WILL YOU STILL NEED ME, WILL YOU STILL HIRE ME, WHEN I'M SIXTY-FOUR: DISPARATE IMPACT CLAIMS AND JOB APPLICANTS UNDER THE ADEA

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As life expectancy increases, the expected retirement age also rises. More Americans are working past the traditional retirement age, with almost 19% of people sixty-five or older working at least part-time. However, with a focus on technological advancement, companies are increasingly giving preference to younger applicants, or "digital natives," both at entry level and management positions. The age and experience that was once seen as a plus for job candidates is now working against elderly Americans.

Currently, the Age Discrimination in Employment Act ("ADEA") bars employers from discriminating against employees because of age. There is a developing split amongst circuit courts, however, as to whether this protection extends to include job applicants. In 2016, the Eleventh Circuit ruled that the protections under the ADEA are limited to employees and thus applicants are unable to bring disparate impact claims against prospective employers. In contrast, the Northern District of California and the Seventh Circuit have ruled in favor of applicants, holding that the protections provided by the ADEA extend to job applicants. The Seventh Circuit later vacated this opinion and recently reheard the case en banc.

This Note surveys the jurisdictional split on whether job applicants are protected under the ADEA. The Note recommends that the Seventh Circuit maintain its original ruling in agreement with the ruling of the Northern District of California, which allows age discrimination laws to protect both employees and applicants. Protecting applicants as well as employees would further congressional intent and promote justice by treating potential employees equally, regardless of age.

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I. Introduction

With increases in life expectancy, people are living past the age of sixty-five, and as a result, many people have realized that sixty-five is no longer an appropriate age to retire. More Americans are working past the traditional retirement age, with Bloomberg reporting earlier this year that almost 19% of people sixty-five or older are working at least part-time.[1] According to the U.S. Bureau of Labor statistics, people over the age of sixty-five are expected to be the fastest growing demographic in the workplace by 2024 as Baby Boomers age.[2] More people wanting to remain in the workforce longer has led to a few different issues in terms of employment discrimination. These issues involve workers over age sixty-five, in addition to those in their mid-to-late fifties, who are looking for another career opportunity but may struggle to find new jobs because many companies believe older workers' careers should be concluding at that age.[3]

Technological advances and the idea of "digital natives" have resulted in companies looking for younger potential employees, both at entry level and management positions.[4] This result makes it more difficult for older people to pursue new opportunities.[5] The age and experience that was once seen as an advantage for job candidates is now working against them.[6] This issue also affects employed elders, as they often find themselves butting heads with bosses who are much younger

1. Ben Steverman, *Working Past 70: Americans Can't Seem to Retire*, BLOOMBERG (July 10, 2017, 3:00 AM), https://www.bloomberg.com/news/articles/2017-07-10/working-past-70-americans-can-t-seem-to-retire [hereinafter Steverman].

2. Jena McGregor, *Retirement, deferred: Workers– and companies– grapple with a new reality*, WASH. POST (July 19, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/07/19/retirement-deferred-workers-and-companies-grapple-with-a-new-reality/?utm_term=.6e5377dd4b1e.

3. *See, e.g.*, Jessica Contrera, *She needs a job. The economy is in great shape. It should be easy, right?*, WASH. POST (Aug. 7, 2017), https://www.washingtonpost.com/lifestyle/style/she-needs-a-job-the-economy-is-in-great-shape-it-should-be-easy-right/2017/08/07/f79c1f14-794e-11e7-8839-ec48ec4cae25_story.html?utm_term=.8733c4281222 [hereinafter Contrera]; Joanne Kaufman, *When the Boss Is Half Your Age*, N.Y. TIMES (Mar. 17, 2017), https://www.nytimes.com/2017/03/17/your-money/retiring-older-workers-younger-bosses.html?rref=collection%2Fcolumn%2Fretiring [hereinafter Kaufman].

4. *See* Ann Brenoff, *There's No Such Thing As 'Digital Natives'*, HUFFPOST (Aug. 24, 2017, 4:10 AM), https://www.huffingtonpost.com/entry/digital-natives-dont-actually-exist_us_599c985de4b0a296083a9e8a [hereinafter Brenoff].

5. Kaufman, *supra* note 3.

6. *Id.*

than them, which can lead to issues in the work environment and potentially termination.[7] Age discrimination is illegal in the United States under the Age Discrimination in Employment Act ("ADEA"),[8] but that does not stop employers from focusing on younger candidates when considering applicants.[9]

The consideration of age at the application stage has resulted in a dramatic increase in the number of ADEA claims.[10] Over the last ten years, the average number of claims per year increased over 25% as compared with the prior ten years.[11] This increase occurred in spite of the fact that the ADEA does not afford elderly individuals the same protections that protected classes receive under Title VII.[12] The Eleventh Circuit ruled in 2016 that job applicants are not able to bring disparate impact claims against employers, as the protections under the ADEA are limited to employees.[13] Conversely, the Northern District of California ruled in 2017 that these protections do reach applicants.[14] A little over a year later, the Seventh Circuit followed suit, also ruling in favor of applicants; however, that decision is currently under review after a rehearing en banc.[15]

This Note proposes that courts adopt the ruling of the Northern District of California and that the Seventh Circuit maintain its original

7. *Id.*

8. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–633a (2012).

9. Kaufman, *supra* note 3 ("Companies these days are looking to fill the management ranks with people who are 'digital natives' which frequently translates to millenials and Gen X-ers.").

10. *See* KIMBERLY D. JONES, CONG. RESEARCH SERV., RL 97479, THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA): OVERVIEW AND CURRENT LEGAL DEVELOPMENTS (2000) [hereinafter JONES].

11. *See Age Discrimination in Employment Act (Charges filed with EEOC) (includes concurrent charges with Title VII, ADA, EPA, and GINA) FY 1997 – FY 2017*, U.S. EQUAL EMP'T OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm (last visited Sept. 19, 2018).

12. *See generally* Villareal v. R.J. Reynolds Tobacco Co., 839 F.3d 958 (11th Cir. 2016).

13. *Id.*

14. *See generally* Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126 (N.D. Cal. 2017).

15. *See generally* Kleber v. CareFusion Corp., 888 F.3d 868 (7th Cir. 2018) *vacated and ren'g granted* No. 17-2016, 2018 U.S. App. LEXIS 17148 (7th Cir. 2018). Shortly before publication the Seventh Circuit ruled against plaintiff Kleber in an eight to four decision, limiting the protections to employees. Due to the timing of the opinion, the Seventh Circuit's *en banc* decision is not discussed in this Note. *See* Kleber v. CareFusion Corp., No. 17-1206 2019 WL 290241 (7th Cir. Jan. 23, 2019).

ruling in agreement with the Northern District of California, which allows age discrimination laws to protect both employees and applicants. Part II of this Note addresses information regarding the increase of elderly persons in the workforce and the difficulties they face when searching for employment. Part III discusses the types of employment discrimination claims and how the ADEA has been interpreted and applied by the courts to these methods. Part IV provides a recommendation, which suggests adopting the ruling of the Northern District of California and that the Seventh Circuit maintain its original ruling.

II. Background

Recently, there has been tremendous growth in the number of elderly individuals who participate, or desire to participate, in the workforce.[16] Seniors in the United States have been employed at the highest rates in the last fifty-five years.[17] While this number is the highest it has been in a long time, it is still much lower than it could be given that 60% of Americans want to work past sixty-five, according to a 2014 Merrill Lynch survey.[18] Similarly, 72% of pre-retirees over the age of fifty indicated that they would like to continue working in some capacity after retirement.[19] While nearly three out of four pre-retirees indicate plans of working past the age of retirement, the Bureau of Labor Statistics ("the Bureau") revealed that the hiring reality was much different: in 2017, 32% of Americans ages sixty-five to sixty-nine were employed and 19% of seventy- to seventy-four-year-olds were working.[20] Compared to the percentages in 1994, this was an increase from the prior 22% for ages sixty-five to sixty-nine, and the 11% for ages seventy to seventy-four.[21] Further, the Bureau projects that by 2024 the number of individuals ages sixty-five to sixty-nine who will be active participants in the labor market will rise to 36%.[22]

16. *See generally Rabin*, 236 F. Supp. 3d at 1126.
17. Steverman, *supra* note 1.
18. *Merrill Lynch Study Finds 72 Percent of People Over the Age of 50 Want to Work in Retirement: Americans Find Later Life Without Work to be Impractical and Undesirable*, BANK OF AM. (June 4, 2014 4:00 PM), http://newsroom.bankofamerica.com/press-releases/global-wealth-and-investment-management/merrill-lynch-study-finds-72-percent-people-o.
19. *Id.*
20. Steverman, *supra* note 1.
21. *Id.*
22. *Id.*

The labor force participation rate is defined as people who are "available for work," meaning those who are working or are actively looking for work; in 2014, about 40% of people age fifty-five or older were working or actively looking for work.[23] The labor force includes people ages sixteen and older who are either working or actively looking for work, excluding active-duty military personnel and the institutionalized population, such as prison inmates.[24] The labor force participation rate is expected to increase fastest for the oldest segments of the population—most notably, people aged sixty-five to seventy-four and seventy-five and older—through 2024, while participation rates for most other age groups are not projected to change.[25] From 1970 until the end of the twentieth century, older workers—which the Bureau defines as those aged fifty-five and older—made up the smallest segment of the labor force.[26] In the 1990s, these workers began to increase their share, and by 2003 the older age group no longer had the smallest share.[27]

By 2024, the Bureau projects that the labor force will grow to about 164 million people, including 14 million people who will be aged fifty-five and older—of whom about 13 million are expected to be aged sixty-five and older.[28] Sixty-five to seventy-four and seventy-five and older age groups are projected to have faster rates of labor force growth annually than any other age group.[29] The labor force growth rate of the sixty-five to seventy-four age group is expected to be about 55%, and the labor force growth rate of the seventy-five and older age group is expected to be about 86%, compared to the 5% increase for the labor force as a whole between 2014 and 2024.[30] Moving forward, it seems that the number of elderly people participating in the workforce will only increase.

The increase in elderly employees is fueled by the aging Baby Boomer generation, a large group of people born between 1946 and

23. Mitra Toossi & Elka Torpey, *Older Workers: Labor force trends and career options*, BUREAU OF LAB. STAT. (May 2017), https://www.bls.gov/careeroutlook/2017/article/older-workers.htm.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

1964.[31] By 2024, Baby Boomers will have reached ages sixty to seventy-eight.[32] People are working later in life for a number of reasons, including: they are healthier and have a longer life expectancy than previous generations; they are better educated, which increases their likelihood of staying in the labor force; they enjoy their jobs or want to stay active and alert; and they are responding to changes in Social Security benefits and employee retirement plans, along with the need to save more for retirement.[33]

Unfortunately, this desire or need to work later in life is often not met with great opportunity.[34] Seventy-nine percent of U.S. workers expect to supplement their retirement income by working for pay, but just 29% of retirees indicated they worked for pay at some point in their retirement.[35] The prevalence of ageism results in limited work opportunities for older individuals seeking employment, and the opportunities offered are often undesirable choices.[36] The National Bureau of Economic Research indicates that elderly individuals who work during retirement make an average $18,160 less per year because many switch to self-employment out of choice or necessity.[37]

While it is difficult to find definitive proof that employers are discriminating against older individuals in the workplace, there are many stories of people personally feeling forced out of offices or struggling to find opportunities when attempting to change jobs later in life.[38] Meanwhile, employers focus on young college graduates entering the workforce, with 74% of employers planning to hire recent college graduates in 2017.[39] This number has only increased in recent years; with the prior

31. *Id.*
32. *Id.*
33. *Id.*; *see* Steverman, *supra* note 1.
34. *See* Steverman, *supra* note 1.
35. *2017 Retirement Confidence Survey – 2017 Results*, EMP. BENEFIT RES. INST. (Mar. 21, 2017), https://www.ebri.org/surveys/rcs/2017/.
36. Jody Cline et al., *Improve Opportunities for State's Older Workers*, THE REGISTER-GUARD (Sept. 7, 2017), https://www.thefreelibrary.com/Improve+opportunities+for+sale%27s+older+workers.-a0503712123.
37. Shanthi Ramnath et al., *Pathways to Retirement Through Self-Employment*, NAT'L BUREAU OF ECON. RES. (2017), http://www.nber.org/papers/w23551 [hereinafter Ramnath].
38. *See, e.g.*, Brenoff, *supra* note 4; Contrera, *supra* note 3; Kaufman, *supra* note 3.
39. Maureen Minehan, *Spotlight: Could Hiring New College Graduates Land You in Hot Water?*, 23 No. 13 HR COMPLIANCE L. BULL. (Thomas Reuters/Quinlan, New York, N.Y.) (July 10, 2017) [hereinafter Minehan].

67% in 2016 being the highest point since 2007.[40] The difficulty elders face in the job market is also reflected by the fact that older persons who become unemployed spend more time searching for work than their younger counterparts, with nearly half of jobseekers over the age of fifty-five facing more than twenty-seven weeks of unemployment.[41]

III. Analysis

In 1967, Congress passed the ADEA to protect older individuals in the workforce.[42] The ADEA makes it unlawful for employers "to limit, segregate, or classify [their] 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."[43] Unfortunately, this proscription has not solved the problems elderly individuals face in the workforce. Ruth Milkman, a sociology professor at the City University of New York, explains that "[a]lthough age discrimination has been illegal for [fifty] years, employers continue to see older workers as a liability."[44] Because elderly individuals continue to face discrimination in the workforce, the interpretation and implementation of the ADEA remains an issue in courts today, fifty years after the act's enactment.

A. Disparate Treatment vs. Disparate Impact

Employment discrimination lawsuits can be brought under the theories of disparate treatment or disparate impact.[45] This section provides an overview of the differences between the two claims. It also discusses the limitations plaintiffs face when trying to bring claims under either theory.

40. *Id.*

41. *Record Unemployment Among Older Workers Does Not Keep Them Out of the Job Market*, U.S. BUREAU OF LAB. STAT. (March, 2010), https://www.bls.gov/opub/ils/pdf/opbils81.pdf.

42. *Age Discrimination*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/discrimination/agedisc (last visited Sept. 19, 2018).

43. 29 U.S.C. § 623(a)(2) (2012).

44. Steverman, *supra* note 1.

45. *The Difference Between Disparate Impact and Disparate Treatment*, WRADY & MICHEL, LLC (Oct. 1, 2015), http://www.wmalabamalaw.com/Employment-Law-Blog/2015/October/The-Difference-Between-Disparate-Impact-and-Disp.aspx.

1. DISPARATE TREATMENT

The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age."[46] This part of the statute conveys that individuals are allowed to bring disparate treatment claims under the ADEA.[47] Disparate treatment claims arise when a person or group of people are treated less favorably by an employer because of a protected characteristic, such as race, color, religion, or age.[48] Disparate treatment claims are considered to be those resulting from intentional discrimination.[49] Disparate treatment occurs under the ADEA when an employer intentionally discriminates against an employee or enacts a policy with the intent to treat, or has the effect of treating, the employee differently from other employees because of the employee's age.[50] This requires proof by direct or circumstantial evidence that the employer intended to discriminate against that protected class.[51]

For a plaintiff to succeed on a disparate treatment claim under the ADEA, the plaintiff must prove both that the employer acted with discriminatory intent or motive, and that age was the "but for" cause of the discrimination.[52] This differs from disparate treatment claims brought under Title VII of the Civil Rights Act of 1964.[53] In *Price Waterhouse v. Hopkins*, the Supreme Court held that in "mixed-motive" cases—situations where employers may be motivated by both illegal bias and some permissible reasons—the burden shifts to the employer under Title VII to show the action was not influenced by impermissible

46. 29 U.S.C. § 623(a)(1) (2012).

47. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609–10 (1993); *see also* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 120–25 (1985).

48. *See Hazen*, 507 U.S. at 609; *see also Disparate Treatment*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining disparate treatment as "[t]he practice, esp. in employment, of intentionally dealing with persons differently because of their race, sex, national origin, age, or disability.").

49. GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 56 (2011).

50. JONES, *supra* note 10, at CRS-6-7.

51. Carla J. Rozycki & Emma J. Sullivan, *Disparate-Impact Claims Under the ADEA*, AM. B. ASS'N (Sept. 2011), https://www.americanbar.org/publications/gp_solo/2011/september/disparate_impact_claims_adea.html [hereinafter Rozycki & Sullivan].

52. *Disparate Treatment*, BLACK'S LAW DICTIONARY (10th ed. 2014); ROBERT D. KLAUSNER & JOHN E. SANCHEZ, STATE AND LOCAL GOVERNMENT EMPLOYMENT LIABILITY § 24:6, Westlaw (database updated Oct. 2018) [hereinafter KLAUSNER & SANCHEZ].

53. KLAUSNER & SANCHEZ, *supra* note 52.

considerations.[54] This ruling was later incorporated into an amended version of the statute by Congress.[55]

This line of reasoning was not extended to disparate treatment claims brought under the ADEA.[56] In 2009, the Supreme Court ruled that the ordinary meaning of the words "because of" in the statute signals that the plaintiff has the burden of establishing age as the cause of the employer's adverse action.[57] Later that year, Congress reviewed bills that were introduced to restore the protections eliminated by the Supreme Court's ruling but they were never passed.[58] This difficulty in proving employment discrimination through disparate treatment claims has led individuals to bring employment discrimination under disparate impact claims instead.[59]

2. DISPARATE IMPACT

Unlike disparate treatment claims, a plaintiff who brings a disparate impact claim is not required to prove that he or she is the victim of discriminatory motive or discriminatory intent.[60] Because disparate treatment requires intentional action, disparate impact is often referred to as unintentional discrimination.[61] However, disparate impact is not always the result of unintentional actions. Disparate impact occurs when employment policies, practices, or rules that appear neutral have a disproportional impact on a protected group.[62] Disparate impact claims are based on the premise that "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[63] These claims cover practices and policies that do not intend to discriminate

54. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
55. Burrage v. United States, 571 U.S. 204, 213 n.5 (2014).
56. KLAUSNER & SANCHEZ, *supra* note 52.
57. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009).
58. KLAUSNER & SANCHEZ, *supra* note 52.
59. *Id.*
60. Keisha-Ann G. Gray, *The Difference Between Disparate Impact and Treatment*, HUM. RESOURCE EXEC. ONLINE (Aug. 30, 2012), http://www.hreonline.com/HRE/view/story.jhtml?id=533349910.
61. *EEO: General: What Are Disparate Impact and Disparate Treatment?*, SOC'Y FOR HUM. RESOURCE (Aug. 30, 2016), https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disparateimpactdisparatetreatment.aspx.
62. *See id.*; *see also* Rozycki & Sullivan, *supra* note 51.
63. *See* Pippin v. Burlington Res. Oil & Gas Co., 440 F.3d 1186, 1199 (10th Cir. 2006).

against a group of individuals but have the same effect as intentional discrimination.[64]

The disparate impact theory has long been recognized as a viable theory of discrimination under Title VII.[65] In 1989, the Supreme Court held that in bringing a disparate impact claim, the plaintiff has the burden of "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."[66] Should the plaintiff meet this standard, the burden shifts to the employer, who must produce evidence of a business justification for his employment practice.[67] Further, the employer must persuade the court that the business justification is a necessity to satisfy the affirmative defense.[68] This standard for disparate impact claims was extended to those brought under the ADEA by the Supreme Court in 2005.[69] Again, the Court provided employers the affirmative defense of arguing that the challenged employment practice is based on reasonable factors other than age.[70]

The Court expanded the protections of the ADEA by ruling that individuals may bring disparate impact claims under the ADEA.[71] Disparate treatment claims require proof that the employer intended to discriminate, which causes difficulty in prevailing on claims unless there is a clearly established record of discrimination.[72] Disparate impact claims, on the other hand, can be brought by an individual who may not have faced direct discrimination but can show that the employer engages in practices that have a disparate impact against the elderly.[73] Disparate impact claims are important in employment discrimination law because they may be established without proof of

64. Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 96 (2006).

65. Rozycki & Sullivan, *supra* note 51.

66. Wards Cove Packing v. Atonio, 490 U.S. 642, 656 (1989).

67. *Id.*

68. Rozycki & Sullivan, *supra* note 51.

69. *See generally* Smith v. City of Jackson, 544 U.S. 228 (2005).

70. *See* Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 84 (2008); *see Smith*, 544 U.S. at 228.

71. *See generally* CHARLES V. DALE & JODY FEDER, CONG. RESEARCH SERV., RS22170, THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND DISPARATE IMPACT CLAIMS: AN ANALYSIS OF THE SUPREME COURT RULING IN SMITH V. CITY JACKSON (2005) [hereinafter DALE & FEDER].

72. *Id.* at CRS-2 (providing example of discriminatory statements or behavior of a supervisor towards a subordinate).

73. LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 137.01, Lexis (database updated Apr. 2018).

discriminatory intent, often an insurmountable burden for individuals bringing disparate treatment claims.[74] One current issue with disparate impact claims is that some courts have established that disparate impact claims only protect employees.[75]

B. Developing Circuit Split

There is currently a split developing among the circuit courts as to whether the language of the ADEA should limit disparate impact claims to employees or extend to job applicants.[76] Since its inception, courts have found that the ADEA should be broadly interpreted to achieve its goal because "[t]he ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment."[77] Despite these suggestions for broad construction and application, the Eleventh Circuit recently ruled against allowing job applicants to bring claims against potential employers under the ADEA.[78]

1. VILLARREAL V. R.J. REYNOLDS TOBACCO CO.

The Eleventh Circuit case *Villarreal v. R.J. Reynolds Tobacco Co.* concerned a forty-nine-year-old plaintiff who applied for a territory manager position at R.J. Reynolds Tobacco.[79] R.J. Reynolds provided guidelines to a contractor for screening applicants that included describing the target candidate as someone who was two to three years out of college and could adjust easily to changes.[80] Further, the guidelines instructed to avoid applicants who had been in sales for eight to ten

74. DALE & FEDER, *supra* note 71.

75. Karim Lakhani, *Can job applicants bring disparate impact claims under the ADEA?*, ON LAB. (May 19, 2017), https://onlabor.org/can-job-applicants-bring-disparate-impact-claims-under-the-ADEA/.

76. *Compare* Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 974–75 (11th Cir. 2016) (holding that job applicants are not protected by ADEA), *with* Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126, 1133 (N.D. Cal. 2017) (holding that job applicants may bring disparate impact claims under ADEA), *and* Kleber v. CareFusion Corp., 888 F.3d 868, 870 (7th Cir. 2018) *vacated and reh'g granted* No. 17-1206, 2018 U.S. App. LEXIS 17148 (7th Cir. 2018).

77. Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976); *see also* Moses v. Falstaff Brewing Corp., 525 F.2d 92, 93 (8th Cir. 1975); Skoglund v. Singer Co., 403 F. Supp. 797, 801 (D.N.H. 1975).

78. *See Villarreal*, 839 F.3d at 963.

79. *Id.*

80. *Id.*

years.[81] Based on these parameters, Villarreal was screened out by the contractor.[82] In finding that there was no standing for Villarreal to bring a disparate impact claim against R.J. Reynolds as an applicant, the Eleventh Circuit based its decision on "[t]he plain text of section 4(a)(2)" and specifically focused on the ADEA's use of the words "or otherwise."[83] In her concurrence, Judge Rosenbaum acknowledged arguments in favor of expanding the ADEA's protections to include applicants, but determined that "since the statute is . . . susceptible of only a single interpretation as the Majority points out, we must abide by its plain meaning . . . ."[84]

Despite the majority and Judge Rosenbaum's concurrence in *Villarreal*, the language of the ADEA has been interpreted differently by other judges.[85] In a dissent joined by two others, Judge Martin stated that the *Villarreal* majority's holding, that the only reasonable reading of the ADEA limited its application to employees, was inaccurate.[86] Focusing on the statute's use of the phrase "any individual," the dissent argued that if Congress intended to protect a narrower group, such as employees only, it would have said so explicitly.[87] This line of reasoning was more recently applied by the Northern District of California, when the court allowed a job applicant to bring a disparate impact claim under the ADEA.[88]

2. RABIN V. PRICEWATERHOUSECOOPERS LLP

In *Rabin v. PricewaterhouseCoopers LLP*, a CPA in his fifties sued PricewaterhouseCoopers LLP ("PwC") after being rejected for a lower level accounting job.[89] Rabin's argument was based on PwC's hiring practices, which focused on hiring entry-level accountants through

81. *Id.*
82. *Id.*
83. *Id.* at 963 ("The key phrase in section 4(a)(2) is 'or otherwise adversely affect his status as an employee.' By using 'or otherwise' to join the verbs in this section, Congress made 'depriv[ing] or tend[ing] to deprive any individual of employment opportunities' a subset of 'adversely affect[ing] [the individual's] status as an employee.' In other words, section 4(a)(2) protects an individual only if he has a 'status as an employee.'").
84. *Id.* at 975 (Rosenbaum, J., concurring).
85. *See generally id.* at 973–93 (Martin, J., dissenting).
86. *Id.* at 982.
87. *Id.*
88. *See* Rabin v. PricewaterhouseCoopers, LLP, 236 F. Supp. 3d 1126, 1129 (N.D. Cal. 2017).
89. Minehan, *supra* note 39. Plaintiffs in *Rabin* filed a class action suit and are pursuing class status. This is a discussion of the named plaintiff's underlying claim.

campus recruiting instead of posting entry-level accountant positions on its website or providing a method for those not affiliated with a college to apply for these positions.[90] The complaint also cited PwC's numbers on the age of its workforce as evidence of ageism.[91] Also examining the plain language of the statute, the court focused on the use of the phrase "any individual" and interpreted that phrase to mean that the ADEA covers applicants as well as employees.[92] While admitting that the Supreme Court has not held that job applicants are included under the ADEA, the *Rabin* court noted that the Supreme Court's decision in *Griggs v. Duke Power Co.* required interpreting language similar to that in the ADEA.[93] Finally, the opinion considered that the EEOC's interpretation and legislative history also supported a more inclusive reading.[94] In the *Kleber v. Carefusion Corp.* 2018 opinion, which was later vacated and is currently under consideration following rehearing en banc, the Seventh Circuit expanded this argument while allowing a job applicant to bring a disparate impact claim under the ADEA.[95]

3. KLEBER V. CAREFUSION CORP.

In *Kleber v. CareFusion Corp.*, a fifty-eight-year-old attorney with extensive legal and business experience applied for a senior counsel position with the defendant, CareFusion Corporation.[96] Included in CareFusion's job posting was a requirement that applicants have "3 to 7 years (no more than 7 years) of relevant legal experience."[97] CareFusion rejected Kleber's application and later filled the position with a twenty-

90. *Id.*

91. Complaint at 9, Rabin v. PricewaterhouseCoopers, LLP, 236 F. Supp. 3d 1126, 1129 (N.D. Cal. 2017) (3:6-cv-02276) ("In a 2014 *Harvard Business Review* article, the U.S. Chairman of PwC trumpeted PwC's 'strikingly young' workforce: 'Because we recruit approximately 8,000 graduates annually from college and university campuses, two-thirds of our people are in their twenties and early thirties.'").

92. *See Rabin*, 236 F. Supp. 3d at 1128 ("The plain language of the statute supports the more inclusive interpretation. Critically, the ADEA uses the phase [sic] 'any individual,' rather than 'employee' to identify those people section 4(a)(2) protects. By contrast, elsewhere in the same provision, Congress chose the word 'employees' to refer to the people an employer may not 'limit, segregate, or classify.' [T]his reading of section 4(a)(2) is bolstered further by the fact that, elsewhere in the ADEA, Congress used the phrase 'any employee' to refer to the affected parties with a right to sue.").

93. *See id.*

94. *See id.* at 1132–33.

95. *See generally* Kleber v. CareFusion Corp., 888 F.3d 868 (7th Cir. 2018) *vacated and reh'g granted* No. 17-1206, 2018 U.S. App. LEXIS 17148 (7th Cir. 2018).

96. *Id.* at 871.

97. *Id.*

nine-year-old applicant.[98] The district court dismissed Kleber's disparate impact claim, holding that the ADEA's disparate impact provision does not cover those who are not already employed by the defendant.[99] In overturning the district court's decision, the Seventh Circuit focused on the plain language of the statute and considered the arguments of the *Villareal* and *Rabin* courts.[100] While the majority admitted the narrow reading was plausible based on the language of section 4(a)(2), it determined that the plain meaning of the phrase "or otherwise" did not necessitate it be read as a limitation on "any individual" earlier in the sentence.[101] The court explained that even if the decision must affect one's "status as an employee" to be protected under disparate impact, deciding whether an applicant becomes employed does in fact affect that person's status as an employee, and thus applicants should be protected by the language in paragraph (a)(2).[102] Writing in dissent, Judge Bauer echoed the *Villareal* court, arguing that an ordinary reading of the text limits the protections of section 4(a)(2) to employees and that the majority's interpretation required writing in words that Congress chose not to include.[103]

The *Kleber* court also looked beyond the text of the statute to consider the larger context of the ADEA and it expanded on the Supreme Court's decision in *Griggs v. Duke Power Co*.[104] First, the court considered the practical consequences of limiting disparate impact claims to employees, and identified the arbitrary results this distinction would create; however, the court also stated that Congress may draw arbitrary lines when it sees fit.[105] Second, the court reviewed congressional intent, concluding that the purpose of the ADEA strongly supports allowing

98. *Id.*

99. *Id.* at 872; *see infra* Section B at subsection 3 (discussing the 7th Circuit ruling on which the district court relied).

100. *See Kleber*, 888 F.3d at 872–73 (comparing the broad phrase "any individual" with the narrow "or otherwise adversely affect his status as an employee.").

101. *Id.* at 873 ("It is not self-evident—as a matter of plain meaning—that the last 'status' phrase be read as a limitation. A list culminating in an 'or otherwise' term could instead direct the reader to consider the last phrase alternatively, 'in addition to' what came before.").

102. *Id.*

103. *Id.* at 889–90 (Bauer, J., dissenting) (identifying other parts of the ADEA where Congress chose to include "applicants for employment" either explicitly or implicitly).

104. *Id.* at 874–84; *see also* Rabin v. Pricewaterhouse Coopers, LLP, 236 F. Supp. 3d 1126, 1128.

105. *See Kleber*, 888 F.3d at 875–76.

job applicants to bring disparate impact claims.[106] Third, the court applied the reasoning from *Griggs*, where the Supreme Court interpreted the same language of section 4(a)(2) to include job applicants under Title VII.[107] In doing so, the court rejected an argument from the defense that because the language of Title VII was amended after *Griggs* to explicitly include job applicants, but because no such change was made to the ADEA, Congress was in effect endorsing a narrower interpretation of the ADEA.[108] Based on that rationale, the Seventh Circuit ruled in favor of allowing job applicants to bring disparate impact claims under the ADEA and created a circuit split.[109] Two months later, however, the Court would vacate this decision in favor of a rehearing en banc.[110] The ruling of the full panel will be significant for the viability of such claims moving forward by either creating a true circuit split, or reinforcing the Eleventh Circuit's more restrictive position.

C. Disparate Impact, Applicants, and the ADEA

This subsection analyzes the ways disparate impact claims have been applied historically, and later applies this framework to the different rulings and reasonings of the *Villarreal*, *Rabin*, and *Kleber* courts. First, this subsection examines disparate impact claims brought by job applicants under Title VII and how those cases relate to similar claims brought under the ADEA. Second, this subsection discusses disparate impact claims brought under the ADEA in general and how those cases relate to claims brought by job applicants.

1. DISPARATE IMPACT AMONG APPLICANTS

In *Griggs*, the Supreme Court considered identical statutory language in the Civil Rights Act of 1964, Title VII.[111] Duke Power Company

106. *Id.* at 877–79.
107. *Id.* at 880.
108. *Id.* at 882.
109. *Id.* at 888–89.
110. Kleber v. CareFusion Corp., No. 17-1206, 2018 U.S. App. LEXIS 17148 (7th Cir. June 22, 2018).
111. Civil Rights Act of 1964: Title VII–Equal Employment Opportunity, Pub. L. No. 88-352, § 703(a)(2), 78 Stat. 241, 255 (1964) (making it 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 race, color, religion, sex, or national origin."); Griggs v. Duke Power Co., 401 U.S. 424, 426 n.1 (1971).

maintained a number of policies that required job applicants and employees seeking transfer to have a high school diploma and take standardized general intelligence tests, neither of which was shown to be related to successful job employment.[112] A number of African-American employees brought a class action lawsuit against Duke Power Co., arguing that the policies were discriminatory against non-white applicants and employees based on disparate impact.[113] In ruling that Title VII should be understood as including job applicants, the *Griggs* court explained that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[114] Congress later amended the language of the statute to more directly reflect the interpretation used by the *Griggs* court.[115]

In light of the dissenting opinion in *Villarreal*, the *Rabin* and *Kleber* opinions, and the Supreme Court's interpretation of identical language in *Griggs*, the question of to whom the ADEA applies is not as clear as the *Villarreal* majority's ruling makes it seem.[116] In considering which view is the correct one, it is important to acknowledge arguments that go beyond interpreting the plain text of the statute. As discussed by the Supreme Court in *Griggs*, the objective of Congress in enacting the ADEA is relevant to how one should interpret the language of the statute.[117] Similar to the statute in *Griggs*, the ADEA is remedial legislation that was passed to facilitate equality in employment.[118] As such, there is an argument that the ADEA should be interpreted broadly to effect

112. *See Griggs*, 401 U.S. at 426.
113. *Id.* at 426–27.
114. *Id.* at 429–30.
115. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 8(a), 86 Stat. 103, 109 (1972) ("Section 703(a)(2) of the Civil Rights Act of 1964 is amended by inserting the words 'or applicants for employment' after the words 'his employees.'") (internal citation omitted); *see also* 42 U.S.C. § 2000e-2(a)(2) (2012) ("It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.") (emphasis added).
116. *See Griggs*, 401 U.S. at 426–30; Kleber v. CareFusion Corp., 888 F.3d 868 (7th Cir. 2018) *vacated and reh'g granted* No. 17-1206, 2018 U.S. App. LEXIS 17148 (7th Cir. 2018); Villareal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 988-89 (11th. Cir. 2016) (Martin, I., dissenting); Rabin v. PricewaterCoopers, LLP, 236 F. Supp. 3d 1128 (N.D. Cal. 2017).
117. *See Griggs*, 401 U.S. at 429.
118. *See id.* at 426.

greater change.[119] The statute was enacted to protect elderly people, and any "[l]imitations which would take away a right from one for whom the statute was enacted have been required to be express and not subject to varying interpretations."[120] Despite the *Villarreal* court's reasoning that there was only one reasonable way to interpret the text of ADEA, the text has been subject to multiple interpretations.[121]

2. DISPARATE IMPACT UNDER ADEA

In 2005, the Supreme Court resolved a circuit split by holding that disparate impact theory is available to employees under the ADEA.[122] In its reasoning, the Court noted that "both the Department of Labor, which initially drafted the legislation, and the Equal Employment Opportunity Commission ("EEOC"), which is the agency charged by Congress with responsibility for implementing the statute, have consistently interpreted the ADEA to authorize relief on a disparate-impact theory."[123] Justice Scalia, providing the fifth vote in favor of allowing disparate impact claims under the ADEA in *Smith v. City of Jackson*, based his decision by wholly deferring to the views of the EEOC.[124] The EEOC is the organization charged with overseeing the implementation of the ADEA, and as a result "may issue such rules and regulations as it may consider necessary or appropriate for carrying out [the ADEA]."[125] Deference to the EEOC was proposed by Judge Martin in

119. *See* Lorillard v. Pons, 434 U.S. 575, 577 (1978) ("The ADEA broadly prohibits arbitrary discrimination in the workplace based on age."); Skoglund v. Singer Co., 403 F. Supp. 797, 801 (D.N.H. 1975) ("Remedial legislation should not be so narrowly read as to preclude achievement of its purpose; form should not be raised over substance.").

120. *Skoglund*, 403 F. Supp. at 801.

121. *See Villareal*, 839 F.3d at 970; *Skoglund*, 403 F. Supp. at 801.

122. Smith v. City of Jackson, 544 U.S. 228, 240 (2005); *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (defining disparate impact claims as those "involv[ing] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.") (quoting Teamsters v. United States, 431 U.S. 324, 335–36 (1977)).

123. *See Smith*, 544 U.S. at 239.

124. *Id.* at 243–44 (Scalia, J., dissenting) ("This is an absolutely classic case for deference to agency interpretation."); *see also* 4 A. KIMBERLEY DAYTON ET AL., ADVISING THE ELDERLY CLIENT § 35:18 (2017), Westlaw (database updated June 2018).

125. 29 U.S.C. § 628 (2012).

his dissent to the *Villarreal* decision.[126] Further, Judge Rosenbaum discussed this deference as presenting a strong argument, however she ultimately rejected it in her concurrence.[127]

Four months after the *Villarreal* court rejected the above considerations in favor of a plain text interpretation which limited the ADEA to employees, the court in *Rabin* ruled that "[b]ased on the language of the ADEA, existing precedent, agency interpretations of the ADEA, and the Act's legislative history, the Court today concludes that job applicants . . . may bring disparate impact claims."[128] In considering factors other than the plain language of the text, the reasoning of the *Rabin* and *Kleber* courts more closely parallel that of the Supreme Court in both *Griggs* and *Smith*.

D. Incorporating Title VII Interpretations to the ADEA

To fully understand the Eleventh Circuit's reasoning, one must consider how previous rulings on the application of employment discrimination legislation have been applied to cases brought under the ADEA. Specifically considering tests that have been used by the courts to resolve Title VII claims, and whether they were later extended to ADEA claims, aids the understanding of whether rulings like *Griggs* should also apply to the ADEA.

1. THE MCDONNELL DOUGLAS ANALYSIS

In the seminal case *McDonnell Douglas Corp. v. Green*, the Supreme Court developed a test for disparate treatment claims for racial discrimination.[129] The *McDonnell Douglas* analysis established that, when bringing a disparate treatment claim under Title VII, the plaintiff must satisfy four elements to make a prima facie case.[130] Once the plaintiff

126. *See Villarreal*, 839 F.3d at 988–89 (Martin, J., dissenting).

127. *Id.* at 975 (Rosenbaum, J., concurring) ("[T]his case is challenging because despite the clarity of the statutory language, the agency charged with administering the statute has, for nearly the past 50 years – through both Republican and Democrat administrations – consistently construed it in a way that conflicts with what appears to me to be the objectively indisputable meaning of the statutory language . . . . [S]ince the statute is, in my view, susceptible of only a single interpretation as the Majority points out, we must abide by its plain meaning, without resorting to the administering agency's construction.").

128. Rabin v. PricewaterhouseCoopers, LLP, 236 F. Supp. 3d 1128, 1128 (N.D. Cal. 2017).

129. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

130. *Id.* at 802 (stating a plaintiff must show, "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was

establishes a prima facie case, the burden shifts to the employer to give a legitimate, nondiscriminatory reason for the employee's rejection.[131] If this meets the prima facie case, the plaintiff must then prove the reason provided for the employer's rejection is pretext for discrimination.[132] Circuit courts began applying the *McDonnel Douglas* analytical framework to disparate treatment claims brought under the ADEA over the next few decades.[133]

In the 2000 case *Reeves v. Sanderson Plumbing Products, Inc.*, the Supreme Court applied the *McDonnell Douglas* analysis to an ADEA claim.[134] However, in its ruling the Court noted that despite its application of the *McDonnell Douglas* analysis in *Reeves*, it was not determining that the analysis applies to ADEA actions generally.[135] While the Supreme Court withheld any clear judgment as to whether the *McDonnell Douglas* analysis should be applied to disparate treatment claims brought under the ADEA, the tacit approval of widespread use by circuit courts seems to suggest that the Court agrees with the interpretations of circuit courts.[136] Further, the Court's application of the analysis in *Reeves*, though it was claimed as simply for the sake of argument, seems to suggest that consideration of *McDonnell Douglas* in ADEA cases does have some merit.[137]

2. MIXED-MOTIVE ANALYSIS

Approximately fifteen years after *McDonnell Douglas*, the Supreme Court supplemented the *McDonnell Douglas* analysis with the

seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open . . . .").

131. *Id.*

132. *Id.* at 804.

133. *See, e.g.*, Jameson v. Arrow Co., 75 F.3d 1528, 1531–32, (11th Cir. 1996); Mesnick v. Gen. Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 69 (6th Cir. 1982).

134. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141–42 (2000) (applying the *McDonnell Douglas* analysis because the parties did not dispute its applicability, while acknowledging that "the Courts of Appeals, including the Fifth Circuit in this case, have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims") (internal citations omitted).

135. *Id.* at 142 ("This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to asses claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, arguendo, that the *McDonnell Douglas* framework is fully applicable here.") (internal citations omitted).

136. *See id.* at 141–42.

137. *See id.*; *see generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

creation of a mixed-motive analysis.[138] *McDonnell Douglas* addressed cases where the employer's nondiscriminatory reason for the action was simply pretext for a discriminatory decision.[139] In *Price Waterhouse v. Hopkins*, the Supreme Court addressed mixed-motive cases: situations where an employer's action may be based partly on discriminatory reasoning and partly on legitimate reasoning.[140] The defense in *Price Waterhouse v. Hopkins* argued that the use of the phrase "because of" in Title VII meant that employers were only liable if discrimination was the but for cause of the employer's action.[141]

Rejecting this argument, the Supreme Court considered Congress's intent in passing Title VII when it examined the language of the statute, going as far as stating that courts "need not leave common sense at the doorstep when [they] interpret a statute."[142] In doing so, the Court ruled that Title VII made it unlawful for employers to make decisions based on a mixture of legitimate and illegitimate considerations.[143] The Court created the mixed-motives test to be used in such situations, which only requires that the plaintiff show that his or her employer relied upon discriminatory considerations (e.g., race-, gender-, or age-based) in making its decision.[144] But the mixed-motive analysis allows employers to raise a defense by proving that the employer would have come to the same decision had the employer not taken impermissible factors (such as race, gender, age) into account.[145]

Unlike the *McDonnell Douglas* analysis, the Supreme Court has decided against applying the mixed-motives analysis to employment discrimination claims brought under statutes other than Title VII.[146] In *Gross v. FBL Financial Services, Inc.*, the Supreme Court stated that interpretation of the ADEA is not governed by Title VII decisions, such as

138. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
139. *See McDonnell Douglas*, 411 U.S. at 804.
140. *See generally Price Waterhouse*, 490 U.S. 228; 9 LEX K. LARSON LARSON ON EMPLOYMENT DISCRIMINATION § 156.02, Lexis (database updated Apr. 2018).
141. *See* 42 U.S.C. § 2000e-2(a)(1) (2018) (making it unlawful for employers to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."); *see also Price Waterhouse*, 490 U.S. at 239–40.
142. *Price Waterhouse*, 490 U.S. at 239–42.
143. *Id.* at 241.
144. *Id.* at 241–42.
145. *Id.*
146. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 377 (2013) (rejecting an argument that the standard applied by *Price Waterhouse* should control retaliation claims); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009) (declining to apply the *Price Waterhouse* burden-shifting framework to ADEA claims).

Price Waterhouse, because Congress later amended Title VII's relevant provisions to include the mixed-motive analysis, but did not make similar changes to the ADEA despite amending the ADEA in several other ways.[147] This argument is extrapolated from the ideas of congressional acquiescence and reenactment, both of which are based on legislative inaction.[148]

Congressional acquiescence occurs when Congress fails to act in response to a judicial or administrative interpretation of a statute, and as a result, the court assumes Congress accepts the interpretation.[149] Reenactment takes this idea one step further by interpreting Congress's reenactment of a statute following judicial or administrative interpretation to signify legislative adoption of that interpretation.[150] The *Gross* court essentially applied the inverse of acquiescence and reenactment: because Congress amended the language of Title VII to conform with the court's mixed-motive interpretation from *Price Waterhouse v. Hopkins*, but not the ADEA, it is signifying that the mixed-motive interpretation does not apply to the ADEA.

As a result, the Court interpreted the language of the ADEA independent of the *Price Waterhouse* decision and determined that the use of the phrase "because of" in the ADEA meant that employers were only liable if discrimination was the but for cause of the employer's action.[151] In a dissent joined by three other justices, Justice Stevens argued that the Court's interpretations of Title VII should be incorporated into the ADEA because the substantive provisions of the ADEA were based on the corresponding provisions of Title VII.[152] Further, Justice Stevens referred to the Supreme Court's decision in *Smith v. City of Jackson*, where the Court determined that Congress's failure to amend disparate im-

147. *See Gross*, 557 U.S. at 174–75 (explaining that decisions to amend one statutory provision but not another are presumed to be intentional).

148. William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 70–71 (1988) [hereinafter Eskridge].

149. John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U. L. REV. 737, 741 (1984) [hereinafter Grabow].

150. *Id.*

151. *See* 29 U.S.C. § 623 (2012) (making it unlawful for employers to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age."); *Gross*, 557 U.S. at 176.

152. *See Gross*, 557 U.S. at 183 (Stevens, J., dissenting).

pact provisions of the ADEA when Congress amended the corresponding Title VII provisions meant that prior decisions interpreting those Title VII provisions still applied to the ADEA.[153]

3. CONNECTION TO *VILLARREAL*, *RABIN*, AND *KLEBER*

The differing interpretations by the *Villarreal*, *Rabin*, and *Kleber* courts on the ADEA and whether section 4(a)(2) extends to applicants is more easily understood when considered in light of the inconsistent reasoning by the Supreme Court regarding similar statutory interpretations. The Eleventh Circuit's narrow reading parallels that of the Supreme Court in determining the mixed-motive analysis does not apply in ADEA cases.[154] The mixed-motive analysis was developed in a Title VII case where the Supreme Court broadly interpreted the language of Title VII to rule that the phrase "because of" did not equate to requiring discrimination to be the but for cause, basing its decision on congressional intent.[155] This interpretation was later confirmed by Congress when it amended the language of Title VII to include the mixed-motives analysis.[156]

Because Congress amended the language of Title VII to reflect the mixed-motive analysis, and did not amend the language in the ADEA, the Court later ruled that the same "because of" language in the ADEA did equate to requiring discrimination to be the but for cause of the employer's action.[157] Similarly, the Supreme Court widely interpreted the language of Title VII to allow applicants to bring disparate impact claims based on the intent of the statute.[158] Congress later amended the language of Title VII to reflect the inclusion of applicants as individuals

153. *Id.* at 186; *see also* Smith v. City of Jackson, 544 U.S. 228, 240 (2005) ("While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA.").

154. *See generally Gross*, 557 U.S. 167.

155. Price Waterhouse v. Hopkins, 490 U.S. 228, 239–42 (1989).

156. 42 U.S.C. § 2000e-2(m) (2018); *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (discussing amendments Congress made in 1991 in light of the *Price Waterhouse* decision).

157. *See Gross*, 557 U.S. at 176.

158. Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

protected by such claims.[159] As with the mixed-motive analysis, Congress did not make the corresponding changes to the ADEA.[160]

It should be noted that in rejecting the extension of the mixed-motive analysis to the ADEA, the *Gross* court's discussion considered that Congress had not made similar changes to the ADEA despite making other amendments to the ADEA at the time.[161] This supports the congressional acquiescence argument—had Congress wanted to amend the language of the ADEA to include mixed-motive analysis, it could have done so at that time as it was already amending other parts of the ADEA. In comparison, Congress did not make any changes to the ADEA when amending Title VII to include job applicants under disparate impact.[162] This reasoning is used by the *Kleber* court in rejecting the defendant's argument that because Congress amended Title VII to reflect the *Griggs* decisions but made no such change to the ADEA, Congress was signifying that disparate impact claims do not protect applicants under the ADEA.[163] Interestingly, the district court decision that *Kleber* overturned was based on Seventh Circuit precedent which, in part, established that applicants were not protected by disparate impact under the ADEA due to this difference in statutory language.[164] The *Kleber* majority quickly cast this precedent, *E.E.O.C. v. Francis W. Parker School*,[165] aside, as the *Francis Parker School* decision categorically rejected all disparate impact claims under the ADEA and was subsequently abrogated by the Supreme Court's ruling in *Smith*.[166] While the

159. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 8, 86 Stat. 103, 109 (1972); *see also* 42 U.S.C. § 2000e-2(a)(2) (2012) (making it unlawful for employers to "limit, segregate, or classify his employees *or applicants for employment* in any way") (emphasis added).

160. *See generally* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (refraining from adding corresponding "applicants" language to the ADEA).

161. *Gross*, 557 U.S. at 174–75.

162. *See generally* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (refraining from making any amendments to the ADEA).

163. Kleber v. CareFusion Corp., 888 F.3d 868, 882 (7th Cir. 2018) *vacated and reh'g granted* No. 17-1206, 2018 U.S. App. LEXIS 17148 (7th Cir. 2018) ("This negative inference is not justified. The ADEA was never mentioned in the 1972 Act itself or in the conference report describing it. The 1972 Act was the Equal Employment Opportunity Act of 1972, and it amended *only* provisions of Title VII of the 1964 Act.").

164. *Id.* at 872; EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077–78 (7th Cir. 1994) (comparing Title VII's inclusion of the category "applicants for employment" with the corresponding provision in the ADEA which omits this group from its coverage).

165. *See EEOC*, 41 F.3d 1073.

166. *See Kleber*, 888 F.3d at 883.

holding is no longer good law, the differing language reasoning provided in *Francis Parker School* is largely consistent with the analysis provided by the Supreme Court in *Gross*.[167] Ultimately, the *Kleber* court hinged on the argument of whether the instant case was comparable to *Griggs* based on the employment status of the individual bringing the claim.[168]

The *Villarreal* court, facing a similar argument, refused to recognize *Griggs* as extending disparate impact claims to applicants because the individuals in *Griggs* were already employees.[169] Further, the court argued that while other cases after *Griggs* suggested that the ruling did extend to applicants, those interpretations resulted only after Congress amended the language of Title VII accordingly, but no such amendments were made to the ADEA.[170] Conversely, the *Rabin* court justified its broad interpretation of ADEA's section 4(a)(2) as extending to applicants based on much of the same information.[171] The decision noted that while all plaintiffs in the *Griggs* case were already employed, the Court chose to phrase the question broadly and include a challenge to conditions of employment and pointed to subsequent Supreme Court decisions that characterized *Griggs* as applying to job applicants.[172] This reasoning is consistent with that of Justice Stevens's dissent in *Gross*.[173]

Interestingly, the *Villarreal*, *Rabin*, and *Kleber* courts all base their strongest argument on the plain language of the text, and in doing so come to completely different conclusions.[174] The *Villarreal* court argued that the key phrase is "or otherwise affect his status as an employee," which means the section protects an individual only if he or she has

167. *See generally* Gross v. FBL Fin. Servs. Inc., 557 U.S. 167 (2009).

168. *Kleber*, 888 F.3d at 884–85 (rejecting arguments to narrow *Griggs* to transferees within companies and deciding *Griggs* was about both promotion and hiring criteria).

169. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 968 (11th Cir. 2016).

170. *Id.* at 968–69 (discussing the Supreme Court's ruling in *Dothard v. Rawlinson*, 433 U.S. 321 (1977)).

171. *Id.* at 986–87.

172. Rabin v. PricewaterhouseCoopers, LLP, 236 F. Supp. 3d 1128, 1130–31 (N.D. Cal. 2017).

173. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 183–86 (2009); *see also* Smith v. City of Jackson, 544 U.S. 228, 240 (2005).

174. *Compare Villarreal*, 839 F.3d at 963 ("The plain text of section 4(a)(2) covers discrimination against employees. It does not cover applicants for employment."), *with Rabin*, 236 F. Supp. 3d at 1128 ("The plain language of the statute supports the more inclusive interpretation.") *vacated and reh'g granted* No. 17-1206, 2018 U.S. App. LEXIS 17148 (7th Cir. 2018), *and* Kleber v. CareFusion Corp., 888 F.3d 868, 872 ("[The disparate impact provision's] broad language easily reaches employment practices that hurt older job applicants as well as current employees.").

status as an employee.[175] Conversely, the *Rabin* court identified the ADEA's use of the phrase "any individual" earlier in section 4(a)(2) as indicating that all individuals, not just employees, are protected under the statute.[176] The *Kleber* opinion is consistent with the *Rabin* court's interpretation and expands further, stating that unemployment qualifies as one's "status as an employee."[177] Beyond the plain text meaning, the *Rabin* and *Kleber* courts also allow for considerations of the EEOC's interpretation, the legislative history, and the practical consequences of each interpretation in determining that the ADEA permits disparate impact claims by applicants.[178] The *Villarreal* court expressly rejected the plaintiff's request that the court consider the purpose of the ADEA, articulating that courts do not defer to agency interpretations when the text of a statute is clear and that prioritizing purpose of a statute over the plain meaning is inconsistent with the judicial duty to interpret the law as written.[179]

IV. Recommendation

The opposite rulings and rationales of *Villarreal* compared to the *Rabin* and *Kleber* courts suggest that this issue of whether the ADEA extends to applicants will continue to face scrutiny in other courts before it is resolved. While the Supreme Court declined to hear *Villarreal* on appeal,[180] progression of judicial interpretations of other employment discrimination provisions, such as the *McDonnell Douglas* and mixed-motive analyses as well as disparate impact among employees, suggest that a ruling by the Supreme Court will eventually be required. Until then, both courts and employers will have to decide whether to adopt and act under the *Villarreal* or *Rabin* and *Kleber* reasoning. This section recommends that the Seventh Circuit and future courts adopt the interpretation of the *Rabin* court, extending disparate impact claims to applicants under the ADEA. In light of the *Rabin* decision, employers would be wise to proactively extend these protections to job applicants.

175. *Villarreal*, 839 F.3d at 963–64.
176. *Rabin*, 236 F. Supp. 3d at 1128.
177. *Kleber*, 888 F.3d at 873–74.
178. *Id.* at 875–79; *Rabin*, 236 F. Supp. 3d at 1132–33.
179. *Villarreal*, 839 F.3d at 969–70.
180. Chris Farrell, *The Supreme Court Turns Its Back On Age Discrimination*, FORBES (July 13, 2017 3:31 PM), https://www.forbes.com/sites/nextavenue/2017/07/13/the-supreme-court-turns-its-back-on-age-discrimination/#2e8396611a03.

A. The Courts

The Seventh Circuit should maintain their original ruling in agreement with the Northern District of California and extend the protections of the ADEA to job applicants by allowing them to bring disparate impact claims under the ADEA. Many elderly people plan on remaining in the workforce, but not necessarily at their current jobs.[181] As a result, it is important to protect job applicants in addition to employees to ensure that opportunities for employment remain available to older people in the workforce. In passing the ADEA, Congress expected that one result would be less discrimination in the process of hiring older workers.[182] For the ADEA to achieve Congress's goal of ending age-related discrimination in employment, it is necessary to ensure that elderly individuals have equal opportunities in employment, not just that they are treated equally once they are employed. This goal is also illustrated by the implementation of Title VII. The Supreme Court determined that to protect employment opportunities of individuals under Title VII, those protections must be expanded to include job applicants.[183] In agreement, Congress ultimately clarified the language of the statute to reflect this more inclusive reading.[184] In adopting the ruling of the Northern District of California, the court system can once again be the catalyst that moves anti-discrimination law forward.

Further, the reasoning of the *Rabin* opinion aligns with the Supreme Court's interpretation of identical language when applying Title VII in *Griggs*.[185] The *Griggs* court considered the purpose of the Title VII legislation in making its decision, and ultimately ruled that prospective employees were also protected.[186] The Court's decision in *Griggs* showed how important disparate impact claims are in the enforcement

181. *See* Patrick Kiger, *More Workers Are Quitting Amid Tight Labor Market*, AARP (July 17, 2018), https://www.aarp.org/work/working-at-50-plus/info-2018/older-workers-quit-better-pay.html.

182. H.R. REP. NO. 90-202, at 3 (1967) (Conf. Rep.).

183. Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

184. 42 U.S.C. § 2000e-2(a)(2) (2012) (making it unlawful for employers to "limit, segregate, or classify his employees *or applicants for employment* in any way") (emphasis added).

185. *See Griggs*, 401 U.S. at 428; *see* Rabin v. Pricewaterhouse Coopers, LLP, 236 F. Supp.3d 1126 (N.D. Cal. 2017); *see also* Kleber v. CareFusion Corp., 888 F.3d 868 (7th Cir. 2018) *vacated and reh'g granted* No. 17-1206, 2018 U.S. App. LEXIS 17148 (7th Cir. 2018).

186. *See* Burrage v. United States, 571 U.S. 204, 213 n.5 (2014); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009); *see generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

of employment discrimination law.[187] The defendants in *Rabin* attempted to argue that because Congress later amended the section of Title VII after the *Griggs* decision to explicitly include the phrase "employees or applicants for employment" that Congress did not believe applicants were included in the initial version.[188] Similarly, the *Villarreal* court stressed that the *Griggs* decision was not about hiring policies, but rather promotion or transfer opportunities for current employees; it was not until after Congress amended the language of Title VII to expressly include applicants that these individuals were protected by the legislation.[189]

The Eleventh Circuit's narrow reading of the ADEA and dismissal of any impact from the *Griggs* decision goes too far.[190] A strong argument, not raised by the *Villarreal* court, would be a consideration of how the Supreme Court has refused to extend the mixed-motive analysis to claims brought under the ADEA despite the initial ruling in favor of the mixed-motive analysis being based on identical language in Title VII at the time.[191] Surprisingly, the *Villarreal* court does not make any mention of the Supreme Court's inconsistent reading of identical text from Title VII and the ADEA which resulted in a narrow interpretation of the ADEA in *Gross*.[192] Instead, *Villarreal* distinguishes the *Griggs* ruling based on the facts of the case rather than the Court's interpretation of the statute in order to further support the Eleventh Circuit's singular argument: that the plain text of section 4(a)(2) only applies to employees.[193] The purpose of the ADEA is to promote employment of older persons based on their ability rather than age, and to prohibit arbitrary age discrimination in employment.[194] As the initial *Kleber* opinion explained, if Congress truly intended to write such a statute that would accomplish this purpose, but not prevent a wide array of discriminatory hiring practices, it would have done so more clearly.[195]

187. Ricci v. DeStefano, 557 U.S. 557, 609 (2009) (Ginsburg, J., dissenting) (describing *Griggs* as a "pathmarking decision . . . which explained the centrality of the disparate-impact concept to effective enforcement of Title VII.").

188. *Rabin*, 236 F. Supp. 3d at 1131.

189. *See* Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 968–69 (11th Cir. 2016).

190. *See generally id.*

191. *See supra* III.D.2., ii. Mixed-Motive Analysis.

192. Gross v. FBL Fin. Servs. Inc., 557 U.S. 167, 174–75 (2009).

193. *Villarreal*, 839 F.3d at 968–69.

194. 29 U.S.C. § 621(b) (2012).

195. Kleber v. CareFusion, 888 F.3d 868, 874 ("Thus, if Congress really meant to outlaw employment practices that tend to deprive older workers of employment

The Eleventh Circuit's insistence that the plain text of the ADEA only allows for an interpretation that limits section 4(a)(2) to employees should ultimately fail because it is inconsistent with the purpose of the statute.[196] The court argues that the job of interpreting the law requires courts to "follow the text even if doing so will supposedly undercut a basic objective of the statute."[197] This claim directly contradicts the Supreme Court's repeated consideration of congressional intent and the purpose of employment discrimination laws when interpreting such statutes.[198] While providing many citations in support of the position that the purpose of a statute should not be considered over the plain meaning of the text, the Eleventh Circuit did not provide any employment discrimination decisions in support of its stance.[199]

Similarly, the *Villarreal* court was too quick to dismiss any consideration of the EEOC's interpretation of the statute, as evinced by the court's argument that it does not defer to an agency's interpretation of a statute when the text is clear.[200] The court stated that it first must determine if the meaning of a statute is clear based on the traditional tools of statutory interpretation before considering an agency's interpretation.[201] However, the Supreme Court's decision cited by the *Villarreal* court is narrower than this, asking whether (1) Congress has directly spoken to the precise question at issue and (2) provided its unambiguously expressed intent.[202] In choosing to employ the traditional tools of statutory interpretation, without any consideration of the EEOC's construction of section 4(a)(2), the *Villarreal* court ignored the reasoning of the Supreme Court, and its consideration of the EEOC's construction, in interpreting the same section of the ADEA and Title VII's corresponding provision.[203]

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opportunities, which it did, *but at the same time deliberately chose to leave a wide array of discriminatory hiring practices untouched*, its use of the phrase 'status as an employee' would have been a remarkably indirect and even backhanded way to express that meaning.") *vacated and reh'g granted* No. 17-1206, 2018 U.S. App. LEXIS 17148 (7th Cir. 2018).

196. *See Villareal*, 839 F.3d at 963.

197. *Id.* at 969 (internal quotations omitted).

198. *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228, 235 (2005); Price Waterhouse v. Hopkins, 490 U.S. 228, 239–42 (1989); Griggs v. Duke Power Co., 401 U.S. 424, 434–36 (1971).

199. *See Villarreal*, 839 F.3d at 969–70 (citing to decisions interpreting statutes regarding bankruptcy, civil procedure, and property law).

200. *Id.*

201. *Id.* (citing Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984)).

202. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–43 (1984).

203. *Smith*, 544 U.S. at 239–40; *Griggs*, 401 U.S. at 434–36.

The *Villarreal* court further argued, based on a prior Eleventh Circuit decision, that statutory language is ambiguous if it is susceptible to more than one reasonable interpretation, and because the language of the statute can only be reasonably interpreted one way, there was no ambiguity that required consideration of the EEOC's construction of the statute.[204] When considered in light of the Northern District of California's decision in *Rabin* and the Seventh Circuit's initial *Kleber* opinion, this argument would seem to support consideration of the EEOC's interpretation, as the statute must be susceptible to more than one reasonable interpretation given the ADEA has been interpreted differently by separate courts, and would therefore be ambiguous. Whether applicants are able to bring disparate impact claims under the ADEA is a complex question of statutory interpretation,[205] and as a result, the *Villarreal* court should have deferred to the agency interpretation as courts generally do.[206] Applying agency interpretation here necessitates extending disparate impact claims to applicants, because the EEOC has long interpreted the ADEA as permitting job-seekers to bring disparate impact claims.[207]

Courts that agree with the *Villarreal* ruling may set forth a stronger case for limiting disparate impact claims to employees on the basis of the Supreme Court's reasoning in *Gross*. The *Gross* ruling declined to extend employment discrimination's mixed-motive analysis to the ADEA because Congress amended Title VII to include the mixed-motive analysis but did not make a corresponding change to the ADEA.[208] This argument should also fail, however, because of the unreliable application of congressional acquiescence and reenactment. The Court's reliance on the silence of Congress is without a clear legal basis,[209] and oftentimes such silence may well be the result of the structural inertia and biases, rather than acquiescence of the legislature.[210] Further, the

204. *Villarreal*, 839 F.3d at 970 (citing Med. Transp. Mgmt. Corp. v. Comm'r of IRS, 506 F.3d 1364, 1368 (11th Cir. 2007)).

205. Heath v. Google LLC, No. 15-cv-01824-BLF, 2018 U.S. Dist. LEXIS 6064, at *2 (N.D. Cal. Jan. 12, 2018).

206. *See generally* DALE & FEDER, *supra* note 71.

207. Rabin v. PricewaterhouseCoopers, LLP, 236 F. Supp. 3d 1126, 1132–33 (N.D. Cal. 2017).

208. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174–75 (2009).

209. Grabow, *supra* note 149.

210. Eskridge, *supra* note 148.

reenactment doctrine has had unpredictable and contradictory application by courts.[211] The *Gross* argument is somewhat self-defeating, because the idea of congressional acquiescence also applies to agency interpretations, and it is generally agreed upon that longstanding agency statutory interpretations should be entitled to extra weight upon judicial review.[212] As the *Rabin* court discussed, only months after the ADEA was signed into law, an agency interpretation had explained that restrictions on pre-employment requirements apply equally to all applicants.[213] If courts are to consider congressional acquiescence, they should do so consistently, which also supports including applicants.

The Seventh Circuit should maintain its original ruling and extend disparate impact claim protections to job applicants under the ADEA. No matter which way the full panel decides to rule, it is clear that this issue is one future courts will have to face. Should the Seventh Circuit allow Kleber's claim to be brought under disparate impact, it will reestablish the circuit split that was originally created by their original opinion and force other circuit courts to choose a side if and when these claims are brought in their jurisdiction. Further, while a ruling against Kleber's claim would align with the Seventh and Eleventh Circuits on this issue, the initial opinion of *Kleber* in conjunction with the Norther District of California's ruling in *Rabin* suggest that future courts will come down on different sides of this issue.

Another case to consider is *Champlin v. Manpower Inc.* from the Southern District of Texas. The court allowed a disparate impact claim brought by a job applicant under the ADEA to survive the defendant's motion to dismiss.[214] In *Champlin*, a fifty-six-year-old plaintiff brought a claim under the ADEA after receiving a job-listing email with age discriminatory language.[215] Acknowledging the rulings of both *Villarreal*

211. Grabow, *supra* note 149.

212. Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1825 (2015); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) ("The administrative interpretation of the Act by the enforcing agency [EEOC] is entitled to great deference. Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.").

213. *See* Rabin v. PricewaterhouseCoopers, LLP, 236 F.Supp. 3d 1126, 1136 (N.D. Cal. 2017); 33 Fed. Reg. 9172, 9173 (1968).

214. Champlin v. Manpower Inc., No. 16-CV-02987, 2018 U.S. Dist. LEXIS 13450, at *19–20 (S.D. Tex., Jan. 24, 2018).

215. *Id.* at *2–3 ("[T]he e-mail included the following discriminatory language: 'we are not looking for anyone with overspecialization . . . or candidates with more

and *Rabin*, the *Champlin* court declined to accept the reasoning of either decision, but allowed the claim to survive the motion to dismiss because there was no binding authority in the Fifth Circuit restricting disparate impact claims to employees.[216] Should the *Champlin* case proceed to trial, the court will have to decide whether to ultimately allow such a claim.

Future courts may also further examine the meaning of the phrase "status as an employee" in section 4(a)(2).[217] This phrase, which was interpreted by the Eleventh Circuit to restrict disparate impact claims to employees,[218] was read by the Seventh Circuit to include applicants in their initial *Kleber* opinion.[219] This interpretation was first offered in the *Villareal* dissent.[220] This interpretation was also offered by the *Rabin* court, albeit as a conclusory paragraph after the court had established its interpretation was based a different reasoning.[221] Should the Seventh Circuit's ultimate ruling in *Kleber* extend employment status to those seeking employment, it will also have to consider what, if any, additional protections this would provide to job applicants. If there are unwanted implications of such a reading, an inclusive ruling can still be justified based on the reasoning in *Rabin*.

Courts have repeatedly considered congressional intent and the purpose of prohibiting employment discrimination in interpreting specific provisions of employment discrimination statutes.[222] In following the rulings of the *Rabin* court, and rejecting the narrow reading of the *Villarreal* court, the judicial system can once again promote justice through equality among job applicants regardless of age. It is time for courts to follow their Title VII blueprint: ending workplace discrimination based on age and promoting genuine equal opportunity by placing

than 10-12 years of experience. This is a pretty young, eager group, so culturally 1-5 years experience is the best fit.'").

216. *Id.* at *20–21.

217. 29 U.S.C. § 623(a)(2).

218. *See* Villareal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 963 (11th Cir. 2016).

219. Kleber v. CareFusion Corp., 888 F.3d 868, 873 (7th Cir. 2018) ("Deciding whether a person becomes an employee or not has the most dramatic possible effect on 'status as an employee.'") *vacated and reh'g granted* No. 17-1206, 2018 U.S. App. LEXIS 17148 (7th Cir. 2018).

220. *Villareal*, 839 F.3d at 983 (Martin, J., dissenting) ("Certainly it is true that Mr. Villareal was denied any 'status as an employee.'").

221. *See* Rabin v. PricewaterhouseCoopers, LLP, 236 F.Supp. 3d 1126, 1129–30 (N.D. Cal. 2017).

222. *See* Ricci v. DeStefano, 557 U.S. 557, 586 (2009).

disparate impact and disparate treatment on equal footing.[223] While courts primarily serve as interpreters, rather than creators, of law the development of employment discrimination law has illustrated that it is an area where the courts must lead, because when they do the legislature will follow.

B. Employers

Employers should also pay attention to the *Rabin* court's ruling and begin considering older applicants in the hiring process. Following the *Villarreal* ruling, legal journalists' reports included the EEOC's belief that disparate impact claims may apply to hiring and that future litigation on this issue was likely.[224] This reasoning is consistent with established law that prohibits employers from publishing job advertisements that show a preference for applicants based on age.[225] While the defendant in *Rabin* may not have posted advertisements stating a preference for people just out of college, the fact that their advertising efforts were focused on college campuses likely served this same purpose.[226]

Similarly, the EEOC explained that it is illegal for an employer to discriminate against a job applicant based on race, sex, and age, and other protected classes. [227] The EEOC also provided the example that an employer may not refuse to give employment applications to people of a certain race.[228] While PwC did not refuse to give applications to people of Rabin's age, their recruiting practices made it significantly harder

223. *Id.* at 624 (Ginsburg, J., dissenting).

224. *See Job Applicant's Disparate Impact Claim Goes Up In Smoke*, 364 CORP. COUNS. MONITOR NL (Thomas Reuters/Toronto, Can.), Dec. 2016, at 9 [hereinafter *Up In Smoke*].

225. *See Prohibited Employment Policies/Practices*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/practices/index.cfm (last visited Sept. 19, 2017) [hereinafter *Employment Policies/Practices*].

226. *See* Complaint at 9–1, Rabin v. PricewaterhouseCoopers, LLP, 236 F. Supp 3d 1126, 1129 (N.D. Cal. 2017) (3:6-cv-02276) (discussing PwC's use of a "Campus Recruiting Track" to fill entry level positions); *see also* Bob Moritz, *The U.S. Chairman of PwC on Keeping Millennials Engaged*, HARV. BUS. REV. (Nov. 2014), https://hbr.org/2014/11/the-us-chairman-of-pwc-on-keeping-millennials-engaged [hereinafter Moritz] ("PwC's workface is strikingly young: Because we recruit approximately 8,000 graduates annually from college and university campuses . . . .").

227. *Employment Policies/Practices*, *supra* note 225.

228. *Id.*

for older individuals to access applications when compared to their college-student counterparts.[229] This issue was recognized by the *Rabin* court, which observed that "Mr. Rabin is an individual who was deprived of employment opportunities and denied any status as an employee because of something an employer did to limit his employees."[230]

Employers should be proactive based on the *Rabin* court's ruling because the reasoning from the Northern District of California Court will likely apply to the recruiting and hiring practices of many businesses. Peter Siegel, an attorney from Greenspoon Marder, said employers need to pay attention to the *Rabin* decision and urged human resources managers to embrace and utilize the decision as "a teachable moment when it comes to implementing effective and legal recruiting strategies in today's litigious climate."[231] Marder specifically pointed towards PwC's recruiting practice of limiting their applicants to college campuses as something that other businesses need to avoid lest they face similar disparate impact claims.[232]

In order to avoid such claims, Michelle Lee Flores, an attorney in the office of Cozen O'Connor, suggested that employers who only hire from one or two sources should pay attention to the applicants employers receive and seek to expand their pool.[233] PwC's success in hiring recent graduates led to an unfair system that limited or eliminated opportunities for older applicants who sought employment.[234] Employers must be cognizant of the hiring practices to ensure they are not focusing only on certain institutions or locations, like the universities and college campuses to which PwC limited its hiring.[235]

229. Rabin v. PricewaterhouseCoopers, LLP, 236 F. Supp.3d 1128, 1128 (N.D. Cal. 2017).

230. *Id.* at 1130 (internal quotations omitted).

231. Minehan, *supra* note 39.

232. *Id.* ("'Employers like PricewaterhouseCoopers LLP who apparently limited certain recruiting efforts to a particular class of applicants should expect to be the target of similar class action discrimination lawsuits. This expectation remains true even if the perceived discrimination is the byproduct of a recruiting campaign which, at first glance, appears entirely legitimate and innocuous,' Siegel says.").

233. *Id.*

234. Moritz, *supra* note 226.

235. Minehan, *supra* note 39 ("'[M]ake sure that your recruiting efforts expand beyond those institutions, locations, and publications that will inevitably generate an impermissibly narrow applicant pool.' Siegel advises.").

Both courts and employers should take notice of the *Rabin* ruling and the reasoning initially presented by the vacated *Kleber* opinion. Employers should adapt their hiring practices to avoid future litigation, and if litigation arises, courts should adopt the reasoning of the *Rabin* court. The *Villarreal* court placed too much importance on the plain text interpretation of the ADEA, and did not consider the precedent from other courts' analyses of similar legislation, interpretations of the ADEA by agencies charged with creating and enforcing the legislation, and the legislative history behind Congress's intent when drafting and passing the legislation. For these reasons, the Seventh Circuit and future courts should adopt the *Rabin* court's reading of the ADEA and allow disparate impact protections to be available to job applicants as well as employees.

V. Conclusion

The issue of unemployment among the elderly will continue to grow as the Baby Boomer generation enters the traditional retirement age.[236] People reaching the age of sixty-five want to continue working, whether for their current employer or transitioning to a more flexible role.[237] This trend leads to serious issues when employers do not want to hire elderly individuals. Employment practices that preclude older individuals from opportunities that are afforded to younger generations moves employment discrimination based on age from the office to the job market. This often manifests through disparate impact—employers may not openly refuse to hire older individuals, but by targeting younger individuals in hiring practices and procedures, employers are effectively discriminating against older individuals who want to continue working. This is easily understood through the employment practices in *Pricewaterhouse Coopers v. Rabin*, which focused on hiring entry-level accountants through campus recruiting instead of posting entry-level accountant positions on its website or providing a method for those not affiliated with a college to apply for these positions.[238] While there was no policy stating a preference for younger individuals or a dislike for older individuals, it logically follows that if hiring is ac-

236. Ramnath, *supra* note 37.
237. *Id.*
238. Minehan, *supra* note 39.

complished through on-campus recruiting, where the majority of students are under the age of twenty-five,[239] it is unlikely that positions will be filled by individuals over the age of forty.

Courts must respond to this discrimination by allowing job applicants to bring disparate impact claims under the ADEA. The Supreme Court took the first step towards this goal by holding that employees could bring disparate impact claims under the ADEA in *Smith*, a ruling that resolved a circuit split and overturned multiple circuits that had decided the ADEA only allowed individuals to bring disparate treatment claims.[240] The issue of disparate impact among applicants is on the same track now, with the *Villarreal*, *Rabin*, and *Kleber* rulings showing the first signs of a developing circuit split on the issue. With the *Rabin* decision allowing applicants the ability to bring disparate impact claims under the ADEA, similar suits will likely be brought in the Ninth Circuit and elsewhere. This potential litigation will push courts to examine the reasoning behind the *Kleber* and *Villarreal* decisions, as well as review the precedent and interpretations of the statutory language on which these rulings were based.

Ultimately, the *Rabin* decision and the initial ruling of *Kleber* should prevail, as protecting the employment of elderly individuals will not succeed if it ends at the door to the workplace. Equal opportunity in employment must include equal opportunities among job applicants, not just equal opportunity for employees once they are hired. Adoption of these courts' rulings allows for the full achievement of the ADEA's purpose of providing employment protections to elderly individuals. This approach aligns with both Congress's intent in passing employment discrimination legislation and the EEOC's interpretation of such provisions.[241] Whatever rulings these new cases bring, it is likely that this issue of whether the ADEA extends to applicants will ultimately arrive before the Supreme Court of the United States. Historically, employment discrimination issues brought under Title VII and the ADEA are not completely resolved until review by the Supreme Court.[242] The rulings of the Eleventh Circuit, Seventh Circuit, and Northern District of California will certainly be important in the near future for both employers and prospective employees to monitor.

239. *Fast Facts: Back to school statistics*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=372 (last visited Sept. 19, 2018).

240. *See generally* Smith v. City of Jackson, 544 U.S. 228, 245 (2005).

241. *See* JONES, *supra* note 10.

242. *Up In Smoke*, *supra* note 224.