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Does the Theory of Disparate Impact Liability Apply in Cases Arising Under the Age Discrimination in Employment Act?: A Question of Interpretation

On December 3, 2001, the United States Supreme Court granted certiorari in the case of *Adams v. Florida Power Corporation,*[1] to decide whether the disparate impact theory of liability should be applied to claims arising under the Age Discrimination in Employment Act (hereinafter ADEA).[2] The disparate impact theory of liability has been described by the Court as a claim that "involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive...is not required under a disparate-impact theory."[3]

This issue has caused turmoil throughout the circuit courts; ending in a split as to whether the disparate impact theory should be applied. The Second, Eighth, and Ninth Circuits have found that, because the language of the ADEA parallels Title VII, disparate impact claims also should be allowed under the ADEA.[4] In conflict, the viability of disparate impact claims under the ADEA have been questioned by the First, Third, Sixth, Seventh, and Tenth Circuits.[5]

The Equal Employment Opportunity Commission (EEOC), through their interpretive guidelines of the ADEA, which are given great deference, has applied disparate impact liability to

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1. 122 S. Ct. 643 (2001).

2. 29 U.S.C. § 623 (2001).

3. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (quoting Teamsters v. United States, 431 U.S. 324, 335-36 *n.* 15 (1977).

4. Adams v. Florida Power Corporation, 255 F.3d 1322, 1324 (11th Cir. 2001). (See Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980); Smith v. City of Des Moines, 99 F.3d 1466, 1469-70 (8th Cir. 1996); E.E.O.C. v. Borden's, Inc., 724 F.2d 1390, 1394-95 (9th Cir. 1984)).

5. *Adams,* 255 F.3d at 1324-25. (See Mullin v. Raytheon Co., 164 F.3d 696, 700-01 (1st Cir. 1999); E.E.O.C. v. Francis W. Parker School, 41 F.3d 1073, 1076-77 (7th Cir. 1994); Ellis v. United Airlines, Inc., 73 F.3d 999, 1006-07 (10th Cir. 1996); DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 732 (3rd Cir. 1995); Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union, 53 F.3d 135, 139 *n.* 5 (6th Cir. 1995)).

ADEA claims.[6] The EEOC has determined that "when an employment practice ... is claimed as a basis for different treatment of employees ... on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group and cannot be shown to be related to job performance, such a practice is unlawful."[7]

However, an examination of the statutory language and the legislative intent behind the ADEA, as well as the unduly harsh effect that applying disparate impact liability to claims of age discrimination has on employers clearly establishes that the theory of disparate impact liability has no place in the area of age discrimination claims, despite *Griggs v. Duke Power Co.*[8] and its progeny.

The ADEA stems from the enactment of Title VII of the Civil Rights Act of 1964[9], which prohibits discrimination in the workplace based upon race, color, religion, sex, or national origin. When first proposed, Title VII included age under the bill's protection, but when enacted, age was excluded. However, the final version of Title VII directed the secretary of labor to "make a full and complete study" of the factors underlying age discrimination and its consequences.[10] Subsequently, a report was submitted to Congress by Secretary of Labor W. Willard Wirtz, setting forth five basic conclusions:

> 1. Many employers adopt specific age limits upon those they will employ.
>
> 2. These age limitations markedly affect rights and opportunities of older workers.
>
> 3. Although age discrimination rarely is based on the sort of animus that motivates racial, national origin, or religious discrimination, it is based upon stereotypical assumptions of the abilities of the aged, unsupported by objective facts.
>
> 4. The evidence available at the time showed that arbitrary removal of older workers from the workplace was generally

6. Edwards v. Shalala, 64 F.3d 601, 606 (11th Cir. 1995) "An agency's interpretation of an ambiguous provision within a statute it is authorized to implement is entitled to judicial deference." *Id.*

7. 29 C.F.R. 1625.7(d) (1999).

8. 401 U.S. 424 (1971).

9. 42 U.S.C. § 2000e. (2001).

10. RAYMOND F. GREGORY, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE 17 (2001).

unfounded, and that, overall, the performance of the older worker was at least as good as that of the younger worker.

5. Age discrimination is profoundly harmful in that it deprives the national economy of the productive labor of millions of workers and substantially increases the costs of both unemployment insurance and Social Security benefits, and it inflicts economic and psychological injury upon workers deprived of the opportunity to engage in productive and satisfying occupations.[11]

Concurring with these findings, a Congressional committee affirmed Wirtz's conclusions that "employers generally operated under false assumptions regarding the effects of aging in older workers, that these assumptions led to the common usage of age barriers in the hiring process and, consequently, that a disproportionate number of older workers were among the unemployed."[12]

On December 16, 1967, President Johnson signed the ADEA, to become effective June 12, 1968. The ADEA adds to the effort of Title VII to abrogate discrimination from the American workplace. Section 623(a) of the ADEA describes unlawful discriminatory practices by employers. This section reads:

It shall be unlawful for an employee—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or to reduce the wage rate of any employee in order to comply with this Act.[13]

It is illegal, under the ADEA, for an employer to refuse to hire, fire, or take any other negative action against an employee because of his or her age, when that person is at least the age of

11. Department of Labor, Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (Washington D.C., 1965).

12. GREGORY, *Supra* note 10, at 18.

13. 29 U.S.C. § 623 (a) (2001).

forty.[14] Under the statute, an "employer" is a "person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year: Provided, that prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers."[15]

The language of the ADEA has been cited as similar to that of Title VII.[16] The language of Title VII, where unlawful employment practices are defined, parallels the language of the ADEA except where the protected classes are listed. Title VII states that it is unlawful "to fail or refuse to hire or to discharge any individual ... because of such individual's race, color, religion, sex, or national origin",[17] where the ADEA states it is unlawful "to fail or refuse to hire or discharge an individual ... because of such individual's age."[18]

Although, it would be a stretch to read the phrase "because of such individual's age" to prohibit unintentional and incidental discrimination that resulted from legitimate employment decisions,[19] the United States Supreme Court construed the language of Title VII, which is nearly identical to that of the ADEA, to create a disparate impact theory of liability.[20]

Despite these two sections being strikingly similar, the ADEA differs in two important respects from Title VII. First, the ADEA contains § 623(f)(1), which allows an employer to "take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age."[21] This is a defense, not enumerated under Title VII, which allows an employer to show that the action taken was motivated, not by age, but by a reasonable alternative factor. This distinctive difference between Title VII and the ADEA provides a strong backbone for the argument to preclude disparate impact claims under the ADEA.

Second, and possibly the strongest argument for barring disparate impact analysis under the ADEA, is "the recognition that age

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14. 29 U.S.C. §§621-634 (2001).

15. 29 U.S.C. § 630 (b) (2001).

16. See Lorillard v. Pons, 434 U.S. 575, 584 (1978) (noting that "the prohibitions of the ADEA were derived *in haec verba* from Title VII,"); *Compare* 29 U.S.C. § 623(a)(1) *with* 42 U.S.C. § 2000e-2(a)(1).

17. 42 U.S.C. § 2000e-2(a)(1).

18. *Supra* text p. 3.

19. *Ellis*, 73 F.3d at 1007 (*citing Hazen Paper Co.*, 507 U.S. at 604).

20. *Griggs*, 401 U.S. 424. *See infra* pp. 6-7.

21. 29 U.S.C. § 623(f)(1) (2001).

is a class fundamentally unlike classes protected by Title VII."[22] The classes protected under Title VII, with the possible exception of religion, are immutable.[23] A person does not move from gender to gender, or race to race, but one does move upward through the age continuum.[24] Age is not a "suspect" class, and, although abilities decrease with age, the rate of decrease differs from person to person.[25] "Congress must have recognized this, and even if it did not, impact analysis that works well with finite classes like race and sex does not quite fit with a fluid, continuum concept such as age."[26] Disparate impact liability does not run congruent with neither the statutory language of the ADEA, nor the legislative intent; however, it has been applied by various courts to claims of age discrimination.

When a plaintiff files a claim of age discrimination, there are two distinct claims of discrimination that courts have applied under the ADEA: disparate treatment and disparate impact.

In *Hazen Paper Co. v. Biggins,*[27] the United States Supreme Court stated:

> 'Disparate treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment...[28]

Under disparate treatment, a plaintiff must show that age actually motivated an employer's decision.[29] The language of the ADEA makes it clear that disparate treatment is the only valid theory of liability.[30] The action by the employer must have oc-

22. Mark 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, 829 (1997).

23. *Id.* "Immutable" is defined as invariable; unalterable. WEBSTER'S DICTIONARY 192 (1991).

24. *Id.*

25. *Id.*

26. *Id.*

27. 507 U.S. 604 (1993).

28. *Id.* at 609.

29. *Id.*

30. 29 U.S.C. § 623(a)(1). "It shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual of otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age.*" *Id.* (emphasis added).

curred *because* of a person's age. This plain language of the statute embraces intent as an element of a violation. For example, "[an] employer who decided to resolve its financial problems by firing older workers because they have higher salaries is likely to be found guilty of age discrimination."[31] Age was a motivating factor for dismissing the older workers, and because of the statutory language of the ADEA, disparate treatment would be applied and the employer would be held liable.

The disparate impact theory of liability, on the other hand, "involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive ... is not required under a disparate impact theory."[32] The appreciable difference in the two theories is proof of intent. With disparate impact, as compared to disparate treatment, intent need not be proven. "A prima facie case of discriminatory impact may be established by showing that an employer's facially neutral practice has a disparate impact upon members of the plaintiff's class."[33] For this, the plaintiff "must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotion because of their membership in a protected group."[34] The burden then shifts to the employer who "may defend by showing that the employment practice is justified by business necessity or need and is related to successful performance of the job for which the practice is used."[35] "In that event the plaintiff must be given an opportunity to show that other selection methods having less discriminatory effects would serve the employer's legitimate interest in competent performance of the job."[36]

An example of disparate impact is demonstrated when a company invokes a reduction in force (RIF), providing either voluntary or involuntary termination, which unintentionally, but adversely affects workers over the age of forty.[37] For instance, company A is having financial troubles and decides to eliminate a large portion

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31. GREGORY, *Supra* note 10, at 34.
32. *Supra* note 3.
33. *Geller,* 635 F.2d at 1032.
34. *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994-95 (1988).
35. *Geller,* 635 F.2d at 1032.
36. *Id.*
37. GREGORY, *Supra* note 10, at 34.

of their higher salaried employees to cut cost.[38] Unfortunately 70% of the higher salaried workers are over the age of forty. Although, financial difficulty, not age, was the motivating factor behind the RIF, company A could be found to have violated the ADEA, if disparate impact liability were to be available.[39] This would be unfair to employers making decisions based on economic hardship, a rather common occurrence in today's economy.

In combating a situation as described above, section 623(f)(1) of the ADEA[40] allows an employer to show that the otherwise unlawful activity was motivated by reasonable factor other than age. This is an affirmative defense specifically enumerated in the ADEA. This defense directly conflicts with the disparate impact theory of liability. Using the example from above, company A dismissed the workers, not because of age, but to alleviate the financial hardship by eliminating the higher salaried workers. I submit that this is a "reasonable factor other than age," but unfortunately, a court applying the disparate impact theory would likely hold company A in violation of the ADEA, even though age was not a motivating factor.

The United States Supreme Court has clearly applied the disparate impact theory of liability to actions under Title VII in *Griggs v. Duke Power Co.*[41] *Griggs* involved a policy of Duke Power Co. that required a high school education and the passing of two professionally prepared aptitude tests in order to work in any department other than Labor. A group of incumbent Negroes filed suit alleging racial discrimination based on these requirements, which rendered ineligible a markedly disproportionate number of Negroes from jobs other than labor.

The *Griggs* Court began their analysis by determining Congress's purpose in enacting Title VII. The Court stated:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they oper-

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38. *Id.*
39. *Id.*
40. 29 U.S.C. § 623(f)(1) (2001).
41. 401 U.S. 424.

> ate to "freeze" the status quo of prior discriminatory employment practices.[42]

Justice Burger, writing for the majority, further states that the lack of discriminatory intent is irrelevant, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[43] The majority explained, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[44] The *Griggs* Court concluded that the general testing and the requirement of a high school diploma had no relation to job performance in this situation.[45] The majority held that these requirements violated Title VII, even though no discriminatory intent was found. By doing so, the *Griggs* Court set the stage for applying the theory of disparate impact liability to Title VII actions, as well as erroneously applying it to actions under the ADEA.

The issue of whether disparate impact liability should apply to actions under the ADEA has been a major cause of confusion throughout the circuit courts. The 2nd, 8th, and 9th Circuits have answered this question in the affirmative, relying desperately on the holding in *Griggs,* and interpreting this holding to allow disparate impact claims to be brought under the ADEA, based on the similar language of the Title VII and the ADEA.

The theory of disparate impact liability was first applied to the ADEA, by the 2nd Circuit, in the case of *Geller v. Markham.*[46] In *Geller,* the plaintiff was a 55 year old woman, hired to fill a "sudden opening" in the Bugbee School on September 3, 1976.[47] Two weeks later, on September 17, plaintiff was replaced by a 25 year old woman who had not applied for the job until September 10.[48] Plaintiff proceeded to bring suit alleging violations of the ADEA, and "pointing in particular to the 'Sixth Step Policy' adopted by the West Hartford Board of Education.[49]

42. *Id.* at 429-30.
43. *Id.* at 432.
44. *Id.*
45. *Id.* at 433.
46. 635 F.2d 1027.
47. *Id.* at 1030. Ms. Geller ("plaintiff") was a tenured teacher with a great deal of experience when she applied for this permanent position. She was told to be ready to begin teaching on September 7, however, interviews were still being conducted at this time for possible job candidates. *Id.*
48. *Id.*
49. *Id.* This policy was a cost-cutting policy which stated that:

At trial, the plaintiff introduced an expert witness who testified that 92.6% of Connecticut teachers within the protected class of the ADEA (between 40 and 65 years of age) have more than five years experience, putting them within the sixth step of the salary schedule, while only 62% of teachers under 40 years old taught more than five years.[50] The defendant offered two lines of defense. First, the defendants contended that, although the "sixth step" policy appeared to be strongly correlated to membership in the protected class, the policy did not result in discrimination because the percentage of teachers within the protected class hired to fill job openings before and after the application of the policy were about the same.[51] This defense failed based upon the fact that the statistics were compounded by a non-expert, named defendant with an interest in the outcome of the case.[52] Therefore, the district court afforded this argument no weight and found that the "sixth step" policy was discriminatory as a matter of law, based on the statistics presented and the high correlation between experience and membership in the protected age group.[53]

The second defense presented was that the policy was a "necessary cost-cutting gesture in the face of tight budgetary constraints."[54] The court of appeals struck down this argument based upon the clear rule that,

> a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation-an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it.

"Except in special situations and to the extent possible, teachers needed in West Hartford next year will be recruited at levels below the sixth step of the salary schedule." *Id.* Five plus years of experience, which Ms. Geller had, was required to achieve the sixth step salary grade *Id.*

50. *Id.*
51. *Geller,* 635 F.2d at 1033.
52. *Id.*
53. *Id.* The court of appeals agreed with this finding. *Id.*
54. *Id.* at 1034.

Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.[55]

The court concluded that the plaintiff established disparate impact by proving that she was subjected to a facially neutral policy disproportionately disadvantaging her as a member of a protected class.[56] This case put into motion the erroneous rationale behind holdings that apply disparate impact liability to actions under the ADEA.

The Court of Appeals for the Eight Circuit has also mistakenly applied disparate impact liability to claims brought under the ADEA. An example of this can be found in the court's rationale in *Smith v. City of Des Moines.*[57] In *Smith,* the plaintiff was a firefighter of thirty-eight years, giving him a rank of fire captain when he was dismissed.[58] Six years prior to dismissal, the city implemented annual testing of all firefighters at the rank of captain or below to determine whether they could safely fight fires while wearing a self-contained breathing apparatus (SCBA).[59] In 1988, 1992, and 1993, the plaintiff failed the annual testing required by the city.[60] In January 1993, the fire department offered to allow the plaintiff to remain on sick leave for four months, until he turned fifty-five and would be eligible for retirement.[61] After the four months passed, the plaintiff did not file for retirement and, in the interim, was examined by four physicians whom concluded that he was physically capable of working as a firefighter.[62] Subsequently, the plaintiff was not permitted to return to work, but an offer was made by the fire department to place him on a leave of absence with benefits until July 1, 1994, when he would

55. 29 C.F.R. § 860.103(h) (1979).

56. *Geller,* 635 F.2d at 1034.

57. 99 F.3d 1466.

58. *Id.* at 1468.

59. *Id.* "Each firefighter underwent spirometry testing, which gauges pulmonary function by measuring the capacity of lungs to exhale." *Id.* If a firefighter had a forced expiratory volume in one second (FEV1) that was less than 70%, the firefighter was then required to take a maximum exercise stress test, which measures the capacity of the body to use oxygen effectively. *Id.* In order to pass, a firefighter was required to establish a maximum oxygen uptake (VO2 max) of at least 33.5 milliliters per minute per kilogram of body weight in order to pass the stress test. *Id.*

60. *Id.*

61. *Id.*

62. *Smith,* 99 F.3d at 1468. Although Smith (plaintiff) did not file for retirement in April, the fire chief filed an application for disability retirement on his behalf, which was rejected by the pension board after they received recommendations that Smith was physically fit. *Id.*

be eligible for maximum pension benefits.[63] In July, the plaintiff did not file for retirement and the city discharged him shortly thereafter for failing to meet physical fitness requirements.[64] After bringing suit alleging an ADEA violation, the district court held that, even if it could be established that the testing had a disparate impact on older firefighters, the city had established a "business necessity" defense because firefighters require "a high standard of physical fitness."[65]

On appeal, the Court of Appeals for the Eighth Circuit upheld the district court grant of summary judgment in favor of the defendant.[66] In doing so, the court noted the similarity between Title VII and the ADEA, which was used as a basis in applying disparate impact to an ADEA claim.[67] The court stated that, like Title VII, the ADEA contains two prohibitions relevant to this case, those being sections 623(a)(1) and (2).[68] Based on the point of similarity between the statutes, along with several previous holdings, the Court of Appeals for the Eighth Circuit concluded that disparate impact claims under the ADEA are cognizable.[69]

The Ninth Circuit further strengthened the side of the argument for applying disparate impact liability to claims under the ADEA in *E.E.O.C. v. Borden's Inc.*[70] In *Borden's Inc.,* Borden terminated 48 employees by closing their Phoenix, Arizona plant, and 16 of those employees fell within the protected class of the ADEA.[71] Under a policy of Borden, discharged employees were entitled to severance pay, unless they were eligible for retirement at the time of discharge.[72] The Equal Employment Opportunity Commission (EEOC) filed suit against Borden and two labor unions that represented the discharged workers for age discrimination.[73] The district court granted summary judgment for the EEOC and held that the severance pay policy had a discrimina-

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63. *Id.* at 1468.
64. *Id.*
65. *Id.*
66. *Id.* at 1473.
67. *Smith,* 99 F.3d at 1470.
68. *Smith,* 99 F.3d at 1469. *See supra* text p. 4.
69. *Id.* at 1470. *See also* Houghton v. SIPCO, Inc., 38 F.3d 953 (8th Cir. 1994); Nolting v. Yellow Freight System Inc., 799 F.2d 1192 (8th Cir. 1986); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983).
70. 724 F.2d 1390.
71. *Id.* at 1392.
72. *Id.* at 1391. Eligibility for retirement came at age 55 and after 10 years of service. *Id.* at 1392.
73. *Id* at 1392..

tory impact on older workers and was not a "bona fide employee benefit plan" exempted from the ADEA.[74]

On appeal from Borden, the court of appeals affirmed the district court's decision and held that disparate impact claims are cognizable under the ADEA.[75] The court determined, in opposition to Borden's argument of inapplicability, that "[w]hile it is true that the disparate impact theory first arose in cases under Title VII ..., the similar language, structure, and purpose of Title VII and the ADEA, as well as the similarity of the analytical problems posed in interpreting the two statutes, has led us to adopt disparate impact in cases under the ADEA."[76] Once again, the similarity in language of the ADEA and Title VII has erroneously led a court to allow disparate impact liability in age discrimination cases, which lies in direct conflict with the purpose of Congress in enacting the ADEA.

In opposition to the faulty application of the theory of disparate impact to the ADEA, the First, Third, Sixth, Seventh, and Tenth Circuits have questioned the viability of disparate impact analysis when applied to age discrimination claims. These circuits have relied heavily on the United States Supreme Court's opinions in *Hazen Paper Co. v. Biggins.*[77] In *Hazen Paper Co.,* respondent filed suit against petitioners alleging a violation of the ADEA, claiming that age was a determinative factor in his discharge.[78] A jury in the United States District Court for the District of Massachusetts found that petitioners "willfully" violated the ADEA.[79] The Court of Appeals, relying heavily on the evidence that the respondent was fired to prevent his pension from vesting, affirmed the judgment of the district court.[80]

The Supreme Court granted certiorari to decide whether interfering with pension vesting violated the ADEA. In deciding this question, the Court relied on the disparate treatment theory of liability, in part because the Court had never decided whether disparate impact liability was available under the ADEA, and the

74. *Id.*
75. *Borden's Inc.,* 724 F.2d at 1394.
76. *Id.* at 1394.
77. 507 U.S. 604.
78. *Id.* at 606.
79. *Id.*
80. *Id.* at 607. "[The] evidence, as construed most favorably to respondent by the court, showed that the Hazen Paper pension plan had a 10-year vesting period and that respondent would have reached the 10-year mark had he worked 'a few more weeks' after being fired." *Id.*

theory was not raised by respondent at trial.[81] The Court recognized that "[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based'."[82] Based on this, the Court limited their holding to "an employer does not violate the ADEA just by interfering with an employee's pension benefits that would have vested by virtue of the employee's years of service."[83]

Although this case dealt with disparate treatment, the concurring opinion by Justice Kennedy addresses disparate impact. In his concurrence, Justice Kennedy states that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII...and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[84] This simple statement has often supported the comprehensible and logical rationales of the circuit questioning the viability of disparate impact liability under the ADEA.

This question of whether disparate impact liability should be allowed under the ADEA was raised within the First Circuit in *Mullin v. Raytheon Company.*[85] In *Mullin,* the appellant was an employee of Raytheon for twenty-nine years, whom had achieved a labor grade of 15 on a scale ranging from 4 to 18.[86] Beginning in 1984 and continuing until 1995, Raytheon continuously downgraded appellant's job responsibilities, and ultimately decreased his labor grade from 15 to 12.[87] Following this period of demotion, appellant brought suit alleging, inter alia, disparate impact liability under the ADEA. After a period of discovery, the district court

81. *Id.* at 610.

82. *Hazen Paper Co.,* 507 U.S. at 611.

83. *Id.* at 613.

84. *Id.* at 618 (Justice Kennedy, concurring.)

85. 164 F.3d 696.

86. *Id.* at 697. Raytheon assigns salaried employees a labor grade on a numeric scale that ranges from 4 to 18, with each grade corresponding to a successively higher earnings bracket. *Id.*

87. *Id.* at 698. In 1984, Raytheon transferred Mullin (appellant) to its Massachusetts plant, where he became a second shift manager, supervising a mere 400 employees as compared to his previous number of over 2000 subordinates. *Id.* In 1989, Mullin informally became a troubleshooter and was transferred from area to area, according to need. *Id.* And finally, in 1994, Raytheon downgraded his position into one in which he oversaw fewer that 100 subordinates. *Id.*

granted Raytheon motion for brevis disposition and the appeal ensued.[88]

The court of appeals began their analysis of the disparate impact claim by examining the statutory language of the ADEA.[89] The court stated that a "commonsense reading of [section 623(a)(1)] strongly suggests that the statute includes a requirement of intentional discrimination."[90] However, Title VII contains parallel language, and the court noted that the Supreme Court has held "such language encompasses a theory of liability based on disparate impact."[91]

Relying on the majority and concurring opinions in *Hazen Paper Co.*,[92] the court recognized that "Congress passed the ADEA due to 'its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes'" setting the statute apart from Title VII, which was enacted "in an effort to equalize employment opportunities for individuals whose employment prospects had been diminished by past discriminatory practices."[93] The protected classes under Title VII are immutable, however the court remarked that

> "[t]he aging process is inevitable, and Congress was not trying to dissolve those naturally occurring relationships through the medium of the ADEA, but, rather, aimed to protect older workers against the disparate treatment that resulted from stereotyping them as less productive and therefore less valuable members of the work force because of their advancing years."[94]

Based on the classes protected and the purpose of Congress in enacting the ADEA, the court distinguished *Griggs,* and sets apart the ADEA from Title VII.

Another crucial point to the court's analysis is its interpretation of section 623(f)(1) of the ADEA. This section of the ADEA allows employers to utilize reasonable factors other than age as grounds for employment related decisions that disparately impact members of the protected class. The court of appeals stated that

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88. *Id.*
89. *Id.* at 700.
90. *Mullin,* 164 F.3d at 700.
91. *Id.* at 700. See *Griggs,* 401 U.S. 424 discussed *supra* pp. 8-9.
92. 507 U.S. 604.
93. *Mullin,* 164 F.3d at 700-01.
94. *Id.* at 701.

"[w]hen this exception is read with the ADEA's general prohibition against age-based discrimination, the resulting construction follows: it shall be unlawful to 'discriminate against any individual ... because of such individual's age,' except when 'based on ... factors other than age.'"[95] If disparate impact liability is not precluded by section 623(f)(1), then, the court remarked, "such a circular construction would fly in the teeth of the well-settled cannon that 'all words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.'"[96] Therefore, the Court of Appeals for the First Circuit held that the ADEA does not impose liability under a theory of disparate impact.[97]

The Third Circuit has also formulated a rationale for denying disparate impact liability under the ADEA. *DiBiase v. Smithkline Beecham Corporation*[98] involved the scope of liability under the ADEA. In *DiBiase,* the appellee (DiBiase) was terminated in a RIF (Reduction in Force or lay-off), but was offered a separation benefit plan, which could be enhanced by signing a general release of all claims against Smithkline.[99] DiBiase refused to sign the release and wrote a letter to the personnel director contending that the policy violated the ADEA.[100] Subsequently, appellee filed suit in district court alleging two counts of ADEA violations.[101] The district court granted Smithkline's motion for summary judgment in regards to count 1, but denied the motion in regards to count 2 and concluded that Smithkline's policy facially discriminates against employees protected by the ADEA, and granted DiBiase's cross-motion for summary judgment on count 2.[102]

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95. *Id.* at 702.

96. *Id.* (quoting United States v. Ven-Fuel, Inc., 758 F.2d 741 (1st Cir. 1985)).

97. *Id.* at 703.

98. 48 F.3d 719 (3d Cir. 1995)

99. *Id.* at 722. "The separation benefit plan provided a lump sum payment based on the employee's length of service, as well as continued health and dental benefits." *Id.* " The enhanced plan entitled employees who signed the waiver to receive 15 months salary and six months continued health and dental coverage." *Id.*

100. *Id.* at 723.

101. *Id.* "Count 1 asserted that Smithkline fired him because of his age, in violation of the ADEA." *Id.* Count 2 alleged that Smithkline's "separation benefit plan violates the ADEA because it discriminates against [him] and its other employees forty or older by having higher requirements for them to qualify for the additional separation benefits than apply to its employees under forty." *Id.*

102. *Id.* at 724. The district court observed that the policy facially discriminated because "in order for an older employee to receive the same enhanced benefit as a younger employee, the older employee must release her right to file an ADEA claim" and "this

On appeal of the grant of summary judgment in favor of DiBiase, the Court of Appeals for the Third Circuit was called upon, inter alia, to determine whether disparate impact is a viable theory of liability in an ADEA case. The court began their analysis of this question by relying on the Supreme Court's reasoning in *Hazen Paper Co.,* to cast considerable doubt on the viability of the theory of disparate impact under the ADEA.[103] Although this court held previously that disparate impact is cognizable under Title VII and the ADEA,[104] the court of appeals acknowledged that the statement about the ADEA was pure dicta and the case was decided pre-*Hazen.*[105] Furthermore, the court noted that "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes, [and] when the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears."[106] One can read this statement to eliminate disparate impact claims under the ADEA because, to read otherwise, would fly in the face of the "reasonable factors other than age" defense enumerated in section 623 (f)(1).

To strengthen the argument further, the court deconstructed the grammar of section 623 (a)(2), which has been interpreted to allow disparate impact claims.[107] In order to find disparate impact within this section, the language "because of such individual's age" must be read to modify "adversely affect" rather than to modify "limit, segregate, or classify", which, based on the placement of the commas, is a grammatically incorrect reading.[108]

Finally, the court of appeals contrasted the purpose behind Title VII, which was to remedy past discrimination of the protected classes, and the ADEA, which was to prohibit employers from acting upon the assumption that "productivity and competence declined with age."[109] In doing so, the court discussed Congress' rec-

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treatment in patently different because the younger employee cannot have an ADEA claim". *Id.*

103. *DiBiase,* 48 F.3d at 732.

104. *Id.* at 732-33McNamara v. Korean Air Lines, 863 F.2d 1135, 1148 (3rd Cir. 1988).

105. *Id* at 733.

106. *Id.* at 733. (quoting *Hazen Paper Co.,* 113 S.Ct. at 1706).

107. *Id.* This section renders it "unlawful for an employer to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." *Id.*

108. *DiBiase,*48 F.3d at 733..

109. *Id.* at 734.

ognition of the distinction, and found that the "reasonable factor other than age" defense was Congress' way of prohibiting disparate treatment and authorizing disparate impact under the ADEA.[110] The Court of Appeals for the Third Circuit bolstered the argument for precluding disparate impact liability under the ADEA, by peering into the statutory language and set forth the only comprehensible interpretation of the ADEA.

Along with the First and Third Circuits, the Sixth, Seventh, and Tenth Circuits have all sided with the argument of precluding disparate impact liability under the ADEA.

In *Lyon v. Ohio Education Association,*[111] the Court of Appeals for the Sixth Circuit affirmed the district court's grant of summary judgment in favor of the defendants, based on the plaintiff's inability to set forth a prima facie case of age discrimination.[112] In deciding whether a claim of disparate impact is cognizable under the ADEA, the court recognized, relying on *Hazen Paper Co.,* that an employer has not violated the ADEA when motivated by a factor other than age in an employment decision.[113] The court stated that "[t]he ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations," and therefore, "plaintiffs must allege that the [defendant] discriminated against them because they were old, not because they were expensive, or any other reason unrelated to age."[114]

The Seventh Circuit has also depended on the holding in *Hazen Paper Co.* to question the viability of disparate impact under the ADEA. In *EEOC v. Francis W. Parker School,*[115] the Court of Appeals for the Seventh Circuit challenged the disparate impact theory of liability when applied under the ADEA. Once again relying

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110. *Id.* at 734.

111. 53 F.3d 135 (6th Cir. 1995). In this case, the plaintiffs alleged that an early retirement provision in their collective bargaining agreement between the defendants violated the ADEA. *Id.* at 136. The suit centered around "Option B" of their early retirement plan, which states in pertinent part, "[e]arly retirement benefits under this Option B shall be at least equal to the same percent of salary that the participant would have received if the participant had retired on the normal retirement date." *Id.* Plaintiffs claimed that this clause violated the ADEA because "younger persons who take an early retirement receive a higher pension amount than older persons taking a retirement with the same length of service." *Id.*

112. *Id.* at 140.

113. *Id.* at 137.

114. *Id.* 1t 139 (quoting Allen v. Diebold, Inc., 33 f.3d 674, 676-77 (6th Cir. 1994)).

115. 41 F.3d 1073 (7th Cir 1994).

on the Supreme Court's holding in *Hazen Paper Co.,* the court expressed distaste for the disparate impact theory. In this case, the defendant needed to hire a new drama teacher, but because of fiscal restraints, the new teacher's salary would be no more than $28,000.[116] Incumbent teachers' salaries were determined on a twenty-two step salary scale, linking salary to work experience.[117] The EEOC filed suit claiming "that due to the statistically significant relationship between age and work experience, by setting a maximum salary limit, Parker excluded a disproportionate percentage of applicants over age forty from consideration for the teaching position."[118]

In considering the EEOC's claim of disparate impact, the court relied on the critical holding in *Hazen Paper Co.,* and found that "[t]he Court's discussion makes clear that the ADEA prevents employers from using age as a criterion for employment decisions. On the other hand, decisions based on criterion which merely tend to affect workers over age forty more adversely than workers under forty are not prohibited."[119] The court of appeals further noted that "[section 623 (f)(1)] suggests that decisions which are made for reasons independent of age but which happen to correlate with age are not actionable under the ADEA."[120]

Depending less on *Hazen Paper Co.,* and more on the statutory language and legislative intent of the ADEA, the Tenth Circuit has also doubted the application of disparate impact liability to age discrimination claims. In *Ellis v. United Airlines, Inc.,*[121] the Court of Appeals for the Tenth Circuit held that disparate impact claims under the ADEA were not cognizable. In *Ellis,* plaintiffs (Ellis and Wong-Larkin) were two women denied employment by United Airlines for failure to meet the standard weight requirements for flight attendants.[122] Ellis was forty years old when she was first denied employment and Wong-Larkin was age forty when she was denied employment for the second time.[123] United

116. *Id.* at 1075.
117. *Id.*
118. *Id.*
119. *Id.* at 1077.
120. *Francis W. Parker,* 41 F.3d at 1077.
121. 73 F.3d 999 (10th Cir. 1996).
122. *Id.* at 1001. United employed two separate weight standards, one in which an initial weight limit must be met for new applicants, and the second standard establishes maximum weight limits that cannot be exceeded by flight attendants after they are hired. *Id.*
123. *Id.* at 1001-02.

asserted that both women were not hired because of their weight.[124] Plaintiffs subsequently filed suit alleging age discrimination in violation of the ADEA when United refused to hire them as flight attendants.[125] The argument plaintiffs alleged pertinent to this discussion was that "United's use of age-neutral weight requirements for hiring, even if not motivated by a discriminatory animus against age, disparately impacted them because of their age."[126]

In addressing the argument of disparate impact and affirming the district court's grant of summary judgment for United on that ground, the court of appeals began their analysis with the interpretation of the text of the ADEA.[127] The most obvious reading of section 623(a)(1), the court states, is that it prohibits intentional discrimination by employers based on a person's age.[128] The court recognized that "[i]t would be a stretch to read the phrase 'because of such individual's age' to prohibit incidental and unintentional discrimination (disparate impact) that resulted because of employment decisions which were made for reasons other than age."[129]

To further reinforce the denial of disparate impact claims under the ADEA, the court explained, "the legislative history of the ADEA suggests that it was not enacted to address disparate impact claims."[130] The ADEA was enacted in large part based upon a report by the secretary of labor that differentiated between intentional "arbitrary discrimination" and problems stemming from factors that "affect older workers more strongly, as a group, than they do younger employees."[131] The court observed that "[t]he report then recommended that Congress prohibit 'arbitrary discrimination,' but that factors which 'affect older workers' be addressed through programmatic measures to improve opportunities for older workers".[132] The court of appeals is stating the most logical conclusion that the purpose of the ADEA was to prevent disparate treatment, not disparate impact.

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124. *Id.* at 1002.
125. *Id.* at 1003.
126. *Ellis,* 73 F.3d at 1003.
127. *Id.* at 1007.
128. *Id.*
129. *Id.*
130. *Id.* at 1008.
131. *Ellis,* 73 F.3d at 1008.
132. *Id.*

Although there are persuasive arguments on both sides of this issue, the dominating argument precludes disparate impact liability from age discrimination claims. First and foremost, the text on the ADEA must be read to prohibit disparate treatment, and nothing more. The words "because of such individual's age" scream intent. To read this statute to also prohibit unintentional age discrimination would confuse all senses of logic.

Despite that logic, the language of Title VII parallels that of the ADEA, and disparate impact liability has been applied to Title VII actions by the Supreme Court in *Griggs v. Duke Power Co.*.[133] However, the ADEA was enacted before *Griggs,* and to apply the holding in *Griggs* literally, to the ADEA would make no logical sense. Title VII protects "suspect" classes, with the possible exception of religion, where age is a class in which everyone moves into. The application of disparate impact liability to Title VII actions, and those actions alone, allows the prevention of discrimination of "suspect" classes, because these classes have a history of unintentional discriminatory practice employed against them.

The legislative intent of the Congress in enacting the ADEA was to prohibit "arbitrary age discrimination", i.e. intentional age discrimination.[134] If Congress intended to prohibit unintentional age discrimination, the ADEA would read "because of, or *in relation to,* such individual's age." That is not what Congress intended to prohibit, therefore the statute only prohibits intentional discrimination.

In bolstering this argument, Justice Kennedy stated in *Hazen Paper Co.,* that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII...and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[135] The First, Third, Sixth, Seventh and Tenth Circuits were all correct when they found that it did not make sense to apply disparate impact liability to the ADEA, and held that disparate impact claims under the ADEA are not cognizable. Any holding to the contrary lacks a rational interpretation of the ADEA.

Another intricate piece of the argument is section 623(f)(1), the "reasonable factors other than age" defense. By placing this defense within the ADEA, Congress precluded a claim of disparate

133. 401 U.S. 424 (1971).
134. *Ellis,* 73 F.3d at 1009.
135. 507 U.S. at 618 (Justice Kennedy, concurring.)

impact. If disparate impact claims are permitted under the ADEA, section 623(f)(1) becomes useless. Business decisions that disparately impact older employees are based on reasonable factors other than age, because if not, the decision would be based on the person's age, qualifying as disparate treatment in violation of the ADEA.

In today's business world, companies should be allowed to employ business decisions, when not motivated by age, but that inadvertently affect older workers. By allowing disparate impact claims to move forward, the entrepreneurs of society will be discouraged from making these business decisions crucial to a flourishing economy. The business world will fall prey to the whims of the judges and juries, and what they determine is reasonable. Entrepreneurs do not tell judges how to run their courtrooms, and judges should be obligated to offer the same respect to entrepreneurs. The courts should give great deference to the business judgment of employers, and only punish those decisions that were made based on a person's age.

On April 1, 2002, the Supreme Court dismissed their writ of certiorari as improvidently granted in *Adams v. Florida Power Corporation.*[136] Unfortunately, the issue of whether disparate impact liability should be applied under the ADEA will be left undecided, for the time being, by the Supreme Court. However, I respectfully submit that when this issue appears before the Court again, the only logical conclusion that can be reached is to preclude disparate impact liability from age discrimination claims under the ADEA.

Rocco Cozza

136. 2002 U.S. LEXIS 2339