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TITLE VII IMPACT ANALYSIS APPLIED TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT: IS A TRANSPLANT APPROPRIATE?

*Mack A. Player**

The Equal Employment Opportunity Commission and a number of courts have held that "impact analysis," developed by the Supreme Court in Title VII litigation, should be utilized when employer actions are challenged under the Age Discrimination in Employment Act. Under Title VII if plaintiff establishes that an employment practice has an adverse impact on a class of persons protected by that statute, the burden is shifted to defendant to prove that the challenged practice is "necessary." Failure of defendant to carry the relatively heavy burden of proving "business necessity" will result in a judgment for plaintiff. Professor Player suggests that the "business necessity" burden is not appropriate in Age Act litigation, and proposes that if a practice has an adverse impact on persons within the protected age group the defendant should not be held to be in violation of the Act if the challenged practice is age neutral and "reasonable."

I. INTRODUCTION

A. *The Age Discrimination in Employment Act of 1967 (ADEA).*[1]

Generally stated, the ADEA prohibits age discrimination in the employment relationship by private and public[2] employers,[3] la-

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1. 29 U.S.C. §§ 621-34 (1976 & Supp. V 1981).

2. The 1974 Amendments to the ADEA made state and local governments defined "employers." 29 U.S.C. § 630(b)(2) (1976 & Supp. V 1981). Agencies of the federal government are specifically excluded as defined "employers" under § 630(b)(2). 29 U.S.C. § 633a(a) (Supp. V 1981) provides, however, that "[a]ll personnel actions affecting [federal] employees or applicants for [federal] employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." Separate procedures are provided for enforcing federal employer rights. *See* 29 U.S.C. § 633a(b) (1976 & Supp. V 1981). The applicability of the ADEA to state and local governments is constitutional. EEOC v. Wyoming, 103 S. Ct. 1054 (1983).

3. 29 U.S.C. § 630(b) defines employer as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."

bor organizations[4] and employment agencies.[5] This protection, however, is granted only to individuals between the ages of 40 and 70.[6] That is, the ADEA protects a person between the ages of 40 and 70 against all forms of age-based employment discrimination by employers, unions or employment agencies. Thus, persons under age 40 or over age 70 fall outside of the ADEA's protection, and employer's and unions are free to make age-based distinctions with respect to such persons.

The ADEA provides certain express defenses to age distinctions. An employer can make age distinctions when age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[7] An employer may make benefit distinctions pursuant to a bona fide retirement and insurance benefit program, provided that such a plan is not used as a basis for involuntary retirement before the age of 70 or as a rationale for refusing to employ an applicant.[8] Employers and unions may also recognize

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4. *Id.* at § 630(d) & (e) which provide that a union needs generally to have twenty-five or more members and be certified or acting as an employee representative.

5. *Id.* at § 630(c), which defines "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer . . . ."

6. *Id.* at § 631(a) (Supp. V 1981).

7. *Id.* at § 623(f)(1)(1976). In Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977) the court stated that:

> [T]he burden is on the employer to show (1) that the BFOQ is reasonably necessary to the essence of its business . . . and (2) that the employer has a reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

Id. at 1271. *Cf.* Hodgson v. Greyhound Lines, 499 F.2d 859 (7th Cir. 1974). As applied to mandatory age limit on hiring pilots, *compare* Smallwood v. United Air Lines, Inc. 661 F.2d 303 (4th Cir. 1981) (BFOQ not established), *with* Murnane v. American Airlines, 667 F.2d 98 (D.C. Cir. 1981)(BFOQ established). As to mandatory retirement of pilots prior to age 70, *compare* Tuohy v. Ford Motor Co., 675 F.2d 842 (6th Cir. 1982)(BFOQ at age 60 not established) *with* Air Line Pilots Ass'n v. TWA, 30 Empl. Prac. Dec. (CCH) ¶ 33,298 (S.D.N.Y. 1982) and Hollelman v. Conservation Dep't, 30 Fair Empl. Prac. Cas. (BNA) 1104 (W.D. Mo. 1982)(BFOQ established). As applied to firefighters, *see* Orzel v. City of Wauwatosa Fire Dep't., 697 F.2d 743 (7th Cir. 1983). *See generally* 29 C.F.R. § 1625.6 (1982); Player, *Defenses Under the Age Discrimination in Employment Act: Misinterpretation, Misdirection and the 1978 Amendments*, 12 GA. L. REV. 747, 751-67 (1978).

8. 29 U.S.C. § 623(f)(2) (Supp. V. 1981). An exception to the prohibition on mandatory retirement is imposed upon bona fide executives over the age of 65 who

and apply bona fide seniority systems.[9]

B. *Historical Background of the ADEA*

The ADEA shares a heritage with Title VII of the Civil Rights Act of 1964.[10] During the Congressional debates on Title VII, it was suggested that age be included along with race, sex, national origin and religion as one of the proscribed criteria in that statute. That suggestion was rejected in favor of a specific directive to the Secretary of Labor to undertake a study of age discrimination and report back to the Congress with recommendations.[11] The Report, The Older American Worker: Age Discrimination in Employment (1965), along with subsequent legislation drafted by Congress, served as the basis for the ADEA.[12] Thus, the operative substantive prohibitions

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received vested retirement of at least $27,000 annually. *Id.* at § 631(c) (Supp. V 1981). *See* Zises v. Prudential Ins. Co., 30 Fair Empl. Prac. Cas. (BNA) 1218 (D. Mass. 1982). The prohibitions against involuntary retirement made pursuant to a plan was enacted through a 1978 Amendment to the ADEA. This amendment was a reaction to the Supreme Court's decision in United Air Lines v. McMann, 434 U.S. 192 (1977), which had permitted such retirement.

Effective January 1, 1983, the following proviso was added to the ADEA:

> (g)(1) For purposes of this section, any employer must provide that any employee aged 65 through 69 shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee under age 65.
>
> (2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of Title 26.

29 U.S.C.A. § 623(g) (West Supp. 1983). For discussion of the permissible distinctions that may be made in employee benefit plans, see 29 C.F.R. § 860.120 (1982). Generally stated, *benefits* may be reduced on the basis of an employee's age, so long as that reduction is based on actuarial costs. An employee cannot be compelled, however, to make greater contributions in order to retain the same benefits. 29 C.F.R. § 860.120(d)(4)(i) (1982); Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir. 1982); C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION, § 11.5 (1980).

9. 29 U.S.C. § 623(f)(2) (Supp. V 1981). *See* Pullman-Standard v. Swint, 456 U.S. 273 (1982) (interpreting a similar provision of Title VII); California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). *See also* Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir. 1978) (ADEA interpretations); Hodgson v. American Hardware Mut. Ins. Co., 329 F. Supp. 225 (D. Minn. 1971); 29 C.F.R. § 1625.8 (1982).

10. 42 U.S.C. §§ 2000e-2000e-17 (1976).

11. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964); Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 606, 80 Stat. 830, 845 (1966).

12. EEOC v. Wyoming, 103 S. Ct. 1054, 1057-58 (1983); *see generally* EEOC,

of the ADEA were drawn directly from Title VII.[13] The two major defenses set forth in the ADEA and Title VII, bona fide occupational qualification and seniority, are phrased in virtually identical terms.[14] There are, however, differences between Title VII and the ADEA. The most dramatic involve procedures[15] and remedies.[16] For example, the ADEA provides for trial by jury;[17] Title VII does not.[18] Yet, not all of the differences between the two statutes are "technical" or "procedural." Unlike Title VII, the ADEA specifically allows distinctions to be based on bona fide benefit plans.[19] Additionally, the ADEA, using language from the Equal Pay Act,[20] permits distinctions based on "reasonable factors other than age,"[21] and allows discipline for "good cause."[22] Title VII, however, does not make such allowances.

LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (1981).

13. Lorillard v. Pons, 434 U.S. 575, 584 (1978). *Compare* 42 U.S.C. § 2000e-2(a)(1) (1976) *with* 29 U.S.C. § 623(a)(1) (1976).

14. *Compare* 42 U.S.C. § 2000e-2(e) and (h) (1976) *with* 29 U.S.C. § 623(f)(1) and (2) (1976 & Supp. V 1981).

15. The ADEA incorporates the enforcement procedures of the Fair Labor Standards Act, 29 U.S.C. §§ 216 & 217 (1976 & Supp. V 1981), [hereinafter cited as FLSA], into § 626(d). The ADEA further provides that charges must be filed with the EEOC within 180 days after the unlawful practice or 300 days if there is a local agency empowered to enforce local age proscriptions. The charging party must also file with any such local agency. Before suit is filed the charging party must simply wait 60 days. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). Title VII has substantially different filing requirements including an obligation to secure from the EEOC a "notice of right to sue." Suit must be filed within 90 days of the receipt of this notice. 42 U.S.C. § 2000e-5 (1976). For a general summary, *see* M. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL 228-44, 282, 290 (2d ed. 1981).

16. The ADEA utilization of FLSA enforcement procedures allows collection of liquidated damages for willful violations. 29 U.S.C. § 626(b) (1976). Only equitable relief is available under Title VII. Pearson v. Western Electric Co., 542 F.2d 1150 (10th Cir. 1976).

17. *See* 29 U.S.C. § 626(c) (Supp. V 1981).

18. Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975).

19. 29 U.S.C. § 623(f)(2) (1976 & Supp. V 1981).

20. 29 U.S.C. § 206(d) (1976). The Equal Pay Act was the 1963 amendment to the FLSA and it prohibited discrimination in pay on the basis of sex between men and women performing "equal work".

21. 29 U.S.C. § 623(f)(1)(1976).

22. 29 U.S.C. § 623(f)(3) (1976 Supp. V 1981).

C. *The Issue*

If a plaintiff between the ages of 40 and 70 can establish that a particular employment action was "because of" or motivated by age considerations, such action will constitute a violation of the ADEA.[23] There are various ways to prove age motivation. The plaintiff may have direct evidence drawn from notations on employment files,[24] public statements,[25] or published advertisements.[26] A plaintiff might be able to gather statistical data which indicates that particular employment decisions could not have been made without consideration of the age of the employees adversely affected.[27] In the absence of direct or statistical proof of discriminatory motives, a plaintiff also may be able to create an inference of age motivation through proof of objective facts.[28] In each case, motive is the key element of the

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23. *See, e.g.*, Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979). The operative language of the ADEA provides:

> (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(1)6(2)(1976).

24. Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975); Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972).

25. Robb v. Chemetron Corp., 17 Fair Empl. Prac. Cas. (BNA) 1535 (S.D. Tex. 1978); *cf.* Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980).

26. Hodgson v. First Fed. Sav. & Loan Ass'n., 455 F.2d 818 (5th Cir. 1972).

27. EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980); Walker v. Pettit Const. Co. 605 F.2d 128 (4th Cir. 1979); *See also* Gay v. Waiters' & Dairy Lunchmen's Union, Local Union No. 30, 694 F.2d 531 (9th Cir. 1982); *cf.* Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1123 (5th Cir. 1977).

28. "[A] plaintiff may establish a prima facie case . . . by showing (1) that he or she is within the protected age group, (2) that he or she met applicable job qualifications, (3) that despite these qualifications, he or she was discharged, and (4) that after the discharge the position remained open." Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959 (8th Cir. 1978). *Accord:* Smithers v. Bailar, 629 F.2d 892 (3d Cir. 1981); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979). This showing creates an inference of age motivation, shifting an evidentiary burden to defendant to articulate a legitimate, nondiscriminatory reason for its treatment of plaintiff. If defendant fails to carry this burden of presenting a legitimate reason, the inference of age motivation has not been refuted and plaintiff will be entitled to a judgment as a matter of law. Lovelace v. Sherwin Williams Co., 681 F.2d 230 (4th Cir. 1982); Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981); Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980). For a more

plaintiff's case.

One critical issue presented by ADEA litigation, however, is whether a defendant can utilize bona fide age-neutral factors that have an adverse impact on the protected age group. That is, absent any proof of improper motivation, does evidence that a selection device or criteria has an unjustified adverse impact on persons between the ages of 40 and 70 constitute a violation of the ADEA?

To illustrate, assume that an employer imposes on all employees certain physical qualifications. The evidence indicates that the employer's goal is to improve the health and performance of his work force and not to harm any age class. Assume further that these physical qualifications have an adverse impact on persons over age 40. That is, persons over age 40 fail to meet the standards much more frequently than do persons under age 40. Assume further that the employer is unable to show that the particular job duties require the level of physical qualifications that are imposed on the employees. In short, good physical condition may be rational and imposed in good faith. Nonetheless, the physical requirements may not be necessary or directly related to job performance. Would such a fact pattern establish a violation of the ADEA?

Using another example, assume that an employer imposes an objective pen and paper test. Perhaps because of test wisdom or their more recent exposure to formal education, it is proved that persons under age 40 perform significantly better on the test than do persons over age 40. As a result, the younger applicants are selected at a rate significantly higher than the older applicants. Assume, too, that the employer can establish good faith in imposing the examination. For example, the employer may legitimately desire a more highly sophisticated workforce. Nevertheless, the employer is unable to prove that the examination relates in any precise way to actual or projected performance on the particular job. In short, the test measures general knowledge, but does not predict specific ability to perform job duties. Would this test violate the ADEA?

To be sure, if these cases arose in a Title VII context, a violation would exist. "Congress directed the thrust of the Act [Title VII] to the consequences of employment practices not simply the motiva-

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comprehensive discussion, see Player, *Proof of Disparate Treatment Under the ADEA*, 17 GA. L. REV. 621 (1983).

Thus, the courts have adopted, with adaptations, the approach utilized in Title VII litigation. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

tion." Title VII "proscribes not only overt discrimination, but it also forbids practices that are fair in form, yet discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[29] Thus, the unresolved issue is whether a similar conclusion would or should be reached under the ADEA?

II. The Title VII Model: An Overview of Impact Analysis

A. *Neutral Standards: Inherently Discriminatory*

The earliest cases arising under Title VII involved criteria that were neutral on their face but, as applied to a particular employer's work force, necessarily produced a non-neutral or racially discriminatory result. For example, an employer with a work force traditionally segregated into two units according to race imposes a rule prohibiting transfers between units. The neutral "no transfer" rule is inherently and necessarily discriminatory on the basis of race because it perpetuates existing patterns of segregation.[30] A union with all white membership or an employer with white management gives preference to family members. Although neutral on its face, such nepotism necessarily has a discriminatory effect.[31] There is no need to present statistics. The result is a necessary and unavoidable consequence of the criteria. The criteria, therefore, cannot be considered truly neutral. Only if the employer could show the business necessity of such an inherently discriminatory criteria would the courts permit its use.[32]

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29. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).

30. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

31. United States v. Sheet Metal Workers, Int'l Ass'n, Local 36, 416 F.2d 123 (8th Cir. 1969); Local 53, Int'l Ass'n of Heat & Frost Insulators and Asbestos Workers v. Volgler, 407 F.2d 1047 (5th Cir. 1967). *See also* Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1983).

32. *See supra* note 31 and accompanying text.

B. *Neutral Standards: Adverse Impact*

Griggs v. Duke Power Co.[33] addressed the utilization of standards which were not inherently tied to a proscribed classification, but only through statistical proof could it be shown that the criteria in fact adversely affected a protected class. The employer in *Griggs* utilized two different criteria in making employment selections. Employees were required to have a high school diploma and make passing scores on two nationally developed intelligence tests. Census data disclosed that 34% of the white males in the state had high school diplomas compared to only 12% of the black males. Thus, the neutral rule (high school diploma) had an impact on potential black applicants at a rate almost three times that of the impact on potential white applicants. As to the objective tests, an EEOC study found that 58% of the whites taking a similar test had received a passing score compared to a success rate of only 6% of blacks.[34] Notwithstanding the impact of these two neutral criteria, the lower courts found that the employer imposed the requirements in good faith with no intent to discriminate against black applicants. The lower courts further concluded that motive was a required element which plaintiff had the burden of establishing. Consequently, judgment was granted to the defendant. The Supreme Court reversed, and ruled that motivation was not the controlling factor. The Court stated that "[t]he true touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[35]

A few years later, the Court, addressing the legality of minimum height and weight requirements under Title VII refined and clarified its approach to impact analysis:

> [T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection de-

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33. 401 U.S. 424 (1971).

34. *Id.* at 430 n.6.

35. *Id.* at 431.

> vices without a similar discriminatory effect would also "serve the employer's legitimate interest in efficient and trustworthy workmanship."[36]

The Court found that the plaintiff had established a prima facie case of sex discrimination by showing that the physical criteria excluded from consideration over 41% of the female population of the United States, while having an adverse effect on less than 1% of the male population. The Court held that the employer had not met its burden of showing a "manifest relationship to the employment in question."[37] Arguing that minimum height and weight for a highway patrol officer would suggest superior strength was inadequate. The Court suggested that the defendant's burden would be met not by a showing of reasonableness but only by correlating height and weight requirements to actual job performances.

In a third major case the Supreme Court addressed the issue: "What must an employer show to establish that pre-employment tests racially discriminatory in effect, though not in intent, are sufficiently 'job related' to survive challenge under Title VII?"[38] The Court indicated that "job relatedness" proof should be guided by the EEOC Guidelines[39] which the Court held "are 'entitled to great deference.' "[40] These Guidelines, followed by the Court, require the defendant to establish a close statistical correlation according to standards of professional statisticians between performance on the test and accurately measured job performance. Upon a showing that the criteria have an adverse impact, the failure of defendant to establish that statistical correlation will result in a judgment for the plaintiff.[41]

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36. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) and Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).

37. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

38. Albemarle Paper Co. v. Moody, 422 U.S. 405, 408 (1975).

39. 29 C.F.R. pt. 1607 (1975). The EEOC has since issued new guidelines; the Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. pt. 1607 (1982).

40. Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971)).

41. *But see* New York Transit Auth. v. Beazer, 440 U.S. 568 (1979), which suggested, simultaneously, a greater burden on plaintiff in establishing the adverse impact of a neutral criterion and a very relaxed burden on defendant in proving "business necessity."

III. The Issue Resolved? Transplanting The Title VII Adverse Impact Model Into ADEA Litigation

A first impression would lead one to accept that the model for Title VII impact litigation could be fully employed in age discrimination cases. The Supreme Court has noted the similarity of the two statutes in origin, purpose and language.[42] Where improperly motivated disparate treatment is at issue in ADEA cases, the lower courts uniformly have adopted the elements and burdens utilized in Title VII litigation.[43] The EEOC and four courts have boldly and

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The application of impact analysis in the lower courts has been far from uniform. Some courts, following the *Griggs* example, are willing to infer adverse impact from relatively general data. *See, e.g.*, Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981); Grant v. Bethelem Steel Corp., 635 F.2d 1007 (2d Cir. 1980); Guardians Ass'n of N.Y. City Police Dep't, Inc. v. Civil Service Comm'n, 633 F.2d 232 (2d Cir. 1980). Other courts, inspired by *Beazer*, insist that the plaintiff present more exacting and precise statistical data. *See, e.g.*, EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983); EEOC v. Greyhound Lines, 635 F.2d 188 (3d Cir. 1980). In addressing the employer's burden upon proof of impact some courts, emphasizing the "necessity" aspects of *Griggs*, require the employer to demonstrate with persuasive evidence not only the importance of the business purpose but also the factual proximity of the discriminatory criteria to that goal. *See, e.g.*, Williams v. Colorado Springs, Colorado School District #11, 641 F.2d 835 (10th Cir. 1981); Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980). Other courts, however, are satisfied with a general showing of a business relationship between the criteria and some attribute of the employer's business. *See, e.g.*, Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983); Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981); Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977). Some courts have held that defendant's burden of proving "necessity" includes proof that there are no lesser discriminatory alternatives. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). Such a burden on the defendant seems clearly improper in light of the Court's statement in *Dothard*. *See supra* text accompanying note 34. Other courts have indicated that the burden of showing lesser discriminatory alternatives shifts to plaintiff after defendant has established the business relationship of the discriminatory criteria. If plaintiff carries the burden of establishing lesser discriminatory alternatives, the "necessity" of defendant's rule will be destroyed and plaintiff will prevail. Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982). It is not here the purpose to explore the precise parameters of plaintiff's burden of proving impact or defendant's burden of showing "necessity." Rather, the issue is whether future standards, adopted under Title VII, will be appropriate for use in ADEA cases.

42. Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979); Lorillard v. Pons, 434 U.S. 575 (1978).

43. Blackwell v. Sun Elec. Corp., 696 F.2d 1176 (6th Cir. 1983); Cuddy v. Carmen, 694 F.2d 853 (D.C. Cir. 1982); Anderson v. Savage Laboratories, 675 F.2d 1221 (11th Cir. 1982); Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981); Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981); Geller v. Markham, 635 F.2d 1027

broadly announced that impact analysis is appropriate for use under the ADEA.[44] Thus, the issue would appear to be well on its way to being resolved. An examination of whether Title VII standards of impact and necessity should be completely transplanted into the ADEA suggests, however, that the issue is not as simple as the EEOC and courts have indicated.

Evidence of express legislative intent on this matter is meagre. There is no indication that Congress intended to have the ADEA proscribe procedures having an adverse impact. Additionally, there was no discussion of impact analysis in the legislative history of Title VII. Nonetheless, the holding in *Griggs v. Duke Power Co.* was premised expressly upon a divined legislative intent to outlaw practices "fair in form, but discriminatory in operation."[45] Hence, given the silence in the legislative history of Title VII, there is no abstract reason why such an intent could not be similarly "found" under the ADEA. However, the very fact that Congress enacted two different statutes suggests that Congress desired that the two statutes be given appropriately differing and independent interpretations.[46] Arguably, if Congress had desired a mirror image analysis, it would simply have amended Title VII by adding "age" as a proscribed criterion. Congress specifically rejected such a proposal.

The difference in the two statutes is highlighted by the specific provision in the ADEA permitting employers to make differentiations based on "reasonable factors other than age."[47] No such provision appears in Title VII. Not only does this suggest a different analysis, the language of the proviso itself specifies that an employer is authorized to make distinctions using any age neutral factor that

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(2d Cir. 1980); Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980); Smithers v. Bailar, 629 F.2d 892 (3d Cir. 1980); Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Schwager v. Sun Oil Co., 591 F.2d 58 (10th Cir. 1979); Cova v. Coca-Cola Bottling Co., 574 F.2d 958 (8th Cir. 1978).

44. 29 C.F.R. § 1625.7(d) (1982); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Allison v. Western Union Telegraph Co., 680 F.2d 1319 (11th Cir. 1982); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980); EEOC v. Bordens, Inc., 551 F. Supp. 1095 (D. Ariz. 1982). *See also* Massarsky v. General Motors Corp., 706 F.2d 111, 120 (3d Cir. 1983) (assumed without resolving, finding no impact on older workers).

45. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

46. *See* Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1982); McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980); Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975).

47. 29 U.S.C. § 623(f)(1) (1976).

is "reasonable." Regardless of the impact of that factor, if "reasonable," the ADEA, unlike Title VII, specifically authorizes its use. Thus, to require defendants to prove "business necessity" would seem to be a burden not authorized under the ADEA.

The Supreme Court addressed the constitutionality of the ADEA's application to state and local governments and suggested that:

> [I]n order to insure that employers were permitted to use neutral criteria not directly dependent on age, and in recognition of the fact that even criteria that are based on age are occasionally justified, the Act provided that certain otherwise prohibited employment practices would not be unlawful "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." . . . [T]he State's discretion to achieve its goals in the way it thinks best is not being overridden entirely, but is merely being tested against a reasonable federal standard.[48]

There are other, more practical, reasons why the ADEA might not mandate a pure Title VII analysis. The first reason is that unlike Title VII, the ADEA utilizes trial by jury.[49] Impact analysis depends initially upon complex statistical data to prove impact. Generally, even more complex validation studies are presented through expert testimony to establish the statistical relationship according to professional standards between the criteria and job performance.[50] Submitting this often conflicting and exceedingly technical data to a jury with correct instructions could be quite difficult. While effective evaluation of strict validation might be unmanageable, a standard of "reasonableness" could be applied by a jury.

Secondly, because a wide-spread application of a particular criteria is being challenged in an adverse impact case, class actions are particularly appropriate. Indeed, it generally is the class as opposed to the individuals that complain about the application of the crite-

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48. EEOC v. Wyoming, 103 S. Ct. 1054, 1058, 1062 (1983)(quoting 29 U.S.C. § 623(f)(1)). The Court also stated: "[T]he State may still, at the very least, assess the fitness of its game wardens and dismiss those wardens whom it reasonably finds to be unfit." 103 S. Ct. at 1062.

49. 29 U.S.C. § 626(c) (Supp. V 1981); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975).

50. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Hameed v. Int'l Ass'n of Bridge, Structural, and Ornamental Iron Workers, Local 396, 637 F.2d 506 (8th Cir. 1980).

ria.[51] However, because the ADEA utilizes enforcement procedures of the Fair Labor Standards Act,[52] and that statute does not allow unconsented class actions, the ADEA has been interpreted as not allowing true class actions.[53] Thus, challenging a class-wide practice with non-class action suits would, at best, be awkward and repetitive.

The uncertainty of whether impact analysis was appropriate under the ADEA, uncertainty suggested by the language, history and practicalities of the statute, was reflected in initial official interpretations of the Act. The Department of Labor had statutory authority which it exercised until 1979.[54] Pursuant to that authority, the Secretary of Labor issued interpretative guidelines which stated that physical fitness requirements had to be "reasonably necessary for the specific work to be performed."[55] This suggested a "business necessity" standard that was imposed regardless of motivation. As to objective tests, however, the Secretary of Labor stated that such tests would "be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute."[56] This, of course, suggests that motive is the controlling element, and that such tests would be permitted if used for a proper "purpose".

In 1978, the Uniform Guidelines on Employee Selection Procedures were approved for use by all major federal civil rights enforcement agencies, including the Department of Labor and the EEOC.[57] These Guidelines set forth in substantial detail the requirements to prove the adverse impact of selection criteria.[58] They set forth the standards by which a defendant can establish the validity of selection criteria that have an adverse impact.[59] These Guidelines expressly exclude from coverage complaints brought under the

51. *See, e.g.*, General Tel. Co. v. Falcon, 102 S. Ct. 2364 (1982); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

52. 29 U.S.C. § 216(b) (1976 & Supp. V 1981). No member of a class will be bound unless written consent filed.

53. *See, e.g.*, Franci v. Avco Corp., 460 F. Supp. 389, 399 (D. Conn. 1978); LaChapelle v. Owens-Illinois, Inc., 64 F.R.D. 96 (N.D. Ga. 1974).

54. Reorganization Plan No. 1 (1978), 3 C.F.R. § 321 (1979), transferred the statutory authority of the Department of Labor to the EEOC.

55. 29 C.F.R. § 860.103(f)(1)(1982).

56. 29 C.F.R. § 860.104(b)(1982).

57. 29 C.F.R. § 1607.1(1982).

58. 29 C.F.R. § 1607.3-.4, .15 (1982).

59. 29 C.F.R. § 1607.5-.14 (1982).

ADEA.[60] This suggests that enforcing agencies had some doubt about the applicability of impact analysis to the ADEA. And, it is clear that the Guidelines rejected the "business necessity" standards of "work relatedness" utilized in Title VII litigation.

The EEOC recently made a significant change of course. Its new guidelines provide:

> (d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at Part 1607 of this Title. [Uniform Guidelines].[61]

The position of the EEOC that ADEA litigation may employ impact analysis, including the Title VII requirement that criteria adversely impacting on the protected group must be validated in terms of "business necessity" has received support from four circuits.

The Second Circuit, in *Geller v. Markham*, became the first court to adopt this position.[62] *Geller* involved the refusal of the school board to hire a fifty-year-old teacher for a vacancy ultimately filled by a twenty-five-year-old applicant. The reason given by the defendant for not hiring the plaintiff was a board of education policy that new appointments be made from among qualified teachers who had less than five years teaching experience. This policy of favoring the inexperienced teacher was an effort to save salary expenditures. The court admitted evidence that 92.6% of the teachers in the state over age 40 would be affected by the preference, while only 62% of those under 40 would be similarly disadvantaged. The court held that this evidence established a prima facie case of illegal discrimination, and shifted the burden to the defendant of showing that the "practice is justified by business necessity or need and is related to successful performance of the job for which the practice is used."[63] The court held that group-based cost justifications would not meet the burden of proving the "necessity" of the practice.[64]

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60. 29 C.F.R. § 1607.2 (1982).

61. 29 C.F.R. § 1625.7(d)(1982).

62. 635 F.2d 1027 (2d Cir. 1980).

63. *Id.* at 1032.

64. *See* 29 C.F.R. § 860.103(h)(1982)(Department of Labor Guidelines): "[A]

The Second Circuit gave no reason why impact analysis with its "business necessity" component should be applied to ADEA cases. The court was content to rely on the broad statements from the Supreme Court in *Lorillard v. Pons*[65] that "[t]he [substantive] prohibitions of the ADEA were derived *in haec verbe* from Title VII."[66]

In a similar case from the Eighth Circuit, *Leftwich v. Harris-Stowe State College*,[67] the defendant was a successor, reorganized college, which was reducing the size of its faculty. To accomplish this personnel reduction and to reduce costs, a plan specified the particular number of untenured faculty to be retained. Statistics indicated that the typical tenured faculty member was more than ten years older than the typical non-tenured faculty member. Thus, the court concluded that the denial of an appointment to a tenured faculty applicant based on this preference had an adverse impact on the protected age class. The court then stated that the defendant's burden was to show that the selection plan had "'a manifest relation to the employment in question,' [and] that there [was] a '*compelling need* to maintain that practice.'"[68] Like the Second Circuit in *Geller*, the Eighth Circuit rejected as illegitimate the asserted desire to save resources. The court also rejected the articulated need to have the flexibility to hire non-tenured faculty. Finally, the suggestion that tenured faculty tended to be more stagnant than non-tenured faculty, with non-tenured teachers being more productive, was rejected as being inherently illegitimate. The court held that such an assumption perpetuated the very stereotypical thinking about the worth of older workers that the statute was attempting to remedy.

The Eleventh Circuit in *Allison v. Western Union Telegraph Co.*[69] was the third circuit to announce that it was following Title VII impact analysis. The court, however, offered absolutely no reasons for its view that the ADEA should follow Title VII in this re-

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general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized . . ."; 29 C.F.R. § 1625.7(f)(1982)(EEOC Guidelines): "A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the Act."

65. 434 U.S. 575 (1978).

66. 635 F.2d at 1032 (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)).

67. 702 F.2d 686, 30 Empl. Prac. Dec. (CCH) ¶ 33,429 (8th Cir. 1983).

68. *Id.* at 692 (quoting Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983)).

69. 680 F.2d 1318 (11th Cir. 1982).

gard. In a very short opinion, the court simply ruled that plaintiff had failed to establish as a matter of law that the subjective criteria of which he was complaining had been proved to have an adverse impact on him or older workers.[70]

In *Massarsky v. General Motors Corp.*,[70.1] the Third Circuit raised the issue of whether impact analysis was appropriate under the ADEA, but elected not to resolve the issue. The court concluded that a preference for trainees in assigning order of lay-off was not proved to have an adverse impact on workers over 40.

A number of observations can be made about the three circuit court cases that addressed the issue. First, none of the courts engaged in any significant analysis of the issue. The courts did not even appear to be aware of the unique statutory language of the ADEA ("reasonable factors other than age") that might dictate an analysis that differs from Title VII.

Second, the three cases were essentially disparate treatment cases. Indeed, they could have been and were resolved solely under traditional disparate treatment motivational analysis. Thus, the discussion of adverse impact was unnecessary to their resolution. In *Geller* and *Leftwich*, cases which ruled in favor of the plaintiffs, an individual or a small group of plaintiffs were denied employment opportunities. Each plaintiff established a prima facie case of disparate treatment that was improperly motivated. In each case, the reason articulated by the defendant was rejected as not being a "legitimate, nondiscriminatory reason," because it was largely age-based, relied on group costs, or depended upon stereotypical assumptions as to the worth of workers. Although a uniform "rule" was applied, disparate treatment analysis was still appropriate.[71] The *Allison* court, which ruled in favor of the defendant, addressed the application of a subjective standard utilized to determine the order of layoffs. Substantial authority has held that impact analysis is only applicable to broad-based objective rules that affect a broad class of

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70. A district court in Arizona also applied impact analysis to a severance plan that denied to employees who could claim retirement at age 55 severance pay that would be granted to all employees not eligible to retire. This denial of severance pay by those over 55 who were retiring was challenged. The court held that such a plan had a disparate impact upon those over 55. Indeed, the age factor was virtually on the face of the classification. The court concluded that defendant must prove the business necessity of the plan and had failed to do so. EEOC v. Borden's, Inc., 551 F. Supp. 1095 (D. Ariz. 1982).

70.1 706 F.2d 111 (3d Cir. 1983).

71. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

actual or potential applicants and should not be utilized when the criteria are individualized and subjective.[72] Thus, perhaps any allusion to impact doctrines was not only unnecessary, but would have been misdirected. Furthermore, like its two sister circuits, the Eleventh Circuit resolved the case utilizing traditional disparate treatment analysis. The court found that notwithstanding the prima facie case of illegal age motivation, reliance upon subjective criteria was a "legitimate, nondiscriminatory reason." Thus, in these cases, impact analysis was not necessary for satisfactory resolution of the claims. Each case could have been appropriately analyzed in terms of motivation, and the result reached would have been unchanged.

Finally, none of the three circuit courts was presented with a pure impact case. The Eleventh Circuit's facts involved subjective criteria. Not only is impact analysis arguably inappropriate,[73] the court found that no adverse impact had been proved.[74] The other courts dealt with factual patterns that were inherently based on age. The Eighth Circuit was addressing a tenure disqualification, a factor inherently tied to the age of the possessor. The Second Circuit was addressing experience—similarly a factor that cannot be divorced from age. Both factors were functions of time. As functions of time they must also be inherently related to age. When such a time factor is utilized in reverse to disqualify those who possess the time qualities, such a factor necessarily will harm older persons (they are the ones with the most seniority or experience). Thus, it is not a question of proving impact from a truly neutral criteria. Instead, these cases involved a simple recognition that a time factor is inherently tied to age. Consequently, these cases fall more appropriately into the category of cases that pre-dated *Griggs v. Duke Power Co.*, cases which analyzed facially neutral but inherently discriminatory race factors.[75] These inherently discriminatory factors were not permitted because they were not truly neutral, but were the necessary product of race. The same analysis is appropriate in ADEA cases. There is no need to address impact or necessity of the time factors because, in reality, time factors are necessarily based on age. As time factors are not age-neutral, they cannot be "factors other than age"

72. EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 638-39 (4th Cir. 1983); Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795, 800 (5th Cir. 1982); Harris v. Ford Motor Co., 651 F.2d 609, 611 (8th Cir. 1981).

73. *See supra* note 69 and accompanying text.

74. 680 F.2d at 1322.

75. *See supra* notes 24 & 30 and accompanying text.

as the ADEA defense requires.[76]

There is no reason to criticize the results reached by the three circuits. Their ultimate conclusions are sound. It should be recognized, however, that the courts have yet to address a true impact case, a case involving the utilization of a truly age neutral criteria such as an objective employment test. Moreover, the EEOC Guidelines for the ADEA, which require validation according to the Uniform Guidelines on Employment Selection, have not been tested in court. When that situation is presented, the courts should address the issue anew, and not superficially accept the overly-broad statements from existing authority that impact analysis in all its aspects is appropriate and should be applied under the ADEA.

IV. A Suggested Analysis

The ADEA specifically permits employers to utilize "reasonable factors other than age."[77] That language is not in Title VII and should not be ignored when analyzing ADEA violations. If an employer utilizes factors that are inherently time-based, such as experience, years on the job, and tenure, those factors are inherently age-related and thus cannot be considered "factors other than age."[78]

When faced with truly neutral criteria, the first problem will be to determine if the criteria have an adverse impact on persons in the protected age group. If such impact is proved, there is nothing in the language or history of the ADEA that would prohibit a finding that this impact creates a prima facie showing of illegal discrimination.[79] To this extent, the Title VII model is appropriate, notwithstanding some unique problems under the ADEA. The burden that shifts to the defendant, however, cannot be one of "business necessity." Since the ADEA specifically permits use of "reasonable factors other than age," the defendant's burden should be no greater than establishing

76. 29 U.S.C. § 623(f)(1)(1976).

77. *Id.*

78. Seniority is a time factor but the Act specifically allows the employer to utilize bona fide seniority systems. 29 U.S.C. § 623(f)(2)(1976).

79. This prima facie case may be stated in terms of *Griggs v. Duke Power*, that it is the consequences, not solely the intent, of employment practices that the ADEA is designed to eliminate. Or, just as appropriately the prima facie case may be analyzed in terms of inferred intent. A significant impact carries with it an inference of improper motivation. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); NLRB v. Erie Resistor Co., 373 U.S. 221 (1963). In either case the burden shifts to defendant, which if not met will entitle plaintiff to a judgment. *Cf.* Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982).

that it has applied an age neutral factor that is "reasonable." To impose a greater burden would be to deprive defendant of a statutorily granted defense.

There is little doubt that "reasonable factors other than age" should be treated as a defense. It is structurally so arranged in the statute, and other similarly arranged provisions have been treated as defenses.[80] As a defense, the burden is upon defendant to establish: (1) the factual existence of the "factor," (2) its "reasonableness," and (3) its age neutrality.[81] The defendant's burden is one of persuasion, to be distinguished from the evidentiary burden of simply presenting some evidence of the existence of the factor.[82]

The term "reasonable factor" may not be easy to define. It would seem that such a term demands less of a showing than would be required to prove "business necessity." First, "necessity" suggests a certain balancing that reaches a level of "compelling."[83] A factor could be deemed reasonable under a less demanding standard. Nonetheless, a "reasonable factor other than age" has more of a substantive content than simple "legitimacy."[84] Thus reasonableness would seem to require a "middle tier" showing somewhere between these two extremes. It presupposes a form of business rationality, a demonstration of a factual relationship between the "factor" and bona fide business purposes.[85] Thus, upon a showing of substantial

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80. *See* United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) (Benefit Plans); Marshall v. Westinghouse Electric Corp., 576 F.2d 588, 591 (5th Cir. 1978).

81. Utilizing impact analysis under Title VII, the courts have generally agreed that the defendant's burden of proving "business necessity" is in the nature of a "defense" in that defendant carries a burden of establishing the "necessity". Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Johnson v. Uncle Ben's Inc., 657 F.2d 750, 753 (5th Cir. 1981); Contreras v. City of Los Angeles, 656 F.2d 1267, 1271 (9th Cir. 1981).

82. *Compare* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) *with* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). In disparate treatment cases, upon plaintiff's presentation of a prima facie case of illegal motivation the burden is shifted to defendant to "articulate a legitimate, nondiscriminatory reason" for its action. This burden is to present admissible evidence that would justify a finding on behalf of defendant; it is not a burden to convince the fact finder that the articulated reason motivated the defendant's action. The courts have distinguished the burdens in an adverse impact case from the burden required of defendant when the issue is motivation. *See* Johnson v. Uncle Ben's, Inc., 657 F.2d 750, 752 n.2 (5th Cir. 1981).

83. *See, e.g.*, Green v. Missouri Pacific R.R. Co., 523 F.2d 1290 (8th Cir. 1975).

84. *See* Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

85. Perhaps the closest analogy would be the standard applied in constitutional

adverse impact of a particular factor, the defendant in an ADEA case must prove more than that the reason exists and is "rational." Defendant's burden is to prove that the reason is age neutral and serves an identified business purpose. Defendant, however, should not be required to show that the weight of the reason reaches the level of being "compelling."

The term "necessity" also presupposes the absence of alternative devices that would accomplish the business objective with less of a discriminatory effect. If a lesser discriminatory alternative is available, then the "factor" utilized could not be "necessary."[86] Moreover, because the employer could have utilized alternative devices does not, in itself, require a finding that the factor utilized was unreasonable. A reason could still be reasonable, even in the presence of other, lesser discriminatory alternatives.[87] The presence of lesser discriminatory devices might be some evidence of unreasonableness, or it might suggest that the use of the factor was pretextual, but a lesser discriminatory alternative does not, as a matter of law, require the rejection of an otherwise "reasonable factor other than age."

Support for this interpretation of the ADEA comes from an analysis of the Equal Pay Act.[88] That statute permits pay distinctions between men and women performing equal work if the difference is based on any "factor other than sex."[89] That phrase was obviously the inspiration for the similar ADEA defense, and thus, a similar interpretation would seem appropriate. The Supreme Court analyzed the "factor other than sex" provision of the Equal Pay Act,

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litigation to classifications according to sex. The state's burden is to "establish that the classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). This "factual relationship" test is to be distinguished from the mere rationality test which will suffice to sustain ordinary economic legislation. Ferguson v. Skrupa, 372 U.S. 726 (1963). It also differs from the "strict scrutiny" standard, which is applied to suspect classifications and those classifications infringing upon fundamental liberties. In such cases, the state must prove the classification to be "necessary" to serve "compelling governmental interests". Roe v. Wade, 410 U.S. 113 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969). The weak rationality test could be analogized to the Title VII concept of "legitimacy". The "strict scrutiny" standard is quite close to that of "business necessity". *See* Washington v. Davis, 426 U.S. 229 (1976). The suggested standard for "reasonable factors other than age" is close to the middle tier "factual relationship" test.

86. *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); 29 C.F.R. § 1607.3B (1982).

87. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

88. 29 U.S.C. § 206(d)(1976).

89. 29 U.S.C. § 206(d)(1)(iv)(1976).

and held that it should be treated as an affirmative defense. Consequently, it was the defendant who was obligated to carry the burden of establishing that the factor utilized was entirely sex neutral.[90]

The Supreme Court also interpreted the content of "factor other than sex" in *County of Washington v. Gunther*,[91] and indicated that impact analysis with its "business necessity" component would not be appropriate under the Equal Pay Act. The Court was addressing the relationship between Title VII and the Equal Pay Act as established in the so-called "Bennett Amendment."[92] The Court held that pay distinctions could violate Title VII without there being a violation of the Equal Pay Act and observed that:

> Title VII's prohibitions of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.* . . . The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act [,"factors other than sex"], however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. . . . Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on bona fide use of "factors other than sex." Under the Equal Pay Act, the courts and administrative agencies are not permitted to "substitute their judgment for the judgment of the employer . . . who has established and applied a bona fide job rating system," so long as it does not discriminate on the basis of sex.[93]

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90. Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

91. 452 U.S. 161 (1981).

92. 42 U.S.C. § 2000e-2(h) (1976). The "Bennett Amendment" to Title VII provides:

> It shall not be an unlawful employment practice under this [title] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [The Equal Pay Act].

Id.

93. 452 U.S. at 170-71 (citations omitted). The Court was addressing the precise issue of whether in light of the "Bennett Amendment", 42 U.S.C. § 2000e-2(h) a pay differential that would not violate the Equal Pay Act could ever be a violation of Title VII. The Court held that a Title VII claim could be stated if a pay differential between sexes performing "unequal jobs" was based upon intentional discrimination. The Court interpreted the "Bennett Amendment" not as incorporating into Title VII the "equal work" standard of the Equal Pay Act, but as permitting as a defense wage distinctions actually "authorized" by the Equal Pay Act. The Court held that a dis-

Thus, "factors other than sex" is considered much less of a burden than "business necessity." At the same time, however, the Court indicated that arbitrary reasons would not carry the employer's burden of proving a "factor other than sex". The *Gunther* Court required that the "factor" be "bona fide" and sex neutral. In a previous case, which arose under the Equal Pay Act, the Court had similarly indicated that mere economic considerations would not suffice, particularly if those considerations had any genesis in sex segregation.[94] Hence, "the burden . . . is one which cannot be satisfied by general or conclusory assertions."[95] Lower courts have elaborated:

> The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason.[96]

The Department of Labor, which enforced the Equal Pay Act until 1979, takes the position that to qualify as a "factor other than sex" there must be a "relationship to the requirements of the job or the individual's performance on the job. . . ."[97]

When this standard is applied to a training program, for the program to be considered a "factor other than sex" justifying premium pay to males, the employer must establish not only the sex neutral character of the program, but also, the employer must show that the

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tinction would be "authorized" by the Equal Pay Act only if it fell within one of the four specified defenses. In making the statement set forth above in the text the Court was addressing an argument made by the dissent that if the "Bennett Amendment" was so limited it was made superfluous because Equal Pay Act defenses were already and necessarily Title VII defenses. The Court was countering this argument by pointing out that absent the "Bennett Amendment" proof of the adverse impact of a system would have to be justified by proof of the system's "business necessity." The "Bennett Amendment's" incorporation of the Equal Pay Act defenses allows an employer to defend a distinction by showing that it was a bona fide factor other than sex, a burden that is significantly lighter, the court held, than proving its "necessity." In this way the "Bennett Amendment," as construed, continued to have some vitality.

94. Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974). *See also* City of Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702, 717 n.32 (1978).

95. Shultz v. Wheaton Glass Co., 421 F.2d 259, 267 (3d Cir. 1970).

96. Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982).

97. 29 C.F.R. § 800.149 (1982). The EEOC now enforces the Equal Pay Act by virtue of Reorganization Plan No. 1 of 1978, 3 C.F.R. § 321 (1979).

program actually serves its stated purpose of providing significant job-related skills training.[98] Similarly, an employer who desires to rely on a merit system to justify pay distinctions must show that the system is bona fide and does in fact measure relative merit in terms of business goals.[99] Educational attainments and prior experience can be considered as "factors other than sex" even though they are not validated in terms of "business necessity." However, they must be "related to the responsibilities and duties the employee must perform."[100]

Thus, under the Equal Pay Act a standard of "business necessity" has been rejected as an equivalent to the "factor other than sex" defense. The courts have adopted a standard of "business rationality," a standard that falls short of the "business necessity" requirement of Title VII, yet requires more of a showing than simple legitimacy or abstract reasonableness.[101] A similar application of the similar defense, "reasonable factor other than age," would seem appropriate under the ADEA. Such an application would be consistent with the precise language and purposes of the ADEA. And, the statutory parallel to the defense of "factor other than sex" in the Equal Pay Act provides more direction than anything found in the silence of Title VII. This interpretation is more consistent with the earlier and presumably reliable agency interpretations. Finally, the standard of "business reasonableness" provides a practical talisman for analysis by a jury that avoids the hyper-technical proof that is an earmark of non-jury Title VII impact cases.[102]

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98. Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973); Hodgson v. Security National Bank of Sioux City, 460 F.2d 57 (8th Cir. 1972); Shultz v. First Victoria Nat'l Bank, 420 F.2d 648 (5th Cir. 1969).

99. EEOC v. Aetna Ins. Co., 616 F.2d 719 (4th Cir. 1980); Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896 (5th Cir. 1974).

100. Strecker v. Grand Forks County Social Serv. Bd., 640 F.2d 96, 100 (8th Cir. 1980). See the dissenting opinion of Judge Heaney, who argued for a stringent standard of job relatedness. 640 F.2d at 104. (Heaney, J., dissenting); EEOC v. First Citizen Bank of Billings, 31 Empl. Prac. Dec. (CCN) ¶ 33,508 (D.C. Mont. 1983).

101. *See supra* note 100 and accompanying text. *See generally* 29 C.F.R. §§ 800.143 — .151 (1982).

102. This concept of reasonableness tied to job relatedness was recently suggested by the Court in the ADEA case of EEOC v. Wyoming, 103 S. Ct. 1054 (1983). *See supra* note 48 and accompanying text.

V. Conclusion

The EEOC and a few courts have boldly announced that impact analysis drawn from Title VII litigation should be applied in ADEA litigation. If the adverse impact on persons over age 40 can be established, the burden is upon the defendant to prove the "business necessity" of its selection criteria. Those announcements have ignored the specific statutory language in the ADEA which permits an employer to utilize "reasonable factors other than age." By adopting the Title VII requirement of "business necessity," the EEOC and the courts are suggesting a higher burden of defendants than authorized by the statute. Although the courts thus far have been essentially correct in their ultimate conclusions—the factors employed by defendants were inherently time factors and thus would not qualify as "factors other than age"—they were incorrect in assuming the burden that an employer should carry is the heavy burden of "necessity."

The more appropriate burden for an employer to carry, upon proof of adverse impact of a criteria, is that suggested by interpretations of similar language in the Equal Pay Act, a burden of proving "business reasonableness." Applying such a standard, the employer must carry a burden of persuasion, proving that the "factor" exists and is entirely age neutral. The employer must further show that the factor is factually related to bona fide business purposes. Finally, the employer should be able to prove that the factor is bona fide in that its use does not undercut some of the basic purposes of the ADEA, by being based upon group cost factors[103] or stereotypical assumptions as to relative abilities.[104]

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103. 29 C.F.R. § 1625.7(f) (1982); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 713, 717 n.32 (1978); EEOC v. Bordens, Inc., 551 F. Supp. 1095 (D. Ariz. 1982).

104. Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983).