St. John's Law Review

Volume 77
Number 3 *Volume 77, Summer 2003, Number 3*

Article 6

February 2012

A Necessary Tool: The Continuing Debate over the Viability of Disparate Impact Claims Under the Age Discrimination in Employment Act

Laura C. Marino

NOTES

A NECESSARY TOOL: THE CONTINUING DEBATE OVER THE VIABILITY OF DISPARATE IMPACT CLAIMS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

LAURA C. MARINO†

INTRODUCTION

Discrimination against older employees in the American workplace has long been a common phenomenon.[1] Until the 1950s, when many states began to pass laws addressing such discrimination, older workers in America enjoyed relatively few protections from employment discrimination.[2] The American population is increasingly getting older. The baby boomer generation workers make up almost half of the entire workforce, and the youngest of them will turn forty in 2006.[3] Therefore, in a few short years this entire group will fall within a protected class.[4] It is clear that, now more than ever, our court systems and workplaces are on the threshold of a crisis that cannot be avoided unless the current trend of age discrimination is abated.[5]

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† J.D. Candidate, June 2004, St. John's University School of Law; B.S., 2001, Cornell University.

1 *See generally* RAYMOND F. GREGORY, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE (2001).

2 *See id.* at 6.

3 *Id.* at 10.

4 *Id.*

5 *See id.* ("Unless U.S. employers dramatically alter their perception and treatment of older workers in the workplace, a crisis of unequaled proportions will confront our court system.").

Three key pieces of federal legislation offer workers crucial protections against many forms of employment discrimination: Title VII of the Civil Rights Act of 1964 (Title VII),[6] the Americans With Disabilities Act of 1990 (ADA),[7] and the Age Discrimination in Employment Act (ADEA).[8] Typically, an employee can use one of two theories to allege employment discrimination. First, the employee can claim injury under a disparate treatment theory, meaning that the employer has clearly treated the employee differently based on a protected characteristic.[9] Alternatively, an employee can proceed under a disparate impact theory. To succeed under this theory, the employee must show that an employment practice, though neutral on its face, has the effect of discrimination.[10] The "chief difference" between these two theories is that under the disparate treatment theory an employee must show that an employer acted with a discriminatory motive, while under disparate impact theory no such showing is required.[11] To allege violations of Title VII or the ADA, employees may bring claims

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[6] 42 U.S.C. § 2000e-2 (2000). Generally, this statute makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."
Id. § 2000e-2(a)(1).

[7] *Id.* §§ 12111–12117 (2000). This statute prohibits discrimination by an employer "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge or employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a).

[8] 29 U.S.C. §§ 621–34 (2000).

[9] Disparate treatment occurs when " '[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.' " Geller v. Markham, 635 F.2d 1027, 1031 (2d Cir. 1980) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). To succeed, an employee must prove that the employer acted with a discriminatory motive which " 'can in some situations be inferred from the mere fact of differences in treatment.' " *Id.* (quoting *Teamsters*, 431 U.S. at 335 n.15 (1977)). Often times, disparate treatment cases "concern a decision to hire, fire, or promote." EEOC v. Borden's, Inc., 724 F.2d 1390, 1392 (9th Cir. 1984).

[10] Disparate impact "results from the use of 'employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another.' " *Geller*, 635 F.2d at 1031 (quoting *Teamsters*, 431 U.S. at 336 n.15). Cases brought under a disparate impact theory generally involve "an employment test or criterion or other general policy." *Borden's*, 724 F.2d at 1392.

[11] *Borden's*, 724 F.2d at 1392.

using either theory.[12] Under the ADEA, while courts unanimously recognize an employee's ability to claim disparate treatment,[13] they are split over whether they will allow disparate impact claims. The Courts of Appeals for the Second, Eighth, and Ninth Circuits have allowed such disparate impact claims, while the First, Third, Sixth, Seventh, and Tenth Circuits have not. [14]

The longstanding debate among scholars and the split in the circuits on the availability of disparate impact claims under the ADEA continues today.[15] Part I of this Note reviews the background of the ADEA and discusses the split among the circuits on this issue. Part II argues that because Title VII and the ADEA are similar both in statutory language and purpose, courts should allow plaintiffs to use a disparate impact theory to allege discrimination in violation of the ADEA, as they can under Title VII. Part III contends that the Supreme Court has left this issue undecided in *Hazen Paper Co. v. Biggins*[16] and argues further that disparate impact theory is necessary for employees who wish to attempt to prove that employment practices based on valid factors are actually pretextual and motivated by animus. Finally, Part IV shows that allowing employees to bring disparate impact claims under the ADEA is in the best interests of the public and fulfills the true purposes of the Act.

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[12] Title VII codifies this right, 42 U.S.C. § 2000e-2(k), and courts have consistently recognized it. Similarly, the ADA "explicitly includes the [availability of] disparate impact theory" in the language of the statute. MACK A. PLAYER ET AL., EMPLOYMENT DISCRIMINATION LAW 605 (2d ed. 1995); *see also* 42 U.S.C. § 12112(b)(3)(A), 12112(b)(6).

[13] *See, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) ("The disparate treatment theory is of course available under the ADEA, as the language of the statute makes clear.").

[14] *See* Adams v. Fla. Power Corp., 255 F.3d 1322, 1324–26 (11th Cir. 2001). The Courts of Appeals for the Fourth, Fifth, and D.C. Circuits have expressed no opinion on the issue. *Id.* at 1325 n.5.

[15] *See id.* at 1324–26. Recently, the Supreme Court granted certiorari on an appeal from the Court of Appeals for the Eleventh Circuit's decision prohibiting the use of disparate impact theory under the ADEA, Adams v. Fla. Power Corp., 534 U.S. 1054 (2001), but later dismissed the writ of certiorari as "improvidently granted." Adams v. Fla. Power Corp., 535 U.S. 228, 228 (2002).

[16] 507 U.S. 604 (1993).

I. THE FOUNDATIONS OF THE DEBATE

A. *The Purpose and Legislative History of the ADEA*

Congress enacted the ADEA in 1967 as a response to the prevalence of age discrimination throughout the American workplace.[17] The statute's goal was to end arbitrary discrimination against workers because of their age.[18] Congress intended to "promote the employment of older workers based on their ability" rather than their age[19] and therefore prohibited an employer from failing or refusing 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."[20]

Title VII of the Civil Rights Act of 1964[21] originally contained a provision concerning age discrimination, but it was deleted before the Act's passage.[22] Title VII instead directed the

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[17] GREGORY, *supra* note 1, at 6 ("[I]t was not until 1967 that Congress recognized that *ageism* was outdated and irreconcilable with civilized society and American cultural values.").

[18] 29 U.S.C. § 621(b) (2000) ("It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."). Arbitrary discrimination was almost always based on stereotypes that led employers to believe older workers were stubborn, less productive than younger workers, and not worth the investment to train to use new technology. GREGORY, *supra* note 1, at 24.

[19] H.R. REP. NO. 90-805, at 1 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2214.

[20] 29 U.S.C. § 623(a)(1). Similarly, the ADEA forbids an employer "to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." *Id.* § 623(a)(2). The Act initially did not protect workers over seventy but was amended in 1986 to protect all workers over forty years old. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3342 (codified as amended in 29 U.S.C. § 631(a), (c)(1)).

[21] 42 U.S.C. § 2000e-2 (2000).

[22] GREGORY, *supra* note 1, at 17. It has been argued that the age discrimination provision was added to Title VII in order to create dissent in Congress and prevent its passage. *See* Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 512 n.23 (1995). The "most plausible reason" for the deletion of the provision was that Congress lacked information about age discrimination that could provide a sufficient basis for statutory prohibitions. Miles F. Archer, Note, Mullin v. Raytheon Company*: The Threatened Vitality of Disparate Impact Under the ADEA*, 52 ME. L. REV. 149, 151 n.12 (2000).

Secretary of Labor to conduct a study of the reasons or factors leading to age discrimination and the effect of such discrimination on the United States.[23] In 1965, Secretary of Labor W. Willard Wirtz submitted a report to Congress[24] that found that many employers imposed age limits when hiring new employees and that employers generally premised these limits on stereotypical assumptions about older workers.[25] The Secretary recommended action be taken "to eliminate arbitrary age discrimination in employment."[26] Accordingly, Congress confirmed Secretary Wirtz's findings[27] and passed the ADEA.[28] In its final form the statute prohibited, with some exceptions, an employer from using age as a factor in employment decisions, practices, and policies.[29] The most notable statutory exception allowed employers to escape liability by proving that an employment decision was based on "reasonable factors other than age."[30]

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[23] Archer, *supra* note 22, at 151. The study was part of a Congressional compromise to satisfy those who wanted to include age provisions in Title VII but realized that doing so would hinder its chance of passage. Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038, 1053 (1984).

[24] U.S. Dep't of Labor, The Older American Worker; Age Discrimination in Employment, Report of the Secretary of Labor to Congress Under § 715 of the Civil Rights Act of 1964 (1965).

[25] GREGORY, *supra* note 1, at 17.

[26] H.R. REP. NO. 90-805, at 1 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2214. The report recommended action to *prohibit* arbitrary discrimination, while suggesting that "factors which 'affect older workers' be addressed through programmatic measures to improve opportunities for older workers"—a distinction that some courts emphasize. *See* Ellis v. United Airlines, Inc., 73 F.3d 999, 1008 (10th Cir. 1996); *see infra* notes 80–84 and accompanying text.

[27] Jennifer J. Clemons & Richard A. Bales, *ADEA Disparate Impact in the Sixth Circuit*, 27 OHIO N.U. L. REV. 1, 4–5 (2000); *see also* EEOC v. Wyoming, 460 U.S. 226, 230–31 (1983).

[28] It has been argued that because the ADEA was, in essence, born from Title VII, it was intended to be an extension of Title VII protections. *See* Ziegler, *supra* note 23, at 1055 (asserting Congress intended "that the two Acts were not conflicting, but complementary").

[29] *See* Archer, *supra* note 22, at 153 (noting Congress did not place a "blanket ban" on such decisions).

[30] 29 U.S.C. § 623(f)(1) (2000). An employer can also avoid liability under the statute by showing that "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," *id.*, or that the employer is observing the "terms of a bona fide seniority system that is not intended to evade the purposes of this chapter." *Id.* § 623(f)(2)(A). Additionally, an employer does not violate the statute by discharging or disciplining an employee for good cause. *Id.* § 623(f)(3).

B. *Disparate Treatment Theory Under the ADEA*

Disparate treatment is "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion[,]" or any other protected trait.[31] The most important element that a plaintiff must prove is that the discrimination was intentional.[32] A plaintiff can do this by either establishing an employer's unlawful pattern or practice or by showing mixed-motives on the part of the employer Courts unanimously agree that a plaintiff can bring either type of disparate treatment claim under the ADEA.[33]

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[31] Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977)).

[32] *See id.*; Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 955 (8th Cir. 2001) ("The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.").

[33] *See, e.g., Hazen Paper*, 507 U.S. at 610; Mullin v. Raytheon Co., 164 F.3d 696, 699 (1st Cir. 1999); Mangold v. Cal. Pub. Utilities Comm'n, 67 F.3d 1470, 1474 (9th Cir. 1995).

There are two additional ways a plaintiff can bring a disparate treatment claim. First, the plaintiff can allege that an unlawful pattern or practice of age discrimination exists. Adams v. Ameritech Services, Inc., 231 F.3d 414, 422 (7th Cir. 2000). In order to succeed, the plaintiff must show by a preponderance of the evidence that discrimination "was the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. After a plaintiff establishes a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination. *Id.* at 360; *see also* Archer, *supra* note 22, at 155 (noting that the employer has the burden of producing a legitimate, nondiscriminatory reason for its actions). Courts have generally allowed plaintiffs to establish disparate treatment under the ADEA using a pattern or practice theory. *See, e.g.*, King v. Gen. Elec. Co., 960 F.2d 617, 621–22 (7th Cir. 1992); EEOC v. W. Elec. Co., 713 F.2d 1011, 1016 (4th Cir. 1983); EEOC v. Sandia Co., 639 F.2d 600, 621–22 (10th Cir. 1980). Another type of disparate treatment claim is a "mixed-motives" case in which the plaintiff argues that the employer considered a protected characteristic in addition to other legitimate reasons while making an employment decision. Archer, *supra* note 22, at 156. The Supreme Court, which developed this theory using a Title VII case, held that the employer must prove "by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989). As a response to this, in 1991 Congress amended Title VII to hold an employer liable when partially basing an employment decision on a discriminatory factor, even if he could show that he would have made the same decision if he had considered legitimate factors alone. 42 U.S.C. § 2000e-2(m) (2000); *see also* Archer, *supra* note 22, at 156 n. 56; PLAYER ET AL., *supra* note 12, at 213. The mixed motives analysis has been applied to cases arising under the ADEA. *See, e.g.*, Ostrowski v. Atl. Mut. Ins. Co., 968 F.2d 171, 180–84 (2d Cir. 1992). It is unclear whether the 1991 amendments to Title VII should be adopted by analogy by

The primary way for a plaintiff to prove disparate treatment is with a direct showing that an employer's practice or policy was discriminatory on its face.[34] Alternatively, if a plaintiff has only circumstantial evidence of disparate treatment, she can still succeed under the "indirect, burden shifting approach"[35] set out in *McDonnell Douglas Corp. v. Green*.[36] Under this theory, a plaintiff must demonstrate by a preponderance of the evidence[37] a prima facie case of age discrimination,[38] thereby creating a presumption that the employer has unlawfully discriminated against the employee.[39] The burden then shifts to the employer to "offer a legitimate, nondiscriminatory explanation for its employment decision."[40] If the employer meets this burden,[41] the presumption of discrimination disappears,[42] and the plaintiff must prove that the employer's proffered reason is pretextual.[43]

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courts under the ADEA framework or whether courts should apply the *Price Waterhouse* standard to mixed-motives cases under the ADEA. *See* Archer, *supra* note 22, at 156 n.56; PLAYER ET AL., *supra* note 12, at 634.

[34] *See Hazen Paper*, 507 U.S. at 610; Rummery v. Ill. Bell Tel. Co., 250 F.3d 553, 556 (7th Cir. 2001). Once such a facial treatment is demonstrated, a plaintiff need not prove the employer held a particular "animus or ill will toward older people." EEOC v. Borden's Inc., 724 F.2d 1390, 1393 (9th Cir. 1984).

[35] *Rummery*, 250 F.3d at 556.

[36] 411 U.S. 792, 802–03 (1973). Although originally developed in a Title VII context, courts apply this approach to ADEA cases as well. *See, e.g.*, Ellis v. United Airlines, Inc., 73 F.3d 999, 1004 (10th Cir. 1996).

[37] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

[38] There are generally two different ways in which courts allow a plaintiff to prove a prima facie case. *See* PLAYER ET AL. note 12, at 203–04. Most courts require that the plaintiff show that (1) she was discharged; (2) she was qualified for the position or performing satisfactorily; and (3) she was a member of the protected group, i.e. forty or older. *See Rummery*, 250 F.3d at 556; *Ellis*, 73 F.3d at 1004; Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 149 (5th Cir. 1995). Some courts also require plaintiff to show that "substantially younger, similarly situated employees were treated more favorably," *Rummery*, 250 F.3d at 556, while other courts require the plaintiff to prove not only that the replacement was younger but also that the replacement was outside the protected class, i.e. under forty. PLAYER ET AL., *supra* note 12, at 204; *see also Armendariz*, 58 F.3d at 149.

[39] Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[40] Lewis v. Aerospace Cmty. Credit Union, 114 F.3d 745, 748 (8th Cir. 1997).

[41] This burden is a burden of production only. *Burdine*, 450 U.S. at 254–55. The burden of persuasion as to the employer's intentional discrimination "remains at all times with the plaintiff." *Id.* at 253. Additionally, the employer must "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255–56.

[42] *See id.* at 255 n.10; Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 958 (8th Cir. 2001).

[43] *Rummery*, 250 F.3d at 556. For example, in *Rummery*, the plaintiff was discharged as part of a reduction in force. *Id.* at 554–55. Although plaintiff had

The Supreme Court has held that if a plaintiff with a disparate treatment claim based on circumstantial evidence shows that the employer's legitimate, nondiscriminatory reason was not truthful, this "*may*, together with the elements of a prima facie case, suffice to show intentional discrimination."[44] In other words, even if the plaintiff proves that the employer's stated reasons for the employment decision were untruthful, a fact-finder may still require more before finding that the employer intentionally discriminated.[45] This position is a recent change from what courts had previously considered sufficient to constitute pretext.[46] Some argue that this scheme makes it very

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received poor evaluations, he sought to prove that this otherwise legitimate reason was pretextual. *Id.* at 557–60. The court stated that one way plaintiff could prove pretext was to show that the employer did not believe its own evaluation that plaintiff was doing substandard work. *Id.* at 557. Often plaintiffs will try to prove pretext through the use of statistics. *See Evers*, 241 F.3d at 958 (summarizing statistical evidence purporting to show that a majority of those laid off by the employer were over forty and therefore pretext was established). Courts, however, have noted that standing alone, statistics cannot establish disparate treatment. *See Rummery*, 250 F.3d at 559.

[44] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (emphasis added).

[45] Thus, a fact finder's rejection of the employer's proffered reasons will permit, but not compel, a finding of intentional discrimination. *See id.* The Supreme Court reasoned that it could only impose liability on an employer who actually discriminated. *See id.* at 514–15. The Court stated further that it did not equate proof of untruthfulness with proof of unlawful discrimination unless the burden on the plaintiff to establish her prima facie case was "a degree of proof so high that it would, in absence of rebuttal, require a directed verdict for the plaintiff" and because a plaintiff's prima facie burden simply was not this high, this could not be so. *Id.* at 515. The dissent characterized this view of the pretext requirement as "exempting [employers] from responsibility for [their] lies." *Id.* at 537 (Souter, J., dissenting). The majority in *Hicks*, however, dismissed that view by noting that some employers would surely lie about their motivations for their employment decisions but that "Title VII is not a cause of action for perjury." *Id.* at 521.

[46] Before *Hicks*, three competing theories on what constituted pretext had emerged in the federal courts. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994). First, the "pretext-only" rule stated that if a plaintiff showed that the reasons given by the employer relating to the employment decision were false, "then she is automatically entitled to a judgment in her favor." *Id.* Second, the "pretext-plus" rule required the plaintiff to show both "that the employer's reasons [were] false and direct evidence that the employer's real reasons were discriminatory." *Id.* at 1123. Finally, some courts, including the Court of Appeals for the Seventh Circuit, adopted an intermediary rule which permitted but did not compel a fact-finder to infer that the employer had intentionally discriminated against the plaintiff upon a showing that the employer's proffered reasons were false. *See, e.g., id.* at 1122–23.

It is clear that in *Hicks*, the Supreme Court rejected the "pretext-only rule," but it is not as clear which of the remaining two theories the Court adopted. *Id.* at 1123. The dissent in *Hicks* pointed out that the majority gave conflicting signals; some

difficult for plaintiffs who lack direct evidence of intentional discrimination to prevail.[47]

C. *Disparate Impact Theory Under the ADEA*

A disparate impact "occurs when an employment practice or decision that appears on its face to be nondiscriminatory falls more harshly upon" employees within a protected group than on employees outside the protected group.[48] The Supreme Court first conceptualized disparate impact theory in 1971 in *Griggs v. Duke Power Co.*[49] The Court noted that "practices, procedures,

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language implied that falsity of the proffered reasons will permit the trier of fact to find intentional discrimination, while other language suggested "that proof of the falsity of the employer's articulated reasons will not even be sufficient to sustain judgment for the plaintiff." *Hicks*, 509 U.S. at 535 (Souter, J., dissenting). At least one circuit has chosen to ignore this apparent conflict and read *Hicks* as permitting, but not compelling, judgment for the plaintiff if she proves the employer's proffered reasons are false. *See Anderson*, 13 F.3d at 1123–24, 1124 n.3. Currently, the circuits are split on this issue. Archer, *supra* note 22, at 156 n.52.

[47] *Hicks*, 509 U.S. at 534 (Souter, J., dissenting) ("The majority's scheme greatly disfavors Title VII plaintiffs without the good luck to have direct evidence of discriminatory intent."); GREGORY, *supra* note 1, at 207 ("The *Hicks* decision greatly disfavors the worker who has no direct evidence of discrimination to present to the court.").

[48] GREGORY, *supra* note 1, at 158; *see also* EEOC v. Local 350, Plumbers and Pipefitters, 998 F.2d 641, 648 n.2 (9th Cir. 1992) (defining an employment practice with a disparate impact as one that is facially neutral but actually affects one group more harshly than another). One case that serves as a prime example of disparate impact in an age discrimination context is *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980). GREGORY, *supra* note 1, 158–59. In *Geller*, the fifty-five year old plaintiff who had "considerable experience as a tenured teacher" was interviewed and hired to fill a position in an elementary school. *See Geller*, 635 F.2d at 1030. Ten days after the plaintiff began work, she was replaced by a twenty-five year old woman, ostensibly as part of a "cost-cutting policy" which required recruitment, whenever possible, of teachers who had less than five years work experience and could therefore be paid at lower levels. *See id.* Plaintiff introduced statistics at trial which proved that almost 93% of teachers in the state who were members of the protected group, aged forty to sixty-five, had more than five years experience, while only 62% of teachers under forty taught for that long. *See id.* Therefore, considering the school's cost cutting policy, younger applicants had a greater chance of being hired than did applicants in the protected group. The trial judge found, and the Second Circuit affirmed, that a disparate impact existed. *See id.*

[49] 401 U.S. 424 (1971). In that case, the employer openly discriminated based on race until July 2, 1965, the effective date of Title VII. *Id.* at 426–27. Subsequently, all overt discrimination ceased and the employer adopted a policy that required either a high school diploma or a certain test score as a prerequisite for applying for a position in one of the higher paying departments. *See id.* at 427–28. It was determined that both of these requirements had the effect of disqualifying black workers for these positions at a significantly higher rate than white workers. *Id.* at 426.

or tests neutral on their face . . . cannot be maintained" if they have the effect of discrimination in the workplace.[50]

In order to succeed with a disparate impact claim, a plaintiff must first establish a prima facie case: She must show that an employer's policy or practice, while neutral on its face, has the effect of discriminating against a protected class and prove causation.[51] Often a plaintiff can establish a prima facie case by using statistics.[52] While a plaintiff is not required to prove that the employer intended to discriminate,[53] she must be sure to identify a specific employment practice that is causing the disparate impact,[54] and she may be required to demonstrate that the impact is affecting the entire protected group.[55]

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[50] *Id.* at 430. The Court reasoned that Title VII prohibited both overt discrimination as well as "practices that are fair in form, but discriminatory in operation." *Id.* at 431.

[51] *See* Lewis v. Aerospace Cmty. Credit Union, 114 F.3d 745, 750 (8th Cir. 1997); *Geller*, 635 F.2d at 1032.

[52] For example, statistics are frequently used to create an inference that an employer's hiring criteria led to employment of more individuals outside the protected group (aged forty or younger). *See, e.g.*, *Geller*, 635 F.2d at 1032–33. Such statistics must show a disparity so substantial that it is sufficient to warrant an "inference of causation." Smith v. Xerox Corp., 196 F.3d 358, 365 (2d Cir. 1999).

A court will usually deem a disparity sufficiently substantial using one of three methods. First, it could utilize the "four-fifths" rule. *Id.* (quoting 29 C.F.R. § 1607.4D (1998)). If employer records show a selection rate for any protected group that is less than four-fifths of the highest rate for a group there will be evidence of disparate impact. *See id.* Alternatively, courts will consider whether a disparity is sufficiently "significant." *Id.* A result is statistically significant if one can conclude that the result in question, such as a disparate impact on a protected group, is so improbable to occur by chance that it is unlikely to have happened in this case by chance alone. *See* PLAYER ET AL., *supra* note 12, at 236.

Finally, some courts use multiple regression as a statistical tool to determine if disparate impact was present. PLAYER ET AL., *supra* note 12, at 270. This method determines whether one independent variable, for example, a protected characteristic, has an influence on a dependent variable, such as salary. PLAYER ET AL., *supra* note 12, at 270.

There is not one rule that courts use all the time—the "substantiality of a disparity is judged on a case-by-case basis." *Xerox*, 196 F.3d at 366. Sometimes, statistical evidence can lead to such an "indisputable result" that a trial judge may be "justified in taking the evaluation of the statistics away from the jury." *Geller*, 635 F.2d at 1034.

[53] *See Griggs*, 401 U.S. at 432 (noting that although the employer demonstrated a lack of discriminatory intent, the Court would focus on "the *consequences* of employment practices, not simply the motivation"); *see also* Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 953 (8th Cir. 2001).

[54] *Evers*, 241 F.3d at 953.

[55] Criley v. Delta Air Lines, Inc., 119 F.3d 102, 105 (2d Cir. 1997). In *Criley*, the plaintiff alleged that the employer's hiring plan had a disparate impact on

Once the plaintiff has successfully demonstrated her prima facie case, the employer has the opportunity to assert the business necessity defense. The employer must show "that the employment practice is justified by business necessity or need and is related to successful performance of the job for which the practice is used."[56] Generally, the employer has only a burden of production while the plaintiff maintains the burden of persuasion; however, this is uncertain because of the business necessity defense.[57] If the employer successfully meets this burden, the plaintiff can still succeed by demonstrating that a "comparably effective alternative practice would produce a significantly smaller adverse impact on the protected class."[58]

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employees who were fifty-five years old and older. *Id.* The court pointed out that because 94% of the employees the employer hired were forty and older, there was no negative effect on the entire protected group. *Id.* Therefore, the plaintiff's claim failed. *See id*; *infra* note 145.

[56] *Geller*, 635 F.2d at 1032. The Supreme Court noted that the "touchstone" of the employer's defense is business necessity. *Griggs*, 401 U.S. at 431. Therefore, if the employment practice in question "cannot be shown to be related to job performance" it is prohibited. *Id.*

[57] Before the Supreme Court decided *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), the normal procedure stated that once the plaintiff established her prima facie case the burden shifted to the employer to prove the business necessity defense. Houghton v. Sipco, Inc., 38 F.3d 953, 958 (8th Cir. 1994). In *Wards Cove Packing*, the Supreme Court modified this rule and required the employer only to produce "evidence of a business justification" for the employment practice in question while the plaintiff retained the burden of persuasion. *Wards Cove Packing*, 490 U.S. at 659. In 1991, amendments to Title VII reversed the *Wards Cove Packing* standard and "shifted . . . to the employer the burden to prove job relatedness and business necessity." PLAYER ET AL., *supra* note 12, at 627. These amendments were not made to the ADEA, so a question arose: Which standard applies to the employer's burden of proof in disparate impact cases under the ADEA? *Id.* An example of the confusion surrounding this issue can be seen in the Eighth Circuit. In 1994, the Court of Appeals for the Eighth Circuit ruled that the *Wards Cove Packing* standard applied to such cases. *See Houghton*, 38 F.3d at 958–59. In 1996, however, the Eighth Circuit noted that it had never considered whether the 1991 amendments to Title VII affected the employer's burden of proof in an ADEA disparate impact case. *See* Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996). The court assumed without deciding that the pre-*Wards Cove Packing* standard would apply. *See id.*

[58] *Evers*, 241 F.3d at 954; *Geller*, 635 F.2d at 1032. The plaintiff is said to have proved pretext if the plaintiff can demonstrate "that another practice would achieve the same result at comparable cost without causing a disparate impact." *See* Smith v. Xerox Corp., 196 F.3d 358, 365 (2d Cir. 1999).

D. *The Circuit Split on the Issue of Allowing Disparate Impact Theory Under the ADEA*

1. Reasons for Allowing Disparate Impact Theory

The courts of appeals are divided as to whether a disparate impact claim is cognizable under the ADEA.[59] Courts that allow disparate impact claims to be brought under the ADEA usually do so for one of two reasons.[60] First, courts have reasoned that the Supreme Court left the issue open in *Hazen Paper*,[61] where it considered whether an employer who interfered with the vesting of his employee's pension benefits violated the ADEA.[62] The Court ruled that there was no disparate treatment when an

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[59] *Xerox*, 196 F.3d at 367 n.6 ("The viability of the disparate impact theory under the ADEA is far from settled among the circuits."). The Courts of Appeals for the First, Third, Sixth, Seventh, Tenth, and Eleventh Circuits have all prohibited or questioned the use of disparate impact with an ADEA claim. The Second, Eighth, and Ninth Circuits have recognized the use of such claims. Adams v. Fla. Power Corp., 255 F.3d 1322, 1324–25 (11th Cir. 2001). The Fourth, Fifth, and D.C. Circuits have yet to weigh in on the issue. *Id.* at 1325 n.5. At least three judges in the Fifth Circuit have clear doubts about the applicability of disparate impact claims under the ADEA. *See* Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 1003–04 (5th Cir. 1996) (DeMoss, J., dissenting in part). In *Rhodes*, after noting that the Court of Appeals for the Fifth Circuit has yet to decide the issue, Judge DeMoss pointed out that "other circuits have followed [the] lead" of the *Hazen Paper* sentiment, which expressed doubts as to the viability of disparate impact theory under the ADEA." *Id.* at 1004. He then opined that his circuit "should follow the Supreme Court's lead in *Hazen Paper* and *Hicks* by recognizing that the standards governing Title VII liability and ADEA liability are not, and need not, be identical." *Id.* He concluded by reasoning that "[t]he world will not come to an end, nor will our system be in peril, because ADEA plaintiffs face a different and higher burden than Title VII plaintiffs." *Id.*

[60] Some courts, however, have allowed such claims but not given any rationale for their decision. *See Evers*, 241 F.3d at 953 n.7; *Houghton*, 38 F.3d at 958–59.

[61] *See Adams*, 255 F.3d at 1329 (Barkett, J., specially concurring) ("The Court in *Hazen Paper* took great care to say explicitly that that decision should not be read to address a disparate impact case."); Criley v. Delta Air Lines, Inc., 119 F.3d 102, 105 (2d Cir. 1997) (explaining that "the Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA"); Lewis v. Aerospace Cmty. Credit Union, 114 F.3d 745, 750 (8th Cir. 1997) (recognizing that "the Supreme Court has yet to rule on this legal question"); EEOC v. Local 350, Plumbers and Pipefitters, 998 F.2d 641, 648 n.2 (9th Cir. 1992) (noting that *Hazen Paper* "expressly" left the question open).

[62] Hazen Paper Co. v. Biggins, 507 U.S. 604, 608 (1993). The employer hired Biggins in 1977 and fired him in 1986 when he was sixty-two years old. *Id.* at 606. The employer had a pension plan with a ten-year vesting period, and Biggins was only weeks away from reaching that mark when he was fired. *Id.* at 607. Biggins sued claiming his employer had violated the ADEA because his "age had been a determinative factor in [his employer's] decision to fire him." *Id.* at 606.

employer based his employment decision entirely on factors other than age, even if a correlation can be shown between those factors and the employee's age.[63] The Court noted, however, that it had "never decided whether a disparate impact theory of liability is available under the ADEA."[64] Therefore, several circuits have interpreted this to mean the Supreme Court has not decided the issue, and therefore they have felt free to follow their circuit precedents that allow them to recognize disparate impact claims under such circumstances.[65] Even though dicta in *Hazen Paper* can be read as casting doubt on the viability of disparate impact claims under the ADEA,[66] several circuits have reasoned that the Supreme Court has not yet prohibited claims under this theory.[67]

Secondly, courts argue that the ADEA is so similar to Title VII that the former should be interpreted to also allow disparate impact claims. Before *Hazen Paper*, most circuits assumed without much thought that the ADEA was so similar in purpose and text to Title VII that the two should be analyzed the same way—even allowing disparate impact claims under each.[68] With the Supreme Court's decision in *Hazen Paper*, "the tectonic plates shifted" and many courts began to second-guess the blind

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[63] *Id.* at 609. The Court noted that an employer "cannot rely on age as a proxy" for an employee characteristic such as productivity. *Id.* at 611; GREGORY, *supra* note 1, at 212. The Court held, however, that when an employer is "wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." *Hazen Paper*, 507 U.S. at 611. The Court noted that although an employee's age may be correlated with his pension status, the two are "analytically distinct." *Id.* For example, an employee under age forty, and therefore outside the protected class, could have worked for an employer for their entire career, while an older worker could have been hired only recently. *Id.* Therefore, an employer can make decisions about pension status without taking account of age and its related stereotypes. *Id.* The Court ruled that such prohibited and inaccurate stereotypes did not figure into this type of decision. *Id.* at 612. Rather, the employer based the decision on "an accurate judgment about the employee," namely, that he was "close to vesting." *Id.*; *see also* GREGORY, *supra* note 1, at 212–13.

[64] *Hazen Paper*, 507 U.S. at 610.

[65] *See, e.g.*, *Criley*, 119 F.3d at 105; *Lewis*, 114 F.3d at 750.

[66] *See infra* notes 90–94 and accompanying text.

[67] *See* Arnett v. Cal. Pub. Employees Ret. Sys., 179 F.3d 690, 696–97 (9th Cir. 1999) (allowing a claim despite the court's recognition of "the Supreme Court's intimation that a disparate impact claim might not be viable under the ADEA"); Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996).

[68] *See* EEOC v. Borden's, Inc., 724 F.2d 1390, 1394 (9th Cir. 1984) (noting the "similar language, structure, and purpose of Title VII and the ADEA"); Geller v. Markham, 635 F.2d 1027, 1030 (2d Cir. 1980).

application of Title VII policies to the ADEA.[69] Since *Hazen*, however, some courts have continued to analyze claims, including disparate impact claims, identically under the two statutes.[70]

2. Reasons for Prohibiting Disparate Impact Theory

Other circuits offer several reasons for refusing to recognize disparate impact claims under the ADEA.[71] First, courts state that textual provisions within the ADEA have the effect of excluding disparate impact claims.[72] One particular section of the statute on which courts focus allows employers to differentiate among employees if their decision is based on "reasonable factors other than age."[73] By definition, disparate impact claims are based on factors that are neutral on their face and do not deal with age. As such, courts claim that this

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[69] *See* Mullin v. Raytheon Co., 164 F.3d 696, 700 (1st Cir. 1999) (noting that *Hazen Paper* forced lower courts "to rethink the viability of disparate impact doctrine in the ADEA context").

[70] *See e.g.*, Smith v. Xerox Corp., 196 F.3d 358, 367 (2d Cir. 1999). Additionally, the Court of Appeals for the Second Circuit speculated that *Hazen Paper* may not control claims brought under the disparate impact theory when the employer does not rely on factors that tend to be highly correlated with age. *Id.* at 367 n.5. In *Xerox*, the employer relied on employees' test scores in deciding who to lay off. *Id.* at 362–63. The Second Circuit suggested a different analysis—namely one treating the ADEA and Title VII identically—might apply to cases like this and the *Hazen Paper* case might control situations where the factor is correlated with age. *Id.* at 367 n.5.

[71] Some courts deciding this issue have neglected to give their reasoning. *See* Casteel v. Executive Bd. of Local 703, Int'l Bhd. of Teamsters, 272 F.3d 463, 466 n.4 (7th Cir. 2001); Rummery v. Ill. Bell Tel. Co., 250 F.3d 553, 559 n.5 (7th Cir. 2001); Adams v. Ameritech Servs., Inc., 231 F.3d 414, 422 (7th Cir. 2000).

[72] *See* Adams v. Fla. Power Corp., 255 F.3d 1322, 1325 (11th Cir. 2001) (analyzing the textual construction of the ADEA).

[73] 29 U.S.C. § 623(f) (2000). The subsection in question reads:

> It shall not be unlawful for an employer, employment agency, or labor organization—(1) to take any action otherwise prohibited under subsections . . . of this section 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* . . . .

Id. (emphasis added).

At least one court has focused on a separate section of the ADEA, *id.* § 623(a), as proof that the statute does not allow disparate impact claims. *See* Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996). The court noted that the section prohibited various forms of discrimination based on age. The court reasoned that this prohibits only intentional discrimination and it "would be a stretch to read" this phrase as prohibiting "incidental and unintentional discrimination" which resulted from facially neutral practices. *Id.*

language has the effect of prohibiting disparate impact claims.[74] A few courts have argued that this provision of the ADEA is textually similar to section 206(d)(1) of the Equal Pay Act (EPA),[75] a statute that the Supreme Court has interpreted as prohibiting claims using disparate impact theory.[76]

Other courts emphasize the difference in purpose and legislative history between the ADEA and Title VII as justifications for disallowing disparate impact claims under the former.[77] For example, some courts argue that while Title VII seeks to correct a long history of past discriminatory practices in the employment context, the ADEA purports only to protect older employees from contemporaneous discrimination.[78] Therefore, this "divergence in purpose" can be a basis for courts to disallow claims using a disparate impact theory.[79]

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[74] *See Mullin*, 164 F.3d at 701–02. Courts have understood § 623(f)(1) to permit "employers to utilize factors other than age as grounds for employment-related decisions that differentially impact members of the protected class." *Id.* at 702; *see also Adams*, 255 F.3d at 1325; EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994) (stating that § 623(f)(1) "suggests that decisions which are made for reasons independent of age but which happen to correlate with age are not actionable under the ADEA").

[75] 29 U.S.C. § 206(d)(1). The EPA provides in relevant part that, "[n]o employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than . . . he pays wages to employees of the opposite sex . . . for equal work . . . except where such payment is . . . based on any other factor other than sex." *Id.*

[76] County of Washington v. Gunther, 452 U.S. 161, 179–80 (1981). Section 206(d)(1) of the Equal Pay Act prohibits wage discrimination on the basis of gender unless such wage differential is "based on any other factor other than sex." 29 U.S.C. § 206(d)(1). The Supreme Court held that this language confined "the application of the Act to wage differentials attributable to sex discrimination." *Gunther*, 452 U.S. at 170 (citing H.R. REP. NO. 88-309, at 3 (1963)). This had the effect of eliminating the use of disparate impact theory under the EPA. *See Mullin*, 164 F.3d at 702 (suggesting that disparate impact is not in "the armamentarium of weapons available to plaintiffs under the Equal Pay Act"). Some courts have concluded that section 623(f)(1) of the ADEA is so similar in language to section 206(d)(1) of the EPA that disparate impact claims are logically precluded under the ADEA also. *Id.*; *see also Adams*, 255 F.3d at 1325; *Ellis*, 73 F.3d at 1008; *Francis W. Parker Sch.*, 41 F.3d at 1077.

[77] *See, e.g.*, *Mullin*, 164 F.3d at 701 (reviewing and contrasting goals of ADEA and Title VII).

[78] *See id.* The First Circuit reasoned that facially neutral practices that discriminated against workers protected under Title VII countervailed the statute's purpose of remedying past inequities, and should therefore be prohibited. The court reasoned that the ADEA, in contrast, sought only to shield workers from intentional discrimination resulting from stereotypes and that disparate impact theories of discrimination were not envisioned by the Act's drafters. *Id.*

[79] *Id.* (noting that because of the different purposes of the statutes, the

Opponents of disparate impact theory also point to two differences in the legislative histories of Title VII and the ADEA.[80] The report written by the Secretary of Labor, which served as the impetus for the ADEA, notes the first difference.[81] The report differentiated between "arbitrary discrimination"[82] and policies that merely "have a disproportionate effect on older workers."[83] The report went on to recommend that the former, which courts analogize to disparate treatment, be statutorily banned, while the latter, disparate impact, be dealt with in a different manner.[84] This distinction, not drawn in Title VII's legislative history, weighs against the use of disparate impact theory under the ADEA.[85]

The second difference in legislative history can be found in Congress's 1991 amendments to both statutes.[86] Specifically, Congress amended Title VII to explicitly include a cause of action recognizing disparate impact theory[87] but made no such amendment to the ADEA even though Congress

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reasoning in *Griggs* which created the disparate impact theory could not apply in an ADEA context).

[80] At least one court has focused on a third difference in denying this cause of action. The First Circuit reasoned that the Secretary of Labor's report did not find evidence of prejudice towards older workers. *Mullin*, 164 F.3d at 702–03; *see also supra* notes 24–25 and accompanying text. The court reasoned that disparate impact theory was designed "to combat invidious prejudice that is entirely unrelated to an ability to perform the job." *Id.* at 703. Therefore, the report's lack of findings of prejudice suggested that disparate impact theory could not be used in age discrimination cases. *Id.*

[81] *See supra* notes 24–25 and accompanying text.

[82] Adams v. Fla. Power Corp., 255 F.3d 1322, 1325 (11th Cir. 2001).

[83] *Mullin*, 164 F.3d at 703.

[84] *See Adams*, 255 F.3d at 1325; *Mullin*, 164 F.3d at 703 (suggesting some alternative means, including "educational programs and institutional restructuring"); Ellis v. United Airlines, Inc., 73 F.3d 999, 1008 (10th Cir. 1996) (arguing the effect on older workers should be "addressed through programmatic measures to improve opportunities for older workers").

[85] *See Adams*, 255 F.3d at 1325 ("Thus, the history of the ADEA differs from the legislative history of Title VII, which the Supreme Court in *Griggs* relied on to find a cause of action for disparate impact."); *Ellis*, 73 F.3d at 1008 ("The ADEA's stated purposes . . . reflect different approaches for intentional or arbitrary discrimination and the more benign problem of disparate impact.").

[86] *See* Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (1991) (amending Title VII); *cf.* Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (1991) (amending the ADEA).

[87] 42 U.S.C. § 2000e-2(k) (2000); *see Mullin*, 164 F.3d at 703 (reviewing the 1991 amendments to Title VII); *Ellis*, 73 F.3d at 1008 (noting the addition of a disparate impact cause of action to Title VII).

contemporaneously amended other portions of the statute.[88] Some courts have seen this omission as an expression of congressional intent to prohibit disparate impact theory causes of action under the ADEA.[89]

Additionally, some courts have read language in the Supreme Court's decision in *Hazen Paper* as an indication that disparate impact causes of action should not be allowed in the ADEA context.[90] These courts focus on the Supreme Court's statement that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA."[91] In *Hazen Paper*, the Supreme Court prohibited the use of age as a criterion in employment policies but allowed the use of other factors even if they correlate with age. Many courts read this to permit precisely what a disparate impact cause of action seeks to outlaw.[92] Finally, courts also reason that the strong language in the concurring opinion to *Hazen Paper* supports the prohibition of disparate impact causes of action in the ADEA context.[93] For these reasons, some courts have refused to entertain disparate impact claims under the ADEA.[94]

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[88] *See Mullin*, 164 F.3d at 703 (pointing to the absence of a disparate impact cause of action provision in the ADEA); *Ellis*, 73 F.3d at 1008 (same).

[89] *See Ellis*, 73 F.3d at 1008 (reasoning that Congress "thus signal[ed] its intent not to provide for a disparate impact cause of action under the ADEA").

[90] *See Adams*, 255 F.3d at 1326; *Mullin*, 164 F.3d at 700–01; *Ellis*, 73 F.3d at 1008; DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995); Lyon v. Ohio Educ. Ass'n, 53 F.3d 135, 139 n.5 (6th Cir. 1995); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076–77 (7th Cir. 1994).

[91] Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). Many courts have relied on this language. *See Adams*, 255 F.3d at 1326; *Mullin*, 164 F.3d at 700; *Ellis*, 73 F.3d at 1008–09; *DiBiase*, 48 F.3d at 732; *Francis W. Parker Sch.*, 41 F.3d at 1076.

[92] *See, e.g.*, *Mullin*, 164 F.3d at 700–701 (arguing the "inescapable implication" of the majority's language in *Hazen Paper* is that disparate impact theory will not be recognized); *DiBiase*, 48 F.3d at 732–33.

[93] *See Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring) (noting that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA").

[94] Additionally, courts have based their decisions to prohibit disparate impact claims on other courts' refusal to do so. *See Mullin*, 164 F.3d at 701; *Ellis*, 73 F.3d at 1009 (noting that after *Hazen Paper* "there is a clear trend toward concluding that the ADEA does not support a disparate impact claim.").

II. THE ADEA AND TITLE VII ARE SUFFICIENTLY SIMILAR TO ALLOW DISPARATE IMPACT CLAIMS UNDER BOTH

Title VII and the ADEA share the same purpose; both prohibit an employer from failing or refusing to hire or from discharging or otherwise discriminating against an individual because of a protected characteristic.[95] The Supreme Court has recognized that the ADEA's prohibitions "were derived in *haec verba* from Title VII."[96] The substantive provisions of the two mirror each other,[97] and it is these substantive provisions that are at issue.[98]

Many courts focus on the 1991 amendments to Title VII and the ADEA, namely that Congress added an express provision to Title VII allowing disparate impact claims and did not add a parallel provision to the ADEA even though it simultaneously amended that statute.[99] This emphasis is misplaced. It has been noted that "courts ordinarily should tread slowly in premising statutory construction on the action (or inaction) of subsequent Congresses."[100] Furthermore, even though Congress did not amend the ADEA to expressly allow disparate impact claims, it did not limit nor prohibit bringing such claims, even though it had the opportunity to do so.[101]

Courts focus on the "reasonable factor other than age" defense as a difference between Title VII and the ADEA

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[95] *Compare* 42 U.S.C. § 2000e-2(a)(2) (2000) *with* 29 U.S.C. § 623(a)(2) (2000).

[96] Lorillard v. Pons, 434 U.S. 575, 584 (1978). There, the Court found the substantive provisions of the two statutes shared important similarities but noted that they had "significant differences" in their "remedial and procedural provisions." *Id.*

[97] EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1080 (7th Cir. 1994) (Cudahy, J., dissenting).

[98] Adams v. Fla. Power Corp., 255 F.3d 1322, 1329 (11th Cir. 2001) (Barkett, J., specially concurring).

[99] *See supra* notes 86–89 and accompanying text.

[100] Mullin v. Raytheon Co., 164 F.3d 696, 703 (1st Cir. 1999).

[101] *See Adams*, 255 F.3d at 1328 n.6 (Barkett, J., specially concurring) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (quoting Lorillard v. Pons, 434 U.S. 575, 580 (1978))); Brett Ira Johnson, Note, *Six of One, Half-Dozen of Another:* Mullin v. Raytheon Co. *as a Representative of Federal Circuit Courts Erroneously Distinguishing the ADEA from Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303, 333 (2000) ("This silence . . . could be seen as acquiescence to the judicial recognition of a disparate impact cause of action under the ADEA.").

sufficient to justify prohibiting disparate impact causes of action under the latter.[102] The Supreme Court clearly articulated, however, that if an employer bases a facially neutral employment practice or policy on a legitimate business purpose, a disparate impact cause of action cannot survive.[103] Therefore, this section of the ADEA should be considered merely "a statutory description of the business necessity defense"[104] and should not be read as outlawing disparate impact claims.[105] The EEOC has suggested that this interpretation is a correct reading of the "'reasonable factors' defense."[106] The EEOC's interpretative guidelines, which are entitled to judicial deference,[107] state that when an employer claims the "reasonable factor other than age" defense to a factor that has an "adverse impact" on the protected group, such a factor "can only be justified as a business necessity."[108]

As noted earlier, some courts have argued that the "reasonable factor other than age" language also constitutes a textual similarity between the ADEA and the EPA and that this similarly precludes recognition of disparate impact theory under the former.[109] It is the substantive provisions of the statutes, however, that are at issue. While the ADEA and EPA may share similar remedial provisions, which are not at issue, they do not have similar substantive provisions.[110] Moreover, even these remedial provisions have a significant difference. While the EPA allows wage differentials based on "*any other factor* other than sex," the ADEA requires factors to be "*reasonable factors* other

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[102] *See supra* notes 72–73 and accompanying text.

[103] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 ("The touchstone is business necessity.").

[104] *Adams*, 255 F.3d at 1327 (Barkett, J., specially concurring); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1080 (7th Cir. 1994) (Cudahy, J., dissenting) ("[I]t seems clear to me that [section 623(f)(1)] simply codifies the business necessity defense.").

[105] EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1080 (Cudahy, J., dissenting) ("It does not preclude the availability of disparate impact liability.").

[106] *Adams*, 255 F.3d at 1328 (Barkett, J., specially concurring); Smith v. City of Des Moines, 99 F.3d 1466, 1470 n.4 (8th Cir. 1996) (noting that an amicus curiae brief filed by the EEOC "interpreting the ADEA suggest[ed] that the business necessity defense is the same under Title VII and the ADEA").

[107] *Griggs*, 401 U.S. at 433–34; *Adams*, 255 F.3d at 1328 (Barkett, J., specially concurring) (citing Edwards v. Shalala, 64 F.3d 601, 606 (11th Cir. 1995)).

[108] 29 C.F.R. § 1625.7(d) (2001).

[109] *See supra* note 74–75 and accompanying text.

[110] *See Adams*, 255 F.3d at 1329.

than age."[111] Therefore, the EPA provides employers with a broader defense, essentially only prohibiting them from intentional discrimination.[112] In contrast, the ADEA has a narrower defense and requires the employer to demonstrate that the factor on which he relied was reasonable.[113] This demonstrative requirement could be thought of as the mechanism by which an employer could defend himself against a disparate impact claim.[114]

Additionally, some argue that the disparate impact theory was not conceptualized until the Supreme Court's 1971 decision in *Griggs v. Duke Power Co.*, [115] and Congress therefore, drafting the ADEA in the late 1960s, could not have formed any opinion about disparate impact theory.[116] Congress could not have intended the "reasonable factor other than age" defense to be a statutory bar against disparate impact claims.[117] Therefore, there is a strong argument that the "reasonable factor other than age" defense under the ADEA does not act to prohibit disparate impact causes of action, but provides an alternate codification of the business necessity defense.

Finally, disparate impact theory, first developed by the Supreme Court in *Griggs* in a Title VII context, [118] was based not on the statutory language of Title VII[119] but on Congress's

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[111] *Compare* 29 U.S.C. § 206(d)(1) (2000) *with id.* § 623(f)(1) (2000) (emphasis added).

[112] *Adams*, 255 F.3d at 1329 n.7 (Barkett, J., specially concurring) (citing Varner v. Ill. State Univ., 226 F.3d 927, 934 (7th Cir. 2000) ("By providing a broad exemption from liability under the Equal Pay Act for any employer who can provide a neutral explanation for a disparity in pay, Congress has effectively targeted employers who intentionally discriminate against women.")).

[113] *Id.* at 1329.

[114] *Id.* at 1325 n.6. The majority in *Adams* declined to draw such an inference. *Id.*

[115] 401 U.S. 424 (1971).

[116] *See* Brief of Amicus Curiae Cornell University Chapter of the American Association of University Professors and the National Lawyers Guild in Support of Petitioners at 23, Adams v. Fla. Power Corp., 255 F.3d 1322 (11th Cir. 2001) (No. 99-15306) ("Our legislators neither condemned disparate impact nor condoned it because they did not know about it.").

[117] *See id.* at 21–23. Others have argued that this line of logic works against proponents of disparate impact theory under the ADEA. Since Congress did not know about disparate impact theory while drafting the ADEA, it could not possibly have *intended* such claims to be cognizable. Johnson, *supra* note 101, at 326.

[118] 401 U.S. 424 (1971).

[119] The relevant portion of Title VII is "nearly identical" to section 623(a) of the ADEA. Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996).

underlying objectives of the Act.[120] These objectives included the "removal of artificial, arbitrary and unnecessary barriers to employment" that caused discrimination.[121] This objective is practically identical to Congress's purpose in enacting the ADEA.[122] Because the Supreme Court in *Griggs* noted that Congress sought to "remove barriers that have operated in the past" to cause discrimination,[123] some have argued that disparate impact theory is available only under Title VII because members of the classes protected under that statute have faced past discrimination, while workers in the ADEA's protected class have not.[124] The Supreme Court in *Griggs*, however, never indicated that other protected classes would have to show evidence of past discrimination in order to use the disparate impact theory.[125] In fact, later decisions expanded the use of disparate impact theory without requiring plaintiffs to prove their class had suffered a history of discrimination.[126]

III. THE SUPREME COURT LEFT THE ISSUE UNDECIDED IN *HAZEN PAPER CO. V. BIGGINS*

Hazen Paper was a disparate treatment case, and the Supreme Court made it clear that it had "never decided whether a disparate impact theory of liability is available under the ADEA . . . and [it] need not do so here."[127] The holding of the

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[120] *Id.* at 1007–08 n.13.

[121] *Griggs*, 401 U.S. at 431.

[122] "It is therefore the purpose of this chapter . . . to prohibit arbitrary age discrimination in employment . . . ." 29 U.S.C. § 621(b) (2000).

[123] *Griggs*, 401 U.S. at 429–30.

[124] Ziegler, *supra* note 23, at 1056.

[125] Johnson, *supra* note 101, at 340. The Supreme Court in *Griggs* seems to have relied on evidence of past racial discrimination as the reason current differences between the two groups exist. *See Griggs*, 401 U.S. at 430–31; *see also* Johnson, *supra* note 101, at 340. The Supreme Court also noted that in enacting Title VII, "Congress directed the thrust of the Act to the *consequences* of employment practice, not simply the motivation." *Griggs*, 401 U.S. at 432. In other words, the Court chose to focus on the effects of the disparate impact and not the reasons such an impact existed. *See* Ziegler, *supra* note 23, at 1057.

[126] *See* Dothard v. Rawlinson, 433 U.S. 321, 330–31 (1977) (applying disparate impact theory to gender discrimination without requiring the plaintiff to show past discrimination); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336–38 (1977) (holding the employer's hiring policy had a disparate impact against black employees or employees with Spanish surnames).

[127] 507 U.S. 604, 610 (1993).

case did not affect the sustainability of disparate impact causes of action, and many courts have read this atatement literally and have continued to follow circuit precedent to allow such claims.[128] Therefore, any doubt that the Supreme Court has cast on the viability of such claims is pure dicta and should be considered as such until the Court makes a determination either way.[129]

The Supreme Court clearly left the door open for disparate impact claims in *Hazen Paper*. Specifically, the Court noted that in cases where an employer supposes that a factor, such as pension status, correlates with age and acts with this belief in mind, the employer engages in age discrimination.[130] Therefore, it can be inferred that a situation with a disproportionate effect on older workers but little proof of the employer's discriminatory motive would be an appropriate situation to use disparate impact theory to prove that the employer *supposed* such a correlation and acted with a discriminatory animus.[131] At least one circuit that has generally prohibited a particular disparate

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[128] *See* Adams v. Fla. Power Corp., 255 F.3d 1322, 1324 (11th Cir. 2001); *see also supra* notes 64–67 and accompanying text.

[129] *See* Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996) (stating that "even if we believed that *Hazen Paper* cast doubt on the validity of [plaintiff's claims], *Houghton* represents the law of this Circuit, which we follow absent a 'clear indication' that it has been overruled").

[130] The Supreme Court stated in *Hazen Paper*:

> We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent . . . but in the sense that the employer may suppose a correlation between the two factors and act accordingly.

507 U.S. at 612–13 (citation omitted).

[131] *See Adams*, 255 F.3d at 1327 (Barkett, J., specially concurring) ("Disparate impact claims provide an avenue for members of protected classes to prove that discrimination occurred in the workplace when proof of motive is difficult or unavailable."); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1079 (7th Cir. 1994) (Cudahy, J., dissenting) (noting that the Supreme Court specified a possible "underlying theory of ADEA liability" and did not make a decision as to the "method of proof").

So, for example, only disparate impact theory could be used to address a situation where an employer used salary as a method of terminating older workers specifically or decided to fire older workers because of their age *and* their high salary. Following the Court's rationale in *Hazen Paper*, however, disparate impact theory could not be used when the employer decided to terminate employees based on cost alone and not because of his employees' ages because he could do so without discriminating. GREGORY, *supra* note 1, at 213.

impact claim under the ADEA has also recognized that there are certain situations where disparate impact could exist.[132]

Additionally, the Supreme Court expressly did not rule out the possibility of "dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employer's age and by his pension status."[133] Likewise, it did not consider the special case of an employer who fires an employee to prevent her from collecting a pension that is based on age rather than years of service.[134] Thus, even if the Supreme Court seemed doubtful about the viability of disparate impact claims under the ADEA, it clearly was not willing to place all situations in which the cause of action might arise in the same category.

IV. ALLOWING DISPARATE IMPACT CLAIMS IS IN THE BEST INTEREST OF PUBLIC POLICY

Eliminating the opportunity for plaintiffs to bring disparate impact claims under the ADEA has several negative effects. It allows employers to make employment decisions that are based on prohibited stereotypes about older workers but use legitimate factors as a mere a pretext.[135] Such a result is anomalous to the purpose of the ADEA, which is to prevent employers from basing employment decisions on prohibited stereotypes about older workers.[136] When there is little evidence that an employer was motivated by such stereotypes and thus discriminated against the plaintiff, the only tool the plaintiff has to redress this discrimination is to bring a disparate impact claim.[137] In fact, it

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[132] The Third Circuit was concerned with a "pure disparate impact case" where the employer's decision is "wholly motivated by factors other than age." DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 732–33 (3d Cir. 1995). Judge McKee was the only author of the subsection that dealt with disparate theory generally under the ADEA. *Id.* at 732 n.17. He made certain to note that his analysis did not consider "situations in which impact is used to prove intent to discriminate." *Id.* at 733 n.19.

[133] *Hazen Paper*, 507 U.S. at 613.

[134] *See id.*; *see also Adams*, 255 F.3d at 1330 (Barkett, J., specially concurring).

[135] *See Francis W. Parker Sch.*, 41 F.3d at 1081 (Cudahy, J., dissenting) ("The basic practical difficulty with the majority's result is that it provides an opportunity for employers to exclude older applicants from lower-level jobs simply by declaring the applicants 'overage' (i.e. entitled to earn an excessive salary for the job they seek[]).").

[136] *See id.* at 1078 (Cudahy, J., dissenting).

[137] *See id.* (Cudahy, J., dissenting) ("[D]isparate impact analysis should be allowed to proceed to determine whether the refusal to hire did really arise from

has been argued that the disparate impact theory was specifically designed to detect the use of such prohibited stereotypes.[138]

When the legislature passed the ADEA, it did so because it found that older workers were at a disadvantage in the workplace and that arbitrary discrimination based on age was harmful not only to individual plaintiffs but also to society as a whole.[139] Congress's purpose in passing the ADEA was to encourage the employment of older workers based on their ability and to prohibit arbitrary discrimination against them because of their age.[140] Thus, it seems contrary to the legislative intent behind the ADEA for courts to prohibit a disparate impact cause of action and allow employers to continue to discriminate in a manner that Congress sought to prohibit.[141] Furthermore, prohibiting plaintiffs from bringing claims using disparate impact theory might actually increase the incidence of employment discrimination against older workers by emboldening employers to use legitimate factors as a pretext for their discriminatorily motivated employment decisions.[142]

Those who oppose disparate impact causes of action under the ADEA point out a possible practical problem: Because age falls on a continuum and is constantly changing, it will be extremely difficult to define who is in the protected class.[143] Therefore, comparison groups are not as clear as they are in cases involving race or gender discrimination.[144] For example, while an employment practice may disparately impact employees who are age fifty-five and older, it may have no effect whatsoever on employees between ages forty and fifty-four who are also

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stereotypical views of older workers.").

138 *See id.* at 1080–81 (Cudahy, J., dissenting).

139 *See* 29 U.S.C. § 621(a)(1)–(4) (2000).

140 *See id.* § 621(b).

141 *See* Clemons & Bales, *supra* note 27, at 27–28.

142 *See* GREGORY, *supra* note 1, at 219 ("If an employer feels confident that it can conceal its discriminatory intent, then it is more likely that it will continue to engage in illegal, discriminatory conduct.").

143 *See* Clemons & Bales, *supra* note 27, at 27 (noting that one practical problem involves imprecisely defined protected groups). This objection was also raised by the Court of Appeals for the Tenth Circuit. *See* Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996) ("Accordingly, the line defining the class that is disparately impacted by a challenged policy is an imprecise one . . . .").

144 Archer, *supra* note 22, at 172.

considered part of the class protected under the ADEA.[145] This, opponents argue, would allow parties to manipulate the line defining the protected class "to either strengthen or weaken the impact of a policy on some age group."[146]

This practical problem does not justify the total elimination of disparate impact theory under the ADEA. Courts could follow the lead of the Second Circuit and adopt a rule that, to succeed under disparate impact theory, plaintiffs must "allege a disparate impact on the entire protected group, i.e., workers aged 40 and over" and not just point to an impact on a subsection of that group.[147] This would eliminate any possibility that a party could manipulate data to strengthen or weaken a case.[148] Additionally, it has been argued that disability is also on a continuum, and the Supreme Court has expressly stated that any evaluation of a person's status as disabled must be done on a case-by-case basis.[149] Therefore, in the disparate impact context, defining a protected class based on age should not be more difficult for courts than defining one on the basis of disability.[150] Finally, the fact that age falls along a continuum could actually help plaintiffs alleging age discrimination because jurors who have a "natural fear of growing older and . . . being subjected to age discrimination themselves" tend to identify with plaintiffs.[151]

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[145] This was the situation in *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102 (2d Cir. 1997). While the employer's seniority system had a disparate impact on plaintiffs who were all fifty-five and older, the scheme had no impact on the "overall group" of employees forty and over. *Id.* at 105. The same problem occurred in *Mullin v. Raytheon Co.*, 2 F. Supp. 2d 165 (D. Mass. 1998), where the district court found that despite the employment policy's disparate effects on employees over fifty years old, the protected class as a whole suffered no damage. *Id.* at 170–71; Archer, *supra* note 22, at 172 n.225.

[146] *Ellis*, 73 F.3d at 1009.

[147] *Criley*, 119 F.3d at 105.

[148] *See supra* note 144.

[149] *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999); Clemons & Bales, *supra* note 27, at 27 n.217.

[150] Clemons & Bales, *supra* note 27, at 27.

[151] GREGORY, *supra* note 1, at 191. Often, however, this positive effect is countered by "the negative attitude toward age discrimination cases" that has developed in the judiciary. *Id.* at 191–93 (noting that often such negative attitudes exhibited at the trial level reflect the "negative attitude of the justices of the Supreme Court" to employment discrimination cases generally).

CONCLUSION

There is a tension underlying this debate. On one hand, there is a desire to protect employees from discrimination. On the other, there is a concern for allowing employers to run their businesses effectively and cost efficiently. The Supreme Court in *Hazen Paper* sought to balance these competing factors. The Court severely limited the bases for an action using disparate impact theory by declaring that factors that may be related to age are not necessarily proxies for age. At the same time, the Court left open the option to use disparate impact theory to prove that otherwise justifiable business practices could be pretextual and actually motivated by animus towards older employees.

While concerns regarding business efficiency and effectiveness are certainly valid, employees should be allowed to retain the tool of disparate impact theory. The purposes behind the ADEA and other employment discrimination legislation, most notably Title VII, support the use of disparate impact theory to root out unlawful employment discrimination. Without such a tool, employees will have no means of attempting to prove discrimination in cases where employment decisions are outwardly based on "permissible" factors, such as pension status, but are in reality a pretext for discriminatory animus.