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DISPARATE IMPACT UNDER THE ADEA:
APPLICANTS NEED NOT APPLY

L. Whitney Woodward

INTRODUCTION

Generally, American employment’s default rule is employment at will, meaning that unless agreed upon otherwise, employers are free to hire and fire who they wish for any reason or no reason, so long as the employer’s reason is not illegal.1 Though this approach provides benefits to both employers and employees,2 employer practices before the mid-1960s often used this default position of employment at will to unfairly discriminate against their employees for innate characteristics, like race, gender, and age.3 To combat certain discriminatory practices, Congress, in 1964, passed Title VII of the Civil Rights Act (Title VII), which prohibits workplace discrimination on the bases of race, color, sex, religion, and national


Although its drafters contemplated prohibiting discrimination against older workers, Title VII is silent regarding age. This missing protection, however, was remedied in 1967 with the passage of the Age Discrimination in Employment Act (ADEA), which stands outside Title VII protections and prohibits age-based employment discrimination.

Under Title VII, both non-employee applicants and employees alleging employment-based discrimination may bring suit under a disparate treatment theory, a disparate impact theory, or both. Disparate treatment claims involve the employer’s intentional discrimination based on a prohibited factor under the law. In contrast, disparate impact claims involve employer practices that are facially neutral but permit an individual to prove employment discrimination based on the effect of an employment policy or practice on a protected class, rather than the employer’s intent behind it. Though many of Title VII’s interpretations were applied analogously to discrimination claims under the ADEA, the disparate impact theory was not explicitly recognized as applicable to employees in the ADEA context until Smith v. City of Jackson.


7. WILLBORN ET AL., supra note 1, at 395.
9. Id.
10. Id., 554 U.S. at 233–34, 240. “[W]e now hold that the ADEA does authorize recovery in ‘disparate[impact]’ cases comparable to Griggs. Because, however, we conclude that petitioners have not set forth a valid disparate[impact] claim, we affirm.” Id. at 232. In Smith, although the Court agreed that a disparate impact right existed under the ADEA, the petitioner-employees were not successful in
However, *Smith* involved an *employee’s* ability to bring a claim of disparate impact age discrimination and did not address whether the theory of recovery was available to non-employee job applicants, leaving the question open as to whether applicants for employment have a cognizable claim under the ADEA’s disparate impact theory. Part I of this Note addresses the current debate on this topic, illustrated through case law in the Eleventh Circuit, the Seventh Circuit, and a recent federal district court ruling in the Ninth Circuit. Part II analyzes the unambiguous, textual differences between the various subsections of the ADEA as well as the textual differences between Title VII and the ADEA. This Note explores these textual arguments through an analysis of the statutes and interpretative case law and concludes that, as drafted, the disparate impact theory of age discrimination should not be available to non-employee job applicants. Part III illustrates why utilizing a disparate impact theory of recovery in age discrimination cases is futile for non-employee job applicants, demonstrates why the current position held by the Equal Employment Opportunity Commission (EEOC), the administrative agency responsible for the ADEA’s enforcement, should not be determinative on this matter, and

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their claim of age-based discrimination because the employer had a “reasonable factor other than age” for the employment action. *Id.* at 244.


12. *See infra* Part I.


14. *See, e.g.,* Kleber v. CareFusion Corp., 888 F.3d 868 (7th Cir. 2018), *aff’d on reh’g en banc,* 914 F.3d 480 (7th Cir. 2019).


16. *See infra* Part II.


18. 29 C.F.R. § 1625.2 (2007); 29 C.F.R. § 1625.7(c)(2012).

proposes a new pathway to support older job applicants in their quests for employment. This Note advocates for Congress, through legislative action, and the EEOC, through its rulemaking responsibilities, to develop incentives and education initiatives for employers to eliminate the unconscious biases and stereotypes often encumbering older workers.

I. Background

Although the ADEA recognizes disparate treatment claims for both employees and applicants, the ADEA’s recently recognized disparate impact language, appearing in Title 29, § 623(a)(2) of the United States Code, contains slightly different language. In Smith, the Court first recognized the disparate impact theory for employees under the ADEA but also noted that this theory is narrower under the ADEA than it is under Title VII. Although Title VII explicitly

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21. See infra Part III.

22. See infra Part III.

23. ADEA, 29 U.S.C. § 623(a)(1) (2012) (“It shall be unlawful for an employer . . . to fail or refuse to hire or 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.”).

24. Id. § 623(a)(2) (“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.”).

25. Smith v. City of Jackson, 554 U.S. 228, 240 (2005). Smith involved claims by age forty and older employees, arguing that the city’s adopted pay plan, granting raises to all city employees, provided a greater percentage of income raises to younger employees than older employees. Id. at 230. The pay plan’s purpose was “to attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability” and accomplished this purpose partly through bringing all
recognizes that both employees and job applicants may raise disparate impact claims,\textsuperscript{26} the question of whether non-employee job applicants may raise disparate impact claims under the ADEA remains unsettled.\textsuperscript{27} The following cases illustrate this timely debate.\textsuperscript{28}

\textbf{A. The Eleventh Circuit: Villarreal v. R.J. Reynolds Tobacco Co.}

In \textit{Villarreal}, the Eleventh Circuit Court of Appeals considered whether a non-employee job applicant could sue a potential employer for age discrimination under the ADEA pursuant to a disparate impact theory.\textsuperscript{29} In 2007, forty-nine-year-old Richard Villarreal applied for a territory manager position with R.J. Reynolds Tobacco Company (R.J. Reynolds).\textsuperscript{30} The position guidelines targeted candidates “[two to three] years out of college,” and more specifically, sought applicants who “adjust[] easily to changes.”\textsuperscript{31} The job position’s recruiter was also advised to “‘stay away from’ applicants ‘in sales for [eight to ten] years.’”\textsuperscript{32} Villarreal applied to work at R.J. Reynolds six times but was screened out based on the aforementioned guidelines or rejected each time.\textsuperscript{33}

In May 2010, Villarreal filed a charge of discrimination with the EEOC, alleging that R.J. Reynolds discriminated against him because starting salaries of police officers up to the regional average. \textit{Id.} at 231. Those with less tenure benefited from the pay adjustments with higher percentage of pay adjustments than the percentage of pay adjustments for higher tenured police officers. \textit{Id.} The claimants in the case consisted of officers with more seniority (i.e., more than five years of service) who also happened to be age forty and over. \textit{Id.}

\textsuperscript{27} See Kleber v. CareFusion Corp., 888 F.3d 868, 870 (7th Cir. 2018), \textit{aff’d on reh’g en banc}, 914 F.3d 480 (7th Cir. 2019) (holding, before vacated en banc, that both employees and applicants may sue employer or potential employer, respectively, for age discrimination under disparate impact theory); Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016) (holding that applicant cannot sue potential employer for age discrimination under disparate impact theory); Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126, 1133 (N.D. Cal. 2017) (holding that both employees and applicants may sue an employer or potential employer, respectively, for age discrimination under disparate impact theory).
\textsuperscript{28} See Kleber, 888 F.3d at 871; Villarreal, 839 F.3d at 961; Rabin, 236 F. Supp. 3d at 1127.
\textsuperscript{29} \textit{Villarreal}, 839 F.3d at 961.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.}
of his age. After receiving an EEOC right-to-sue letter in April 2012, Villarreal filed an age discrimination suit against R.J. Reynolds. One count of the plaintiff’s complaint alleged disparate impact under ADEA § 4(a)(2).

The district court dismissed the plaintiff’s disparate impact claim, holding that only employees, not job applicants, could pursue a disparate impact theory of recovery under the ADEA. In 2015, a divided panel of the Eleventh Circuit Court of Appeals reversed the lower court’s decision, ruling as a matter of first impression that § 4(a)(2) of the ADEA authorized applicants for employment—not just employees—to bring disparate impact claims. The court’s decision hinged not on the plain language of the statute, but instead stemmed from the court’s view that the statute was unclear, and thus the EEOC’s interpretation was entitled to deference. This decision,

34. Id.
35. What You Can Expect After You File a Charge, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/process.cfm [https://perma.cc/6Q6M-PLSB] (last visited Sept. 24, 2019). Generally, before a claimant alleging employment discrimination may sue, the claimant must file a charge with the EEOC, allowing the EEOC 180 days to investigate the matter. Id. If the EEOC is unable to determine that discrimination happened, the agency issues a right-to-sue letter to the claimant so that a lawsuit may be filed. Id. For violations of the ADEA, a claimant may file suit after the passage of sixty days from filing the charge with the EEOC, and no right-to-sue letter is required. Id.
37. Id. Although the plaintiff alleged two counts of age discrimination against defendant employer, disparate treatment and disparate impact, he voluntarily dismissed the disparate treatment claim, only moving forward on the ADEA disparate impact theory. Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288, 1292 (11th Cir. 2015), rev’d en banc, 839 F.3d 958 (11th Cir. 2016).
38. Villarreal, 839 F.3d at 961–62.
Villarreal brought a collective action against R.J. Reynolds . . . under the Act on behalf of “all applicants for the Territory Manager position who applied for the position since the date R[J]. Reynolds began its pattern or practice of discriminating against applicants over the age of [forty] . . . ; who were [forty] years of age or older at the time of their application; and who were rejected for the position.” The complaint alleged two counts: disparate treatment under §§ 4(a)(1) of the Act and disparate impact under §§ 4(a)(2) of the Act.

39. Villarreal, 806 F.3d at 1291.
40. Id. at 1290.
41. Id.
however, was vacated pending a rehearing en banc in early 2016. On October 5, 2016, the Eleventh Circuit Court of Appeals, sitting en banc, held that job applicants are not entitled to bring disparate impact claims under § 4(a)(2) of the ADEA because the applicant has no “status as an employee.” Thus, although the Eleventh Circuit permits job applicants to bring ADEA disparate treatment claims (i.e., claims of intentional age discrimination), those same non-employee job applicants may not bring ADEA disparate impact claims.

B. The Seventh Circuit: Kleber v. CareFusion Corporation

In 2018, the Seventh Circuit Court of Appeals in Kleber also heard a case on this issue: whether the ADEA’s disparate impact provision protects job applicants in addition to current employees. Here, Dale Kleber, a fifty-eight-year-old attorney with extensive experience across multiple industries, applied for a senior counsel position with CareFusion Corporation (CareFusion), a healthcare products employer. Although the employer’s job posting noted a desire for “a business person’s lawyer” with experience handling “complex projects,” the employer also included a provision stating that applicants “must have ‘[three] to [seven] years (no more than [seven] years) of relevant legal experience.’” The fifty-eight-year-old view that § 4(a)(2) protects any individual an employer discriminates against, regardless of whether that individual is an employee or job applicant.

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Id. at 1299 (citations omitted).
43. Id. at 961.
44. Id. at 961.
45. Id. at 963.
46. Kleber v. CareFusion Corp., 888 F.3d 868, 870 (7th Cir. 2018), aff’d on reh’g en banc, 914 F.3d 480 (7th Cir. 2019).
47. Id. at 963.
48. Id. at 970.
49. Id. at 970. “Congress did not leave applicants without recourse. Section 4(a)(1) provides them with a cause of action for disparate treatment.” Id. (citing ADEA, 29 U.S.C. § 623(a)(1) (2012)).
attorney submitted his application but was not selected to interview because, according to the employer, the role’s years of experience maximum precluded this applicant’s consideration.49

Kleber filed an age discrimination charge with the EEOC alleging age discrimination stemming from CareFusion’s decision to exclude him from consideration because of his years of experience.50 After CareFusion provided its business rationale for the years of experience maximum, the EEOC issued Kleber a right-to-sue letter. 51 Kleber then filed a lawsuit against CareFusion which included a claim of disparate impact age discrimination under § 4(a)(2) of the ADEA.52 Therein, Kleber specifically alleged that “the maximum experience cap was ‘based on unfounded stereotypes and assumptions about older workers, deters older workers from applying for positions . . . and has a disparate impact on qualified applicants over the age of [forty].’”53 Relying on precedent, the district court dismissed the plaintiff’s claim, professing that the ADEA’s disparate impact provision applies only to employees, not non-employee job applicants;54 however, on appeal, the Seventh Circuit reversed, holding, unlike the Eleventh Circuit,55 that non-employee job applicants are protected under the ADEA’s disparate impact provision.56 Then, less than two months post-ruling, the Seventh

49. Id.
50. Id.
51. Id.

Because of the experience cap, Kleber filed a charge of age discrimination with the Equal Employment Opportunity Commission. CareFusion responded in a letter to the EEOC saying its maximum experience cap in the job posting was an “objective criterion based on the reasonable concern that an individual with many more years of experience would not be satisfied with less complex duties . . . which could lead to issues with retention.”

Kleber, 888 F.3d at 871.
52. Id. Plaintiff applicant initially filed an age discrimination suit under both disparate treatment and disparate impact theories; however, the plaintiff voluntarily dismissed the disparate treatment claim, proceeding only with the disparate impact theory. Id. at 871–72.
53. Id. at 871.
54. Id. at 872 (citing Equal Emp’t Opportunity Comm’n v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994)).
56. Kleber, 888 F.3d at 888.

Given the statutory language in § 623(a)(2), the interpretation of that language in Smith and virtually identical language in Griggs, and the absence of any apparent policy rationale for barring outside job applicants from raising disparate impact
Circuit vacated the decision, required a rehearing en banc, and subsequently affirmed the district court’s holding that pursuant to the plain language of § 4(a)(2), job applicants are not entitled to bring disparate claims under the ADEA.57

### C. A Ninth Circuit District Court: Rabin v. PricewaterhouseCoopers LLP

In Rabin, the Northern District of California recently broached the topic of whether, in addition to employees, job applicants also had the right to raise disparate impact claims under the ADEA.58 Rabin filed suit against PricewaterhouseCoopers (PwC), “alleging that PwC ‘engages in systemic and pervasive discrimination against older job applicants . . . maintain[ing] hiring policies and practices for giving preference to younger employees that result in the disproportionate employment of younger applicants.’”59 Recognizing that neither the Ninth Circuit nor the Supreme Court had ruled specifically on this applicant issue, the court held that the right to file ADEA-related disparate impact claims attaches to employees and applicants.60

### II. Analysis

Although current case law highlights debate as to whether the ADEA § 4(a)(2) covers non-employee job applicants,61 a literal reading of the statute, with its varied component parts,62 and a
comparison of the ADEA to close companion legislation, Title VII,\textsuperscript{63} settles this debate. First, the section of the ADEA giving rise to disparate impact claims omits the needed reference for non-employee job applicant protection from employer related actions.\textsuperscript{64} Next, language used in other portions of the ADEA expressly includes applicant language or references to hiring activities.\textsuperscript{65} This distinction illustrates that Congress made explicit language choices when drafting the comprehensive statute. Additionally, when comparing the ADEA to Title VII, legislation passed five years before the ADEA and protecting certain innate characteristics other than age,\textsuperscript{66} the statutes’ different language again demonstrates that Congress knew the specific words to include when the intent was to reach non-employee applicants and chose not to include those words in ADEA § 4(a)(2). Without congressional action amending ADEA § 4(a)(2) to expressly include a group of individuals so clearly omitted from the current language, judicial inquiry is complete.\textsuperscript{67}

\textit{A. Congress Means What It Says and Says What It Means}

As noted in \textit{Smith}, the United States Supreme Court recognizes disparate impact claims under the ADEA\textsuperscript{68} through ADEA § 4(a)(2).\textsuperscript{69} That particular section’s ADEA language “focuses on the effects of the action on the employee rather than the motivation for the action of the employer,” meaning that the claim analysis is only one of disparate impact, rather than disparate treatment, where the

\begin{footnotesize}
\textsuperscript{63}. Glenn & Little, \textit{supra} note 5.
\textsuperscript{65}. ADEA, 29 U.S.C. § 623(a)(1), (b), (c)(1)–(2), (d)(2012).
\textsuperscript{66}. Glenn & Little, \textit{supra} note 5.
\textsuperscript{68}. \textit{Smith}, 554 U.S. at 232.
\end{footnotesize}
result turns on an employer’s intentional discriminatory motivations.\textsuperscript{70} So, although \textit{Smith} affirmatively recognizes the ADEA’s disparate impact right, the case squarely focuses on employees, not non-employee job applicants.\textsuperscript{71} Moreover, ADEA § 4(a)(2) does not, specifically or generally, reference applicants or individuals contemplated for hire.\textsuperscript{72} Lastly, when comparing the ADEA’s language in § 4(a)(2) to other portions of the ADEA, it is clear that when Congress desires the inclusion of applicants or individuals contemplated for hire, the legislature knows the particular words to include.\textsuperscript{73} As it relates to judicial interpretation of statutes, courts leverage the canons of construction to guide their statutory interpretation journey.\textsuperscript{74} However, when a court “find[s] the terms of a statute unambiguous, judicial inquiry is complete . . . .”\textsuperscript{75} The ADEA’s applicant language, or lack thereof, tells the judiciary all that is needed without jumping through secondary or tertiary statutory interpretation hoops beyond the written words.\textsuperscript{76}

1. \textit{The ADEA Text for Applicants to Raise Disparate Impact Claims Is Missing}

The ADEA’s development in 1967 came on the heels of a Congress-commissioned Secretary of Labor report on age discrimination.\textsuperscript{77} This report, the \textit{Wirtz Report}, involved extensive

\textsuperscript{70} Smith, 554 U.S. at 236.

\textsuperscript{71} Id. at 232.


\textsuperscript{73} Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 967 (11th Cir. 2016).

\textsuperscript{74} Canon of Construction, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A rule used in construing legal instruments, especially contracts and statutes; a principle that guides the interpreter of a text.”).


\textsuperscript{76} Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 HARV. L. REV. 2118, 2118 (2016).

\textsuperscript{77} Glenn & Little, supra note 5.
study regarding the plight of “older workers” specifically, employers’ tendencies to terminate older workers’ employment and employers’ failure to hire workers age forty and over. Given the proximity of the Wirtz Report to the ADEA’s inception, it would be untenable to argue that applicants were not considered in the ADEA’s development. The statute’s development contemplated older applicants in the case of employer practices; however, only in ADEA § 4(a)(1), not § 4(a)(2)—the section that Smith recognized as providing ADEA’s disparate impact right—
does the ADEA reference unlawfulness when employers “fail or refuse to hire . . . because of such individual’s age.”

The text of the statute is clear: an employer’s failure-to-hire or refusal-to-hire actions of non-employee job applicants are only included in ADEA § 4(a)(1), providing a claim for disparate treatment. ADEA § 4(a)(2), alternatively, provides protection to “an individual only if he has a ‘status as an employee.’” To read non-employee applicants into § 4(a)(2) requires textual gymnastics that run counter to the rules of statutory interpretation. Courts agree: “If the text of the statute is clear, ‘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.’” Here, Congress provided clarity in the statute by adding words to include coverage for non-employee job applicants in ADEA § 4(a)(1) but declining to use the same non-employee applicant inclusive language in § 4(a)(2)—the only subpart giving rise to disparate impact claims under the ADEA. Thus, if the statute’s language or lack thereof is clear, the judicial inquiry is complete.
2. Section 4(a)(2)'s Text Differs from Other Parts of the ADEA

In addition to the clear omission of words in ADEA § 4(a)(2) that would give disparate impact claim rights to non-employee applicants, the employment status language giving rise to ADEA disparate impact claims differs not only from § 4(a)(1) but also from ADEA subsections 4(b), 4(c)(2), and 4(d). In each of these subsections, the statute provides overt recognition of applicants as protected from the unlawful practices listed. Clearly, Congress knows how to phrase legislation to include non-employee job applicants within the statute’s purview.

ADEA § 4(b) explicitly provides that an employment agency’s “fail[ure] or refus[al] to refer for employment . . . any individual because of . . . age” is unlawful. Like § 4(a)(1), this portion of the

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92. Id. § 623(b) (“Employment agency practices[;] It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual’s age, or to classify or refer for employment any individual on the basis of such individual’s age.”).
93. Id. § 623(c)(2).
(c) It shall be unlawful for a labor organization—
(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;
(2) 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 . . . .
94. Id. § 623(c)(1)–(2) (emphasis added).
It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for employment, because of such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.
96. (emphasis added).
“A business that procures, for a fee, employment for people and employees for employers. Whether the employer or the employee pays the fee depends on the terms of the agreement.” Employment Agency, BLACK’S LAW DICTIONARY (11th ed. 2019).
ADEA erases any question about whether non-employee applicants qualify by specifically outlining age discrimination protection for workers before employment.99 Additionally, ADEA § 4(d) prohibits age discrimination by an employer when “any of his employees or applicants for employment . . . opposed any practice made unlawful by [the ADEA] . . . or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.”100 Here, again, a subsection of the same comprehensive statute overtly includes applicants versus § 4(a)(2)’s clear omission of applicants and the hiring process.101

Finally, ADEA § 4(c), governing labor organization practices,102 is crafted to mirror § 4(a), applicable to employers,103 including distinct subsections giving rise to disparate treatment and disparate impact claims, respectively.104 However, the two subsections expressly differ in that § 4(c) references “any individual because of his age” and actions that “limit such employment opportunities or . . . adversely affect his status as an employee or as an applicant for employment, because of . . . age[,]”105 whereas § 4(a)(2) entirely omits any reference to applicants for employment.106 Here, again, Congress chose to include applicant language within another subsection of the ADEA, § 4(c), without doing the same in a preceding provision, § 4(a)(2).107 In citing to Reading Law by Antonin Scalia and Bryan Garner, Villarreal quotes: “The text must be construed as a whole. A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in

99. Id.
100. Id. § 623(d) (emphasis added).
101. Id. § 623(a)(2), (d).
102. Id. § 623(c). “A labor organization is an association of workers who have combined to protect or promote their interests by bargaining collectively with their employers to secure better working conditions, wages, and similar benefits.” Labor Organizations, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/other-non-profits/labor-organizations [https://perma.cc/E4TH-T6A8] (last visited Sept. 25, 2019).
105. ADEA, 29 U.S.C. § 623(c) (emphasis added).
106. Id. § 623(a).
the meaning.”108 As illustrated by ADEA subsections 4(a)(1), 4(b), 4(c), and 4(d), Congress knew how to grant non-employee applicants ADEA protection; hence, the stark omission of applicant language in § 4(a)(2) requires a reading to include only those individuals with “status as an employee.”109

The 1967 Wirtz Report, noted previously as the impetus for the ADEA’s creation, studied the plight of older workers, both actively working and those seeking employment,110 and served as the research driven legislative foundation for this statutory protection of workers age forty and older. Leaning on that report, Congress expressly included the coverage of non-employee job applicants in ADEA subsections 4(a)(1), 4(b), 4(c)(2), and 4(d).111 However, Congress’s overt omission of any non-employee job applicant language in ADEA § 4(a)(2), in contrast to the language choices in those other subparts of the ADEA112 and the research embedded in the legislative foundation’s Wirtz Report,113 further solidifies the position that, as drafted today, § 4(a)(2) of the ADEA does not, nor did Congress intend for it to, provide a non-employee job applicant disparate impact right under the ADEA. Yet again, if the statute’s language or lack thereof is clear, the interpretive role of the judiciary ends.114

B. The ADEA Differs from Title VII

The ADEA is often described as a Title VII offshoot because it passed just three years after Title VII.115 Although legislative records indicate that age was debated as a potential protected class when Title VII was drafted, age did not make the cut in Title VII’s protections of race, color, sex, religion, and national origin.116 Instead, age received its own unique protections under the ADEA in

108. Id.
110. WIRTZ REPORT, supra note 78, at 7.
111. ADEA, 29 U.S.C. § 623(a)(1), (b), (c)(1)- (2), (d).
112. See id. § 623(a)(1), (b), (c)(1)- (2), (d); Villarreal, 839 F.3d at 963.
113. WIRTZ REPORT, supra note 78, at 7.
114. Villarreal, 839 F.3d at 963; Kavanaugh, supra note 76, at 2120.
115. Glenn & Little, supra note 5.
116. Id.
1967 after completion of the *Wirtz Report*.\(^{117}\) Although separate statutes, the courts through the years often interpreted Title VII and the ADEA similarly.\(^{118}\) For example, the Court in *Smith* held that “the ADEA does authorize recovery in ‘disparate[]impact’ cases comparable to *Griggs v. Duke Power Co.*,\(^{119}\) a purely Title VII challenge. Title VII does recognize disparate impact claims for both applicants and employees;\(^{120}\) however, the disparate impact right in *Griggs* specifically applied to employees, not non-employee applicants.\(^{121}\)

*Griggs*, a 1971 seminal case, established the disparate impact theory as cognizable under Title VII.\(^{122}\) This case involved thirteen African-American employees of a power generation facility claiming that the requirement of obtaining a high school education or passing an intelligence test to transfer out of the lowest paying department in the company had a disparate impact on African-American versus Caucasian employees.\(^{123}\) Before Title VII’s passage, this defendant-employer had an overt policy of discrimination, precluding African-American employees from working in any department except for the lowest paying labor department.\(^{124}\) To comply with Title VII, the company introduced a facially neutral policy\(^{125}\) to


\(^{119}\) *Smith*, 554 U.S. at 232.

\(^{120}\) Title VII of the Civil Rights Act, 42 U.S.C. § 2000e–2(a)(2) (2012). Though, today, Title VII covers both applicants and employees, the *Griggs* case only contemplated a disparate impact right for employees, not non-employee applicants, and the case did so before the amendment of Title VII’s additional coverage for applicants for employment. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 968 (11th Cir. 2016).


\(^{122}\) *Smith*, 554 U.S. at 234–35.


\(^{124}\) *Id.* at 426–27.

\(^{125}\) *Id.* at 427–28. A facially neutral policy or factor means that the charging party must “identify the particular employment practice causing” a disproportionate impact on a protected class of people.
replace its previously overt and intentionally discriminatory race-based policy. The Court, however, deemed the new facially neutral policy to have the effect of “freeze[ing]” the status quo of prior discriminatory employment practices,” an unlawful disparate impact on African-Americans under Title VII. Although Griggs involved job qualifications to enter certain employer defined roles, the plaintiffs there were employees, not non-employee applicants. Thus, the connection of the ADEA disparate impact theory determined in Smith to the comparable Title VII disparate impact theory found in Griggs only supports the disparate impact theory recognition for employees. This position harmonizes with the prior statutory language arguments; without express inclusion of non-employee job applicant language at the time of a court’s statutory review, the interpretive role of the judiciary ends when it encounters unambiguous statutory language.

Although it is true today that either employees or non-employee applicants may raise Title VII disparate impact claims, the rights of applicants under Title VII developed only after Title VII’s amendment and a subsequent Griggs case, Dothard v. Rawlinson, leveraging the amended language. The 1977 Dothard case...

WILLBORN ET AL., supra note 1, at 457. The employer need not have any discriminatory intent and may actually have good intentions when designing the policy that is later deemed to have a disproportionate impact on a legally protected group of individuals. Griggs, 401 U.S. at 432. “Congress directed the thrust of the Act [Title VII] to the consequences of employment practices, not simply the motivation.” Id. (emphasis added).

127. Id. at 430.
128. Id. at 426.
132. Title VII of the Civil Rights Act, Pub. L. No. 92-261, 86 Stat. 109 (1972). In 1972, Congress amended numerous provisions of Title VII of the Civil Rights Act of 1964, including an amendment adding applicants to the statute’s protections. Id. This amendment adding applicants for employment to the already covered employees in the statute’s purview took place after the Griggs case—involving only employees of the defendant-employer—was decided in 1971. See generally Griggs, 401 U.S.424.
recognized a non-employee job applicant’s right under Title VII to bring a claim for discrimination under a theory of disparate impact but grounded the decision in Title VII’s amended language of “employees or applicants for employment.”134 This case did not overrule Griggs or extend Griggs to include applicants.135

Even with this case law illustrating that Griggs granted an employee disparate impact right under Title VII136 while the same Title VII disparate impact right for non-employee applicants did not arise until Dothard—a case decided after Title VII’s amendment adding a reference to applicants—137 some still argue that the ADEA provisions “were derived in haec verba138 from Title VII.”139 Those proponents, therefore, argue that the two distinctly different statutes should be interpreted equally as it relates to the unique protected classes named in the statutes.140 The 2009 five to four Gross v. FBL Financial Services decision debunked the myth that Title VII and the ADEA must track together for interpretation.141

In Gross, a fifty-four-year-old, long-tenured employee of FBL Financial Services sued his employer under the ADEA for reassigning him from his position of claims administration director to

five feet two inches tall. Id. at 323–24. Rawlinson did not meet the weight requirement, and her application was rejected for that reason. Id. at 324. Rawlinson argued that the minimum weight requirement violated federal law on the basis of sex, and after filing an EEOC charge and receiving a right-to-sue letter, Rawlinson filed suit “on behalf of herself and other similarly situated women, challenging the statutory height and weight minima as violative of Title VII.” Id. at 323–24.

136. Dothard, 433 U.S. at 328; Villarreal, 839 F.3d at 968. “In enacting Title VII, Congress required ‘the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.’” Dothard, 433 U.S. at 328 (quoting Griggs, 401 U.S. at 431).
138. In Haec Verba, BLACK’S LAW DICTIONARY (11th ed. 2019). The phrase in haec verba is Latin for “[i]n these same words; verbatim.” Id.
140. Id. at 183 (Stevens, J., dissenting). “[W]e have long recognized that our interpretations of Title VII’s language apply ‘with equal force in the context of age discrimination, for the substantive provisions of the ADEA’” (Stevens, J., dissenting) (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)).
141. Id. at 174.
claims project coordinator. Gross argued “that his reassignment was based at least in part on his age” even if other reasons for the employment action existed. The plaintiff here relied on the motivating factor framework applicable to Title VII intentional discrimination claims; however, the Court ruled that this motivating factor framework did not apply to claims under the ADEA. Congress amended Title VII in 1991, adding this motivating factor causation framework, but did not amend the ADEA to add this provision. “When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.” For an ADEA aggrieved plaintiff to prevail, he or she must prove that their age was the “but-for” cause of the undesired employment action, not merely one of the motivating factors. By holding that the mixed-motive instruction endorsed under Title VII does not apply under the ADEA, the Court made it clear that Title VII and the ADEA are two distinct statutory animals.

It follows that if Congress’s intention was to include applicants in the recognized disparate impact provision of the ADEA, it would have done so. Neither Title VII nor the ADEA has been free from amendment since their respective passages in 1964 and 1967.

142. Id. at 170.
143. Id.
145. Id. at 174.
146. Id. (citing Equal Emp’t Opportunity Comm’n v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)).
147. Id. at 176.
148. Id. at 170, 173.
149. Id. at 173.
however, even with the ADEA’s amendments, the word “applicant” or the idea of “hiring activities” have not been added to § 4(a)(2), the section giving rise to disparate impact claims.151 “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”152 If the statute’s language or lack thereof is clear, the judicial inquiry is complete.153

III. Proposal

To settle the debate on whether non-employee job applicants may bring disparate impact claims under the ADEA, the Supreme Court must grant certiorari in a future case to resolve the varied views and interpretations of federal courts on this issue.154 The role for the Court then is quite simple—read and hold to the plain language of ADEA § 4(a)(2) that provides no reference to applicants or individuals contemplated for hire.155 This proposal runs counter to the argument that the ADEA is a broad-brush piece of legislation providing protection for all individuals, whether currently working or seeking work, age forty and over.156

If Congress’s current desire is to protect both employees and non-employee job applicants, then a simple amendment to § 4(a)(2) adding an explicit reference to applicants for employment, like Title VII’s 1972 amendment, is all that would be needed.157 However, as uncomplicated as this language addition might be, the congressional exercise would likely be futile in practice based on the defenses available for both disparate treatment and disparate impact claims in

(ADEA) 9–10 (2018).
153. Kavanaugh, supra note 76, at 2120.
154. See Kleber v. CareFusion Corp., 914 F.3d 480, 481 (7th Cir. 2019); Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016); Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126, 1127 (N.D. Cal. 2017).
156. See generally 29 C.F.R. § 1625.2 (2007); Glenn & Little, supra note 5.
§ 4(f)(1). Particularly for disparate impact claims, *Smith* notes that “[u]nlike Title VII . . . § 4(f)(1) of the ADEA . . . contains language that significantly narrows its coverage by permitting any ‘otherwise prohibited’ action ‘where the differentiation is based on reasonable factors other than age’ . . . . ” *Smith v. City of Jackson,* 554 U.S. 228, 233 (2005). Hence, even if non-employee job applicants were added to the ADEA’s disparate impact provision, the desired effect, supporting older workers in their quest for gainful employment, is unlikely because the additional language would produce little, if any, real change.

A. The Reasonable Factor Other Than Age Defense

Although the ADEA prohibits intentional age-based discriminatory practices and facially neutral practices that have a disparate impact on older workers, the statute includes affirmative defenses for both of these otherwise unlawful practices. *ADEA, 29 U.S.C. § 623(a)(1)–(2), (f)(1); Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 91 (2008).*

The bona fide occupational qualification (BFOQ) is an affirmative defense arising under Title VII and the ADEA for disparate treatment cases. *ADEA, 29 U.S.C. § 623(f)(1); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(c),(k) (2012).*

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160. *See generally* 29 C.F.R. § 1625.2; *Glenn & Little,* *supra* note 5.
necessary to the essence of the employer’s business and that the employer must be compelled to rely on the facial classification as a proxy for the reason validated in the first part of the test.\(^\text{164}\) The Court in *Western Air Lines* noted that the BFOQ standard is one of “reasonable necessity,” not merely reasonableness.\(^\text{165}\) However, in *Meacham v. Knolls Atomic Power Laboratory*, the Court recognized that the ADEA’s BFOQ defense only “establishes an affirmative defense against claims of disparate treatment,” whereas the appropriate affirmative defense against an ADEA claim of disparate impact is reasonable factors other than age (RFOA).\(^\text{166}\)

In contrast to the BFOQ’s strict application of reasonable necessity, the RFOA defense only requires that the facially neutral “factor relied upon was a ‘reasonable’ one for the employer to be using . . . . [A] reasonable factor may lean more heavily on older workers . . . .”\(^\text{167}\) With this statutorily defined defense squarely outlined by Congress in the ADEA, the likelihood of an employer not having at least one reasonable business factor for a facially neutral employment policy is improbable. Especially as it relates to applicants and years-of-experience targets, employers have a myriad of reasons—employee retention; the role’s value to the organization and in the competitive job market; and the establishment of a culture of growth, development, and promotion from within—they might cite for the practice.\(^\text{168}\) An applicant-plaintiff would be hard-pressed to argue that those factors do not represent reasonable business factors and hence, the non-employee applicant-plaintiff would find his disparate impact claim dead on arrival.

\(^{165}\) Id. at 419.
\(^{167}\) Id. at 96.
B. EEOC Only Seeking a Legitimate Business Purpose

For those who argue ADEA § 4(a)(2) disparate impact provision applies to non-employee job applicants despite the statute’s plain language reference only to employees, their premise is that the language in this portion of the ADEA is ambiguous. Once a court defines language as ambiguous, the court then moves to the next step in the statutory interpretation chain—deference to the statute’s enforcement agency. For the ADEA, the EEOC is that enforcement agency. Although the EEOC views the ADEA disparate impact provision as reaching both employees and non-employee job applicants, the enforcement agency also recognizes the limited applicability of ADEA disparate impact claims resulting from the RFOA affirmative defense.

Following the rulings in Smith and Meacham and a lengthy EEOC notice of rulemaking comment period, the EEOC, in March 2012, issued its final rule concerning disparate impact and reasonable factors other than age. Here, the EEOC’s rule clarified that the appropriate defense for ADEA disparate impact claims was RFOA rather than business necessity and explained the meaning of the RFOA defense. The EEOC describes an employment practice as being “based on an RFOA when it was reasonably designed and

169. See Kleber v. CareFusion Corp., 888 F.3d 868, 877 (7th Cir. 2018), aff’d on reh’g en banc, 914 F.3d 480 (7th Cir. 2019); Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126, 1128, 1132 (N.D. Cal. 2017).
171. About EEOC, supra note 19.
172. See generally 29 C.F.R. § 1625.2 (2007); Glenn & Little, supra note 5.
175. Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act, supra note 174, at 19080.
176. Questions and Answers, supra note 173, at No. 3.
administered to achieve a *legitimate business purpose* in light of the circumstances, including its potential harm to older workers.** The EEOC provides a non-exhaustive list of considerations relevant to this reasonableness assessment, including components like the employer’s stated business purpose, the employer’s fair and accurate application of the defined factor, the degree of harm to individuals within the protected age group, and any steps taken to reduce the harm. Clear in the EEOC guidance, a successful RFOA defense does not require an employer to meet all of these considerations; moreover, the employer may still assert a successful RFOA defense without meeting any of these listed considerations. This defense’s practical results are that time and again, plaintiffs, after identifying a specific employment practice ripe for an ADEA disparate impact claim, will find themselves on the losing end of such claim with an employer citing one of many business reasons for these facially neutral practices (e.g., market pay increases, targeted years of experience, focused recruiting on college campuses, or specific technology skills) that disparately impact older workers.

C. **Provide Employers the Knowledge and Incentive to Thrive with Older Workers**

Employers, especially in today’s exceedingly difficult labor market, are searching for the holy grail of talent recruiting and retention; yet, those same employers find themselves frustrated...
when navigating a complicated web of often ineffective regulation. Instead of clogging courts with non-fruitful ADEA disparate impact arguments by older job applicants where employers can typically provide one of many legitimate purposes for facially neutral employment practices, the more appropriate response would be using the EEOC’s voice and power to influence employers to hire older workers by educating and incentivizing employers on the benefits of such action. To further positive movement, congressional and EEOC action should focus on creating incentives for employers to hire older workers, those most susceptible to unconscious biases and stereotypes, and developing programs that increase older workers’ relevance in the workplace.

The concept of incentivizing employers to hire difficult to employ individuals instead of using a regulatory stick to drive action is not an untested idea. For example, the Work Opportunity Tax Credit (WOTC) program, created in 1996 and renewed eleven times since its inception, provides a federal tax credit to employers for hiring individuals in targeted and underserved groups. Although WOTC program research is limited, a Government Accountability Office research study “concluded that ‘the tax subsidy was by far the factor motivating employers to hire WOTC eligible workers.’” Additionally, Peter Cappelli, a Wharton School professor, analyzed

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185. Work Opportunity Tax Credit, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit [https://perma.cc/9LRZ-GQXJ] (last visited Sept. 25, 2019). The WOTC program provides tax credits to employers that hire individuals from targeted groups like supplemental nutrition assistance program recipients, veterans, and supplemental security income recipients. Id. Once an employer acquires certification that an individual hired is a member of a targeted group, the employer then takes a tax credit to offset a portion of the business’s income tax liability. Id.

the WOTC program through limited, program-specific research and a comparison to a broad range of other well-researched employment subsidy programs and determined the WOTC program was cost-effective for society.\textsuperscript{187} Not only does society benefit from these now-employed workers being less dependent on governmental programs, like welfare, employers benefit from the coveted tax credit with an estimated “three-quarters of employers chang[ing] their employment practices in some way to accommodate WOTC recipients[] and half chang[ing] training practices.”\textsuperscript{188}

The EEOC recognizes improvement in blatant or intentional discrimination since the ADEA’s 1967 passage; however, the agency notes that today’s age discrimination often stems from age-based stereotypes and unconscious biases rather than intentional discriminatory actions.\textsuperscript{189} In a survey conducted in 2017, “[six] out of [ten] older workers have seen or experienced age discrimination in the workplace[,] and [ninety] percent of those say it is common.”\textsuperscript{190} These high rates of perceived age discrimination, however, resulted in only three percent of these older workers’ discriminatory experiences being reported as formal complaints either in the workplace or to a regulatory agency like the EEOC.\textsuperscript{191} The statistics clearly demonstrate that regulation alone cannot and has not solved this pervasive issue. Instead, employers must be educated and incentivized to drive real improvement for older workers, debunking myths plaguing the aging workforce.\textsuperscript{192}

Stereotypes about older workers are that they cost more than younger workers for the same job, have an increased absence rate due to illness, do not exhibit the same mental agility that younger workers


\textsuperscript{188} English, supra note 186, at 522.

\textsuperscript{189} LIPNIC, supra note 150, at 22–23.

\textsuperscript{190} Id. at 4.

\textsuperscript{191} Id. at 28.

might, and are less productive and relevant in the workplace.\textsuperscript{193} Alternatively, some cutting-edge employers are refusing to fall prey to these stereotypes and are instead leveraging older workers to shore up the skills shortages faced in America.\textsuperscript{194} These employers recognize the strengths of experienced workers, citing the older workers’ good judgment, unvarnished insight, ability to parse the clutter from what truly matters in a particular situation, emotional intelligence exhibited through keen listening and a strong sense of self, and holistic thinking.\textsuperscript{195}

As noted by the 1973 Senate Special Committee on Aging, the “ADEA was enacted, not only to enforce the law, but to provide the facts that would help change attitudes.”\textsuperscript{196} Those facts, with the power to nullify some of the long-term biases against aging workers, exist. For example, with a focus on market-based competitive wage benchmarking by job,\textsuperscript{197} older workers do not always cost more than younger workers for the same market-priced job. Additionally, the return on investment in an older worker may be higher with millennials changing jobs about every three years versus older workers seeking stability and delivering longer tenures.\textsuperscript{198} This increased retention decreases turnover costs and stems the loss of employer-specific knowledge.\textsuperscript{199} Finally, “[a]ge is positively correlated with employee engagement, as workers age [fifty] and older have the highest levels of engagement in the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{195} Krapivin, \textit{supra} note 194.
\item \textsuperscript{196} LIPNIC, \textit{supra} note 150, at 3.
\item \textsuperscript{197} Building a Market-Based Pay Structure from Scratch, SOC’Y FOR HUMAN RES. MGMT. (Jan. 12, 2018), https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/buildingamarket-basedpaystructurefromscratch.aspx.
\item \textsuperscript{198} LIPNIC, \textit{supra} note 150, at 43.
\item \textsuperscript{199} Id. at 44.
\end{enumerate}
\end{footnotesize}
workplace. . . . [H]igh employee engagement increases employee productivity.” 200

For unconscious biases to dissipate, especially in the hiring realm, and for employers to reap the rewards of older workers, companies must proactively work to change their facially neutral but nonetheless age-limiting practices. Small changes in hiring processes could result in significant changes for older applicants. For example, employers removing years-of-experience maximums from job postings and delivering web content and graphics that depict the multi-generational workforce they seek 201 would open the labor pool to individuals often excluded before even entering the interview process. 202 Additionally, employers’ creation of age-diverse interview teams has the potential to reduce or eliminate the tendency for interviewers to gravitate toward hiring someone like themselves. 203 “Age discrimination is legally wrong and has been since the ADEA took effect five decades ago[,] but it remains too common and too accepted in today’s workplace.” 204 Additional punitive regulation is not the answer; employer education and incentives are.

CONCLUSION

Fifty years since its passage, courts are still interpreting the ADEA’s language, specifically as it relates to a non-employee job applicant’s right to claim disparate impact from an employer’s facially neutral employment practice. 205 Despite clear statutory language, 206 opponents who believe the disparate impact theory of recovery should be available to job applicants argue ambiguity, and

200. Id.
201. Id. at 43.
202. Kleber v. CareFusion Corp., 888 F.3d 868, 877 (7th Cir. 2018), aff’d on reh’g en banc, 914 F.3d 480 (7th Cir. 2019).
203. LIPNIC, supra note 150, at 43–44.
204. Id. at 40.
205. See Kleber, 914 F.3d at 481; Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016); Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126, 1127 (N.D. Cal. 2017).
therefore, deference to the EEOC’s position on the matter.\textsuperscript{207} The EEOC, ignoring the plain language of the statute, recognizes this disparate impact right as arising for non-employee job applicants;\textsuperscript{208} however, in practice, this right provides little, if any, relief to older workers attempting to acquire gainful employment. Instead of continuing to waive the ADEA enforcement stick at disparate impact claims, a stick that packs little punch due to an employer’s recognized RFOA affirmative defense,\textsuperscript{209} Congress and the EEOC must leverage their voices and subsequent action to educate and incentivize employers, shucking the negative myths associated with older workers and embracing the benefits workplace age diversity produces.

\textsuperscript{207} 29 C.F.R. § 1625.2 (2007).
\textsuperscript{208} Id.
\textsuperscript{209} Questions and Answers, supra note 173, at No. 8.