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# Mullin v. Ratheon Co.: The Threatened Vitality of Disparate Impact under the ADEA

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# *MULLIN V. RAYTHEON COMPANY*: THE THREATENED VITALITY OF DISPARATE IMPACT UNDER THE ADEA


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# *MULLIN V. RAYTHEON COMPANY*: THE THREATENED VITALITY OF DISPARATE IMPACT UNDER THE ADEA

## I. INTRODUCTION

Seven years after Congress enacted Title VII of the Civil Rights Act of 1964[1] (Title VII), and four years after the enactment of the Age Discrimination in Employment Act of 1967[2] (the ADEA), the Supreme Court, in *Griggs v. Duke Power Co.*,[3] enunciated the doctrine of disparate impact as a means of establishing liability under Title VII. Since that time, the doctrine has evolved considerably and its application and contours have been redefined by the Court as well as by Congress.[4] Within this evolution there has been a debate among the courts[5] and commentators[6] as to whether the doctrine may be used to establish liability under the ADEA as well.[7] In *Mullin v. Raytheon Co.*,[8] the First Circuit joined two other circuits answering that question in the negative,[9] and held that a claim of disparate impact is not cognizable under the ADEA.[10]

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1. Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000e17 (1994)).

2. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-34 (1994)).

3. 401 U.S. 424 (1971). Interestingly, the term disparate impact was first used by a federal court in *Smith v. City of East Cleveland*, 363 F. Supp. 1131, 1145 (N.D. Ohio 1973), and was first used by the Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

4. *See infra* Part II.C.1 (reviewing the evolution of the disparate impact doctrine).

5. *See* Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 286 n.121 (1995) (collecting an extensive list of cases); Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625, 627 n.7 (1996) (collecting cases).

6. *See* Herbert & Shelton, *supra* note 5, at 627 n.6 (collecting articles); Mack A. Player, Wards Cove Packing *or not* Wards Cove Packing*? That is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819, 826 n.25 (1997) (collecting articles).

7. The Supreme Court has never passed on the issue, although it has expressed some views. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (noting that "we have never decided whether a disparate impact theory of liability is available under the ADEA"); *see id.* at 618 (Kennedy, J., concurring) (noting "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA").

8. 164 F.3d 696 (1st Cir. 1999). A subsequent petition for rehearing was denied by both the original panel and the First Circuit en banc. *See* Mullin v. Raytheon Co., 171 F.3d 710 (1st Cir. 1999). The Supreme Court also recently denied review. *See* Mullin v. Raytheon Co., 120 S. Ct. 44 (1999).

9. *See* EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1078 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995); Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996).

10. *See* Mullin v. Raytheon Co., 164 F.3d at 703-04. This somewhat reversed prior First Circuit law because prior to *Mullin* disparate impact claims were allowed under the ADEA, although no First Circuit panel had directly addressed the issue. *See* Graffam v. Scott Paper Co., No. 95-1046, 1995 WL 414831 (1st Cir. July 14, 1995) (unpublished table decision) (noting that the First Circuit had only assumed the viability of such claims). However, one district court in the First Circuit did explicitly hold that disparate impact claims could be brought under the ADEA. *See* Camacho v. Sears Roebuck de Puerto Rico, 939 F. Supp. 113, 123 (D. P.R. 1996).

This Note details the backdrop of the issue the First Circuit decided, starting in Part II with a discussion of the ADEA. This includes consideration of the purposes behind the ADEA, its similarities to Title VII, and a review of some of its salient provisions. This is followed by a discussion of employment discrimination claims, briefly outlining the disparate treatment theory and focusing on the disparate impact doctrine, including a review of how the doctrine has evolved over the years as well as the procedural aspects of presenting a disparate impact claim. Part III relates the *Mullin* case, concentrating on the First Circuit's rationale for the disposition of Mullin's disparate impact claim under the ADEA. Part IV examines the arguments in favor of permitting disparate impact claims under the ADEA, as well as the arguments against permitting such claims, while focusing on the arguments relied upon by the court in *Mullin*. Finally, this Note concludes that the First Circuit was correct in holding that disparate impact claims are not permitted under the ADEA based on the reasons it cited as well as other rationales relied upon by other courts and commentators.

## II. BACKGROUND

### A. *The ADEA*

Before enactment in its final form, Title VII contained a provision that banned employers from discriminating on the basis of an individual's age.[11] Although this prohibition was removed from Title VII before it was passed,[12] a compromise was reached regarding age discrimination: Congress added a section to Title VII mandating that the Secretary of Labor "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected."[13] One year later, the Secretary of Labor, W. Willard Wirtz, published the report[14] that served as the basis for the ADEA.[15]

---

11. *See* Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact*, *in* AGE DISCRIMINATION IN EMPLOYMENT ACT: A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PRACTITIONERS 68 (Monte B. Lake ed., 1982) (detailing legislative history of the ADEA). *See also* 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).

12. Sloan, *supra* note 11, at 512 & n.23, notes two possible reasons why the age provisions were removed. First, he states that Southern Democrats added the age provisions in an attempt to create dissent in Congress with the aim of killing the bill altogether. *See id. See also* Blumrosen, *supra* note 11, at 74. Alternatively, Sloan suggests that the provisions may have been removed from Title VII because Congress realized that the discrimination faced by older workers was an entirely different problem from that faced by minorities and women, who were the primary focus of Title VII. *See* Sloan, *supra* note 11, at 512 n.23. The most plausible reason, however, is that Congress simply did not have enough information on age discrimination in the United States and felt it was necessary to postpone legislation until a more firm basis for any prohibitions could be established.

13. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964).

14. *See* U.S. DEP'T. OF LABOR, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter Wirtz Report].

15. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-34 (1994)).

The Report concluded that the most obvious form of age discrimination in employment was due to "employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications."[16] The Secretary found that such policies were based on "assumptions about the effect of age on [an individual's] ability to do a job when there [was] in fact no basis for [such] assumptions."[17] Moreover, employers would often refuse to hire older workers "not because of concern about the individual's ability to perform the work, but because of programs and practices actually designed to *protect* the employment of older workers while they remain in the workforce . . . ."[18]

Based on these conclusions, the ADEA aimed "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."[19] In doing so, Congress adopted essentially the same prohibitory language as that found in Title VII,[20] and

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16. Wirtz Report, *supra* note 14, at 6.

17. *Id.* at 2 (emphasis omitted).

18. *Id.* The footing for the ADEA that the Wirtz Report, *supra* note 14, provided is evidenced in the text of the statute:

> § 621. Congressional statement of findings and purpose
>
> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. § 621(a)(1)-(4) (1994).

19. *Id.* § 621(b).

20. Title VII provides:

> § 2000e-2. Unlawful employment practices
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) 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; or
>
> (2) to limit, segregate, or classify his 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.

42 U.S.C. § 2000e-2(a)(1)-(2) (1994). The ADEA provides:

> § 623. Prohibition of age discrimination
>
> (a) Employer practices
>
> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

prohibited employers[21] from discriminating against older workers, who are defined as workers over age forty.[22] Congress also adopted the remedial provisions of the ADEA from the Fair Labor Standards Act of 1938.[23]

Congress did not, however, place a blanket ban on the use of age in making employment decisions and policies. Instead, the ADEA provides several statutory exceptions to liability, which have generally been interpreted as affirmative defenses.[24] The first of these exceptions allows an employer to avoid liability under the ADEA if it can show that "age is a bona fide occupational qualification" (BFOQ) reasonably necessary for the ordinary operation of the employer's business.[25] The BFOQ defense applies where an employer attempts to justify uniform age restrictions that bear a significant relationship to legitimate job qualifications.[26] The employer may also avoid liability if it proves that the adverse employment decision was "based on reasonable factors other than age" (RFOA).[27] This defense is used to negate any causal link between the age of an employee and the employment practice affecting that employee.[28] Next, there is no liability under the ADEA where the adverse employment decision or policy was necessary to "observe the terms of a bona fide seniority system" or "benefit plan."[29] Further, because such benefit and seniority programs depend on age factors, this exception allows employers to make decisions relative to an employee's age without incurring the detrimental costs of applying benefits programs equally to employees of all ages.[30]

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

29 U.S.C. § 623(a)(1)-(2) (1994). *See* Lorillard, Inc. v. Pons, 434 U.S. 575, 584 (1978) (noting that the "prohibitions of the ADEA were derived *in haec verba* from Title VII").

21. The statutory definition of "employer" in the ADEA is limited to "a person engaged in an industry affecting [interstate] commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year...." 29 U.S.C. § 630(b) (1994).

22. *See* 29 U.S.C. § 631 (1994). Originally, the ADEA only protected individuals between the ages of forty and seventy, but the upper age limit was stricken in 1986. *See* Pub. L. No. 99-592, §§ 2(c), 6(a), 100 Stat. 3342, 3344 (1986). Currently, the ADEA does not prevent upper level executives who have reached sixty-five from being forced to retire. *See* 29 U.S.C. § 631(c)(1) (1994).

23. *See* 29 U.S.C. §§ 201-29 (1994). *See also* Whitten v. Farmland Indus., Inc., 759 F. Supp. 1522, 1531 n.4 (D. Kan. 1991) (noting the adoption of the language of the ADEA from Title VII and the Fair Labor Standards Act).

24. *See, e.g.*, 29 C.F.R. § 1625.7(e) (1998).

25. 29 U.S.C. § 623(f)(1) (1994). Title VII also contains a BFOQ defense, but it is limited to discrimination claims based on sex, religion, or national origin. *See* 42 U.S.C. § 2000e-2(e)(1) (1994).

26. *See* Pontz, *supra* note 5, at 274. For example, an employer may use the BFOQ defense to justify an age cap where such a limitation serves an important public safety interest, even though it may adversely affect only older workers. *See id.* (using FAA requirements for commercial airline pilots as an example).

27. 29 U.S.C. § 623(f)(1) (1994).

28. *See* Pontz, *supra* note 5, at 276.

29. 29 U.S.C. § 623(f)(2)(A)-(B) (1994). These exceptions are applicable provided that the employer was not using them as a means to "evade the purposes" of the ADEA. *Id.*

30. *See* Pontz, *supra* note 5, at 275 n.44.

Lastly, a discharge or disciplinary action for good cause does not fall within the prohibitions of the ADEA.[31]

### B. Disparate Treatment

Generally, employment discrimination can be placed into four categories: disparate treatment, employment practices or policies that entrench past discrimination, disparate impact, and the unjustifiable failure to accommodate an employee.[32] The primary methods of proof in discrimination cases, however, are the disparate treatment and disparate impact methods. Although modern employment discrimination law had its genesis with Title VII, the disparate treatment and disparate impact methods of proving liability under Title VII are also applicable in cases brought under the ADEA.[33]

The "most easily understood type of discrimination" and the "most obvious evil Congress had in mind" is disparate treatment.[34] Such a case is based on a claim that an employer discriminated against an individual simply because of the individual's age and is the most common type of case brought under the ADEA.[35] Thus, a plaintiff must show that the employer's decision or practice was motivated by age and that age "had a determinative influence on the outcome."[36] When an individual has alleged disparate treatment based on age, "proof of discriminatory motive is critical."[37]

There are several methods of proving disparate treatment in an employment discrimination case.[38] The first method is by direct evidence of discrimination and discriminatory intent.[39] In these cases the plaintiff is able to point to an ad-

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31. *See* 29 U.S.C. § 623(f)(3) (1994). In addition to these statutory defenses an employer may also escape liability under the ADEA by showing that (1) it "is a foreign [employer] not controlled by an American employer," 29 U.S.C. § 623(h)(2) (1994); (2) it acted in good faith reliance on a written administrative regulation, order, ruling, approval, or interpretation, or an administrative practice or enforcement policy, *see* 29 U.S.C. §§ 259, 626 (1994); or, (3) the suit was not brought within the statute of limitations set forth in 29 U.S.C. § 626(d)-(e) (1994).

32. *See* Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1074 n.15 (1998). As Fentonmiller points out, however, the ADEA does not encompass claims based on a failure to make reasonable accommodations. *See id.* Additionally, he suggests that the perpetuation of past discrimination category is a subset of disparate treatment and disparate impact theories. *See id.*

33. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (noting that the standards established under Title VII apply "with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII'"). *See also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1993); Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 416 (1985); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979); Lorillard, Inc. v. Pons, 434 U.S. 575, 584 (1978).

34. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

35. *See* Sloan, *supra* note 11, at 514.

36. Hazen Paper Co. v. Biggins, 507 U.S. at 610.

37. International Brotherhood of Teamsters v. United States, 431 U.S. at 335 n.15.

38. In addition to the four methods of proving disparate treatment discussed here, unlawful harassment based on an individual's protected characteristic may be yet another method. *See* Fentonmiller, *supra* note 32, at 1078. Because such harassment is sufficient to state a claim under Title VII, *see* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), it is likely that it could be a viable theory under the ADEA as well. *See* Fentonmiller, *supra* note 32, at 1078 n.31.

39. *See, e.g.*, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) (illustrating intentional discrimination by direct proof).

verse employment practice accompanied by statements or written policies of the employer that are facially discriminatory. These cases are limited to those where the direct evidence is more than the occurrence of an "isolated" or "sporadic discriminatory act[]."[40] Once such a showing is made, the burden of persuasion shifts to the employer to show that it did not discriminate.[41] Because direct evidence is so rare, most plaintiffs attempt to establish discrimination and the requisite intent through circumstantial evidence.[42]

In *McDonnell Douglas Corp. v. Green*,[43] the Court established a procedural and evidentiary framework that allows plaintiffs to prove discrimination and discriminatory intent by circumstantial evidence.[44] Although this framework was established in the context of Title VII, it has been wholeheartedly accepted in ADEA suits.[45] Initially, the plaintiff must establish a prima facie case[46] of age discrimination by showing that he or she (1) is forty or older; (2) was qualified for the job or performed it satisfactorily; (3) was harmed by the employer's decision or policy; and, (4) that substantially younger employees were not adversely affected.[47] Once a plaintiff establishes a prima facie case, a presumption arises "that the employer unlawfully discriminated against the employee."[48] The burden then shifts to the employer to rebut that presumption by articulating "some legitimate, nondiscriminatory reason" for its action.[49] This burden is merely a burden of production[50] in that the employer need only produce evidence of legitimate reasons and need not persuade the trier of fact that it was motivated by those reasons.[51] If the employer carries its burden, the presumption is successfully rebutted and the burden shifts

40. International Brotherhood of Teamsters v. United States, 431 U.S. at 336.

41. *See, e.g.*, Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

42. *See* Fentonmiller, *supra* note 32, at 1075-76.

43. 411 U.S. 792 (1973).

44. *See id.* at 800-05. After being laid off, the plaintiff, Green, "protested vigorously" that his release and the general hiring practices of McDonnell Douglas were racially motivated. *Id.* at 794. After Green's application for an advertised position with McDonnell Douglas was denied based on his former protest activities, he filed a complaint with the EEOC, which later developed into a suit under Title VII. *See id.* at 795-96. Because the Eighth Circuit had failed to "state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case," the Supreme Court granted certiorari. *Id.* at 801.

45. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1993) (noting that *McDonnell Douglas* created a "proof framework applicable to ADEA").

46. *See* McDonnell Douglas Corp. v. Green, 411 U.S. at 802. "The burden of establishing a prima facie case of disparate treatment is not onerous." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Furthermore, it serves an important function by eliminating the ordinary nondiscriminatory reasons for the employer's adverse action. *See id.*

47. *See, e.g.*, Maier v. Lucent Techs., Inc., 120 F.3d 730, 734 (7th Cir. 1997). *See also* O'Conner v. Consolidated Coin Caterers Corp., 517 U.S. 308, 313 (1996) (holding that an employer's decision need not be more favorable to employees under forty, but only more favorable to employees who are "substantially younger" even if older than forty).

48. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 254.

49. McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

50. The burden of persuasion "remains at all times with the plaintiff." Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 253.

51. *See id.* at 255. This showing both meets the plaintiff's prima facie case and frames the factual issue with the desired specificity. *See id.*

back to the plaintiff to prove that the employer's proffered reasons are a mere pretext for discrimination.[52]

The third means of proving disparate treatment, called the "mixed-motives" analysis, was also developed in the Title VII context[53] prior to the Civil Rights Act of 1991.[54] This type of case falls within the "fuzzy area between facially-discriminatory policies and wholly-circumstantial cases of intentional discrimination."[55] Once a plaintiff shows that age was a motivating factor in an adverse employment decision along with other legitimate reasons, the employer must prove that "it would have made the same decision even if it had not taken the plaintiff's [age] into account."[56]

Another accepted means of proving disparate treatment generally used in class action suits is by showing a "pattern and practice" of discrimination.[57] According to this method, the plaintiff must show widespread discrimination through statistical as well as anecdotal evidence.[58] If a plaintiff can show that he or she suffered from such a "pattern and practice," it is sufficient to establish a prima facie case of discrimination under the *McDonnell Douglas* framework, and the burden then shifts to the employer to rebut the presumptive discrimination.[59] Although a pattern and practice of discrimination may be proven, an individual class member may still be denied relief if the employer can show it did not discriminate against that particular individual.[60]

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52. *See* McDonnell Douglas Corp. v. Green, 411 U.S. at 804. Currently, there is a split among the circuits as to whether it is sufficient for a plaintiff to prove pretext only or whether the plaintiff must prove pretext and provide evidence that the employer's action was based on age. The split arose after *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), where the Court held that a finding of pretext does not entitle a plaintiff to a judgment as a matter of law. Implicit in the Court's holding is the notion that the plaintiff must also offer proof of discrimination. Thus, the Second, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits all hold that proof of pretext will suffice, while the First, Fourth, Fifth, and Eighth Circuits require more. *See* Mullin v. Raytheon Co., 2 F. Supp.2d 165, 169 n.2 (D. Mass. 1998) (collecting cases). These latter circuits are referred to as the "pretext plus" circuits. *See id.*

53. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion).

54. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.). Similar to other theories developed under Title VII, the "mixed motive" theory has generally been applied in the ADEA context. *See, e.g.*, EEOC v. Ethan Allen, Inc., 44 F.3d 116, 119 (2d Cir. 1994).

55. Fentonmiller, *supra* note 32, at 1077.

56. Price Waterhouse v. Hopkins, 490 U.S. at 258. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991), changed this analysis for Title VII discrimination cases. *See* 42 U.S.C. § 2000e-2(m) (1994). Under that provision, an employer is automatically liable even if it would have made the same decision without the unlawful consideration of an individual's protected characteristic. *See id.* Arguably, because the 1991 Act did not alter the ADEA in this regard, the *Price Waterhouse* standard is still applicable to suits brought under the ADEA. *See* Judith J. Johnson, *Semantic Cover for Age Discrimination: Twilight of the ADEA*, 42 WAYNE L. REV. 1, 18-19 (1995).

57. Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976).

58. *See* Johnson, *supra* note 56, at 19.

59. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 360 (1977).

60. *See id.* at 362.

### C. Disparate Impact

#### 1. The Development of the Disparate Impact Doctrine

Disparate impact is a means of proving discrimination and thereby establishing a statutory violation without presenting evidence of discriminatory intent.[61] It involves employment decisions or policies that are neutral on their face but that "fall more harshly on one group than another and cannot be justified by business necessity."[62] Although discriminatory intent need not be shown, the Court has noted that establishing liability by proof of disparate impact is the functional equivalent of establishing liability by proof of disparate treatment.[63] Moreover, "[e]ither theory may, of course, be applied to a particular set of facts."[64]

Disparate impact was adopted by the Court in *Griggs v. Duke Power Co.*,[65] a racial discrimination case brought under Title VII.[66] In an opinion authored by Chief Justice Burger, the Court concluded that Title VII sought to "remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."[67] Therefore, the Chief Justice reasoned, the Act proscribes not only overt discrimination but also practices, procedures, or tests that are facially neutral and seemingly fair but discriminatory in operation.[68] Accordingly, "good intent or absence of discriminatory intent [will] not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds'" and effectively "freeze" the status quo of past discrimination.[69]

After *Griggs*, the Court extended the doctrine of disparate impact to cover a broader base of situations.[70] In *Connecticut v. Teal*,[71] the Court held that liability under Title VII would result where a specific aspect of an employment policy adversely affected a protected group even though there was no significant disparity when the policy was examined as a whole.[72] Likewise, the theory was extended in

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61. *See id.* at 335 n.15.

62. *Id.*

63. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) (plurality opinion).

64. International Brotherhood of Teamsters v. United States, 431 U.S. at 335 n.15.

65. 401 U.S. 424 (1971).

66. In *Griggs*, the employer had been overtly discriminating against blacks for years prior to the enactment of the 1964 Civil Rights Act. *See id.* at 426-27. On the day that Title VII took effect, the employer began requiring that to qualify for any but the lowest level jobs, employees had to pass a set of standardized tests and have a high school diploma. *See id.* at 427. Because of the historically inferior education minorities received in the segregated school systems in the South, the new requirement disqualified a significantly disproportionate number of African-Americans. *See id.* at 430.

67. *Id.* at 429-30.

68. *See id.* at 431.

69. *Id.* at 430-32.

70. Some commentators suggest that the disparate impact doctrine evolved "into a massive body of caselaw of formidable complexity . . . with the courts struggling to clarify plaintiffs' and defendants' respective burdens of proof . . . ." Herbert & Shelton, *supra* note 5, at 630.

71. 457 U.S. 440 (1982).

72. *See id.* at 453. In that case, the employer's testing requirement resulted in a disparity between African-Americans and whites, with 79.5% of whites passing while only 54% of African-Americans passed. *See id.* at 443. However, the employer promoted 22.9% of the identified African-Americans and only 13.5% of the whites. *See id.* at 444. The Court ruled that even so, the plaintiff had established a case of disparate impact based on the initial testing percentages. *See id.* at 454.

*Watson v. Fort Worth Bank & Trust*.[73] There a plurality of the Court held that disparate impact is applicable not only to objective criteria like standardized testing, but also to subjective employment decisions such as hiring and promotion.[74]

The Court's protective formulation of disparate impact also began to come apart with *Watson*, however. The plurality, led by Justice O'Connor, held that a plaintiff cannot merely point to disproportionate statistics to state a claim of disparate impact but must also point to a specific, isolated employment practice that allegedly caused the disparity.[75] This apparently employer-friendly trend continued with *Wards Cove Packing Co. v. Atonio*.[76] There the Court attempted to resolve several uncertainties in the disparate impact doctrine. First, the Court reaffirmed the plurality's holding in *Watson* that in order to establish a prima facie case of disparate impact, the plaintiff must establish a causal link between a specific employment practice and the statistical disparities.[77] Next, it held that the employer need not prove that its practice is necessary; rather, the employer need only produce sufficient evidence to establish some legitimate justification.[78] This was contrary to the Court's prior holdings,[79] as well as those of the circuit courts.[80] Further, it held that to justify an adverse employment practice, the employer need only produce evidence that the practice or policy allegedly causing the disparate impact significantly serves its business; "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business . . . ."[81] Finally, the Court intimated that in order to establish liability, a plaintiff would have to suggest alternative practices the employer could use that had little or no disparate impact, and the employer would have to refuse to implement them.[82] These modifications were a significant departure from the doctrine as originally set forth in *Griggs*.

Apparently not approving of the direction the Court took in *Wards Cove*, Congress amended Title VII with the Civil Rights Act of 1991.[83] The 1991 Act affected the doctrine of disparate impact in several significant ways. First, the doctrine was codified in Title VII, which now specifically allows for suits based on

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73. 487 U.S. 977 (1988).

74. *See id.* at 990.

75. *See id.* at 994.

76. 490 U.S. 642 (1989).

77. *See id.* at 656-57.

78. *See id.* at 659. *Cf.* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (holding that in disparate treatment cases the burden of persuasion is on the plaintiff at all times).

79. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (holding that employer has the burden of proving that the challenged requirements are job related); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (same).

80. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. at 668-69 n.14 (Stevens, J., dissenting) (collecting circuit court cases holding that the employer must bear the burden).

81. *Id.* at 659.

82. *See id.* at 661.

83. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.). Indeed, the "Findings" section of the Act states that "the decision of the Supreme Court in *Wards Cove Packing v. Atonio* has weakened the scope and effectiveness of Federal civil rights protections . . . and legislation is necessary to provide additional protections against unlawful discrimination in employment." Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (citation omitted).

disparate impact.[84] Next, the Act provided that once a plaintiff makes a prima facie showing of disparate impact, both the burden of production *and* the burden of persuasion[85] are placed upon the employer to show that the challenged practice is both "job related" and a "business necessity."[86] Congress did not, however, completely overrule *Wards Cove*.[87] In fact, it codified two of the central requirements for establishing liability: (1) that the plaintiff prove that a specific practice is causally connected with the disparate impact,[88] and (2) that the employer has rejected a suitable alternative practice suggested by the plaintiff that would have no disparate impact.[89] More important, because the codification of disparate impact in Title VII does not apply to age discrimination cases, the standards set forth in *Wards Cove* are arguably still applicable to such cases.[90]

### 2. *Presenting a Disparate Impact Claim*

To establish a claim of age discrimination based on the disparate impact doctrine, the plaintiff must first make out a prima facie case of discrimination by identifying a facially neutral employment practice[91] and presenting statistical evidence showing that such a practice causes a disparity between employees over forty and other employees.[92] This evidence "focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities."[93] Although the disparity must, of course, be statistically significant,[94] the Court has

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84. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

85. Although section 2000e-2(k)(1)(A)(i) uses the word "demonstrates," section 2000(e)(m) provides that "'demonstrates' means meets the burdens of production and persuasion."

86. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994). This requirement has an interesting legislative history. *See* Sloan, *supra* note 11, at 528-29 (suggesting that the legislative history has an "Alice-in-Wonderland quality"). Apparently members of the House and members of the Senate had differing conceptions of what type of showing an employer had to make to set up the defense of "business necessity." *See id.* at 528. Congressman Edwards believed that the new sections clearly overruled *Wards Cove* while Senator Dole believed that they affirmed *Wards Cove*. *See id.* at 528-29. Because of this blatant disagreement, a note was inserted in the legislation that stated: "No statements other than the interpretative memorandum appearing at Vol. 137 Congressional Record S 15276 . . . shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act . . . that relates to Wards Cove—Business necessity/cumulation/alternative [sic] business practice." Pub. L. No. 102-166, § 105(b), 105 Stat. at 1075 (codified as a note to 42 U.S.C. § 1981 (1994)). The memorandum to which this legislative note refers provided that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power . . . and in other Supreme Court decisions prior to Wards Cove . . . ." INTERPRETIVE MEMORANDUM, 102d Cong., 1st Sess. 81 (1991), *reprinted in* 1991 U.S.C.C.A.N. 767.

87. *See* Herbert & Shelton, *supra* note 5, at 631 n.31.

88. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

89. *See id.* § 2000e-2(k)(1)(A)(ii).

90. *See, e.g.*, Johnson, *supra* note 56, at 47.

91. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656-57 (1989) (currently codified in Title VII at 42 U.S.C. § 2000e- 2(k)(1)(A)(i)).

92. *See id.* at 650; Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 409 (1975). *See also* Johnson, *supra* note 56, at 38.

93. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) (plurality opinion).

94. *See* Johnson, *supra* note 56, at 38.

never indicated what the appropriate statistical standard is.[95] Relative to the comparison groups, the plaintiff must compare all employees over forty with the entire employee or applicant pool.[96] In addition, it is not enough that employment conditions generally cause a disparity; rather, the plaintiff must identify a specific facially neutral employment practice or policy that is causing the disparity.[97]

Once the plaintiff has established a prima facie case, the burden shifts to the employer to justify the practice by showing that it is "job related" and that there is "business necessity."[98] To be sure, the precise contours of the employer's burden here are unclear.[99] The Court has held that the practice must merely "serve the employer's legitimate interest"[100] and that the practice "must be shown to be necessary."[101] Because of this waffling, the lower courts have not reached a universal consensus on what is required.[102]

Finally, if the employer has met its burden of showing "business necessity," in order to prevail the plaintiff must show that the employer's purportedly neutral practices or policies were only pretext for age discrimination.[103] That is, the plaintiff must identify other steps the employer could have taken or other policies it could have adopted that would serve the employer's interests but that would not produce a disparate impact.[104]

### *D. Disparate Impact under the ADEA*

Prior to 1993, a majority of the circuits allowed disparate impact claims to be brought under the ADEA.[105] After the Court's decision in *Hazen Paper Co. v.*

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95. *Compare* Connecticut v. Teal, 457 U.S. 440, 443 n.4 (1982) (suggesting the four-fifths standard), *and* 29 C.F.R. § 1607.4(D) (1999) (adopting the four-fifths standard), *with* Hazelwood School Dist. v. United States, 433 U.S. 299, 309 n.14 (1977) (suggesting the standard deviation rule where a disparity over two or three standard deviations is significant).

96. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. at 650-51.

97. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. at 994.

98. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (referring to "business necessity" as the "touchstone" of the inquiry).

99. *See* Johnson, *supra* note 56, at 40; Sloan, *supra* note 11, at 523. Indeed, as Sloan points out, even at its origin in *Griggs*, the employer's burden was unclear: "business necessity" and "job relatedness," both articulated in *Griggs*, sound like "standards at the opposite ends of a continuum." Sloan, *supra* note 11, at 523.

100. Albemarle Paper Co. v. Moody, 422 U.S. 405, 435 (1975).

101. Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977).

102. *See* Johnson, *supra* note 56, at 41-42. Professor Johnson notes that some courts require that the practice be essential, while others merely require a rational relationship between the employment practice and the employer's interests. *See id.* at 42. She does note some consensus that the employment practice relate to success in the job. *See id.* at 42 & n.165 (collecting cases). *Cf.* Sloan, *supra* note 11, at 524 & n.98 (suggesting that the absence of a clear standard has prompted the lower courts to adopt a "default approach . . . which injects economic and efficiency considerations into the courts' analyses" causing them to be deferential to employers).

103. *See* Albemarle Paper Co. v. Moody, 422 U.S. at 431.

104. *See id. See also* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660-61 (1989).

105. *See, e.g.*, Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986) (recognizing disparate impact claim); Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364 (2d Cir. 1989) (holding that disparate impact claim may be brought); MacNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir. 1988) (implicitly recognizing disparate impact claim); Keplinger v. Blue Cross & Blue Shield, No. 90-2434, 1991 WL 45484 (4th Cir. Apr. 5, 1991) (unpublished table decision) (im

*Biggins*,[106] however, the tide turned. In *Hazen Paper* the Court addressed the issue of whether it was permissible under the ADEA for an employer to consider a factor in making an employment decision that is highly correlated with age, such as seniority or pension status.[107] The Court held that where an employer's actions are motivated by reasons other than age there is no liability under the ADEA, even where such reasons are clearly connected with an employee's age.[108]

Although the Court's holding settled a split among the circuits relative to the propriety of considering such age-correlated correlated factors, the Court also commented on the viability of disparate impact claims under the ADEA.[109] Specifically, the Court noted that it had "never decided whether a disparate impact theory of liability [was] available under the ADEA," and refused to decide the issue because Biggins had only set forth a disparate treatment claim.[110] The Court noted that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA. . . . When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears[,] . . . even if the motivating factor is correlated with age . . . ."[111] More importantly, Justice Kennedy's concurrence, joined by the Chief Justice[112] and Justice Thomas, stressed that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory."[113] Furthermore, Justice Kennedy noted that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[114]

After *Hazen Paper*, the circuit courts became split on the issue. Some courts that previously recognized or assumed that a disparate impact claim could be brought under the ADEA changed their position.[115] Other courts expressed doubts as to

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plicitly recognizing disparate impact claim); Smith v. Tennessee Valley Auth., No. 90-5396, 1991 WL 11271 (6th Cir. Feb. 4, 1991) (unpublished table decision) (same); Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239 (7th Cir. 1992) (assuming disparate impact claims may be brought); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983) (recognizing disparate impact claims); EEOC v. Local 350, Plumbers and Pipefitters, 998 F.2d 641 (9th Cir. 1992) (recognizing disparate impact claims); Gephart v. Delmed, Inc., No. 90-4190, 1992 WL 372380 (10th Cir. Dec. 10, 1992) (implicitly recognizing disparate impact claims); Iervolino v. Delta Air Lines, Inc., 796 F.2d 1408 (11th Cir. 1986) (same). *But cf.* Arnold v. United States Postal Service, 863 F.2d 994 (D.C. Cir. 1988) (choosing not to decide); Akins v. South Cent. Bell Telephone Co., 744 F.2d 1133 (5th Cir. 1984) (same).

106. 507 U.S. 604 (1993).

107. *See id.* at 608. Specifically, the Hazen Paper Company had terminated Biggins a few weeks before his pension rights vested. *See id.* at 607. Biggins brought a disparate treatment claim under the ADEA, arguing that the employer had terminated him because of his age. *See id.* at 606. In affirming the jury's verdict for Biggins on the ADEA claim, the First Circuit held that Hazen Paper Company had impermissibly relied on the vesting of Biggins's pension rights, which were highly correlated with his age. *See id.* at 607. That court reasoned that this was sufficient to show intentional age discrimination under the ADEA. *See id.* at 608.

108. *See id.* at 613.

109. *See id.* at 609-10.

110. *Id.* at 610.

111. *Id.* at 610-11.

112. The Chief Justice had expressed his views on the issue as far back as 1981. *See* Markham v. Geller, 451 U.S. 945 (1981) (Rehnquist, J., dissenting from the denial of certiorari). There, the Chief Justice noted that disparate impact should not be available under the ADEA. *See id.*

113. Hazen Paper Co. v. Biggins, 507 U.S. at 618 (Kennedy, J., concurring).

114. *Id.*

115. *See, e.g.*, Maier v. Lucent Techs., Inc., 120 F.3d 730 (7th Cir. 1997); Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996); Fobian v. Storage Tech. Corp., 959 F. Supp. 742 (E.D. Va. 1997), *vacated on other grounds*, 164 F.3d 887 (4th Cir. 1999).

the continuing vitality of such claims under the ADEA.[116] Still others, however, continued to, and still do adhere to the view that the ADEA encompasses disparate impact claims.[117]

## III. *MULLIN V. RAYTHEON* CO.

### A. *Factual Background*

William Mullin was born in 1934 and was employed by Raytheon from 1967 until 1996.[118] Mullin was promoted numerous times during his twenty-nine-year tenure, and by 1979 he reached an employment grade of level fifteen, earning about $130,000.[119] Over the years, Mullin held various management positions supervising from 400 to 2000 workers.[120] Beginning in 1989, he became an itinerant manager, acting as a "troubleshooter" and overseeing smaller and smaller departments.[121] In 1994, he was named manager of a small Massachusetts plant where he supervised less than 90 employees.[122]

Raytheon, which was primarily a military contractor, began to make cutbacks in 1994 and 1995 in response to substantial decreases in the Defense Department's budget.[123] In addition to closing several facilities, the company underwent major restructuring, which included layoffs, reassignments, and a wage freeze.[124] Raytheon also undertook to evaluate each salaried employee's employment grade and wage level to make sure that these matched the employee's actual responsibilities.[125] Because the company determined that a grade of fifteen was inconsistent with Mullin's actual duties, it downgraded him to level twelve.[126] Under

116. *See, e.g.*, DiBiase v. Smithkline Beecham Corp., 48 F.3d 719 (3d Cir.), *cert. denied*, 516 U.S. 916 (1995); Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) (DeMoss, J., concurring in part and dissenting in part); Lyon v. Ohio Education Ass'n and Prof'l Staff Union, 53 F.3d 135 (6th Cir. 1995); Broaddus v. Florida Power Corp., 145 F.3d 1283 (11th Cir. 1998). To date, the Fourth Circuit has chosen not to decide the issue. *See* Jenkins v. Hallmark Cards, Inc., Nos. 94-1092, 94-1268, 94-1269, 1995 WL 8016 (4th Cir. Jan. 10, 1995).

117. *See, e.g.*, District Council 37 v. New York Dept. of Parks and Recreation, 113 F.3d 347 (2d Cir. 1997); Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996); Mangold v. California Pub. Utils. Comm'n, 67 F.3d 1470 (9th Cir. 1995). Recently, the Ninth Circuit has developed a split within itself. *Compare* Frank v. United Airlines, Inc., No. C-92-0692, 1997 WL 258890 (N.D. Cal. Feb. 26, 1997) (refusing to allow a disparate impact claim under the ADEA), *with* EEOC v. Newport Mesa Uniform Sch., 893 F. Supp. 927 (C.D. Cal. 1995) (allowing a disparate impact claim of age discrimination under the ADEA).

118. *See* Mullin v. Raytheon Co., 2 F. Supp.2d 165, 166 (D. Mass. 1998).

119. *See id.* at 167. Raytheon classifies its salaried employees from grade four to grade eighteen, each grade carrying a particular salary range. *See id.* at 166.

120. *See id.* at 167.

121. Mullin v. Raytheon Co., 164 F.3d 696, 698 (1st Cir.), *reh'g denied*, 171 F.3d 710 (1st Cir.), *cert. denied*, 120 S. Ct. 44 (1999).

122. *See id.*

123. *See id.*

124. *See id.* at 698.

125. *See id.*

126. *See* Mullin v. Raytheon Co., 2 F. Supp.2d 165, 167 (D. Mass. 1998). This determination was based on the number of employees Mullin oversaw, the size of his department, his job's financial responsibilities, and his place in the corporate structure. *See id.*

established corporate policy, this downgrade required a significant salary reduction for Mullin.[127] Mullin subsequently brought suit under both state and federal law claiming that Raytheon had discriminated on the basis of his age.[128]

### B. *The District Court*

Mullin brought suit under the ADEA[129] and under the Massachusetts Anti-Discrimination Act.[130] He alleged both disparate treatment, arguing that his age actually caused Raytheon to reclassify him, and disparate impact, arguing that Raytheon's reclassification policy adversely affected employees over forty significantly more than other employees.[131] After brief discovery, Raytheon moved for summary judgment arguing that the evidence presented no genuine issue of material fact.[132]

Raytheon conceded that Mullin had established a prima facie case of disparate treatment and Mullin conceded that Raytheon had met its burden of articulating a nondiscriminatory justification for both the reclassification of Mullin and the accompanying pay cut.[133] Thus, relative to the disparate treatment claim the only contest was whether there was sufficient evidence of pretext and age animus to generate a jury question.[134] On this issue the court granted Raytheon's motion holding that although some of the evidence Mullin presented was "shocking[,] . . . none of it would permit a reasonable jury to conclude that Raytheon's compensation policy was a sham, and that age animus motivated the company's personnel decisions."[135]

The district court then moved on to consider Mullin's disparate impact claim. Specifically, Mullin alleged that Raytheon's reclassification policy adversely af-

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127. *See* Mullin v. Raytheon Co., 164 F.3d at 698.

128. *See id.*

129. 29 U.S.C. § 623 (1994).

130. MASS. GEN. LAWS ANN. ch. 151B, § 4(1B) (West 1996). Because this Note focuses on the issue of disparate impact claims under the ADEA, Mullin's claim under Massachusetts law will receive little treatment. Significantly, though, the standards of liability under both the federal and state acts are essentially the same. *See* Fontaine v. Ebtec Corp., 613 N.E.2d 881 (Mass. 1993).

131. *See* Mullin v. Raytheon Co., 2 F. Supp.2d at 166.

132. *See* F. R. CIV. P. 56(c).

133. *See* Mullin v. Raytheon Co., 2 F. Supp.2d at 169. This is in accord with First Circuit law, which holds that to withstand a motion for summary judgment the plaintiff must prove that the employer's proffered reason is only a pretext and that the true reason for the action was age discrimination. *See* Mesnick v. General Electric Co., 950 F.2d 816 (1st Cir. 1991). *See also supra* note 52 (discussing the split in the circuits relative to the plaintiffs required pretext showing).

134. *See* Mullin v. Raytheon Co., 2 F. Supp.2d at 169.

135. *Id.* at 170. Mullin had presented evidence regarding several incidents he believed were indicative of age discrimination. *See id.* at 167-68. These included being asked whether he was going to accept an early retirement package, being referred to as old, and twice being subjected to physical abuse. *See id.* Because the incidents involved isolated conduct, mostly by individuals who had no influence over Mullin's employment, they were insufficient to show either pretext or age animus. *See id.* at 170. Additionally, Mullin presented statistical evidence to rebut Raytheon's justification. *See id.* at 168. *See also infra* notes 140-43 and accompanying text. Suffice it to say, the court held that that evidence was also insufficient to rebut Raytheon's justification. The court also granted Raytheon's motion with regard to the state disparate treatment claim. *See id.*

fected employees aged fifty and over significantly more than younger employees.[136] Initially, the court discussed the viability of disparate impact claims under the ADEA and assumed without deciding that such claims were appropriate "[d]espite . . . the gathering strength of authority against applying the disparate impact analysis to ADEA cases."[137] Accordingly, the court then noted that Mullin had satisfied the first two elements of a prima facie case of disparate impact.[138] Namely, Mullin clearly identified the company's salary review and attendant salary reductions, which adversely affected Raytheon's employees. Thus the inquiry was limited to whether the statistics Mullin presented showed a significant enough disparity between the older and younger employees.[139]

In this regard, the district court observed that the statistics Mullin presented did not show a disparate impact on *all* employees over forty; that is, there was no disparity on the entire protected class.[140] At best, the statistics showed only that employees over fifty were more likely to receive pay cuts after the salary review.[141] Indeed, when workers over forty whose salaries were reevaluated were compared with similar workers under forty, any disparity disappeared.[142] This subgroup classification issue, the court noted, "present[ed] a conundrum" that it declined to resolve, because even if Mullin's statistics were sufficient, Raytheon had shown business necessity that Mullin had not rebutted.[143] Therefore, summary judgment for Raytheon on the disparate impact claim was also granted.[144] Mullin subsequently appealed the district court's decision.

### *C. The First Circuit*

On appeal, the First Circuit[145] identified two issues. The first, pertaining to the disparate treatment claim, was "whether [Mullin] adduced enough evidence to create a trialworthy question both as to the employer's alleged motivation (animus based on age) and as to the pretextuality of its explanation for the adverse employment action."[146] The second and central issue of the case was "whether the ADEA . . . should be read to encompass disparate impact claims."[147]

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136. *See id.* at 170.

137. *Id.* at 173.

138. *See id.* at 174. For a detailed discussion of presenting a disparate impact claim and the elements of a prima facie case, see *supra* Part II.C.2.

139. *See* Mullin v. Raytheon Co., 2 F. Supp.2d at 174.

140. *See id.*

141. *See id.*

142. *See id.* at 170-71. Further, there was not even a significant impact on workers, such as Mullin, who were over fifty and who had been downgraded from level 15. *See id.* at 171.

143. *Id.* at 174.

144. *See id.* at 175. Similar to the state disparate treatment claim, *see supra* note 131, the district court granted Raytheon's motion on the state disparate impact claim. *See* Mullin v. Raytheon Co., 2 F. Supp.2d at 175. This is not an unusual disposition for an ADEA claim; indeed, summary judgment is the major means of disposition for ADEA cases. *See* Howard C. Elgit, *The Age Discrimination in Employment Act at Thirty: Where it's Been, Where it is Today, Where it's Going*, 31 U. RICH. L. REV. 579, 630 & n.131 (1997) (statistically illustrating the prevalence of summary judgment in favor of employers and collecting cases).

145. The panel was composed of Circuit Judge Selya and Senior Circuit Judges Coffin and Campbell.

146. Mullin v. Raytheon Co., 164 F.3d 696, 699 (1st Cir. 1999).

147. *Id.* at 700.

As to the first issue the court summarily affirmed the district court, stating:

> We need not tarry. Raytheon advanced a strong, objectively verifiable set of reasons for . . . downgrading Mullin . . . [who] points to nothing that casts doubt upon the legitimacy of this reason, nor . . . proffer[s] any substantial evidence that would permit a rational jury to find that Raytheon rigged the restructuring in a fashion designed to ensure that [his] labor grade and/or compensation level would be reduced unfairly.[148]

Accordingly, the court found the reasons stated in the district court's memorandum and order sufficient to uphold the decision on the disparate treatment claim.[149]

The First Circuit then sought to squarely address the issue that the district court had "skirted," namely, whether the ADEA encompasses disparate impact claims.[150] Initially, the court looked to the text of the statute to deduce an answer. Although a "commonsense" reading of the ADEA's ban on discrimination "because of" an individual's age strongly suggested a statutory requirement of intent to discriminate, the court noted that Title VII contained similar language, yet was held in *Griggs*[151] to encompass disparate impact.[152] Accordingly, it was necessary to look to the purpose behind the ADEA as compared with Title VII's purpose.

As evidence of that purpose, the court looked to the Supreme Court's opinion in *Hazen Paper*[153] and its statement that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA."[154] Furthermore, the purpose of the statute is not at issue when an employment practice is based solely on factors other than age, even though such factors are correlated with age.[155] Therefore, the court reasoned, because disparate impact imposes liability in precisely that situation—facially neutral policies adversely affecting the protected class more harshly—such liability would not speak to the evils sought to be addressed by the ADEA. Additionally, as the Supreme Court noted in *Griggs*,[156] disparate impact under Title VII was a means to counterbalance facially neutral practices connected with, and perpetuating preexisting discriminatory social conditions; the ADEA, on the other hand, was aimed at discriminatory stereotypes based on age that were correlated with "employment-related conditions, not past discriminatory practices" of general social acceptance.[157] The court concluded

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148. *Id.* at 699.

149. *See id.* The court also affirmed the district court's judgment with regard to the state disparate treatment claim. *See id.* The court noted that although Mullin's burden under Massachusetts law was different and less onerous because he need only show pretext rather than pretext plus age animus, which is required under federal law, *see supra* note 52, that difference was not relevant to the case. *See* Mullin v. Raytheon Co., 164 F.3d at 699. Thus, because in the court's opinion he had not even shown pretext, his state disparate treatment claim failed. *See id.*

150. Mullin v. Raytheon Co., 164 F.3d at 700.

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

152. *Id.* (citing Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir.), *cert. denied*, 571 U.S. 1245 (1996)).

153. Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). For a discussion of the *Hazen Paper* decision, see *supra* Part II.D.

154. Mullin v. Raytheon Co., 164 F.3d at 700 (quoting Hazen Paper Co. v. Biggins, 507 U.S. at 700).

155. *See id.*

156. For a discussion of *Griggs*, see *supra* Part II.C.1.

157. Mullin v. Raytheon Co., 164 F.3d at 701.

that the different purposes behind Title VII and the ADEA "counsel[ed] convincingly against mechanistic adherence to *Griggs*" in the setting of the ADEA.[158]

"Three additional considerations persuade[d]" the First Circuit "that *Hazen Paper* foret[old] the future, that *Griggs* [was] inapposite in the ADEA context, and that proof of intentional discrimination [was] a prerequisite to liability under the ADEA."[159] First the court pointed to the structure of the statute and its text. Specifically, the court read the "reasonable factors other than age"[160] (RFOA) exception to liability along with the prohibitory language.[161] Looking to the Supreme Court's interpretation[162] of the Equal Pay Act's[163] "other factor other than sex"[164] exception, the court concluded that the ADEA "forbids disparate treatment based on age and the [RFOA] exception authorizes disparate impact."[165] Further, it noted that because Title VII contained no such exception, *Griggs* was further distinguishable.[166]

Next, the court examined the legislative history of the ADEA. Primarily, the court looked to the report issued pursuant to Title VII by Labor Secretary Wirtz in 1965.[167] It noted that the Wirtz Report found anti-age discrimination legislation was necessary chiefly "to combat stereotyping and to rectify the perception that older persons cannot do particular jobs."[168] Furthermore, the Report drew a distinction between intentional and arbitrary discrimination on the one hand, and institutional arrangements that adversely affected older employees to a greater extent on the other hand. The Report recommended that the latter category, which the court likened to disparate impact, be confronted through educational programs and systemic restructuring while the former category, likened to disparate treatment, be statutorily prohibited.[169] The court subscribed to this dichotomy and concluded that the ADEA's prohibitions[170] were only aimed at the arbitrary discrimination and the educational provisions[171] were aimed at the "institutional arrangements" producing the disparate impact; thus, disparate impact was not actionable under the statute.[172]

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158. *Id.* To support its conclusion, the court also cited Justice Kennedy's concurrence in *Hazen Paper*. *See supra* text accompanying notes 113-14 (discussing Justice Kennedy's concurrence).

159. Mullin v. Raytheon Co., 164 F.3d at 701.

160. 29 U.S.C. § 623(f)(1) (1994).

161. *See id.* § 623(a).

162. *See* County of Washington v. Gunther, 452 U.S. 161 (1981).

163. *See* 42 U.S.C. § 2000e-2(h) (1994). This provision directs the inquiry to title 29.

164. 29 U.S.C. § 206(d)(1)(iv).

165. Mullin v. Raytheon Co., 164 F.3d 696, 702 (1st Cir. 1999). *But cf.* Player, *supra* note 6, at 833 (reading *County of Washington v. Gunther*, 452 U.S. 161 (1981), "to support, if not compel, a conclusion that impact analysis must be recognized under the ADEA").

166. *See* Mullin v. Raytheon Co., 164 F.3d at 702 n.5.

167. The report that the court referred to was the Wirtz Report, *supra* note 14, which was issued under the provision of Title VII contained in Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964).

168. Mullin v. Raytheon Co., 164 F.3d at 703.

169. *See id.*

170. *See* 29 U.S.C. § 623(a) (1994).

171. *See id.* § 622.

172. Mullin v. Raytheon Co., 164 F.3d at 703.

Lastly, the court looked to the 1991 amendments to Title VII,[173] and the simultaneous amendments to the ADEA;[174] while the Title VII amendments codified the disparate impact cause of action, the ADEA amendments did not. Because Congress expressly provided for disparate impact claims in Title VII at the same time, through the same drafting committees, and in the same bill in which it revised the ADEA, the court found the absence of such a provision in the ADEA to be "highly significant."[175] In sum, the court held that Congress did not intend the ADEA to encompass disparate impact claims in 1967 or in 1999.

## IV. DISCUSSION

### A. *The Legislative History and Statutory Purpose*

In *Mullin v. Raytheon Co.*,[176] the court correctly looked to the purpose of the ADEA as a necessary starting point in determining whether the ADEA encompasses disparate impact claims. Evidence of this purpose is found in both the statutory text and the legislative history. Turning first to the legislative history we find the provision in the Civil Rights Act of 1964 directing the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age . . . [and to] include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age . . . ."[177] With this mandate in mind, the Wirtz Report[178] drew a distinction between arbitrary discrimination and arguably neutral factors that tended to result in a discriminatory impact on older workers.[179] As Professor Blumrosen argues, this distinction parallels the disparate treatment and disparate impact theories.[180] Because the Report recommended banning arbitrary discrimination (disparate treatment) but offered other proposals for "institutional arrangements which worked a disadvantage to older workers," (disparate impact) Blumrosen correctly concludes that Congress never intended the ADEA to impose liability under the disparate impact theory.[181]

Indeed, the statutory manifestation of the Wirtz Report[182] carries forward this distinction and arguably supports Professor Blumrosen's position. Looking to the

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173. *See* The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991) (codifying the disparate impact claim). *See also supra* notes 83-90 and accompanying text (discussing the Civil Rights Act of 1991 and its changes to Title VII).

174. *See* Pub. L. No. 102-166, § 115, 105 Stat. at 1079.

175. Mullin v. Raytheon Co., 164 F.3d at 703.

176. 164 F.3d 696 (1st Cir. 1999).

177. Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964).

178. *See* Wirtz Report, *supra* note 14. This Report is generally considered the primary source of legislative history for the ADEA. *See* Sloan, *supra* note 11, at 518.

179. *See* Blumrosen, *supra* note 11, at 73.

180. *See id.* (concluding that "'intent' to discriminate on the basis of age was the gravamen of age discrimination, and that actions which have 'adverse effect' on older workers were not considered illegal" in the Wirtz Report). *But see* Fentonmiller, *supra* note 32, at 1098 (concluding that "the term 'arbitrary' discrimination can encompass more than intentional discrimination").

181. Blumrosen, *supra* note 11, at 78-79. Professor Blumrosen further argues that this dichotomy was also reflected in other portions of the legislative history: namely, an address by President Johnson, the committee reports accompanying the Bill, and the congressional debates. *See id.* at 73.

182. *See* Wirtz Report, *supra* note 14.

first section of the ADEA, Congress declared that the statute's purpose was to "*prohibit* arbitrary age discrimination" but only to "*help* employers and workers find ways of meeting problems arising from the *impact* of age on employment."[183] More significantly though, the statute goes on to ban age discrimination[184] while simultaneously authorizing the Secretary of Labor to promulgate educational programs concerning older workers and the problems that they face.[185] Although the former section is not limited only to "arbitrary" discrimination, and the latter is not limited only to neutral practices causing a disparate impact, the dichotomy of the Wirtz Report recommendations persuasively suggest that this is the effect Congress intended.

Moreover, the social goals that Congress sought to achieve with the ADEA are dissimilar from those of Title VII. Racial discrimination had been entrenched in our society for over two hundred years by 1964, with the last one hundred largely being sanctioned by state law. Hence, Congress had a clear interest in countering this ongoing discrimination, perhaps embodied most prominently in the area of employment. Title VII effectuated that interest by banning racial discrimination in employment. Likewise, the Court in *Griggs*[186] had a clear justification for extending liability under Title VII to facially neutral policies that had a discriminatory impact: perpetuation of the past discriminatory practices through covert, even unintentional employment practices.[187] Age discrimination, on the other hand, was primarily based on "assumptions about the effect of age on [one's] ability to do a job,"[188] and not based on social stereotypes about a group wholly unrelated to the group's capabilities.[189] Therefore, the central rationale of the disparate impact doctrine is inapposite in the case of age discrimination under the ADEA, as the First Circuit correctly held in *Mullin*.[190]

### *B. The Statutory Text*

As noted above, the prohibitory language of the ADEA and Title VII is essentially identical.[191] This language forbids discrimination "because of" an individual's protected characteristic.[192] The logical interpretation of this is that an employer cannot make an employment decision or policy where the protected characteristic,

183. 29 U.S.C. § 621(b) (1994) (emphasis added).

184. *See id.* § 623.

185. *See id.* § 622.

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

187. *See* Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999) ("Neutral, non-essential employment policies that discriminatorily impact protected groups would, if transposed onto such an uneven baseline, exacerbate the preexisting imbalance and countervail the core purpose of Title VII.").

188. Wirtz Report, *supra* note 14, at 2 ("The gist of the matter is that 'discrimination' means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example—race.").

189. *See, e.g.*, Blumrosen, *supra* note 11, at 102-06 (outlining differing policy rationales of the ADEA and Title VII).

190. Mullin v. Raytheon Co., 164 F.3d at 701.

191. *See supra* notes 20-21 and accompanying text. *See also* Lorillard v. Pons, 434 U.S. 575, 584 (1978).

192. *Compare* 29 U.S.C. § 623(a) (1994), *with* 42 U.S.C. § 2000e-2(a) (1994).

age, is determinative.[193] Or, in other words, where age is the reason for the decision, the employer has violated the statute.[194] The obvious counter-argument, however, is that Title VII contains the same "because of" language yet was held to encompass disparate impact claims in *Griggs*.[195] This apparent discrepancy then leads us back to examining the statute's purpose and the legislative history, which, as indicated above, points convincingly toward requiring intentional discrimination.[196]

Other language in the ADEA also counsels against the use of the disparate impact doctrine. Specifically, section 623(f)(1) provides that it is not unlawful "to take any action . . . based on reasonable factors other than age."[197] This RFOA defense belies the application of disparate impact in the age discrimination context because the neutral policies attacked under disparate impact analysis are exactly what *is* allowed under the RFOA exception.[198] That is, under a disparate impact claim, a plaintiff seeks to establish liability by pointing to a practice that operates

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193. *See* Mullin v. Raytheon Co., 164 F.3d at 700 ("It would be a stretch to read the phrase 'because of such individual's age' to prohibit incidental and unintentional discrimination that resulted because of employment decisions which were made for reasons *other than age*." (quoting Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996))).

194. Another argument in favor of disparate impact under the ADEA points to different language in section 623(a). That language prohibits employer practices that "would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* [one's] status as an employee." 29 U.S.C. § 623(a)(2) (1994) (emphasis added). This would suggest that the mere adverse impact would be enough. *See* Herbert & Shelton, *supra* note 5, at 637-38. Indeed, this very argument was raised by Mullin for the first time in his petition for rehearing before the First Circuit. *See* Mullin v. Raytheon Co., 171 F.3d 710, 710 (1999). Even if Mullin had raised this argument at the outset, however, the court noted that its analysis would not have changed because this statutory language is immediately followed by more "because of" language, indicating that the requirement of intentional discrimination is still present and the "adversely affect" language is merely a catch-all phrase applicable to practices not explicitly stated. *See id. See also* Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 843 (1982) (arguing that the phrase "because of age" modifies the phrase "limit, segregate, or classify" and concluding that the section does not prohibit practices that "adversely affect" because of age).

195. Even the language of the Court in *Griggs*, however, suggests that disparate impact was a means to protect only "minority groups." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Arguably, people forty and over are not a "minority group" within the Court's suggestion.

196. The interpretations promulgated by the EEOC implicitly recognize disparate impact as a viable claim under the ADEA. Section 1625.7 of the regulations provides that if "an employment practice . . . has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 C.F.R. § 1625.7 (1998). Although this interpretation is to be afforded some deference, it is "not controlling upon the courts." General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (considering EEOC guidelines in the Title VII domain) (quoting Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

197. 29 U.S.C. § 623(f)(1) (1994). Significantly, Title VII does not contain a similar provision. *See* Pontz, *supra* note 5, at 297 ("The existence of the [RFOA] defense within the ADEA simply undermines the entire concept of disparate impact theory and any attempt to include it as a form of recovery under the ADEA.").

198. Professor Johnson disagrees with such an interpretation, arguing that Congress could not have intended to foreclose application of the disparate impact doctrine by inserting the RFOA defense because it could not have known that the disparate impact doctrine was to be developed. *See* Johnson, *supra* note 56, at 53.

"based on reasonable factors other than age" and that produces a disproportionate adverse impact on the protected class. The First Circuit stated a similar argument in *Mullin*, concluding that if the prohibition is read along with the RFOA exception, the "prohibition forbids disparate treatment based on age and the exception authorizes disparate impact."[199]

On the other hand, Dean Player reaches the opposite result reading the same statutory language.[200] He argues that if the ADEA only prohibits intentional age discrimination, "there would be no need to have the [RFOA] defense because age motivated decisions could not possibly be for reasons 'other than age.'"[201] But this misses the mark because the RFOA exception is used as a *defense* to a claim of age discrimination; thus, the defense is necessary for an employer to be able to escape liability by showing that age was not the motivating factor behind an adverse employment decision.[202] If disparate impact claims were allowed, moreover, the RFOA defense would be meaningless because even where the employer could prove it took action based on legitimate reasons, thereby satisfying the statutory requirements of the RFOA defense, it might still be liable if there was a significant statistical disparity.[203]

Some argue that another legislative basis exists for rejecting disparate impact claims under the ADEA.[204] As the First Circuit pointed out in *Mullin*, when Congress amended Title VII in 1991[205] it codified the disparate impact doctrine, but did not alter the liability rules of the ADEA in simultaneous amendments.[206] From this inaction, opponents, including the First Circuit, draw the conclusion that Congress did not intend to include disparate impact under the ADEA, but to include it only under Title VII. Indeed, Congress was clearly aware of the perceptible animosity the Supreme Court had exhibited toward the disparate impact doctrine, evidenced by the Court's treatment of the doctrine in *Wards Cove*,[207] yet said nothing

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199. Mullin v. Raytheon Co., 164 F.3d at 702. The court also based this conclusion on the Supreme Court's conclusion in *Washington v. Gunther*, 452 U.S. 161, 170 (1981), that the "other factor other than sex" defense under the Equal Pay Act, 29 U.S.C. § 206(d)(1), was inconsistent with the disparate impact theory. *But cf.* Fentonmiller, *supra* note 32, at 1114 ("There are several problems with analogizing the Equal Pay Act to the ADEA.").

200. *See* Player, *supra* note 6, at 832-33.

201. *Id.* at 832.

202. Under the EEOC's regulations, however, the RFOA defense is not available if age is used as a "limiting criterion." 29 C.F.R. § 1625.7(c) (1998). The regulation does not go on to explain exactly what falls under the category of "limiting criterion." *Id.*

203. In a similar vein, the ADEA also provides a defense where "age is a bona fide occupational qualification reasonably necessary" for the particular employment (BFOQ). 29 U.S.C. § 623(f)(1) (1994). Again, this defense would be meaningless if an employer would still be liable under the ADEA where decisions based on BFOQs had a disparate impact. This is clearly not true in the case of race. There is no way race could be a BFOQ. This is presumably why the BFOQ defense in Title VII does not apply to race. *See* 42 U.S.C. § 2000e-2(e) (1994). *See also* Pontz, *supra* note 5, at 306 (noting that "while Title VII's protected classes and ability are unrelated, age and ability are at least at some point inherently linked").

204. *See, e.g.*, Pontz, *supra* note 5, at 304-06; Sloan, *supra* note 11, at 518; Herbert & Shelton, *supra* note 5, at 649.

205. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

206. *See* Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (1991) (codified at 29 U.S.C. § 626(e) (1994)).

207. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

of it in the context of the revisions to the ADEA.[208] On the other hand, though, it is dubious to read too much into congressional inaction, and even the Supreme Court has noted this.[209] It could be that Congress exercised legislative restraint and chose not to legislate beyond what was necessary.[210] Or, it could be that Congress was aware of the use of disparate impact under the ADEA and approved by acquiescence.[211] Neither side of the argument is entirely persuasive, however. To be sure, it is far better to let the language of the statute speak to Congress' intentions than to start inferring the approval or disapproval of major doctrines from its silence.[212]

### *C. The* Hazen Paper *Decision*

Along the same lines as the argument based on the RFOA defense, the argument against allowing disparate impact claims under the ADEA is further bolstered by the holding in *Hazen Paper*,[213] on which the First Circuit in *Mullin* appropriately relied.[214] In *Hazen*, the Supreme Court held that the ADEA is not violated where an employer's adverse practice or policy is based on factors other than age, regardless of whether those factors are highly correlated with age.[215] Like the RFOA defense, this rule operates to preclude liability where an employer bases its decisions on non-age factors even where these decisions fall more harshly on older employees—that is to say, where the decisions create a disparate impact.[216] Accordingly, the *Hazen Paper* rule explicitly allows for employer practices to have a disparate impact on older workers because "(1) [it] held that the ADEA only prohibits actions that are actually motivated by age and (2) in a disparate impact claim, by definition, the employer's decision is wholly motivated by factors other than age."[217]

*Hazen Paper* is a disparate treatment case, however, which technically limits the applicability of its holding. Furthermore, the Supreme Court explicitly declined to address the issue of disparate impact claims under the ADEA.[218] Nevertheless, the analysis that the Court used is quite telling, as evidenced by the lower

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208. For the background of this issue see *supra* notes 83-90 and accompanying text.

209. *See, e.g.*, Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 n.11 (1969).

210. *See* Fentonmiller, *supra* note 32, at 1126.

211. *See* Jonas Saunders, Note, *Age Discrimination: Disparate Impact Under the ADEA after* Hazen Paper Co. v. Biggins*: Arguments in Favor*, 73 U. DET. MERCY L. REV. 591, 611 (1997).

212. *See, e.g.*, Burns v. United States, 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.").

213. Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).

214. *See* Mullin v. Raytheon Co., 164 F.3d 696, 700-01 (1st Cir. 1999).

215. *See* Hazen Paper Co. v. Biggins, 507 U.S. at 611.

216. The Court in *Hazen Paper* went out of its way to not base its holding on the RFOA defense in § 623(f)(1); rather, it simply held that there was no liability under the ADEA where age did not motivate the decision. *See id.* at 610.

217. Brendan Sweeney, Comment, *"Downsizing" the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527, 1558 (1996).

218. *See* Hazen Paper Co. v. Biggins, 507 U.S. at 610.

courts' reliance on it.[219] Moreover, the Court's interpretation of the ADEA, specifically its statement that disparate treatment is "the essence of what Congress sought to prohibit,"[220] commanded unanimous support with three Justices specially concurring to state their views against disparate impact under the ADEA.[221] Were the Court to decide the issue, *Hazen Paper* would undoubtedly be a primary source of authority.[222]

### *D. Practical and Policy Problems*

Although not relied upon by the First Circuit in *Mullin*, another reason for not allowing disparate impact claims under the ADEA is that it would lead to several practical problems of application.[223] The most obvious practical problem is in defining the group that is disparately impacted.[224] Because age falls on a continuum and is constantly changing, the comparison groups are not as clear as in the case of race or sex (e.g., African-American vs. white or male vs. female). Thus, while an employment practice may affect a disproportionate number of employees age fifty and over, it may not have a disproportionate effect on employees forty and over.[225] Accordingly, the comparison groups in an age discrimination case can be manipulated to "strengthen or weaken the impact of a policy on some age group" and thereby obtain the desired result.[226]

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219. *See, e.g.*, Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir.), *cert. Denied* 517 U.S. 1245 (1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1078 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995). *See also* Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1048 (6th Cir. 1998) (questioning the continued vitality of disparate impact under the ADEA in light of *Hazen Paper*); Broaddus v. Florida Power Corp., 145 F.3d 1283, 1287 (11th Cir. 1998) (same). *But see, e.g.*, Mangold v. California Pub. Util. Comm'n, 67 F.3d 1470, 1474 (9th Cir. 1995) (following Ninth Circuit precedent allowing disparate impact claims despite *Hazen Paper*).

220. Hazen Paper Co. v. Biggins, 507 U.S. at 610. Sloan, *supra* note 11, suggests that Justice O'Connor's language "echoed the language she has used in cases that have sought to limit the scope of disparate impact liability." *Id.* at 539-43 (detailing Justice O'Connor's past opinions in disparate impact cases).

This language in *Hazen Paper* has also been criticized by at least one other commentator. *See* Fentonmiller, *supra* note 32, at 1112 ("Obviously, disparate treatment does not define the limit of Title VII's reach, even though it may 'capture the essence' of Title VII's prohibitions.").

221. *See* Hazen Paper Co. v. Biggins, 507 U.S. at 617-18 (Kennedy, J., concurring).

222. Another significant aspect of the Court's decision is that it dismissed the notion that doctrines developed under Title VII can be imported wholesale into the ADEA without reservation. *See* Sweeney, *supra* note 217, at 1558.

223. *See* Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996).

224. *See id.* (noting that "the line defining the class that is disparately impacted by the [employer's] policy is an imprecise one"). The district court in *Mullin* briefly addressed this issue. *See* Mullin v. Raytheon Co., 2 F. Supp.2d 165, 174 (D. Mass. 1998).

225. This was precisely the problem in Mullin's case. *See* Mullin v. Raytheon Co., 2 F. Supp.2d at 170. Although Raytheon's salary reassessments disparately impacted employees over fifty, the same was not true for the protected class as a whole. *See id. See also* Cunningham v. Central Beverage, Inc., 486 F. Supp. 59, 62-63 (N.D. Tex. 1980) (noting that "the facially neutral factors challenged will almost certainly generate different impacts for different age groups").

226. Ellis v. United Airlines, Inc., 73 F.3d at 1009. The Second Circuit avoids this problem by using a bright-line rule that a disparate impact upon a subgroup where there is not a disparate impact on the entire protected group is not enough to establish a prima facie case. *See* Criley v. Delta Air Lines, Inc., 119 F.3d 102, 105 (2d Cir.), *cert. denied*, 522 U.S. 1028 (1997).

Another practical problem is deciding what disparate impact precedent applies under the ADEA. The disparate impact cause of action under Title VII has undergone several modifications over the years, most recently in 1991[227] with the codification of *Griggs*,[228] and the partial codification of *Wards Cove*.[229] Although the procedures for bringing a disparate impact claim under Title VII are now dictated by statute, there is nothing in the ADEA to guide the courts. Accordingly, a disparate impact claim brought under the ADEA would arguably be guided by the standards in *Wards Cove* that Congress believed had "weakened the scope and effectiveness of Federal civil rights protections."[230] That is, the rule that once the plaintiff establishes a prima facie case, only the burden of production shifts to the employer would remain the law under the ADEA.[231] Furthermore, the lenient "business necessity" standard of *Wards Cove* would also apply despite being abrogated in the Title VII context.[232]

Lastly, permitting plaintiffs to bring disparate impact claims under the ADEA would invite endless litigation in the federal courts and contravene the policies of judicial economy and efficiency. That is, because so many employment practices are based on legitimate business reasons that are highly correlated with age, such as salary and seniority, the incidence of a disparate impact on older employees is, and will continue to be, very high. Undoubtedly, a majority of workers will reach the age of forty, at which time they will enter the protected class that could be disparately impacted by some employment practice or policy. It is unlikely that the federal courts are prepared to maintain such a voluminous amount of prospective ADEA cases. And, even so, are the courts willing to "force employers to carry the burden of justifying virtually all of their work and selection standards[?]"[233]

## V. CONCLUSION

In *Mullin v. Raytheon Co.*,[234] the First Circuit held that an age discrimination suit under the ADEA cannot be brought based on evidence of disparate impact.[235] In doing so, the First Circuit correctly relied upon the text of the ADEA, the statutory purpose, and the legislative history. All of these rationales counsel convincingly against allowing disparate impact claims under the ADEA because they all illustrate that the evil Congress sought to prohibit did not include neutral employ-

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227. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

228. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994)).

229. Codified in part at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994). *See also supra* notes 83-90 and accompanying text (discussing effects of the Civil Rights Act of 1991).

230. Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071. *See also* Johnson, *supra* note 56, at 46 (noting that *Wards Cove* most likely applies); Fentonmiller, *supra* note 32, at 1077 & n.29 (noting that the "mixed-motives" method of proving employment discrimination, though abrogated by statute in the context of Title VII, would still be applicable under the ADEA).

231. *See supra* text accompanying notes 76-82 (discussing the *Wards Cove* decision).

232. *See supra* text accompanying notes 76-82 (discussing *Wards Cove*).

233. Player, *supra* note 6, at 830. *See also* Sloan, *supra* note 11, at 522 (noting that "[c]ourts are generally less competent than employers to restructure business practices") (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978)).

234. 164 F.3d 696 (1st Cir. 1999).

235. *See id.* at 697.

ment policies that adversely affect workers over the age of forty more than workers under the age of forty. Furthermore, the dicta in *Hazen Paper Co. v. Biggins*,[236] also relied upon by the *Mullin* court, indicates that there is a strong feeling among the Members of the Supreme Court that the ADEA should be limited to disparate treatment.[237]

Currently, there is a split among the federal courts on the issue,[238] but the First Circuit in *Mullin* appropriately continued the trend toward limiting the ADEA to disparate treatment claims.[239] If the few circuits that still allow disparate impact claims under the ADEA continue to hold out, the issue may become ripe for a decision by the Supreme Court.[240] Were this to happen, the Court would undoubtedly come down on the side of the argument that it hinted at in *Hazen Paper*.[241] Arguably, then, the only way for such claims to survive would be for Congress to amend the ADEA, as it did with Title VII in 1991,[242] to explicitly allow age discrimination suits based on disparate impact. Until that day, however, the ADEA cannot support disparate impact claims.

*Miles F. Archer*

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236. 507 U.S. 604 (1993).

237. *See supra* notes 109-14 and accompanying text (discussing the Court's language in *Hazen Paper* as well as the concurring opinion).

238. *See supra* notes 115-17 and accompanying text (discussing circuit court split).

239. The First Circuit joined two other circuits that changed their rule after *Hazen Paper* to explicitly hold that disparate impact claims could not be maintained under the ADEA. *See* Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1078 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995). Judging by dicta in recent decisions that questions the continuing vitality of such claims, it could be that the Third, Sixth, and Eleventh Circuits are not far behind. *See* DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir.), *cert. denied*, 516 U.S. 916 (1995); Lyon v. Ohio Education Ass'n and Prof'l Staff Union, 53 F.3d 135 (6th Cir. 1995); Broaddus v. Florida Power Corp., 145 F.3d 1283 (11th Cir. 1998).

240. Judging by its recent denial of certiorari, the Court apparently felt that *Mullin* was not the appropriate case in which to address the issue. *See* Mullin v. Raytheon Co., 120 S. Ct. 44 (1999).

241. If the Court were to rule in such a way, Congress could, of course, supercede such a rule by amending the statute. Congress reacted in such way in response to the Court's decision in *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), where the Court held that employee benefit reductions did not have to be justified by actual cost differentials to fall with the BFOQ exception of the ADEA. To overturn that ruling Congress enacted the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified at 29 U.S.C. § 623(f)(2) (1994)).

242. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).