselves about the statute's meaning. As Judge Martin's dissent explained, "Eleven 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). In fact, one of the concurring opinions read the statute to *include* some disparate impact claims for external job applicants—just not the plaintiffs' specific claims. *Id.* at 973-74 (Jordan, J., concurring in part and dissenting in part). Accordingly, following any given opinion in *Villarreal* would not achieve a consistent national jurisprudence regarding the scope of ADEA section 4(a)(2).

The conclusion that the Court cannot resolve conflict among the courts of appeals by reversing the panel is all the more unavoidable in light of the cases still percolating in other Circuits on this issue. Far from the consensus that CareFusion suggests, cases concerning the proper scope of ADEA section 4(a)(2) are just now beginning to emerge throughout the country. District courts in the Fifth and Ninth Circuits, like the panel in this case, have refused to follow *Villarreal* and ruled that external job applicants could pursue disparate impact claims brought under ADEA section 4(a)(2) (*Rabin*, 236 F. Supp. 3d at 1128 ("Based on the language of the ADEA, existing precedent, agency interpretations of the ADEA, and the Act's legislative history, the Court today concludes that job applicants like Plaintiffs may bring disparate impact claims."); *Champlin*, 2018 U.S. Dist. LEXIS 13450, at *19-20 (*citing Rabin* and *Smith*, 544 U.S. at 240)). It would be premature and ultimately futile to rehear the panel's decision to achieve consistency with the result in *Villarreal*, only to potentially cause the Seventh Circuit to be at odds with forthcoming decisions of other courts of appeals.

III. The En Banc Court Should Not Step in to Protect Unreasonable Age Discriminatory Hiring Policies from Challenges by External Job Applicants.

CareFusion's final basis for seeking en banc rehearing is the supposed policy concern that permitting outside job applicants to raise disparate impact claims under the ADEA "threatens significant harm to employers engaged in legitimate,

widespread employment practices" such as on-campus recruitment. Pet. at 15-17. In addition to the petition's failure to explain why employers' fear of increased potential liability is an exceptionally important issue of law worthy of the full court's attention, that fear is greatly exaggerated.

As a preliminary matter, CareFusion's preferred solution—a reading of ADEA section 4(a)(2) that excludes external job applicants—would not achieve the company's preferred result, because current employees could challenge the very practices the company seeks to protect. CareFusion has admitted, as it must under *Griggs*, 401 U.S. 424, that current employees who seek transfers and promotions may challenge facially neutral hiring practices that have a disparate age impact. Brief of CareFusion Corp. at 26 (ECF 15). Thus, narrowing ADEA section 4(a)(2)'s application to current employees would not prevent challenges to the widespread practices CareFusion references; it would only limit the number of potential challengers.

More significantly, as CareFusion also admits, the hiring and recruiting practices the petition describes will not give rise to liability under the ADEA if they are merely found "reasonable" under the "reasonable factors other than age" ("RFOA") defense. Pet. at 17 (referring to ADEA section 4(a)(2), 29 U.S.C. § 623(a)(2)); *see also Smith*, 544 U.S. at 243 ("Unlike the business necessity test," the

RFOA defense does not "ask[] whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class"). Conversely, only *unreasonable* practices are at risk; if CareFusion is correct that these widespread practices are generally legitimate, then cases that do arise will soon establish that the ADEA permits them to continue. Presumably, that is why campus recruiting, entry-level jobs inextricably tied to training for inexperienced workers, and similar practices survived the 25 years between the ADEA's effective date and *Hazen Paper v. Biggins*, when the courts of appeals were in agreement that disparate impact claims were cognizable under the ADEA, and courts never even considered excluding job applicants from the statute's coverage. *See Smith*, 544 U.S. at 238 (describing the "pre-*Hazen-Paper* consensus concerning disparate-impact liability").

And, presumably, that is why no opinion to date, including the majority and two concurrences in *Villarreal*, has expressed concern about the supposed threat to campus recruitment caused by preserving external applicants' ability to invoke section 4(a)(2). *See Villarreal*, 839 F.3d at 988 n.9 (Martin, J., dissenting) ("The majority did right by choosing not to indulge" policy arguments raising similar concerns). This Court should not be the first to go down that path; doing so is unnecessary to preserve valid hiring and recruiting practices that the ADEA does not threaten.

True, some cases may arise in which employers will be required to show that their practices are reasonable. But this argument, which really only articulates CareFusion's own policy concerns, is "a thoroughly unsatisfactory justification for ignoring statutory text and Supreme Court precedent." *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 76 (3d Cir. 2017) (en banc) (rejecting employer's attempt to narrow disparate impact liability under the ADEA). As the Supreme Court explained,

> there is no denying that putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend . . . nor do we doubt that this will sometimes affect the way employers do business with their employees. But at the end of the day, amici's concerns have to be directed at Congress, which set the balance where it is . . . . We have to read [the ADEA] the way Congress wrote it.

Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 101 (2008).

The en banc Court should not step in to protect unreasonable hiring and recruiting practices from challenge by one subset of individuals.

CONCLUSION

For these reasons, the Court should deny the petition for rehearing en banc.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: June 4, 2018

/s/ Dara S. Smith
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I hereby certify that on June 4, 2018, 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 CM/ECF system.

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