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Plaintiffs Cannot Establish a Prima Facie Case of Age Discrimination by Showing Disparate Impact Within the Protected Group. Lowe v. Commack Union Free School Dist., 886 F.2d 1364 (2d Cir. 1989)

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CASE COMMENTS

PLAINTIFFS CANNOT ESTABLISH A PRIMA FACIE CASE OF AGE DISCRIMINATION BY SHOWING DISPARATE IMPACT WITHIN THE PROTECTED GROUP

Lowe v. Commack Union Free School Dist., 886 F.2d 1364 (2d Cir. 1989)

In *Lowe v. Commack Union Free School District*,[1] the Second Circuit ruled that a plaintiff may not use a disparate impact theory to show a prima facie case of discrimination under the Age Discrimination in Employment Act of 1967 (ADEA)[2] when the plaintiff alleges discrimination within ADEA's protected group.[3]

The plaintiffs, Annmarie Lowe and Mary Delisi, applied for teaching positions in the Commack Union Free School District for the 1986-87 school year.[4] Lowe and Delisi were over fifty years old[5] throughout the hiring process,[6] and the school district rejected them both.[7] Of the thir-

1. 886 F.2d 1364, 1373 (2d Cir. 1989) *cert. denied*, 110 S. Ct. 1470 (1990).

2. 29 U.S.C. §§ 621-34 (1988).

3. The "protected group" under the ADEA includes individuals who are 40 or older. 29 U.S.C. § 631(a) (1988). This comment focuses on the situation in which the alleged discrimination occurs within the protected group. In *Lowe*, both plaintiffs were over 50 years old and alleged that the school district discriminated against them in favor of persons between the ages of 40 and 50. *Lowe*, 886 F.2d at 1372. *See infra* notes 4-21.

4. *Lowe*, 886 F.2d at 1365. Both Lowe and Delisi previously worked for the school district. Lowe began teaching as a substitute teacher in 1969, became a full time teacher in 1971, and was granted tenure in 1974. *Id.* at 1366. Delisi worked as an elementary teacher in 1970 and received tenure in 1973. *Id.* Because of declining enrollment, the school district "excessed" Lowe and Delisi pursuant to N.Y. EDUC. LAW § 2510(2) (McKinney 1981). The school district placed both women on a preferred eligibility list that expired after seven years. No vacancies arose during that time. *Lowe*, 886 F.2d at 1366.

5. Lowe was born on March 23, 1934 and Delisi was born on June 12, 1934. The school district began the hiring process in May, 1986. *Id.* at 1366.

6. The school district divided the applicants into two groups: those who had worked for the school district before (internal candidates) and those who had not (external candidates). The school district used a separate screening process for each group. The internal candidates took a written test and the school district interviewed each of them. The school district evaluated the written test on a scale of 0 to 12.5. The interviewers evaluated the candidates on a simple"yes" or "no" basis. The school district placed those who received two "yes" evaluations and a score of 8.0 or higher, or one "yes" evaluation and a score of 9.0 or higher, in the final pool of applicants. *Id.* at 1367. Over 700 external candidates applied. After interviewing 26 of these candidates, the school district placed nine of them in the final pool. *Id.* at 1368.

7. *Id.* at 1367.

teen teachers hired, five were under forty years old, and eight were between the ages of forty and fifty.[8]

In 1987, Lowe and Delisi brought suit in the United States District Court for the Eastern District of New York against the school district,[9] alleging that the district discriminated on the basis of age in violation of the ADEA.[10] The plaintiffs set forth two theories of discrimination:[11] disparate treatment[12] and disparate impact.[13] In support of the disparate

8. *Id.* at 1371.

9. The plaintiffs also named the school's superintendent and assistant superintendent as defendants. *Id.* at 1368.

10. *Id.* The plaintiffs alleged that the school district's failure to hire them constituted a violation of the ADEA, 29 U.S.C. § 623(a)(1) (1988), of their civil rights under 42 U.S.C. §§ 1983, 1988 (1988), and of two state laws, N.Y. EXEC. LAW § 296 (3-a) (McKinney 1982 & Supp. 1990), and N.Y. EDUC. LAW § 3027 (McKinney 1981). *Lowe*, 886 F.2d at 1368. The plaintiffs pursued only the ADEA claim at trial. *Id.* at 1368 n.3.

11. The Supreme Court has adopted two general theories of discrimination proscribed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-14 (1988) (Title VII): disparate treatment and disparate impact. *Lowe*, 886 F.2d at 1369 (citing Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981)). *See infra* notes 12-13.

12. A plaintiff establishes disparate treatment by showing intent, or motive to discriminate. *Lowe*, 886 F.2d at 1369 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)). The Supreme Court set out the elements for a Title VII prima facie case of disparate treatment in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973): 1) the plaintiff must be a member of a racial minority; 2) the plaintiff applied and was qualified for the job for which the employer was seeking applicants; 3) despite the plaintiff's qualifications, he or she was rejected; and 4) after the plaintiff's rejection, the position remained open and the employer continued to seek applications from persons with the same qualifications. *McDonnell Douglas*, 411 U.S. at 802. These elements are founded on the plaintiff's ability to create an inference of discriminatory motive by ruling out the more obvious job-related reasons for not hiring the plaintiff. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977). *See also* Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). For a general discussion of disparate treatment in Title VII cases, see 1 C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION §§ 2.3, 2.5 (2d ed. 1988); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1298-99 (2d ed. 1983).

In the ADEA context, most courts have modified the *McDonnell Douglas* elements to the following: 1) the plaintiff must be a member of the protected group; 2) the employer took adverse employment action against the plaintiff; 3) the plaintiff was qualified for the position; and 4) the employer replaced the plaintiff with a younger person. Guthrie v. J.C. Penney Co., 803 F.2d 202, 206-07 (5th Cir. 1986). The fourth element varies from circuit to circuit. Some circuits require that the plaintiff be replaced by a person outside the protected group; however, those circuits do not apply that element strictly. *See* Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1442-43 (11th Cir.) (counseling against strict interpretation of *McDonnell Douglas*), *cert. denied*, 474 U.S. 1005 (1985); Maxfield v. Sinclair Int'l, 766 F.2d 788, 792 (3d Cir. 1985) (test satisfied if replacement is "sufficiently younger to permit an inference of age discrimination"), *cert. denied*, 474 U.S. 1057 (1986); McCuen v. Home Ins. Co., 633 F.2d 1150, 1151-52 (5th Cir. 1981) (failure to prove replacement by an individual outside the protected class is not fatal but precludes use of the *McDonnell Douglas* presumption); McCorstin v. United States Steel Corp., 621 F.2d 749, 753-54 (5th Cir. 1980) (recognizing that a 60-year-old is seldom replaced by one under 40); Loeb v. Textron, Inc., 600 F.2d 1003, 1012-14 (1st Cir. 1979) (citing the more general rule that the employer looked for any replacement); *but see* Price v.

impact theory, the plaintiffs offered statistical evidence that the hiring

Maryland Casualty Co., 561 F.2d 609, 612 (5th Cir. 1977) (citing strict adherence to the standard, but finding no discrimination because the plaintiff was not replaced).

Lowe and Delisi's disparate treatment argument relied on the school district's adoption of a Retirement Incentive Program. The plaintiffs argued that this program indicated the school district's intent not to hire teachers at or near the retirement age of 55. *Lowe*, 886 F.2d at 1368. Lowe and Delisi also presented evidence that a 55-year-old candidate received two "yes" evaluations and scored a 9.5 on her written test but the school district excluded her from the final pool of candidates. *Id.* at 1369. The defendants responded that the 55 year-old was excluded because of an earlier disciplinary problem. *Id.* The jury returned a verdict in favor of the defendants and the judge denied the plaintiffs' motion to set aside the verdict. *Id.* at 1368-69.

13. *Id.* at 1369-70. Disparate impact, like disparate treatment, is a theory of discrimination developed under Title VII. *See supra* note 11. Unlike disparate treatment, a plaintiff need not show intent to establish discrimination. Disparate impact consists 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 and cannot be justified by business necessity." International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977). For a general discussion of the difference between disparate treatment and disparate impact, see *id.* at 335-36 n.15; Furnish, *A Path Through the Maze: Disparate Impact And Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C. L. REV. 419, 440-44 (1982).

The Supreme Court first adopted a disparate impact analysis of a Title VII discrimination case in Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *Griggs*, the Court struck down a company policy requiring a high school education and satisfactory score on a general intelligence test for initial assignment and transfer within the company. *Id.* at 431. Despite the lack of any discriminatory motive, the policy violated Title VII because it adversely affected a protected group and was not related to job performance. *Id.* The Court held that Title VII prohibits "practices that are fair in form, but discriminatory in operation." *Id.* Congress intended to remove arbitrary barriers to employment that work "to discriminate on the basis of racial or other impermissible classification." *Id.* The Court stated that Congress directed the thrust of the Act to "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past." *Id.* at 429-30.

The *Griggs* Court failed to pinpoint the statutory justification for the disparate impact doctrine other than referring to Congress' general purposes in passing Title VII. In subsequent cases, the Court justified disparate impact by reliance on § 703(a)(2) of Title VII, which prohibits:

> limit[ing], segregat[ing], or classify[ing] . . . employees or applicants for employment 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 race, color, religion, sex or national origin.

See Connecticut v. Teal, 457 U.S. 440, 448-49 & n.9 (1982); Nashville Gas Co. v. Satty, 434 U.S. 136, 141 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 136-37 (1976). For a further discussion of the statutory foundation of disparate impact in Title VII, see Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1299-1311 (1987); Welch, *Superficially Neutral Classification: Extending Disparate Impact Theory to Individuals*, 63 N.C. L. REV. 849, 851-54 (1986). For an argument that Congress only intended to prohibit intentional discrimination under Title VII, see Gold, Grigg's *Folly: An Essay on the Theory Problems and Origins of the Adverse Impact Definition of Employment Discrimination and A Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 497-503 (1985).

Congress adopted the language of § 703(a)(2) of Title VII in the substantive provision of the ADEA, 29 U.S.C. 623(a)(2). Congress' incorporation of Title VII language lends support to the argument that Title VII disparate impact precedent should apply to ADEA cases. *See infra* notes 26-28 and accompanying text.

procedure effectively excluded those over fifty while favoring those under fifty.[14] The district court charged the jury that the plaintiffs could prove discrimination by showing disparate treatment.[15] However, the court ruled that the plaintiffs' failure to establish discriminatory impact as a matter of law precluded a charge to the jury that the plaintiffs could prove discrimination by demonstrating disparate impact.[16] The jury returned a verdict for the school district[17] and the plaintiff appealed.[18]

The Second Circuit affirmed, and *held*: to assert a disparate impact claim under the ADEA, the plaintiff must demonstrate a discriminatory impact upon the group protected by the ADEA,[19] not merely a subgroup of the protected group.[20] Therefore, the plaintiffs could not establish a prima facie claim under the ADEA by showing a disparate impact on persons aged fifty and older in the absence of disparate impact on those aged forty and older.[21]

Congress passed the ADEA to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[22]

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14. *Lowe*, 886 F.2d at 1372. The plaintiffs could not claim that the hiring procedure favored those under 40 because 34 of the 37 internal candidates interviewed by the school district were 40 or older. *Id.* at 1371. In addition, eight of the 13 positions were filled by candidates aged 40 or over even though most of the 700 external candidates were under 40. *Id.*

15. *Id.* at 1369.

16. *Id.*

17. *Id.*

18. *Id.* The plaintiffs raised four issues on appeal. However, this Comment focuses solely on the issue of whether the judge erred in failing to charge the jury that Lowe and Delisi could prove discrimination by demonstrating disparate impact.

19. *Id.* at 1373. The protected group under the ADEA are all individuals who are at least 40 years of age. 29 U.S.C. § 631(a) (1988). *See supra* note 14.

20. *Lowe*, 886 F.2d at 1373. Before examining the question of whether the plaintiffs could establish a prima facie case of discrimination by showing disparate impact on those over 50, the court looked at whether there was a disparate impact on those 40 and over. *Id.* at 1371-72. The court found that Lowe and Delisi failed to satisfy the requirement established by the Supreme Court in Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), of isolating and identifying the specific employment practice responsible for the statistical disparities. *Lowe*, 886 F.2d at 1370. The court stated, however, that even if the plaintiffs had met the *Watson* test, the statistics did not show a disparate impact on those 40 and over. Of the 37 internal candidates, 34 were 40 or older. *Id.* at 1370-71. The court reasoned that comparing the two groups was statistically meaningless because of the small sample of those under 40. *Id.* at 1371-72. Therefore, the plaintiffs could not establish a prima facie case of discrimination by showing disparate impact on those 40 and over. *Id.* at 1370-72.

21. *Id.* at 1373.

22. 29 U.S.C § 621(b) (1988).

During hearings on the ADEA, Senator Yarborough[23] and Senator Javits,[24] two of the most determined supporters of the ADEA, indicated that the ADEA also prohibited age discrimination between persons within the protected group.[25]

Congress modeled the ADEA's prohibitions after those of the Civil Rights Act of 1964 (Title VII).[26] For this reason, courts have referred to Title VII precedent to interpret the ADEA[27] and generally have accepted

23. Senator Ralph Yarborough was the ranking minority member of the committee responsible for the ADEA legislation. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989, at 2095 (1989), 2 H. EGLIT, AGE DISCRIMINATION § 17.60 at 2S-330 (1989 and Supp. 1989).

24. Senator Jacob Javits was chairman of the Senate committee responsible for the ADEA legislation. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989, at 1256 (1989); H. EGLIT, *supra* note 23, § 17.60, at 2S-330 (1989 and Supp. 1989).

25. 113 CONG. REC. 31,255 (1967). Senator Javits stated that "the bill specifically prohibits discrimination against any 'individual' because of his age. It does not say that the discrimination must be in favor of someone younger than age 40. *Id.* Senator Yarborough said, "It was not the intent of the sponsors of this legislation . . . to permit discrimination in employment on account of age, whether discrimination might be attempted between a man 38 and one 52 years of age, or between one 42 and one 52 years of ag[e]." *Id.*

26. 42 U.S.C. § 2000e-2000e-14 (1988). *See* Oscar Mayer Co. v. Evans, 441 U.S. 750, 756 (1979) ("[T]he ADEA and Title VII share a common purpose"); Lorillard v. Pons, 434 U.S. 575, 584 (1978) ("[P]rohibitions of the ADEA were derived *in haec verba* from Title VII."). The ADEA's remedies were modeled after the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1988). *See* Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 381 (1976); Comment, *Recent Developments in Age Discrimination*, 17 AM. BUS. L.J. 363 (1979).

27. These two decisions "led to a string of ADEA cases relying on Title VII precedent." Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038, 1055 n.72 (1984). While the courts have applied Title VII precedent to ADEA cases, some commentators argue that the ADEA should be interpreted apart from Title VII principles. *See* Note, *supra* note 26, at 410-11 (even though the language of Title VII and the ADEA are identical in many respects, age discrimination is distinct enough from race and sex discrimination to avoid automatic application of Title VII precedent). Others argue that courts should not extend the disparate impact analysis to the ADEA. *See* Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 854-55 (1982) (disparate impact analysis is not applicable to age discrimination because age discrimination is not a perpetuation of past discrimination and the ADEA does not authorize disparate impact claims); Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is A Transplant Appropriate?*, 14 U. TOL. L. REV. 1261 (1983) (defense to disparate impact in ADEA is business reasonableness, not Title VII's more stringent business necessity defense). For other citations, see Note, *supra*, 68 Minn. L. Rev. 1038, 1039, 1055 n.9.

In the landmark case Geller v. Markham, 635 F.2d 1026 (2d. Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), the Second Circuit applied a Title VII disparate impact analysis to an ADEA case. *Geller*, 635 F.2d at 1032. The plaintiff in *Geller*, a 55-year-old teacher replaced by a 25-year-old, brought an action against the school board under the ADEA, challenging its policy of only hiring teachers with less than five years of experience. *Id.* at 1030. The plaintiff provided statistics demonstrating that 92.6% of Connecticut teachers in the protected group had more than five years of experience. *Id.* The court accepted the showing of disparate impact to establish a prima facie case of discrimination and found that the policy was discriminatory as a matter of law. *Id.* at 1033. In response to the school board's argument that the ADEA did not adopt Title VII procedural rules

the disparate treatment and disparate impact theories to demonstrate a prima facie case of age discrimination.[28]

Prior to *Lowe*, no court addressed the application of disparate impact analysis to age discrimination occurring within the protected group.[29] However, the Supreme Court considered an analogous situation in a Title VII race discrimination case, *Connecticut v. Teal*.[30] In *Teal*, the defendant employer required its employees to pass a written examination as a first step in obtaining permanent status as supervisors.[31] Fifty-four percent of the identified black candidates passed while seventy-nine percent of the identified white candidates passed.[32] Nevertheless, the employer promoted 22.9 percent of the identified black candidates and only 13.5

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entirely, the court noted that disparate impact was not merely a procedural rule. *Id.* at 1032. The court relied on *Lorillard* to infer that disparate impact was a substantive rule of Title VII. *Id.* at 1029-32.

Other circuits have followed *Geller*, generally assuming the applicability of the analysis without discussion. *See* Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983). Other district courts have applied disparate impact to ADEA cases. *See* EEOC v. Bordens Inc., 724 F.2d 1390 (9th Cir. 1984); Allison v. Western Union Telegraph Co., 680 F.2d 1318 (11th Cir. 1982); Reilly v. Prudential Property & Casualty Ins. Co., 653 F. Supp. 725, 733 (D.N.J. 1987); Arnold v. United States Postal Serv., 649 F. Supp. 676, 681-82 (D.D.C. 1986). However, the issue is not definitively resolved. The Supreme Court denied certiorari in *Geller* over a strong dissent by Justice Rehnquist, who objected to the use of disparate impact in ADEA cases. Markham v. Geller, 451 U.S. 945 (1981). Justice Rehnquist argued that the Supreme Court had never sanctioned using disparate impact to establish an ADEA violation and Congress never intended such an interpretation. *Id.* at 947-49.

28. Although the Supreme Court has not definitively ruled that a disparate treatment analysis is appropriate in ADEA cases, every circuit except the Sixth has applied the *McDonnell Douglas* elements of Title VII disparate treatment to ADEA cases. *See supra* note 13. 2 H. EGLIT, AGE DISCRIMINATION § 17.56, at 17-183, 17-184 n.6 & 7 (1989) (collecting cases). *See also* SCHLEI & GROSSMAN, *supra* note 12, 497-98 n.121 & 122; C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 727-29 (1980); 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 98.53 (1990). For ADEA cases applying disparate treatment to discrimination within the protected group, see *infra* note 51 and accompanying text.

More controversy surrounds adoption of the disparate impact analysis to ADEA cases. The Second Circuit first accepted a disparate impact analysis in an ADEA context in Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). *See supra* note 27 and accompanying text.

29. *See supra* note 3.

30. 457 U.S. 440 (1982).

31. *Id.* at 443. The Department of Income Maintenance of the State of Connecticut promoted four black employees of the department to temporary Welfare Eligibility Supervisors. *Id.* at 442-43. In order to gain permanent status, the plaintiffs had to pass a written test. *Id.* at 443. Thirty-four percent of the identified black candidates passed, while 79.54 percent of the identified white candidates passed. The plaintiffs failed the test. *Id.*

32. *Id.* at 443 n.4.

percent of the identified white candidates.[33] The defendant argued that at the "bottom line" the policy did not adversely affect the black candidates.[34] The Court rejected this "bottom line" argument, pointing out that Congress intended Title VII to achieve equality in employment opportunities for every individual, not just equality in the overall number of minorities actually hired or promoted.[35] The Court reasoned that Congress did not intend to allow employers to discriminate against some employees while favorably treating others within the employees' group.[36]

Only the Second Circuit has addressed whether disparate impact may

33. *Id.* at 444. The Department placed those who passed the exam on an eligibility list. From that list, the Department chose persons for permanent promotion. Of the 46 persons promoted, 11 were black and 35 were white. That is, the Department promoted 22.9% of the 48 identified black candidates and 13.5% of the 259 identified white candidates. *Id.* Thus, the Department promoted blacks at a rate approximately 170 percent of the rate at which it promoted whites. *Id.* at 444 n.6.

34. *Id.* at 444. The district court agreed, holding that the "bottom line" percentages precluded a finding of a Title VII violation. *Id.* at 445. The Second Circuit reversed, holding that "where an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, that barrier must be shown to be job related." *Id.* (quoting Teal v. Connecticut, 645 F.2d 133, 138 (2d Cir. 1981)).

35. *Id.* at 453. The Court cited § 703(a)(2) of Title VII, which prohibits practices that would deprive or tend to deprive "*any individual* of employment opportunities." *Id.* at 453-54 (emphasis court's) (quotations omitted). Section 703(a)(2) provides the statutory foundation of the disparate impact theory. *See supra* note 13. The exact language of § 703(a)(2) appears in the substantive section of the ADEA, 29 U.S.C. § 623(a)(2) (1988). Thus, the court's discussion of § 703(a)(2) is particularly relevant to disparate impact in the ADEA context.

36. *Teal*, 457 U.S. at 455. The *Teal* dissent argued that the majority's emphasis on the individual blurred the distinction between disparate treatment and disparate impact. A plaintiff establishes disparate treatment by showing individual discrimination; the plaintiff can establish disparate impact only by proving adverse effects upon the protected group. *Id.* at 456-60 (Powell, J., dissenting). However, the dissent's analysis did not define "group." In *Teal*, the whole group was not adversely affected. *But see* Massarsky v. General Motors Corp., 706 F.2d 111, 121 (3d Cir. 1983) (an "adverse effect on a single employee or even a few employees, is not sufficient to establish disparate impact").

At least one commentator has argued that after *Teal*, it is no longer necessary to show adverse impact on a group to establish a prima facie case of discrimination. *See* Welch, *Superficially Neutral Classifications: Extending Disparate Impact Theory to Individuals*, 63 N.C. L. REV. 849 (1986) (a plaintiff can establish a prima facie disparate impact case by demonstrating loss of an employment opportunity because of "superficially neutral" practices).

Another commentator acknowledges the *Teal* dissent's assertion that a plaintiff must show disparate impact on a group, but argues that the plaintiffs in *Teal* satisfied this burden. Note, Connecticut v. Teal: *Extending* Griggs *Beyond the Bottom Line*, 44 U. PITT. L. REV. 751, 763 (1983). The author argues that the test adversely affected a discrete group of black applicants who failed the test. This analysis of *Teal* has been criticized because it defines the group by the test itself. Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1337 (1987) (the group must be defined by some criterion other than the test itself).

In *Lowe*, the group adversely affected was not defined as applicants who failed the test, but as applicants over the age of 50.

be applied to subgroup discrimination under the ADEA; however, it is widely accepted that a plaintiff may advance disparate treatment to establish an ADEA claim based on subgroup discrimination.[37] The Eleventh Circuit's decision in *Goldstein v. Manhattan Industries*.[38] illustrates the principle. In *Goldstein*, the defendant replaced the sixty-year-old plaintiff with a forty-six-year-old.[39] The court noted the general rule that the plaintiff must show that he was replaced by someone outside the protected group to establish a prima facie case of discrimination.[40] However, the court refused to follow this requirement strictly, noting that a mechanistic approach would ignore the reality that "age is a continuum along which the distinctions between employees are often subtle and relative ones."[41] The court explained that an employer seldom replaces a sixty-year-old with a twenty-five-year-old.[42] Normally, the replacement is within the protected group,[43] but that does not preclude the possibility that age discrimination motivated the plaintiff's discharge.[44] The court held that the plaintiff could show discriminatory treatment to establish a prima facie case of discrimination within the protected group.[45]

In *Moore v. Sears, Roebuck and Co.*,[46] the court relied on the ADEA's language and interpretive regulations to support the application of disparate treatment to establish discrimination within the protected group. In

37. *See supra* notes 12, 25, *infra* note 51, and accompanying text. In a Title VII context, a district court allowed a claim for intraracial discrimination. Walker v. Secretary of Treasury, 713 F. Supp. 403, 405 (N.D. Ga. 1989) (light-skinned black employee alleged she was discharged by dark-skinned black supervisor who disliked light-skinned blacks). For a discussion of *Walker*, see Recent Case, *Title VII—Discrimination on Basis of "Race" or "Color"— Federal Court Recognizes Cause of Action for Intraracial Bias*—Walker v. IRS, 103 HARV. L. REV. 1403 (1990).

38. 758 F.2d 1435 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985).

39. The plaintiff was a ladies' clothing sales representative. *Id.* at 1438. The defendant employed the plaintiff from 1960 until his discharge at age 60 in 1982. *Id.*

40. *Id.* at 1442 (quoting Pace v. Southern Railway System, 701 F.2d 1383, 1386 (11th Cir.) ("In order to establish a prima facie case of discrimination . . . plaintiff must prove . . . (3) he was replaced by a person outside the protected group."), *cert. denied*, 464 U.S. 1018 (1983).

41. *Goldstein*, 758 F.2d at 1442. For other cases refusing to follow this requirement strictly, see *supra* note 12.

42. *Id.* at 1442-43 (quoting McCorstin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir.) *reh'g denied*, 627 F.2d 239 (1980). The *McCorstin* majority reasoned that because of the value of experience, rarely will a 60-year-old be replaced by someone under 40.

43. *Goldstein*, 758 F.2d at 1442-43.

44. *Id.* at 1443.

45. *Id.*

46. 464 F. Supp. 357 (N.D. Ga. 1979).

Moore, two of the plaintiffs[47] were fifty-seven and forty-eight years old, and the defendant replaced them with workers who were over forty years old.[48] The defendant argued that because the replacements were within the protected class, the plaintiffs could not establish a prima facie case of discrimination.[49] In denying the defendant's motion for summary judgment, the court noted that the Labor Department had published interpretive guidelines that specifically prohibited discrimination within the protected group.[50] Relying on these guidelines, the *Moore* court interpreted the ADEA to prohibit discriminatory treatment on the basis of age between two individuals within the protected group.[51]

In *Lowe v. Commack Union Free School District*,[52] the Second Circuit held that, in an ADEA case, a plaintiff's demonstration of disparate impact will not establish a prima facie case of discrimination.[53] The court noted that in disparate impact analysis, the Supreme Court generally has focused on the effect of the challenged practice on the protected group rather than on the individual.[54] Therefore, the court reasoned that dividing the protected group into subgroups would shift the emphasis from

47. There were six plaintiffs, four of whom were not replaced. *Id.* at 360. This Comment concerns only workers who are replaced by younger workers. *See supra* note 3.

48. *Id.* at 360.

49. *Id.*

50. 29 C.F.R. § 860.91 (1986). In 1978, President Carter shifted the ADEA enforcement duties to the Equal Employment Opportunity Commission (EEOC). Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. 1, at 1366 (1988). The Labor Department rules were revoked in 1981 on issuance of the EEOC interpretations. 29 C.F.R. § 625 (1990). The EEOC Interpretive Guidelines also specifically prohibit discrimination between members of the protected group. 29 C.F.R. §§ 1625, 1625.2 (1989).

51. *Moore*, 464 F. Supp. at 365. *See also* Barnes v. GenCorp Inc., 896 F.2d 1457, 1466 (6th Cir.) ("employer violates the ADEA when preference is given to a younger employee even if the employee is within the protected class"), *cert. denied*, 111 S. Ct. 211 (1990); Maxfield v. Sinclair Int'l., 766 F.2d 788 (3d Cir. 1985) (policy considerations support holding that prima facie case may be established through proof of replacement by younger person), *cert. denied*, 479 U.S. 1057 (1986); Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981) (replacement does not have to be member of protected class). For other citations, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 485 n.25, 499 n.130 (2d ed. 1983); H. EGLIT, *supra* note 23, at § 17.60; A. LARSON & L. LARSON, *supra* note 28, at § 98.53.

52. 886 F.2d 1364 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1470 (1990).

53. *Id.* at 1372-74. The court initially dismissed plaintiff's reliance on *Goldstein* on the ground that it involved disparate treatment, not disparate impact. *Id.* at 1373. *See supra* notes 38-45 and accompanying text.

54. *Id.* The court relied on Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) ("evidence in . . .'disparate impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities.").

the protected group to protected individuals.[55] The result, the court concluded, would allow any plaintiff to take his or her own age as the lower end of a subgroup, and argue that the subgroup is impacted disparately. For instance, an eighty-five-year-old could say he or she was discriminated against in favor of those under eighty.[56] The court found that neither the case law nor the language of the ADEA supported this result.[57]

The *Lowe* court rejected the plaintiffs' analogy to *Connecticut v. Teal*.[58] The court recognized that the school district's screening process could not be justified simply because the district filled eight of the thirteen positions with members of the protected group; however, the court examined each step of the process and found no disparate impact on those aged forty and over.[59] Finally, the court stated that although a plaintiff cannot prevail on a disparate impact theory to show discrimination within the protected group, a plaintiff is not precluded from prevailing on a disparate treatment claim.[60]

In a concurring opinion,[61] Judge Pierce disagreed with the majority's finding that a showing of disparate impact on a subgroup of the protected class does not establish a prima facie case of discrimination.[62] The con-

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55. *Id.*

56. *Id.*

57. *Id.* The court asserted that this result is inconsistent with Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). The court reasoned that the *Geller* court only looked at the effect of the hiring policy on the group protected under the ADEA, not the effect on subsets of the protected group. *Lowe*, 886 F.2d at 1343. *See supra* note 27.

58. *Lowe*, 886 F.2d at 1373-74. For discussion of *Teal*, see *supra* notes 30-36 and accompanying text.

59. *Id.* at 1374. The court stated that it was not upholding the school district's hiring procedures because at the "bottom line" the school district filled the majority of the positions with members of the protected group. Almost all of the internal candidates were over 40, and the procedures were a means of choosing some members of the protected group over others. *Id.*

However, the court's analysis does not address whether a plaintiff can use disparate impact to establish a prima facie case of discrimination within the protected group. In *Teal*, the majority held that if a hiring process adversely affects members of the protected group because of their race or sex, then those members can establish a prima facie case of discrimination even though the hiring process benefits the protected group as a whole. In *Lowe*, the hiring process did not adversely affect the protected group as a whole (those age 40 and over), but did adversely affect those age 50 and over. Because the subgroup can be defined by age, then according to *Teal*, the subgroup could establish a prima facie case of discrimination regardless of the benefits to the protected group as a whole. The majority in *Lowe* failed to distinguish *Teal* on the issue of whether disparate impact can establish discrimination within the protected group.

60. *Id.* at 1372, 1374.

61. *Id.* at 1379.

62. *Id.*

currence noted that the majority's ruling would not adversely affect those at the lower end of the protected age group, but would adversely affect those in the upper age group.[63] The concurrence explained that, because employers are not likely to replace a sixty-year-old employee with someone under forty,[64] the majority's limitation on the disparate impact analysis renders it virtually useless to those persons in the upper age group.[65]

The concurrence then argued that the plain language of the Act and precedent support protection for individuals, not just the protected group as a whole; hence, the disparate impact analysis applies in the ADEA context.[66] In response to the majority's hypothetical situation in which an eighty-five-year-old replaced by someone under eighty could claim disparate impact by creating a subset of those eighty-five and older, Judge Pierce pointed out that the court might not find an inference of age discrimination if the difference in age is slight.[67] The concurrence concluded that an eighty-five-year-old is *entitled* to full protection of the ADEA if he or she is qualified and is discriminated against based on age.[68]

The majority erroneously held that a plaintiff cannot use a disparate impact analysis to establish a prima facie case of discrimination within a protected group. The purpose of the statute, the relevant case law, and the unique nature of age discrimination dictate a different result. The ADEA legislative history shows that Congress intended to prohibit discrimination within the protected group as well as discrimination in favor of those under forty.[69] The enforcement agencies issued guidelines re-

63. *Id.*

64. *Id.* (citing McCorstin v. United States Steel Corp., 621 F.2d 749, 754-54 (5th Cir. 1980) ("[s]eldom will a 60-year old person be replaced by a person in [his] twenties.")). *See supra* note 37 and accompanying text.

65. 886 F.2d 1379 (citing Maxfield v. Sinclair Int'l., 766 F.2d 788, 792 (3d Cir. 1985) (if the ADEA did not provide intra-age group protection, the Act would be virtually useless to those in the upper ages of the protected group; a prima facie case of discrimination within the protected age group can be established by showing disparate treatment.), *cert.denied*, 474 U.S. 1057 (1986)).

66. *Id.* at 1379-80. Judge Pierce noted that the ADEA expressly protects individuals. *Id.* at 1379 (quoting 29 U.S.C. § 631(a) (Supp. v. 1987) ("individuals who are at least 40 years of age" are protected by the ADEA)). He added that nothing in the statute suggests that the scope of individual protection should be contingent upon the age of the beneficiary of the discrimination. *Id.*

67. *Id.* at 1380.

68. *Id.* Judge Pierce also disagreed with the majority's contention that applying disparate impact to subgroup discrimination is inconsistent with *Geller*. *Id.* The court in *Geller* did not examine whether Connecticut's hiring policy adversely affected subsets of the protected group. *Id.*

69. *See supra* notes 22-25, 50 and accompanying text.

flecting this legislative purpose.[70] Age discrimination, unlike race and sex discrimination, occurs on a continuum. A sixty-year-old employee is unlikely to be replaced by someone under forty,[71] but the sixty-year-old needs just as much protection as the forty-year-old. However, after *Lowe*, those in the lower age bracket are protected from employment practices with discriminatory impact while older plaintiffs cannot claim the same protection.

The majority's ruling is an unfortunate limitation of ADEA protection. Both in the practical effects and in the interpretation of prior law, the Second Circuit misread the purpose of the ADEA and the role of a disparate impact analysis in establishing a prima facie case of discrimination within the protected group.

Terrence J. Dee

70. *See supra* note 50 and accompanying text. While these guidelines do not have the force of law, courts accord them deference. *See* Udall v. Tallman, 380 U.S. 1, 16 (1965); *Moore*, 464 F. Supp. 357, 365 (N.D. Ga. 1979).

71. *Lowe*, 886 F.2d at 1379 (citing McCorstin v. United States Steel Corp., 621 F.2d 749, 753-54 (5th Cir. 1980)).