

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1342
(3:19-cv-00159-JAG)

JANE D. DICOCCO, M.D.,

Plaintiff – Appellant,

v.

MERRICK B. GARLAND, Attorney General, United States Department of Justice,

Defendant – Appellee.

AARP; AARP FOUNDATION,

Amici Supporting Rehearing Petition.

O R D E R

GREGORY, Chief Judge:

A panel of this Court considered Dr. Jane DiCocco’s appeal of the district court’s disposition of her Title VII and Age Discrimination in Employment Act (“ADEA”) claims against the Attorney General of the United States. The panel reversed the dismissal of DiCocco’s complaint for lack of Article III standing and remanded her Title VII claim for further proceedings, but affirmed the dismissal of her ADEA claim because “the ADEA

provision applicable to federal-sector employees does not provide a disparate-impact cause of action,” *DiCocco v. Garland*, 18 F.4th 406, 410 (4th Cir. 2021), and thus “her claim does not fall within the government’s waiver of sovereign immunity.” *Id.*

DiCocco petitioned for rehearing en banc, and the parties briefed the matter, with the government taking the position that the ADEA’s federal-sector provision, 29 U.S.C. § 633a(a), does not encompass a disparate-impact liability claim. We granted DiCocco’s petition for rehearing en banc, *DiCocco v. Garland*, No. 20-1342, 2022 WL 832505 (4th Cir. Mar. 21, 2022), and oral argument is scheduled for September 15, 2022.

By letter of August 3, 2022, the government informed the Court that, contrary to its position articulated in its March 2022 en banc briefing, it has now determined disparate-impact claims *are* cognizable under the federal-sector provision of the ADEA. In light of the government’s change in position, we now remove this case from the Court’s September argument calendar and return the case to the panel to vacate the district court’s dismissal of the complaint for lack of Article III standing and to remand DiCocco’s ADEA and Title VII claims for consideration by the district court in the first instance.

The motion of Amici AARP and AARP Foundation for leave to participate in the oral argument of this case is dismissed as moot. Entered at the direction of Chief Judge Gregory with the concurrences of Judges Wilkinson, Niemeyer, Motz, King, Agee, Wynn, Diaz, Thacker, Harris, Richardson, Quattlebaum, Rushing, Heytens, and Senior Judge Floyd.

FOR THE COURT

/s/ Patricia S. Connor
Clerk