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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

STEVE RABIN, et al.,  
Plaintiffs,

v.

PRICEWATERHOUSECOOPERS LLP,  
Defendant.

Case No. 16-cv-02276-JST

**ORDER DENYING DEFENDANT’S  
MOTION FOR JUDGMENT ON THE  
PLEADINGS**

Re: ECF No. 55

Before the Court is Defendant PricewaterhouseCooper LLP’s (“PwC” or “Defendant”) Motion for Judgment on the Pleadings. ECF No. 55. Defendant seeks judgment as a matter of law on Plaintiff Steve Rabin and John Chapman’s (“Plaintiffs”) second cause of action—a disparate impact claim under the Age Discrimination in Employment Act (“ADEA”). For the reasons set forth below, the Court will deny the motion.

**I. BACKGROUND**

On April 27, 2017, Plaintiffs filed this putative class action, alleging that PwC “engages in systemic and pervasive discrimination against older job applicants.” ECF No. 62 at 7. Plaintiffs claim that PwC’s “maintains hiring policies and practices for giving preference to younger employees that result in the disproportionate employment of younger applicants.” ECF No. 1 at 3. According to the complaint, these practices also deter older applicants from applying for positions at PwC in the first place. *Id.* at 4. On July 22, 2016, PwC answered the complaint. ECF No. 32. Plaintiffs filed an amended complaint on September 8, 2016, ECF No. 42, and Defendant answered again on September 30, 2017, ECF No. 47.

Then, on January 9, 2017, Defendant moved for judgment on the pleadings, asking the court to enter judgment in favor of PwC as to Plaintiffs’ disparate impact claim under the ADEA.

1 ECF No. 60. Defendant argues that the ADEA does not permit job applicants to bring disparate  
2 impact claims.

### 3 **II. LEGAL STANDARD**

4 “After the pleadings are closed—but early enough not to delay trial—a party may move for  
5 judgment on the pleadings.” Fed. R. Civ. P. 12(c). The analysis for Rule 12(c) motions for  
6 judgment on the pleadings is “substantially identical to [the] analysis under Rule 12(b)(6) . . . .”  
7 Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012) (quotations omitted). To evaluate a  
8 Rule 12(b)(6) motion to dismiss, the court accepts the material facts alleged in the complaint,  
9 together with reasonable inferences to be drawn from those facts, as true. Navarro v. Block, 250  
10 F.3d 729, 732 (9th Cir. 2001). A plaintiff must allege facts that are enough to raise her right to  
11 relief “above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). A  
12 “judgment on the pleadings is properly granted when, taking all the allegations in the non-moving  
13 party’s pleadings as true, the moving party is entitled to judgment as a matter of law.” Fajardo v.  
14 Cty. of Los Angeles, 179 F.3d 698, 699 (9th Cir. 1999).

### 15 **III. ANALYSIS**

16 “The ADEA is remedial and humanitarian legislation and should be liberally interpreted to  
17 effectuate the congressional purpose of ending age discrimination in employment.” Naton v. Bank  
18 of California, 649 F.2d 691, 696 (9th Cir. 1981) (quoting Dartt v. Shell Oil Co., 539 F.2d 1256  
19 (10th Cir. 1976). To that end, the Supreme Court held in Smith v. City of Jackson that the ADEA  
20 permits disparate impact claims in addition to disparate treatment claims. 544 U.S. 228, 240  
21 (2005) (“[The ADEA] authorize[s] recovery on a disparate-impact theory[.]”). Neither the  
22 Supreme Court nor the Ninth Circuit has explicitly held, however, that this right extends to both  
23 employees and job applicants under the ADEA. Based on the language of the ADEA, existing  
24 precedent, agency interpretations of the ADEA, and the Act’s legislative history, the Court today  
25 concludes that job applicants like Plaintiffs may bring disparate impact claims.

#### 26 **A. Text of the ADEA**

27 Section 4 of the ADEA makes it unlawful for an employer:  
28

1 to limit, segregate, or classify his employees in any way which would deprive or  
 2 tend to deprive any individual of employment opportunities or otherwise  
 adversely affect his status as an employee, because of such individual's age . . . .

3 29 U.S.C. § 623(a)(2). In Smith, the Supreme Court held unequivocally that section 4(a)(2)  
 4 allows for disparate impact claims. 544 U.S. at 240. The only question here is whether that right  
 5 extends to job applicants in addition to employees.

6 The plain language of the statute supports the more inclusive interpretation. Critically, the  
 7 ADEA uses the phrase “any individual,” rather than “employee” to identify those people section  
 8 4(a)(2) protects. 29 U.S.C. § 623(a)(2). By contrast, elsewhere in the same provision, Congress  
 9 chose the word “employees” to refer to the people an employer may not “limit, segregate, or  
 10 classify.” Id. The Court assumes that this variation in language was a deliberate choice, and one  
 11 that reflects Congress’s intent to include all “individuals” within section 4(a)(2)’s ambit. S.E.C. v.  
 12 McCarthy, 322 F.3d 650, 656 (9th Cir. 2003) (“It is a well-established canon of statutory  
 13 interpretation that the use of different words or terms within a statute demonstrates that Congress  
 14 intended to convey a different meaning for those words.”). This reading of section 4(a)(2) is  
 15 bolstered further by the fact that, elsewhere in the ADEA, Congress used the phrase “any  
 16 employee” to refer to the affected parties with a right to sue. See, e.g., 29 U.S.C. § 623(a)(3)  
 17 (making it unlawful “to reduce the wage rate of any employee in order to comply with this  
 18 chapter”) (emphasis added). “If Congress intended to protect a narrower group, [such as  
 19 employees only], it would have said so.” Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958,  
 20 982 (11th Cir. 2016) (Martin, J., dissenting).

21 The Court acknowledges that the Eleventh Circuit came to the opposite conclusion in  
 22 Villarreal. Indeed, Defendant leans heavily on the majority opinion in that case for its argument  
 23 that the plain language of section 4(a)(2) clearly limits its application to employees. The Court in  
 24 Villarreal focused on the phrase “or otherwise adversely affect his status as an employee,” and  
 25 argued that its use made ““depriving or tending to deprive any individual of employment  
 26 opportunities’ a subset of ‘adversely affecting [the individual’s status as an employee.’”  
 27 Villarreal, 839 F.3d at 963. Under this reading, section 4(a)(2) gives only employees, and not  
 28 applicants, the right to bring disparate impact claims. Defendant further explains how, in other

1 parts of the U.S. Code, similar “otherwise” phrases have been interpreted to “operate[] as a  
2 catchall: the specific items that precede it are meant to be subsumed by what comes after the ‘or  
3 otherwise.’” ECF No. 64 at 8. But the power of this argument and Defendants’ statutory  
4 examples is undermined by the fact that the Supreme Court has interpreted *identical* statutory  
5 language in Title VII, and did not suggest that only employees were entitled to bring suit or that  
6 the “otherwise” phrase modifies “any individual.” See Part III.B (discussing Griggs v. Duke  
7 Power Co.).

8 Moreover, as Judge Martin noted in her dissent, “the Supreme Court has even told us that  
9 when the word employee lacks any temporal qualifier it can include people other than current  
10 employees,” such as “prospective employees.” Id. at 984 (Martin, J., dissenting) (citing Robinson  
11 v. Shell Oil Co., 519 U.S. 337, 342 (1997)) (internal quotation marks omitted).<sup>1</sup> “If ‘employees  
12 can mean prospective employees, surely ‘any individual’ can too.” Id. The text of the statute  
13 therefore contradicts the Villarreal majority’s conclusion that “4(a)(2) protects an individual only  
14 if he has a ‘status as an employee.’” Id. at 963.

15 Defendant and the Villarreal majority also focus on section 4(c)(2) of the ADEA, which  
16 uses the words “status as an employee or as an applicant for employment” rather than “status as an  
17 employee” like section 4(a)(2). According to Defendant, Congress’s decision to omit the  
18 “applicant for employment” language in section 4(a)(2) must mean something. This is  
19 Defendant’s strongest textual argument. Nonetheless, Section 4(c)(2) is distinguishable, because  
20 it governs labor organizations, not employers. The Villarreal dissent explained the ramifications  
21 of this distinction:

22 [Section 4(c)(2)] governs a labor organization’s ability to “refuse to refer for  
23 employment.” This part of the statute targets the unique way in which labor  
24 organizations can discriminate when they “refer” “applicants” to employers, such  
25 as through union hiring halls. None of the other parts of the ADEA that govern  
26 employers say anything about “referring” anyone for employment. Employers,  
27 after all, don’t “refer applicants.” But labor organizations, by virtue of their  
28 unique referral role, are sometimes the sole conduit by which an employer can get

<sup>1</sup> Defendant misunderstands Plaintiffs and the Court’s use of Robinson. ECF No. 64 at 13. That decision supports a broader interpretation of the word “employee”; the Court does not rely on Robinson to interpret the word “individual.”

1 potential job applicants. And § 4(c)(2) prohibits labor organizations from  
 2 “refus[ing] to refer” a person for employment at all because of her age and  
 3 thereby denying her “status . . . as an applicant for employment.” In other words,  
 4 the statute protects someone who sought work but was denied status as an  
 5 applicant—that is, being allowed to apply at all—due to labor organizations’  
 6 control of the hiring process.

7 839 F.3d at 985 (Martin, J., dissenting). The Court finds this analysis persuasive. And  
 8 Defendant’s statutory comparison, however convincing, cannot overcome the use of the phrase  
 9 “any individual,” binding Supreme Court precedent, see Part III.B, or the legislative history of the  
 10 Act, see Part III.C.

11 Finally, the most natural reading of section 4(a)(2) “plainly describes what [PwC  
 12 allegedly] did to [Plaintiffs]. Specifically, Mr. [Rabin] is an ‘individual’ who was ‘deprive[d]’ ‘of  
 13 employment opportunities’ and denied any ‘status as an employee’ because of something an  
 14 employer did to ‘limit . . . his employees.’” Id. at 982 (Martin, J., dissenting). Given that it is  
 15 PwC’s alleged discrimination that deprived Mr. Rabin of his status an employee, it would turn the  
 16 ADEA on its head to say that Mr. Rabin cannot bring a disparate impact claim because he was  
 17 never actually hired.

### 18 **B. Supreme Court Precedent**

19 Supreme Court precedent supports an interpretation of section 4(a)(2) that permits job-  
 20 seekers to bring disparate impact claims. Most importantly, in Griggs v. Duke Power Co., the  
 21 Supreme Court considered identical statutory language in Title VII. 401 U.S. 424 (1971).<sup>2</sup> The  
 22 question before the Court was whether, under that identical statute, “an employer is prohibited by  
 23 the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a  
 24 standardized general intelligence test as a condition of employment in or transfer to jobs.” Id. at  
 25 425-26 (emphasis added). The Court held that Title VII prohibited the employer’s actions if they  
 26 were shown to have a disparate impact on African Americans. Id.

27 Defendant argues that Griggs has no bearing on whether job applicants, versus employees,  
 28 may bring disparate impact claims, because in Griggs the plaintiffs were all “employed at the

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<sup>2</sup> Of course, the statutes differ in that protected status under Title VII is “race, color, religion, sex, or national origin,” whereas under the ADEA it is “age.”

1 Company’s Dan River Steam Station.” Id. at 426. But as described above, the Court phrased the  
2 question presented broadly to include a challenge to “condition[s] of employment.” Id.  
3 Moreover, the Griggs Court explained the decision below as finding that the defendant had  
4 “openly discriminated on the basis of race in the hiring and assigning of employees at its Dan  
5 River plant.” Id. at 426-27 (emphasis added). This suggests that the Court did not intend to limit  
6 Title VII’s protections in a way that excluded job applicants. That more liberal reading of Griggs  
7 makes sense given the Court’s approval of disparate impact liability as a tool to combat “subtle  
8 forms of discrimination that ‘freeze the status quo,’ create ‘artificial, arbitrary, and unnecessary  
9 barriers to employment,’ or ‘operate as built-in-headwinds for minority groups.’” Villarreal, 839  
10 F.3d at 987 (Martin, J., dissenting) (quoting Griggs, 401 U.S. at 430-32). Those same “subtle  
11 forms of discrimination” are just as likely to persist in the interview room as they are within the  
12 walls of the workplace. It cannot be that, despite Griggs’s clear message, an employer remains  
13 free to freeze the status quo “by not hiring minorities at all.” Id.

14 Notably, several subsequent Supreme Court decisions have characterized Griggs as  
15 applying to job applicants. In Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities  
16 Project, Inc., for example, the Court described how Griggs had placed important limits on Title  
17 VII disparate impact liability, explaining that even “in a disparate-impact case, § 703(a)(2) does  
18 not prohibit hiring criteria with a ‘manifest relationship’ to job performance.” 135 S. Ct. 2507,  
19 2517 (2015). Likewise, in Connecticut v. Teal, the Court explained that although the requirements  
20 in Griggs “applied equally to white and black employees and applicants, they barred employment  
21 opportunities to a disproportionate number of blacks” and were therefore invalid. 457 U.S. 440,  
22 446 (1982) (emphasis added); see also Dothard v. Rawlinson, 433 U.S. 321, 329 (1977)  
23 (explaining that Griggs “ma[de] clear that to establish a prima facie case of discrimination, a  
24 plaintiff need only show that the facially neutral standards in question select applicants for hire in  
25 a significantly discriminatory pattern”). That the Court described its own prior decision in these  
26 terms casts doubt on Defendant’s cramped reading of Griggs.

27 Defendant makes much of the fact that Congress later amended the section of Title VII at  
28 issue in Griggs to read:

1 to limit, segregate, or classify his employees or applicants for employment in any  
2 way which would deprive or tend to deprive any individual of employment  
3 opportunities or otherwise adversely affect his status as an employee, because of  
such individual's race, color, religion, sex, or national origin.

4 42 U.S.C. § 2000e-2(a)(2) (emphasis on new language). Defendant suggests that the decision to  
5 add the phrase “or applicants for employment” means Congress believed that group was not  
6 protected under the earlier version – i.e., the version interpreted in Griggs. ECF No. 55 at 10.  
7 Because Congress did not add a similar phrase to the ADEA, the argument goes, job applicants  
8 remain unprotected under section 4(a)(2).<sup>3</sup> Defendant draws the wrong inference. As Plaintiffs  
9 point out, the amendment to Title VII was intended to be “declaratory of present law,” S. Rep. No.  
10 92-415 at 43 (1971), and “fully in accord with the decision of the Court” in Griggs, H.R. Rep. No.  
11 92-238 at 21-22 (1971). In other words, the amendment signaled that Griggs had properly  
12 interpreted Title VII as protecting both employees and applicants. Therefore, the amendment  
13 supports, rather than detracts from, an interpretation of the ADEA as likewise covering both  
14 employees and applicants.

15 Smith, which announced that disparate impact claims are cognizable under section 4(a)(2)  
16 of the ADEA, made no distinction between applicants and employees. 544 U.S. 228 (2005).<sup>4</sup> It is  
17 true that the plaintiffs in Smith were employees. Id. at 230 (describing plaintiffs as “police and  
18 public safety officers employed by the city of Jackson”). But just because Smith granted relief to  
19 employees, it does not follow that the Court would *not* have granted relief had the plaintiffs been  
20 applicants instead. Moreover, the Smith Court relied heavily on the reasoning in Griggs, which, as  
21 described above, did not limit its holding to employees. Id. at 232 (“[We] now hold that the  
22 ADEA does authorize recovery in ‘disparate-impact’ cases comparable to Griggs.”).

23 \_\_\_\_\_  
24 <sup>3</sup> Defendant cites Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009), in support of this point. But  
25 there, the Court emphasized that “Congress neglected to add such a provision to the ADEA when  
26 it amended Title VII . . . , even though it *contemporaneously* amended the ADEA in several  
ways.” Id. at 175 (emphasis added). Defendant makes no claim here that Congress specifically  
27 considered adding “or applicants for employment” to the ADEA at the time it amended Title VII  
28 and decided against it.

<sup>4</sup> When Smith was decided, the amendment to Title VII that added the “or applicants for  
employment” language had been in place for over three decades.

1            Smith did identify “[t]wo textual differences between the ADEA and Title VII [that] make  
2 it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope  
3 of disparate-impact liability under ADEA is narrower than under Title VII.” Smith, 544 U.S. at  
4 240. Neither, however, has the slightest connection to the applicant/employee distinction.<sup>5</sup> That  
5 the Court chose to comment on the differences between Title VII and the ADEA’s analogous  
6 provisions but made no mention of the “or applicants for employment” language in Title VII is  
7 noteworthy.

8            The Smith Court also carefully analyzed the textual differences between section 4(a)(2)  
9 and section (4)(a)(1). The latter makes it unlawful to “to fail or refuse to hire or to discharge any  
10 individual or otherwise discriminate against any individual with respect to his compensation,  
11 terms, conditions, or privileges of employment, because of such individual’s age.” 29 U.S.C. §  
12 623(a)(1). Although subsection one contains the “fail or refuse to hire” language, and subsection  
13 two does not, the Smith Court “said nothing about the distinction between hiring versus other  
14 claims that [Defendant’s] entire effort to distinguish Smith is staked on.” Villarreal, 839 F.3d at  
15 988 (Martin, J., dissenting).

16            Rather than invent a new and more restrictive interpretation of section 4(a)(2), this Court  
17 will follow the guidance of Smith and Griggs.<sup>6</sup> Those precedents support extending the right to  
18 make a disparate impact claim under the ADEA to “any individual” who has been adversely  
19 affected “because of such individual’s age,” regardless of whether she is an applicant or employee.

### 20            **C. Agency Interpretation**

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22  
23            <sup>5</sup> First, ADEA defendants may use the “reasonable factors other than age” defense; and second,  
24 Wards Cove’s pre-1991 interpretation of Title VII’s identical language remains applicable to the  
ADEA. ECF No. 62 at 16-17.

25            <sup>6</sup> Defendant claims that, by adopting this approach, the Court will be “break[ing] with th[e]  
26 significant weight of precedent,” pointing to Villarreal, but also to Ellis v. United Airlines, Inc., 73  
27 F.3d 999, 1009 (10th Cir. 1996) and E.E.O.C. v. Francis W. Parker Sch., 41 F.3d 1073, 1075 (7th  
28 Cir. 1994). ECF No. 64 at 12. This reliance is misplaced. Both the Tenth and Seventh Circuits  
held that disparate claims were not available at all under the ADEA. The Supreme Court overruled  
that holding in Smith. The fact that Ellis and Francis W. Parker School involved claims by job  
applicants does not change the fact that their central holdings are no longer good law and cannot  
support Defendant’s argument here.



1           Deference to agency interpretation provides yet another reason to reject Defendant’s  
 2 narrow construction of section 4(a)(2). To be clear, the Court believes the language of the statute,  
 3 read in light of Griggs and Smith, makes plain that the ADEA permits job applicants to bring  
 4 disparate impact claims. Nonetheless, the Court acknowledges that others might would interpret  
 5 section 4(a)(2) differently, including a majority of judges on the Villarreal en banc panel. Where a  
 6 statute is ambiguous, courts grant increased deference to the responsible agency’s interpretation.  
 7 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

8           Here, the Equal Employment Opportunity Commission (“EEOC”), the agency with  
 9 authority to issue rules and regulations related to the ADEA, 29 U.S.C. § 628, has long interpreted  
 10 the ADEA as permitting disparate impact claims by job-seekers. The EEOC’s current regulation  
 11 explains that “[a]ny employment practice that adversely affects *individuals* within the protected  
 12 age group on the basis of older age is discriminatory unless the practice is justified by a  
 13 “reasonable factor other than age.” 29 C.F.R. § 1625.7(c). The regulation mirrors section  
 14 4(a)(2)’s broad “any individual” language. Additionally, the regulation’s preamble section  
 15 explains how it addresses “neutral practices that act as barriers to the employment of older  
 16 workers”:

17           Data show that older individuals who become unemployed have more difficulty  
 18 finding a new position and tend to stay unemployed longer than younger  
 19 individuals. To the extent that the difficulty in finding new work is attributable to  
 20 neutral practices that act as barriers to the employment of older workers, the  
 21 regulation should help to reduce the rate of their unemployment.

22           77 Fed. Reg. 19080, 19092 (2012) (footnote omitted). This endorsement of applicant disparate  
 23 impact claims is not new. Only months after the ADEA was signed into law, the Department of  
 24 Labor, then the agency in charge of its interpretation, declared that supposedly neutral “pre-  
 25 employment” tests must be “reasonably necessary for the specific work to be performed” and  
 26 “equally applied to all applicants.” 33 Fed. Reg. 9173 (1968). Defendant offers no persuasive  
 27 reason to discard this decades-old interpretation of the ADEA by its implementing agency.

#### 28           **D. Legislative History**

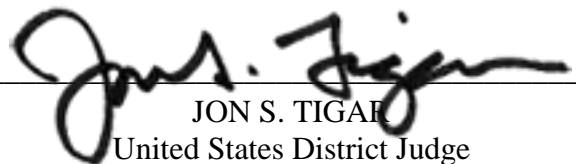
1 The history of the ADEA's enactment reveals that Congress was concerned not just with  
 2 age discrimination within the workplace, but also with the barriers to older workers finding  
 3 employment in the first place. In the Act's statement of purpose, Congress described how "older  
 4 workers find themselves disadvantaged in their efforts . . . to regain employment when displaced  
 5 from jobs," and struggle with "high" unemployment, "especially long-term unemployment with  
 6 resultant deterioration of skill, morale, and employer acceptability." 29 U.S.C. § 621(a)(1), (a)(3).  
 7 Plaintiffs amply demonstrate that congressional supporters of the ADEA spoke out often and  
 8 openly about the need to address age discrimination in hiring. ECF No. 62 at 24-26. As the chief  
 9 sponsor of the ADEA in the Senate, Ralph Yarborough, stated succinctly, "[i]n simple terms, this  
 10 bill prohibits discrimination in hiring and firing." 113 Cong. Rec. 31248, 31252 (1967). This and  
 11 many other references to protecting older job applicants negate any impression that Congress  
 12 viewed discrimination in hiring as less important than discrimination against those already  
 13 employed. While statements by particular lawmakers are not "controlling," as Defendant rightly  
 14 states, it is wrong to say they have "no probative value." ECF No. 64 at 20.

### 15 CONCLUSION

16 Together, a textual analysis of section 4(a)(2), the Supreme Court's precedent in Griggs  
 17 and Smith, the EEOC's interpretation of the ADEA, and the Act's legislative history, all confirm  
 18 that job applicants like Plaintiffs may bring disparate impact claims. Defendant's motion for  
 19 judgment on the pleadings is denied.

20 IT IS SO ORDERED.

21 Dated: February 17, 2017

22  
 23   
 24 JON S. TIGARI  
 United States District Judge