No. 17-1206

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DALE E. KLEBER,

Plaintiff-Appellant,

v.

CAREFUSION CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois

Case No. 1:15-cv-1994 (Hon. Sharon Johnson Coleman)

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING *EN BANC*

Deborah R. White
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209
(703) 600-2067

Joseph G. Schmitt
Mark J. Girouard
NILAN JOHNSON LEWIS PA
120 South Sixth Street, Suite 400
Minneapolis, MN 55402
jschmitt@nilanjohnson.com
(612) 305-7500

Counsel for Amicus Curiae the Retail Litigation Center, Inc.

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel provides the following statement in compliance with Federal Rule of Appellate Procedure 26.1 and Seventh Circuit Rule 26.1:

1. The full name of every party that the attorney represents in the case:

   Amicus curiae Retail Litigation Center, Inc.

2. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   Nilan Johnson Lewis PA

   Retail Litigation Center, Inc.

3. If the party is a corporation:

   i. Identify all its parent corporations, if any:

   Amicus has no parent corporations.

   ii. List any publicly held company that owns 10% or more of the party's stock.

   No publicly held company owns 10% or more of *amicus*'s stock.

/s/ Joseph G. Schmitt
Joseph G. Schmitt

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/s/ Deborah R. White
Deborah R. White

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Retail Litigation Center, Inc. ("RLC") respectfully submits this brief in support of Defendant-Appellee CareFusion's Petition for Rehearing *En Banc*.[1]

The RLC is a public policy organization that identifies and participates in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers, employing millions of people throughout the U.S., providing goods and services to tens of millions more, and accounting for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues and to highlight the potential industry-wide consequences of significant pending cases.

The RLC's members are employers who are subject to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq*. ("ADEA") and other federal and state employment laws. As national employers, the RLC's members have a vital interest in ensuring robust access to a large number of job applicants from a multitude of backgrounds and with a broad range of experience and qualifications. The RLC's members have a direct and ongoing interest in the issues presented in this case: the panel majority's opinion could subject these employers

[1] No party or counsel for a party authored this brief in whole or in part or contributed money intended to fund the preparation or submission of this brief; and no person or entity other than the RLC, its members, or its counsel, contributed money intended to fund the preparation or submission of this brief.

to suit by unsuccessful job applicants simply because they engaged in common practices to reach potential applicants, like participating in college job fairs.

In short, the RLC believes the opinion incorrectly answered the question in this case—whether §4(a)(2) of the ADEA authorizes claims of disparate impact age discrimination in hiring. This question is of particular importance to the RLC's members and other private sector employers that seek to reach large and diverse groups of potential employees in an efficient manner through accepted strategies such as college-campus recruiting, job fairs for new entrants to the workforce (including diverse and disadvantaged youth), and veterans hiring programs. The opinion's answer will have a significant impact on these employers, by turning their effective recruiting strategies into sources of increased litigation risk and significant potential liability.

Because of its interest in the application of the nation's equal employment laws, the RLC has filed numerous briefs amicus curiae in cases before the U.S. Supreme Court and U.S. circuit courts of appeal involving the proper construction and interpretation of federal employment discrimination laws, including §4(a)(2) of the ADEA. Thus, the RLC is well-positioned to outline for the Court the concerns of the retail business community and the significance of this case to its members and other employers. The RLC seeks to assist the Court by highlighting relevant considerations that have not already been brought to the Court's attention;

namely, the practical implications that the opinion will have beyond the immediate concerns of the parties.

ARGUMENT

I. The Opinion Creates, and Then Relies on Hypothetical Anomalies Between "Inside" and "Outside" Applicants, Which Terms Appear Nowhere in the Statute.

For the reasons detailed in Defendant-Appellee's Petition for Rehearing *En Banc*, the RLC agrees that the plain language of §4(a)(2), the text and structure of other sections of the ADEA, the statute's history, and the text and history of a parallel—but contrasting—provision of Title VII all lead to the conclusion that Congress did not intend to make it unlawful for employers to use hiring policies and practices that disparately impact job applicants based on age. Br. 11-15.

Beyond those arguments, the RLC is compelled to address the opinion's speculations on the "practical consequences of [the] parties' readings" of §4(a)(2). Op., p. 10. That section of the opinion describes the supposed consequences of Defendant-Appellee's position, but fails to address the practical implications that the panel majority's own reading would have for both employers and job-seekers. The RLC outlines those ramifications in Sections II and III below.

Beyond the one-sided nature of its discussion of practical consequences, the opinion conjures a strawman: the hypothetical "internal" or "inside" applicant. *Id*., p. 11. Of course, the terms "internal applicant" and "inside applicant"—and their

converse, "external applicant" and "outside applicant"—appear nowhere in §4(a)(2); nor do they appear elsewhere in the ADEA. Rather, the statute distinguishes between "employees," on the one hand, and "applicants," on the other. In interpreting §4(a)(2), and in analogous statutory contexts, the circuit courts of appeal have uniformly recognized that Congress acts intentionally when it extends protections to employees that are not available to applicants. Br., pp. 7, 14.

The "baffling" anomalies between "external"/"outside" and "internal"/"inside" applicants the opinion posits, Op. pp. 11-13, are easily understood when viewed in terms of practical distinctions between applicants and employees. Simply put, when an employee seeks another position with her employer, she falls within the ambit of §4(a)(2) because she is an *employee* seeking a promotion, transfer, demotion, or a lateral move under her employer's employment policies, not because she is applying to be hired under a hiring policy. Even if an employee subject to an employment policy is competing against an applicant subject to a hiring policy, it is not at all unusual that Congress would afford greater protections to an employee than to an applicant. Br., p. 14.

Other circuit courts of appeal have been able to resolve the "anomalies" suggested by the opinion without inserting new terms into the statute. For example, the opinion poses a hypothetical "applicant" who "was recently laid off by the

employer and challenges its failure to recall her," asking whether she has "status as an employee." Op., p. 12. The Eighth Circuit addressed this very question, concluding that former employees subject to a rehire policy were entitled to pursue a disparate impact claim because the rehire policy "was inextricably linked to and implemented as part of an employment policy," i.e., a reduction-in-force program that applied to the plaintiffs only because of their past status as employees. *E.E.O.C. v. Allstate*, 528 F.3d 1042, 1048 (8th Cir. 2008), *rehearing en banc granted, opinion vacated* (Sep. 8, 2008). In other words, when framed in terms of distinctions between hiring policies that affect applicants and employment policies that affect employees, as opposed to distinctions between "outside"/"external" applicants and "inside"/"internal" applicants, the practical consequences with which the opinion wrestles disappear.[2]

II. Disparate Impact Age Discrimination Hiring Claims Are Inconsistent with Established Recruiting Practices and Would Undermine Legitimate Efforts to Benefit New Entrants to the Workforce, Including Diverse and Underserved Populations.

Like many of the nation's leading employers, the RLC's members engage in a variety of recruiting programs to ensure they have access to the talent they need from all sectors of the population. These include college-campus recruiting, job

[2] Notably, the Eighth Circuit granted rehearing *en banc* to consider the question of whether former employees subject to a reduction-in-force recall policy (as opposed to a hiring policy) were "employees" at all. Order (Sep. 8, 2008). The matter settled before the petition for rehearing was resolved.

fairs, conferences, and other events to engage current students, recent graduates, veterans, and candidates with limited experience that, by their very nature, attract a greater proportion of younger candidates than older candidates. A holding that §4(a)(2) authorizes disparate impact claims by job applicants would upset these time-tested, commonplace, and common-sense practices by subjecting countless employers to the threat of class litigation and liability.

That outcome would be unfortunate. As *Amicus* the Chamber of Commerce highlights in its brief, these practices provide a ready source of active job seekers with the appropriate qualifications, allow employers to better leverage limited recruiting resources, and enable employers to efficiently recruit entry-level employees they can train for higher-level positions. *See* Chamber Amicus, pp. 14-18. Moreover, these practices provide important social benefits by helping employers reach traditionally underserved populations and improve racial and ethnic diversity in their workforce.

The RLC's members participate in a variety of events intended to attract current students and recent graduates from diverse and underserved backgrounds, which would be adversely affected by the opinion. These include participation in events sponsored by the following organizations, to name just a few: the Consortium for Graduate Study of Management (which addresses under-representation of African-Americans, Native Americans, and Hispanic-Americans

in education and business); the nation's Historically Black Colleges and Universities; the Association of Latino Professionals in Finance & Accounting; Lime (which connects disabled students with corporate internships); Management Leadership for Tomorrow (which prepares minority students for career success post-graduation); the National Association of Asian MBAs; the National Association of Black Accountants; the National Black MBA Association; the National Society of Hispanic MBAs; and Reaching Out MBA (a conference of LGBT graduate and business students).

In addition, the RLC's members participate in veterans recruiting programs, such as the Service Academy Career Conference (a job fair for service academy alumni) and programs administered by the federal Department of Labor ("DOL").[3] The latter encourages employers to create recruiting programs for veterans and to commit to hiring a specific number of veterans. Many members of the RLC have shown support for veterans by making such commitments. Because the average age of veterans entering the job force is under 40, the opinion authorizes plaintiffs to file suit over these employers' commitments to hire veterans.[4]

[3] *See* https://sacc-jobfair.com/ (last visited May 16, 2018); https://iris.custhelp.com/app/answers/detail/a_id/1489 (last visited May 16, 2018).

[4] *See* Bureau of Labor Statistics, U.S. Department of Labor, Demographics of Gulf War-era II Veterans, http://www.bls.gov/opub/ted/2010/ted_20100805.htm (last visited May 16, 2018) ("[a]mong recent veterans, 63 percent of men and 72 percent

Plaintiff-Appellee may well argue that veterans hiring programs, college-campus recruiting, minority student job fairs, and other beneficial recruiting practices are not threatened by the opinion because a fact-finder may, in a particular case, find that the practice was based on a reasonable factor other than age ("RFOA"). In reality, such a finding would be reached only after protracted discovery and litigation, not on a motion to dismiss. Despite availability of the RFOA defense, the specter of substantial discovery, other litigation expenses, and potential liability from disparate impact class litigation by applicants presents the RLC's members with an untenable dilemma. Do they continue to participate in programs sponsored by the DOL and the other organizations that benefit veterans and diverse entrants into the workforce, or do they abandon them in order to mitigate the risks created by the opinion?

That dilemma fortifies the conclusion that Congress acted deliberately when it omitted "applicants for employment" from §4(a)(2), as the contrary conclusion would disadvantage not only employers and new entrants to the workforce, but also the very populations whom Title VII and the nation's other civil rights laws were designed to protect.

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of women were under the age of 35, compared with 37 percent of nonveteran men and 29 percent of nonveteran women").

III. Employers Cannot Meaningfully Assess or Address Whether Their Recruiting and Selection Practices Have Disparate Impact Based on Age Without Creating Additional Legal Risk.

Another practical question the opinion fails to answer is how employers can meaningfully assess whether their hiring practices have age-based disparate impact. This question highlights important differences between the ADEA and Title VII. In particular, in 1978—four years after Title VII was amended to allow disparate impact hiring claims—the DOL, Department of Justice ("DOJ"), and Equal Employment Opportunity Commission ("EEOC") jointly adopted the "Uniform Guidelines on Employee Selection Procedures," establishing standards for how employers should use pre-employment selection procedures consistent with Title VII, including standards for collecting data and assessing and addressing those procedures' potential for disparate impact based on race or gender. *See* 29 C.F.R. § 1607 ("Uniform Guidelines"). Notably, in the forty years since the Uniform Guidelines were adopted, those agencies have adopted no standards governing how employers should assess and address their selection procedures' potential for disparate impact based on *age*, let alone created a comprehensive administrative scheme like the Uniform Guidelines.

The Uniform Guidelines require employers to collect race and gender information about applicants, to analyze that information at least annually to determine if their selection procedures have significant race or gender-based

adverse impact, mandate formal validation of any selection procedures found to have adverse impact, and establish detailed standards for achieving and documenting those requirements. *Id.* This administrative authority enables employers to meaningfully assess their legal risk of disparate impact race and gender discrimination hiring claims and to make proactive, informed decisions about how to validate and/or modify those practices to mitigate risk and enhance compliance.

Employers have no such tools, however, to assess or address the risk of disparate impact age discrimination litigation created by the opinion. To conduct the analyses that the panel majority would implicitly require, employers would need to collect age information from applicants. But doing so would impose risk of additional litigation and liability under federal and state law. Indeed, in a regulation addressing ADEA disparate treatment hiring claims, the EEOC states that it could find inquiries about applicants' age to create an inference of discriminatory intent. *See* 29 C.F.R. § 1625.5 ("because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination against older individuals, employment application forms that request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act"). Thus, if employers seek and collect information about applicants' ages to assess the

potential age-based impact of their hiring practices, they would do so only at the risk of private plaintiffs—or the EEOC itself—leveraging that fact as proof of discriminatory animus against older workers. Indeed, the EEOC has taken that very position. *See E.E.O.C. v. Timeless Investments, Inc.*, 734 F. Supp. 2d 1035, 1066 (E.D. Cal. 2010) (asking applicants to disclose age on applications was "sufficiently specific and substantial evidence to indicate pretext" for disparate treatment claims).[5]

Even more problematic, especially for national retailers, is the fact that at least seventeen states have enacted statutes expressly prohibiting inquiries about applicants' membership in protected classes, including age.[6] On their face, these state laws also prohibit race and gender inquiries. But such inquiries are permitted—indeed, mandated—under the Uniform Guidelines, which preempt the state law prohibitions. Because there is no parallel comprehensive federal administrative scheme mandating the collection of age data, employers operating in those seventeen states could be subject to claims of unlawful employment

[5] Private plaintiffs also argue that inquiring about applicants' age creates an inference of discriminatory intent. *See Carden v. Chenega Sec. & Prot. Servs., LLC*, No. CIV. 2:09-1799 WBS, 2011 WL 1807384, at *7 (E.D. Cal. May 10, 2011); *Burton v. Texas Parks & Wildlife Dep't*, No. A-09-CA-298-LY, 2009 WL 1231768, at *4 (W.D. Tex. May 1, 2009).

[6] These include Alaska, California, Colorado, Hawaii, Kansas, Maine, Minnesota, Missouri, New Hampshire, New York, Ohio, Oregon, Rhode Island, Utah, Washington, West Virginia, and Wisconsin.

practices were they to collect from applicants the data necessary to conduct disparate impact age analyses.

Thus, the majority's opinion would force employers onto the horns of a 3-pronged dilemma: continue to use commonplace and beneficial hiring practices without the ability to meaningfully assess or respond to their associated risks; create additional risk by collecting the information necessary to assess those hiring practices' potential for disparate impact; or abandon these commonsense practices, to the detriment of employers and job-seekers, including veterans and diverse populations who benefit daily from these kinds of programs.

CONCLUSION

For these reasons, the RLC urges the Court to grant Defendant-Appellee's petition for rehearing *en banc*.

Respectfully submitted,

/s/ Joseph G. Schmitt

Joseph G. Schmitt
Mark J. Girouard
NILAN JOHNSON LEWIS PA
120 South Sixth Street, Suite 400
Minneapolis, MN 55402
jschmitt@nilanjohnson.com
(612) 305-7500

DEBORAH R. WHITE
Retail Litigation Center, Inc.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209
(703) 600-2067

Counsel for Amicus Curiae the Retail Litigation Center, Inc.

May 17, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I certify that the forgoing brief complies with the type-volume limitation prescribed by Rule 29(b)(4). The brief contains 2,590 words in Times New Roman, 14-point size font.

May 17, 2018

/s/ Joseph G. Schmitt
Joseph G. Schmitt

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2018, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the Court's CM/ECF electronic filing system. All participants in the case are registered CM/ECF users who will be served by the CM/ECF system.

May 17, 2018

/s/ Joseph G. Schmitt
Joseph G. Schmitt