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

REPLY BRIEF OF APPELLANT DALE E. KLEBER

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INTRODUCTION

In enacting the ADEA, Congress emphasized the adverse results of hiring barriers for older job applicants, citing "the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability" as a factor necessitating a federal law prohibiting age discrimination in employment. ADEA § 2(A)(3), 29 U.S.C. § 621(a)(3). Further, based on Secretary of Labor Willard Wirtz's 1965 report[1] and other authorities, Congress was well aware that age bias in hiring included age-neutral policies that disadvantage older workers and that a federal policy was needed to remove such barriers to employment. Consequently, Congress incorporated Title VII's prohibitions word-for-word, *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), seeking to eliminate the "last vestiges of discrimination," *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995).

Nevertheless, CareFusion seeks to rewrite the ADEA to exclude applicants from the disparate impact provision's broad coverage. The company also attempts to rewrite history to convince the Court that this was Congress's intention all along. CareFusion likewise writes unspoken limitations into Supreme Court decisions and writes out decades of consistent administrative interpretations construing section

[1] U.S. Department of Labor, *The Older American Worker: Age Discrimination in Employment* (1965), Report of the Sec'y of Labor under Section 715 of the Civil Rights Act of 1964 ("Wirtz Report").

4(a)(2) of the ADEA to cover applicants. In reality, however, all of these sources point to the same conclusion: Congress, the Supreme Court, and the EEOC always intended section 4(a)(2) to cover applicants for employment.

ARGUMENT

I. The ADEA's Disparate Impact Provision Covers Applicants For Employment

A. CareFusion's Textual Arguments Yield No Support For Reading An Exception Into Section 4(a)(2) To Exclude Older Job Applicants

CareFusion addresses very few of Kleber's textual arguments. The company has no answer for the arguments that: (1) the modifier "any" in the statutory phrase "any individual" signals an intent to provide broad coverage, rather than limiting section 4(a)(2)'s reach to current employees; (2) the provision's final phrase, "because of *such* individual's age," makes clear that individuals—not only current employees—are adversely affected persons covered by section 4(a)(2); (3) section 4(a)(2)'s reference to "employment opportunities" provides critical evidence of Congress's intent to include the initial hiring context within the disparate impact provision's ambit; (4) the section's use of "otherwise" expands, rather than contracts, the provision's reach; (5) it is natural to read section 4(a)(2)'s reference to "status as an employee" as encompassing job applicants because refusal to hire a job applicant adversely affects his "status as an employee" by depriving him of that status

altogether; and (6) the specific reference to applicants for employment in section 4(c)(2) is explained by the provision's prohibition of discriminatory refusal to *refer* applicants for employment. Opening Brief ("Open. Br.") at 13, 17, 15, 16-17, 18-19.

The textual arguments CareFusion does make fall far short of demonstrating that Congress intentionally, but tacitly, carved applicants out of section 4(a)(2)'s coverage. CareFusion contends that Congress's exclusion of applicants is clear from the ADEA's deliberate variation: referring in some instances to applicants for employment and in others to employees. Answering Brief ("Ans. Br.") at 13. CareFusion assumes that section 4(a)(2)'s reference to "employees" must limit its reach to current employees. *Id.* However, the variation here weighs in favor of, not against, a construction that covers applicants: as Kleber has explained, section 4(a)(2) refers to prohibited practices as those "limit[ing], segregate[ing], or classify[ing] . . . *employees*," but refers to "any *individual*" and "such *individual*" as the adversely-affected persons who may bring suit. ADEA § 4(a)(2), 29 U.S.C. § 623(a)(2) (emphasis added); Open. Br. at 12; *Rabin v. PricewaterhouseCoopers, LLP*, No. 16-2276, 2017 U.S. Dist. LEXIS 23224, at *4-5 (N.D. Cal. Feb. 17, 2017) ("The Court assumes that this variation in language was a deliberate choice, and one that reflects Congress's intent to include all 'individuals' within section 4(a)(2)'s ambit.").

Moreover, the premise of CareFusion's contention that Congress intentionally used "employees" to exclude applicants presupposes that "employees" can only mean current employees. That is not the case, as *Robinson v. Shell Oil Co.* makes clear. 519 U.S. 337, 341 (1997). As discussed in Kleber's Opening Brief, as in Title VII, Congress used "employee" in many different ways in different contexts throughout the ADEA; some of them plainly could only apply to current employees, whereas others must include prospective employees. Open. Br. at 14-15.[2] CareFusion argues that permitting applicants to bring disparate impact claims under the ADEA is somehow impractical—an argument addressed below, *see infra*, Part I.E. But the company has no response to the argument that context militates a more careful parsing of "employee" in section 4(a)(2) than an assumption that it means only current employees. Here, particularly given the section's broad, inclusive language and the reference to deprivation of "employment opportunities," including prospective employees is the most "coherent and consistent" reading of section 4(a)(2). *See Robinson*, 519 U.S. at 340.

[2] In fact, the definitional provision associated with section 4(c)(2)—the section CareFusion uses as a contrast with section 4(a)(2)—makes clear that "employees" as used in that subsection *must* include prospective employees because the definition states that covered labor organizations are those that "operate[] a hiring hall or hiring office which *procures employees for an employer* or *procures for employees opportunities to work for an employer . . . .* " ADEA § 11(e), 29 U.S.C. § 630(e) (emphasis added).

Additionally, CareFusion suggests that section 4(a)(2) cannot protect job applicants because section 4(a)(1), which addresses intentional discrimination, makes it unlawful to "fail or refuse to hire" an individual because of age, whereas section 4(a)(2) does not mention hiring. Ans. Br. at 13. But that argument proves too much: section 4(a)(1) also forbids employers to "discharge" employees, whereas section 4(a)(2) contains no such language. *Compare* ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1), *with* ADEA § 4(a)(2), 29 U.S.C. § 623(a)(2). Under *Smith v. City of Jackson*, 544 U.S. 228 (2005), it is beyond cavil that section 4(a)(2) covers terminations having a disparate impact on older workers. Section 4(a)(1)'s reference to some specific hiring practices, thus, gives no indication of what section 4(a)(2) covers—except to demonstrate that the latter's broad language must be read to address the "principal evil" Congress sought to stamp out when enacting the ADEA: hiring discrimination. *Cf. Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 356 (7th Cir. 2017) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998)); *see also* Open. Br. at 28-33.

B. CareFusion Has Not Proven That The ADEA's Disparate Impact Provision Excludes Applicants While Title VII's Parallel Provision Has Always Covered Them

As the Supreme Court has explained, "[t]he ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of

discrimination in the workplace.'" *McKennon*, 513 U.S. at 358 (internal citations omitted). Nonetheless, CareFusion contends that section 4(a)(2) excludes job applicants even though Title VII's parallel provision includes them because Congress amended Title VII in 1972 to expressly include job applicants, but did not similarly amend the ADEA.[3] Ans. Br. at 14-17.

As Kleber has already explained, the 1972 Amendment to Title VII did not meaningfully change the scope of section 703(a)(2), which had long been understood to cover job applicants. Open. Br. at 22-23. CareFusion argues that it is unclear whether the 1972 amendment adding "applicants for employment" to Title VII, section 703(a)(2), was "declaratory of present law" as set forth in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Ans. Br. at 29-30. However, while the Senate Reports CareFusion cites regarding the 1972 amendment do not mention *Griggs* expressly, the House Report *does* expressly state that the amendment's provisions regarding job applicants are "fully in accord with the decision of the Court" in *Griggs* and notes that that the newly amended section 703(a)(2) would be would be "[c]omparable to present Section 703(a)(2)." H.R. Rep. No. 92-238, at 21-22, 30.

[3] CareFusion also points to other differences between Title VII and the ADEA, none of which are relevant, and one of which is incorrect: the ADEA and Title VII both include "bona fide occupational qualification" defenses. ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1); Title VII § 703(e), 42 U.S.C. § 2000e-2(e).

Moreover, CareFusion's contention that none of the cases referenced in the Conference Report applied section 703(a), Ans. Br. at 29-30, is incorrect: *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), concerns a job qualification that excluded many female applicants. While *Phillips* is not a disparate impact case, the Report states that the bill amends section 703(a) "to *make it clear that* discrimination against applicants for employment . . . is an unlawful employment practice," without any suggestion that this coverage applied only to disparate treatment. Conf. Rep. on H.R. 1746, *reprinted in* 118 Cong. Rec. 7166, 7169 (emphasis added). All of the relevant legislative history indicates that the 1972 amendment confirmed the provision's existing meaning—not that the addition of "applicants for employment" changed the statute in a way that differentiated it from the ADEA's coverage.[4]

Finally, CareFusion's invocation of *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), is inapposite. The amendment at issue in *Gross* was part of the Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (1991), which overhauled both Title VII and the ADEA. 557 U.S. at 174. As *Gross* explained, "'negative

[4] The summary of provisions that CareFusion references is no exception. Ans. Br. at 29. This summary describes ADEA section 4(a)(2) as making it unlawful "[t]o limit, segregate, or classify employees by age if it would adversely affect their status." S. Rep. No. 90-723, at 4. But this summary is not the language Congress used. If anything, it demonstrates that Congress had a simple means at its disposal to limit section 4(a)(2) to employees if that had been its intent: it could have used this language. Instead, Congress incorporated Title VII's disparate impact provision verbatim, covering all individuals included therein. *Lorillard*, 434 U.S. at 584.

implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" 557 U.S. at 175 (internal citations omitted). The negative implication recognized in *Gross* does not apply to the 1972 amendment, which made no changes to the ADEA. Additionally, the Civil Rights Act of 1991 *superseded* several Supreme Court decisions that had interpreted the original language of Title VII narrowly. *See Gross*, 557 U.S. at 178 n.5. By contrast, the 1972 amendment did not reverse any prior Supreme Court decision, but *confirmed Griggs*. Thus, *Gross*'s reasoning cannot disturb the conclusion that the ADEA's and Title VII's disparate impact provisions should be read consistently, as Congress and the Supreme Court have always understood Title VII's original language, incorporated into section 4(a)(2) of the ADEA, to cover job applicants.

C. *Smith* and *Griggs* Support Kleber's Challenge to CareFusion's Maximum-Years-of-Experience Hiring Restriction Under Section 4(a)(2)

1. *Smith* Supports the Conclusion that Section 4(a)(2) Protects Applicants

CareFusion claims that the Supreme Court's decision in *Smith v. City of Jackson* supports its position that Congress intentionally carved applicants out of section 4(a)(2)'s protection because the *Smith* plurality used the term "employees" and did not mention "applicants." Ans. Br. at 18. That minutia is irrelevant,

however, when considered in context: *Smith* was a case about current employees. 544 U.S. at 230 (plaintiffs were "police and public safety officers employed by the City of Jackson"); *see also Rabin*, 2017 U.S. Dist. LEXIS 23224, at *12-13 ("[J]ust because *Smith* granted relief to employees, it does not follow that the Court would *not* have granted relief had the plaintiffs been applicants instead.") (emphasis in original). Neither the *Smith* majority nor the plurality distinguished between applicants and employees.

CareFusion also relies on Justice O'Connor's concurrence, which summarily concluded that "Section 4(a)(2), of course, does not apply to 'applicants for employment' at all," 544 U.S. at 266,[5] and on Justice Scalia's concurrence in which he noted Justice O'Connor's position, but declined to take one himself. *Id.* at 246 n.3 (Scalia, J., concurring) ("*Perhaps* applicants for employment are covered only when (as Justice O'CONNOR posits) disparate treatment results in disparate impact . . ." (emphasis added). But neither concurrence has any precedential value. *See Alexander v. Sandoval*, 532 U.S. 275, 285 n.5 (2001) ("[A majority's] holding is not made coextensive with the concurrence because their opinion does not expressly

[5] Justice O'Connor's concurrence contrasts section 4(a)(2) not with Title VII, but with ADEA section 4(a)(1). *Smith*, 544 U.S. at 266. Notably, Justice O'Connor's discussion of "the significant differences between Title VII and the ADEA," 544 U.S. at 262, does not mention the absence of the term "applicants" from section 4(a)(2).

preclude . . . the concurrence's approach. The Court would be in an odd predicament if a concurring minority of the Justices could force the majority to address a point they found unnecessary (and did not wish) to address, under compulsion of [the] principle that silence implies agreement."). Justice O'Connor, along with Justices Kennedy and Thomas, joined only the disposition of the majority affirming summary judgment for the city. *Smith*, 544 U.S. at 247. Because they concluded that the ADEA *never* permits a disparate impact claim, *id.* at 248 – a position that the *Smith* majority rejected – their views on whether such claims extend to applicants are not significant.

Smith does provide abundant support *for* applying section 4(a)(2) to applicants. First and foremost, the concurrences' statements regarding applicants presented a clear opportunity for the plurality to address applicants' coverage when detailing how "the scope of disparate-impact liability under the ADEA is narrower than under Title VII." *Id.* at 240. The discussion of the differences between disparate impact claims under Title VII and the ADEA, including amendments made to one statute but not the other, presented the perfect opportunity for the Court to discuss any significance it attributed to the 1972 amendment to Title VII that added "applicants for employment" to section 703(a). After all, "When *Smith* was decided, the amendment to Title VII that added the "or applicants for employment" language

had been in place for over three decades." *Rabin*, 2017 U.S. Dist. LEXIS 23224, at *12 n.4. The *Smith* majority and plurality's silence on the issue speaks volumes, as does its reliance on *Griggs*, which, as discussed below, in no way limits its holding to employees.

2. Griggs Authorized Title VII Disparate Impact Hiring Claims

CareFusion protests at length that *Griggs* did not authorize disparate impact claims for applicants under section 703(a) of the ADEA because *Griggs* was brought on behalf of current employees. Ans. Br. at 25-28. The Supreme Court did not say it was only interpreting Title VII for current employees in *Griggs*; nor has any Supreme Court or Seventh Circuit decision since limited *Griggs* in that way.

The *Griggs* Court declared that it was deciding "whether an employer is prohibited . . . from requiring a high school education or passing of a standardized general intelligence test *as a condition of employment*." 401 U.S. at 424-26 (emphasis added). Subsequent Supreme Court decisions acknowledge that *Griggs* addressed and protects job applicants. *See Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (explaining that a prima facie violation of Title VII can be established under *Griggs* by showing that the "facially neutral standards in question select *applicants for hire* in a significantly discriminatory pattern.") (emphasis added); *Conn. v. Teal*, 457 U.S. 440, 446 (1982) (noting that the employment requirements at issue in *Griggs*

"applied equally to white and black employees and applicants, [but] barred employment opportunities to a disproportionate number of blacks"); *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2517 (2015) (explaining that Griggs applied to "hiring criteria"). Finally, this Court has correctly acknowledged that *Griggs* addressed hiring practices. *See, e.g., Lewis v. City of Chicago*, 643 F.3d 201, 205 (7th Cir. 2011) ("*Griggs* . . . the first disparate-impact case, did not ask whether the employer's requirement that *applicants* possess high-school diplomas—a requirement that disproportionately disqualified minority *applicants*—was 'lawful.'. . . The Court asked whether the employer had justified using a requirement that filtered out minority *applicants*.") (emphasis added). In short, the argument that *Griggs* did not address hiring is unsupported by any authority.

3. *Francis Parker* Does Not Preclude This Court From Allowing Kleber To Pursue His Disparate Impact Hiring Claim

Contrary to CareFusion's pronouncement, Kleber "provide[d] [several] reason[s] for this Court to depart from its prior interpretation of § 4(a)(2) in *Francis Parker*." Ans. Br. at 22. As set out in Kleber's Opening Brief, the Supreme Court overruled virtually every aspect of the *Francis Parker* decision. Open Br. at 25-27. First, *Smith* explained that "nothing in our opinion in *Hazen Paper* [*v. Biggins*, 507 U.S. 604 (1993)] precludes" the use of the disparate impact theory under the ADEA.

Smith, 544 U.S. at 238. In contrast, *Francis Parker* held that *Hazen Paper did* preclude the use of the disparate impact theory under the ADEA. *EEOC v. Francis Parker Sch.*, 41 F.3d 1073, 1076-77 (7th Cir. 1994). Second, *Smith* reasoned that, "Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA [reasonable factor other than age] provision actually supports the contrary conclusion." 544 U.S. at 239. *Francis Parker* ruled that the RFOA provision supported its conclusion that the disparate impact theory did not apply to the ADEA. 41 F.3d at 1077. *Smith*, thus, overturned both of *Francis Parker*'s bases.

The *Francis Parker*'s majority's reference to the absence of the word "applicants" in section 4(a)(2) did not constitute a separate ruling that applicants in particular could not bring ADEA disparate impact claims. Instead, the comment responded to an argument by Judge Cudahy, in his dissent from the majority's holding that the theory was not available at all under the ADEA. 41 F.3d at 1077. The majority was chiding the dissent for concluding that "because Title VII's prohibitions mirror those of the ADEA and Title VII permits disparate impact relief, 'similar acceptance in ADEA cases,' is required," by pointing out a difference in the statutes. *Id.*

The *Francis Parker* majority could have reached an independent, alternate holding that, even if the ADEA generally allowed disparate impact claims, section

4(a)(2) precludes applicants from bringing disparate impact claims – but it did not do so. Such a holding might have survived *Smith*, because it would not have been rooted in the incorrect underlying assumptions about *Hazen Paper* and the statute's RFOA provision, but that is not the opinion that the *Francis Parker* panel's majority wrote. Instead, the panel majority simply augmented its incorrect analysis about disparate impact under the ADEA generally with an (incorrect) counter-argument about the statute's not being parallel to Title VII, as interpreted by *Griggs*.[6] As a result, *Francis Parker*'s comment about applicants is erroneous dicta in a decision overruled by intervening Supreme Court precedent. This Court is not bound by it.

D. The EEOC's Longstanding, Consistent Position That The ADEA Covers Disparate Impact Claims For Job Applicants Is Entitled To Deference

CareFusion makes very little response to Kleber's extensive arguments regarding deference. Beyond arguing that deference is not warranted because the text of section 4(a)(2) precludes the EEOC's interpretation—a point amply refuted throughout the remainder of the briefing—CareFusion quibbles with the location and manner in which the EEOC has expressed its longstanding view that the ADEA covers disparate impact claims for job applicants. Ans. Br. at 31-35. CareFusion

[6] As explained in Kleber's Opening Brief, in concluding that the ADEA excludes applicants, the *Francis Parker* panel majority erroneously compared the text of section 4(a)(2) with the *post*-1972 amendment text of section 703(a) of Title VII, rather than the pre-amendment language at issue in *Griggs*. Open. Br. at 25 n.8.

contends that the relevant regulation, 29 C.F.R. § 1625.7(c), is not authoritative as to whether applicants may bring disparate impact claims because it only interprets section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1), the statutory provision setting out the RFOA defense. Ans. Br. at 32-33.

But the substance of the regulation warrants deference regardless of its location. In outlining the RFOA defense, the agency spoke definitively to concomitant legal violations, providing that "[a]ny employment practice that adversely affects individuals . . . on the basis of older age is discriminatory unless the practice is justified by a 'reasonable factor other than age.'" 29 C.F.R. § 1625.7(c). Moreover, the Supreme Court in *Smith* treated the predecessor regulation as the EEOC's interpretation of the ADEA's disparate impact coverage. *See Smith*, 544 U.S. at 239-40 (plurality opinion) (these regulations "interpreted the ADEA to authorize relief on a disparate-impact theory").

Additionally, CareFusion points out that the EEOC updated the relevant regulation after *Smith* to refer to "individuals" rather than "employees or applicants," suggesting that this change somehow reflects a shift to a new position that section 4(a)(2) is the source of applicants' disparate impact claims. Ans. Br. at 35. But CareFusion does not explain how the regulations' former phrase "employees or applicants" could, by itself, demonstrate that the agency believed disparate impact

arose solely from section 4(a)(2). Indeed, there does not appear to be any authority or additional support for this theory.

CareFusion also attempts to muster inconsistency in the agency's position by noting that the EEOC argued in its briefing in *Francis Parker* that section 4(a)(1) of the ADEA covered disparate impact claims for job applicants. Ans. Br. at 34. However, the EEOC's argument was only one of two alternatives: the agency also argued that section 4(a)(2) supported such claims. *EEOC v. Francis Parker Sch.*, 1994 WL 16045193, at *4 n.3 (7th Cir. 1994) (EEOC Br.). Further, in its petition for certiorari in *Francis Parker*, the EEOC argued at some length that section 4(a)(2) of the ADEA covers disparate impact claims for job applicants, making precisely the argument about Title VII and *Griggs* that Kleber makes here. *EEOC v. Francis Parker Sch.*, 1995 WL 17047545, at *10 (S. Ct. 1995) (EEOC petition for certiorari) (discussing Title VII as interpreted in *Griggs*). This longstanding interpretation of the ADEA in every facet of the agency's actions merits *Chevron* deference.

E. The Supreme Court Has Determined That Applying The Disparate Impact Theory To The ADEA Is Appropriate And Workable

In *Smith*, the Supreme Court interpreted the ADEA to allow disparate impact claims without distinguishing between applicants and current employees. CareFusion and its amicus, the U.S. Chamber of Commerce, ask the Court to ignore that fact in a bid to rewrite the ADEA and craft a statute where Congress

engaged in purposeful "line drawing" to protect the interests of employers. Br. of Chamber of Commerce ("Chamber Br.") , ECF No. 19 at 4. But CareFusion's and the Chamber's preference to avoid needing to even minimally defend business practices that have an adverse impact on older applicants cannot carve a new exception out of a remedial statute. *See EEOC v. Fox Point-Bayside Sch. Dist.*, 772 F.2d 1294, 1302 (7th Cir. 1985) ("We agree that as an exception to a remedial statute section 4(f)(2) is to be construed narrowly, and that the burden is on the School District to establish the exception.").

Both CareFusion and the Chamber complain that if the ADEA authorizes disparate impact hiring claims, employers "would face potential liability by an older job applicant . . . regardless of the legitimate, non-discriminatory business purpose for which he is not hired." Ans. Br. at 25. *See also* Chamber Br. at 14-22. However, the Supreme Court addressed that precise complaint already.

First, the Supreme Court has made clear that all statistical disparities do not automatically give rise to potential liability under the ADEA. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (showing a statistical disparity alone "will not suffice to make out a prima facie case of disparate impact"); *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (plurality opinion) ("[P]laintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical

disparities in the employer's work force."); *see also Karlo v. Pittsburgh Glass Works*, LLC, 849 F.3d 61, 79 (3d Cir. 2017) ("deviating from statistical parity is not, by itself, enough to incur disparate-impact liability"). Instead, to establish a prima facie case of disparate impact, age discrimination victims must first identify the specific employment practice that causes the disparity, which "is not a trivial burden . . . [and should not] induc[e] employers to alter business practices in order to avoid being sued." *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 101 (2008); *see also Smith*, 544 U.S. at 241 (explaining that this requirement avoids the "result [of] employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances.'").

Second, as the Supreme Court concluded in *Watson*, "the evidentiary standards that apply in [disparate impact] cases should serve as an adequate safeguard against" undue burdens on employers, 487 U.S. at 993, as "the high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment," *id.* at 999. Congress already has considered the differences between age and other forms of discrimination, which both CareFusion

and the Chamber overstate.[7] "Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the RFOA clause into the ADEA, 'significantly narrow[ing] its coverage.'" *Meacham*, 554 U.S. at 102 (quoting *Smith*, 544 U.S. at 233). In short, CareFusion's and the Chamber's arguments that allowing disparate impact hiring claims under the ADEA would be disastrous to hiring practices only protect unreasonable hiring practices. For all others, the Supreme Court has already provided the answer: prove that the practice is reasonable. ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1). Anything less would remove any reason for employers to "self-examine and to self-evaluate their employment practices . . . ." *McKennon*, 513 U.S. at 358 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

Finally, the Chamber's opinion that "older workers did not face societal headwinds that might lock them into a lifetime of inferior job prospects absent

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[7] For example, while age discrimination does not carry with it all of the history and profound prejudice underlying race discrimination, Title VII is not limited to race discrimination and the "principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent" is not limited "to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination." *Watson*, 487 U.S. at 988; *see also generally, e.g., Dothard*, 433 U.S. 321 (claim of disparate impact on the basis of gender).

judicial scrutiny of even neutral employment practices," Chamber Br. at 10, flies in the face of Secretary Wirtz's findings that older workers face their own "built-in-headwinds," *Griggs*, 401 U.S. at 432, in the workplace. These persistent barriers — *e.g.*, an ever more outdated educational background; an ever more outdated test-taking capacity; an ever growing perception that certain assignments and jobs and even industries are deemed unsuitable for older workers — are surely different and less scurrilous in their origins than those faced by members of minority groups, especially African-Americans, but they are daunting nevertheless. Wirtz Report at 3, 11-15. "[O]ne can have a 'status quo' based on inaccurate stereotypes that society needs to destroy as much as one can have a 'status quo' based on animus that should be swept away." Roberta Sue Alexander, Comment, *The Future of Disparate Impact Analysis for Age Discrimination in a Post-Hazen World*, 25 DAYTON L. REV. 75, 94 (1999).

That a civil rights statute is inconvenient for employers because it creates potential liability and/or implicates practices that are "widespread," "ubiquitous," or used "regularly," Chamber Br. at 12, 14, is "a thoroughly unsatisfactory justification for ignoring statutory text and Supreme Court precedent," *Karlo*, 849 F.3d at 76. As the Supreme Court made clear, "at the end of the day, [CareFusion's and the

Chamber's] concerns have to be directed at Congress, which set the balance where it is. . . ." *Meacham* 554 U.S. at 101-02.

II. Kleber Exhausted His Disparate Impact Claim Before The EEOC

The Court should not affirm the district court's dismissal of his disparate impact claim on exhaustion grounds. Ans. Br. at 35-40. On the contrary, Kleber amply notified the agency and CareFusion of his belief that the company's experience cap had a disparate adverse impact on older applicants.

The administrative exhaustion analysis in employment discrimination cases focuses on whether the purposes of EEOC process were fulfilled, not solely on the four corners of the formal charge. *Vela v. Vill. of Sauk Vill.*, 218 F.3d 661, 664 (7th Cir. 2000); *see also Segura v. Strive Group, LLC*, No. 11-c-5334, 2012 U.S. Dist. LEXIS 28669, at *5 (N.D. Ill. Mar. 5, 2012) (citing *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008)) (considering information outside the charge because of the Supreme Court's "caution against overly formalistic requirements"). Accordingly, a discrimination complaint filed in federal court may include all claims that could reasonably have been expected to arise from the agency's investigation of the charge. *Cheek v. Western & S. Life. Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994) ("The test for determining whether an EEOC charge encompasses the claims in a complaint therefore grants the [discrimination] plaintiff significant leeway. . . . [T]he test . . . is

satisfied if there is a reasonable relationship between the allegations in the charge and the claims in the complaint, and the claim in the complaint can reasonably be expected to grow out of an EEOC investigation of the allegations in the charge."); *Lucas v. Vee Pak, Inc.*, 68 F. Supp. 3d 870, 15-16 (N. D. Ill. 2014) (plaintiffs' complaint allegation that employer's policy had a disparate impact on protected workers was reasonably related to plaintiff's charge challenging the policy before the EEOC as intentionally discriminatory). Further, the complaint may include allegations made to the EEOC that the plaintiff clearly intended the agency to investigate but did not include in the formal charge document. *Swearnigen-El v. Cook Conty. Sheriff's Dep't*, 602 F.3d 852, 865 (7th Cir. 2010); *cf. Novitsky v. Am. Consulting Eng'rs, LLC.*, 196 F.3d 699, 702 (7th Cir. 1999) (rejecting reliance on questionnaire where the plaintiff read the formal charge and obtained legal advice before signing it).

Kleber exhausted his disparate impact claim because: (1) that claim would reasonably have been expected to arise—indeed, it did arise—from the EEOC's investigation of his charge; and (2) Kleber demonstrably expected the EEOC to investigate his intake questionnaire's allegations about the experience cap's adverse discriminatory effect on older applicants.

A. Kleber's Disparate Impact Claim Was Reasonably Related To The Age Discrimination Allegations In His Charge, And The EEOC Investigation Encompassed The Disparate Impact Claim

Kleber's complaint alleges that the maximum experience requirement CareFusion used in the hiring process for the Senior Counsel position violated the ADEA because it had a discriminatory disparate impact on older individuals. First Amended Complaint, *Kleber v. CareFusion, Corp.*, No. 15-1994 (N. D. Ill. July 7, 2015) ("First Amended Compl."), ECF 22 at 4-5. This claim is plainly related to his charge's allegation that CareFusion's refusal to hire him for the Senior Counsel position was age discrimination that violated the ADEA. *Id.* at 10-11; ECF 22-1 at 8.[8]

Under the circumstances, the disparate impact claim would reasonably have been expected to arise from the EEOC's investigation of Kleber's charge. Any investigation of the charge's allegations would naturally have led the agency to investigate CareFusion's policy of using a facially age-neutral maximum experience requirement in its job posting because that policy is CareFusion's sole stated reason for refusing to consider Kleber's application. First Amended Compl. ECF 22 at 11; ECF 22-1 at 19-20. Investigating the age-neutral policy would inexorably have led the agency to inquire into the policy's potential disparate impact. *See Lucas*, 68 F.

[8] Citations to ECF documents that are exhibits with multiple, separately paginated documents refer to the ECF page designations.

Supp. 3d at 15-16 (finding allegation in charge that a policy was intentionally discriminatory reasonably related to claim in complaint that policy had a disparate impact); *Gomes v. Avco Corp.*, 964 F.2d 1330, 1334-35 (2d Cir. 1992) (individual's allegation that he was passed over for a promotion despite meeting an eight-year maximum experience requirement was reasonably related to claim that the requirement had a disparate impact because the agency would naturally investigate the policy's effects).

Accordingly, *Noreuil v. Peabody Coal Co.*, 96 F.3d 254, 258 (7th Cir. 1996), on which CareFusion relies, Ans. Br. at 37, is inapposite. In *Noreuil*, the Court concluded that the plaintiff's charge of retaliation—an intentional act in a single instance—did not reasonably relate to his complaint's allegation that the employer's policies had a discriminatory disparate impact on older workers. 96 F.3d at 257-58. Here, Kleber challenged CareFusion's failure to hire him, and the only basis for that action was, as all parties have acknowledged throughout the case, CareFusion's seven-year experience cap. The EEOC's investigation of that policy was virtually certain to investigate both the intent of applying the policy and its effects.

In any event, here, there is no question about whether the disparate impact claim *might* have arisen during the EEOC investigation because it *did* arise. EEOC records reflect that, after filing his charge, Kleber stated to agency investigative staff

his specific claim that the seven-year experience cap had a discriminatory effect on workers over 40 years old. First Amended Compl., ECF 22-1 at 27-28 ("there are exceptions but . . . 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"). Kleber brought to the agency's attention the precise adverse action that he now seeks to challenge in this Court, and he made clear to agency staff that he believed it has a discriminatory effect – the essence of his disparate impact claim.

B. CareFusion Had Notice Of A Potential Disparate Impact Claim

Although CareFusion contends that it was not on notice of the disparate impact claim, Ans. Br. at 5, its response to the EEOC charge demonstrates otherwise in stating that Kleber was not considered for the Senior Counsel position because his experience exceeded the seven-year maximum and that the requirement was reasonable. First Amended Compl., ECF 22 at 11; *Id.*at ECF 22-1 at 19. The company argued that this "objective criterion" was based on the "reasonable concern" that a candidate with experience beyond the seven-year maximum would be dissatisfied with job responsibilities and would "lead to issues with retention." *Id.* The words "disparate impact" may have been absent from CareFusion's response, but the company squarely addressed the RFOA issue. *See* 29 C.F.R. § 1625.7(e)(1)

(2012) (describing an RFOA as a factor that is "objectively reasonable" and "designed to further or achieve a legitimate business purpose").

These circumstances are entirely different from those in the cases on which CareFusion relies, where plaintiffs either did not mention the defendant in the EEOC charge at all (*Tamayo v. Balgojevich,* 526 F.3d 1074, 1089 (7th Cir. 2008)), omitted allegedly discriminatory actions from their charges and referred only to other, specific instances of discrimination (*Geldon v. S. Milwaukee Sch. Dist.*, 414 F.3d 817, 820 (7th Cir. 2005)), or simply did not make clear what actions the plaintiff sought to challenge at all (*McGoffney v. Vigo Cnty. Div. of Family & Children*, 389 F.3d 750, 752 (7th Cir. 2004)). In marked contrast, Kleber challenged CareFusion's failure to hire him in one instance, and CareFusion both had the opportunity to explain its age-neutral policy and availed itself of that opportunity, arguing that it was justified by objectively reasonable goals. *See Sickinger v. Mega Sys.*, 951 F. Supp.153, 158 (N.D. Ind. 1996) (exhaustion satisfied, in part, because employer demonstrably did have notice of the plaintiff's claims, even though they were not in the charge).

C. Kleber's Intake Questionnaire Set Out Extensive Factual Allegations Supporting A Disparate Impact Claim, And Kleber Clearly Demonstrated His Intent That The EEOC Investigate Those Allegations

Kleber's intake questionnaire and supplement articulated his disparate impact claim to the EEOC and urged the agency to investigate that claim. *See* First Amended Compl., ECF 22-1 at 10-14 (proposing that the EEOC investigate further to uncover systemic age discrimination). The questionnaire set out Kleber's claim that the 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." *Id.* ECF 22 at 9-10; ECF 22 at 14. In the supplement to his questionnaire, Kleber stated that the experience maximum was "the legal equivalent of stating, 'No older attorneys need apply[]'" and that the company's multiple job descriptions with experience maximums "suggest that CareFusion is systematically discriminating against older applicants by placing a maximum on the required level of experience." *Id.* ECF 22-1 at 14. And, the EEOC investigator's pre-charge notes refer to Kleber's claim that the experience maximum was discriminatory and record Kleber's desire to pursue a charge of discrimination based on CareFusion's facially age-neutral policy. *Id.* at 23 ("R has a policy on its face they will not hire anyone with more than 7 years of experience . . . decided to file").

Kleber's charge was prepared solely by the EEOC investigator, who did not include every detail that Kleber provided to him, and Kleber was not represented by counsel. *Id.* ECF 22 at 10; ECF 22-1 at 8. Although CareFusion argues that Kleber should not be treated as an "unsophisticated" litigant because he is an experienced attorney, Ans. Br. at 39, Kleber has no experience in bringing employment discrimination cases and, thus, had no reason to understand the EEOC charge-filing requirements, *i.e.*, the potential significance of omitting contentions from the charge. As an unrepresented charging party with "no detailed knowledge of the relevant statutory mechanisms and agency processes," *Holowecki*, 552 U.S. at 403, Kleber had no reason to expect that signing a charge prepared by EEOC staff could eliminate from consideration most of what he had told the agency, especially when he had already provided agency staff a full written account of his allegations of systemic age discrimination.

Nor did Kleber have any reason to believe that attaching the intake questionnaire to the charge would do more than he had already done to preserve his rights. Indeed, the EEOC file shows that he did not understand the significance of the difference between the charge and questionnaire at all, as he referred to the allegations in his intake questionnaire as having been detailed in his "charge." First Amended Compl., ECF 22 at 10-11; ECF 22-1 at 25. The EEOC investigator's

omissions in the charge should not foreclose Kleber's rights. *See Sickinger*, 951 F. Supp. 156-58 (plaintiff exhausted allegations outside the charge when she demonstrated her intent for the agency to investigate them, but the EEOC investigator failed to include them in the charge).

To hold in these circumstances that the disparate impact of CareFusion's policy was not raised in the administrative process would ignore what actually happened. Barring the disparate impact claim at the gate on this basis would be needlessly formalistic and inequitable, given that Kleber amply fulfilled the purposes of administrative exhaustion.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision and remand for further proceedings on Kleber's disparate impact claim.

Dated: July 26, 2017

Respectfully submitted,

/s/ Dara S. Smith

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Dated: July 26, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by CM/ECF system.

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