BROADBANDING: LEGAL AND POLICY IMPLICATIONS UNDER THE ADEA

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I. Introduction

In a profit-based society, businesses need rewarding pay systems to motivate employees to succeed.[1] However, what happens if the system used imposes an unequal burden on individuals of a particular age group? With the evolution of broadbanding, it is possible that an aging generation may have more difficulty staying competitive in the workforce. This article will discuss the development and use of broadbanding as a growing force in competitive compensation structure. It will also discuss the possible advantages and disadvantages of a broadband system and the importance of skill attainment in this type of structure. It will then examine disparate impact discrimination and the controversy concerning its viability under the Age Discrimination in Employment Act ("ADEA"). Lastly, it will discuss the potential legal ramifications if disparate impact theory is recognized under the ADEA, and conclude that, whether or not there is a legal obligation, employers

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[1] ROBERT L. HENEMAN, BUSINESS DRIVEN COMPENSATION POLICIES 142 (2001).

owe an ethical obligation to implement broadbanding systems that give all workers ample opportunities to acquire the requisite skills for advancement.

II. Broadbanding

A. *Development of Broadbanding*

For decades employees have been struggling to climb the corporate ladder, while any horizontal movement was seen as a failure or lack of motivation.[2] Also, workers were given specific tasks that left no room for extraordinary performance, since any such performance would upset the balance within the traditional workplace.[3] However, in the late 1980s, corporate America began a series of cutbacks that generated a new acceptance of horizontal change.[4] Along with the plethora of cutbacks, companies have created new structures that give them more flexibility to respond to ever-evolving competition.[5] Employers are forced to expect more from their employees in order to meet increasing competition, and are more focused on attracting employees that exhibit creativity, responsibility, communication, and involved decision-making skills.[6] Previously, employees were only expected to complete the responsibilities described for their specific position.[7] The new perceptions about employee productivity created a broader, flatter hierarchy.[8] With this new hierarchy came a new view of compensation systems.

Broadbanding, also referred to as *career banding* or *pay banding*, is a relatively new type of salary program that has replaced the

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[2] Adele Scheele, *Moving Over Instead of Up*, WORKING WOMAN, Nov. 1993, at 75.

[3] Steven Sass, *Just Compensation*, REGIONAL REV., Winter 1995, at 13. If the workers in the traditional setting had done more than their job description allowed, they would be encroaching on the responsibilities of a colleague. *Id.* Such an encroachment could make managers and employees alike feel that the position was unnecessary and someone could be out of a job. *Id.*

[4] Scheele, *supra* note 2, at 75.

[5] Karen Jacobs, *The Broad View: A new approach to pay scales gives employers greater flexibility*, WALL ST. J., Apr. 10, 1997, at R10.

[6] Sass, *supra* note 3, at 14. Employers are searching for employees with the most skills and a heightened ability to manage themselves. *Id.*

[7] Shari Caudron, *Mastering the Compensation Maze*, *at* http://www.workforce.com/archive/feature/22/18/22/index.php (last visited Apr. 3, 2003).

[8] Scheele, *supra* note 2, at 75.

traditional pay grades with a limited number of grades encompassing wider ranges.[9] While there is no succinct definition of broadbanding, the term refers to the clustering of jobs into wide groups in order to manage employee career growth and administer pay.[10] With the introduction of broadbanding, seniority may become an antiquated concept.[11] Instead employees will move through the wider ranges without "traditional promotions or job delineation."[12] The basic design of the new system includes an emphasis on employee empowerment and innovation, substantially fewer levels of management, wider pay ranges, fewer titles, horizontal orientation, shared decision-making, larger spans of control,[13] and a dual career track for professionals and management that maintains team orientation.[14]

Many large companies have implemented such a system. For example, according to a 1998 study, MetLife Auto & Home Insurance changed from 732 positions and twenty grades into fifty-one career bands,[15] in order to adapt to a system based on employee contribution.[16] Home Depot Inc. in Atlanta instituted broadbanding ten years ago, and Dow Jones & Co. in New York initiated a new system in July 2000.[17] Data General, the Westborough, Massachusetts computer maker, also adopted similar concepts in response to downsized departments plagued

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[9] *Broadbanding, at* www.compensationresources.com/Services/broad.html (last visited Jan. 15, 2003) [hereinafter cited as *Services Broadbanding*]; *see also* LRP PUBLICATIONS, *The President wants broadbanding—are you ready to meet the challenge?,* MANAGING TODAY'S FEDERAL EMPLOYEES (Oct. 2001) [hereinafter *President wants broadbanding*].

[10] Caudron, *supra* note 7; *see also* Heneman, *supra* note 1, at 142; Martin G. Wolf, *Compensation: An Overview, in* THE COMPENSATION HANDBOOK 41, 45 (Lance A. Berger & Dorothy R. Berger, eds. 2000); RICHARD L. HENDERSON, COMPENSATION MANAGEMENT IN A KNOWLEDGE-BASED WORLD 212 (2000).

[11] Sass, *supra* note 3, at 17.

[12] *Services Broadbanding, supra* note 9.

[13] Heneman, *supra* note 1, at 10.

[14] *Services Broadbanding, supra* note 9; *see also* Heneman, *supra* note 1, at 310 (explaining how team orientation involves various employees who work together on a cross-functional basis in order to complete special projects or other tasks).

[15] *See infra* notes 26-31 and accompanying text for an explanation of broadband structure.

[16] Wolf, *supra* note 10, at 47 (citing Lorenzo Sierra, *The Next Generation of Broadbanding,* ACA NEWS, Feb. 1998, at 23-24).

[17] Dawne Shand, *Broadbanding The IT Worker, at* http://www.computerworld.com/careertopics/careers/recruiting/story/0,10801,52055,00.html (last visited Oct. 9, 2000).

by excessive work and lack of staff;[18] restructuring was necessary, and produced new job descriptions with pay evaluations.[19] Aetna Life chose to switch to broadbanding to maintain its competitive edge, as well.[20] Their process involved identifying the major competencies needed by employees in order to create broad job-families, with about two hundred job families expected for the company's 42,000 employees.[21] According to a survey conducted by Hewitt Associates, LLC that included 413 Fortune 500 Companies, twenty-seven percent were using broadbanding for some employees, and another thirty percent were considering implementing the system.[22]

How exactly does such a system work? Consider as an example the possible career development of Jerri and Alex, two office workers.[23] Jerri works for a company which has not implemented broadbandingbut follows a more traditional approach.[24] Alex, on the other hand, works for a company that has a broadbanding compensation system. For Jerri to advance in the company, she has to go through many different positions, all with different job titles, descriptions, and pay ranges. For example, if Jerri wants to become an office assistant, she would start out at the entry-level as a receptionist. After being a receptionist for a period of time (sometimes months or years), and being paid at the respective pay range, Jerri may have the opportunity to advance to a secretarial position. Her job description would change along with her position, and she would be assigned to a different pay range. After adequately performing the specific duties assigned to her for another period of time (possibly several more months or years), Jerri may be promoted to office assistant. With this change in position, her

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[18] Sass, *supra* note 3, at 15-16.

[19] *Id.* The director of the company subsequently implemented broadbanding at Stride-Rite when he took a position there. *Id.*

[20] Shari Caudron, *Managers Make Pay Decisions Through Job Families Structure,* PERSONNEL J., June 1993, at 64G.

[21] *Id.*

[22] David W. Foote, *Taking Stock for Future Shock, at* http://www.cio.com/archive/010198/expert.html (last visited Jan. 1, 1998). A second survey showed a fifteen percent increase in the use of broadbanding between 1992 and 1997 among 1048 US companies. *Id.*

[23] These individuals are imaginary. Any resemblance to real persons is completely accidental. The examples are only created to serve as an illustration of broadbanding concepts.

[24] *See infra* notes 36-41 and accompanying text for a discussion of traditional pay structure.

corresponding duties and pay would change again. Jerri's progression is very job specific, and involves deliberate steps into new job titles and job descriptions. The associated incremental increases in pay tend to be as specific as the job titles themselves.

The broadbanding structure, however, takes a more consolidated approach to organization. In contrast to Jerri, Alex would begin as a technical worker. The title of technical worker would encompass all of the positions and job descriptions mentioned previously in the traditional structure, which is considered to be the *banding* of the structure. That is, broadbanding consolidates separate jobs into one broader category, or band. The technical band would consist of the job duties for receptionists, secretaries, and office assistants. Commensurately, the job titles used in the old system are dropped.[25] Instead, all the individuals are referred to as technical workers, and are expected to perform a larger spectrum of tasks. The individual distinctions dissolve, resulting in a wider pay range.[26] There is more overlap of pay amounts in this structure, and individuals have more opportunities to increase their pay without changing positions.[27] Within each of the bands there are different career stages that represent different pay amounts within the pay range. For example,[28] Alex would begin at career stage I,[29] which equates with a pay rate of approximately $12,000 annually.[30] As Alex gains more skill, performs more efficiently, and accepts more responsibility, he then may move to a classification II and a pay rate of about $23,000. If Alex successfully attains addition skills and knowledge based upon his job evaluations, then his pay may continue to increase until he tops out at the upper limit for his career band. Alex also may be offered a horizontal promotion. For example, Alex's manager may decide that a supervisor is needed in the office. If Alex accepts the job, he will move out of the technical

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25 This system allows pay to be more focused on the individual rather than tied to a specific job description.

26 *See, e.g.,* Heneman, *supra* note 1, at 142. For example, as many as nine pay ranges may be collapsed into three wider pay ranges, thus reducing the number of ranges and broadening the existing pay ranges. *Id.*

27 *Id.*

28 While the specifics of this example are contrived, for a general explanation see Hilary Belanger & Andrew S. Rosen *The Development of Salary Structures, in* THE COMPENSATION HANDBOOK 129, 134 (Lance A. Berger & Dorothy R. Berger, eds. 2000).

29 Career stage placement depends on an individual employee's skill level, which determines where an employee falls in the pay range.

30 Manager discretion and variability are determinants in the exact pay rate.

career band and into the supervisory band with its corresponding pay range of $15,000 to $60,000. Since Alex may not be as efficient at this job as his previous job, he may even initially take a pay cut; however, after gaining experience and knowledge he can advance just as he did in the previous career stage.

This *new* system was first introduced at the Naval Warfare Center in China Lake, California in 1980.[31] During this time federal agencies were experimenting with several new approaches to federal personnel management.[32] The main objective of the China Lake project was to increase the efficiency of the federal personnel system by simplifying the classification system and decreasing unnecessary bureaucratic tasks in order to provide a system that could be adopted by other government agencies.[33] Since the creation of the Navy's project, two other demonstration projects also were approved to test broadbanding.[34]

B. *Advantages and Disadvantages*

Arguably, traditional systems based on equity pay and seniority are no longer competitive. Traditional compensation structures are consistent with the hierarchy of the proverbial corporate ladder. Job classifications are narrowly defined and job descriptions are extremely specific.[35] Job titles are very important in this system and pay is strictly

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[31] *Demonstration Project by Subject, at* http://www.opm.gov/demos/Feat-Sub.pdf, (last visited Jan. 15, 1998).

> The purpose of the China Lake project was to demonstrate the effectiveness of Federal laboratories can be enhanced by developing an integrated approach to pay, performance appraisal, and classification; by allowing greater managerial control over personnel functions; and by expanding the opportunities available to employees through a more responsive flexible personnel system

Id. at 3.

[32] Brigitte W. Schay, et al., *Broadbanding in the Federal Government: Technical Report,* U.S. Office of Personnel Management (Dec. 1992). Title VI of the Civil Service Reform Act authorized the Office of Personnel Management to conduct these demonstration projects to discover ways to enhance the existing systems. *Id.* at 1.

[33] *Id.* at 3.

[34] Schay et al., *supra* note 32, at 2-3 (describing the NIST demonstration project and the Pacer Share demonstration which included about 1400 blue and white collar-workers in a broadbanding system).

[35] Belanger & Rosen, *supra* note 28, at 132.

tied to job title.[36] Pay is not the only thing attached to job title. Everything from promotional opportunities to supervisory responsibilities is linked to job title.[37] Such stratification-intensive job classification systems no longer work in the competitive business environment.[38] These systems limit employee productivity, persuading individuals to do only what is required of them rather than to take on extraneous responsibilities.[39] Traditional systems were more appropriate in the industrial business environment; however, with the advancement of the service industry and the information age, the focus has shifted from quantity to quality.[40] The new distinction has made job-based, traditional systems obsolete compared to skill-based systems such as broadbanding.[41] Broadbanding allows people to assume new responsibilities and to develop continuous learning skills.[42]

There are many advantages to broadbanding. Broadbanding reduces the emphasis on promotions and grades.[43] Therefore, excessive job titles and artificial classifications are eliminated.[44] This procedure can enhance employee motivation[45] since larger pay grades cause employees to focus less on titles.[46] As a result, employees concentrate on how to do their job well, rather than how to grab the next promotion. They have more incentive to go beyond the bounds of their traditional job descriptions and gain more skills.[47] Broadbanding also makes it easier to move people around within the organization.[48] While employees are still given opportunities to make career development

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36 Sass, *supra* note 3, at 15.

37 Caudron, *supra* note 20.

38 *Id.*

39 *Id.*

40 Caudron, *supra* note 7.

41 *Id.* (stating how well individuals perform is deemed to be more important that how well their jobs are defined).

42 *Career Banding-Advantages and Disadvantages at* http://www2.compensationnext.com/Article.cfm/Nav/1.0.0.0.13398 (last visited Apr. 8, 2001).

43 Belanger & Rosen, *supra* note 28, at 135.

44 Caudron, *supra* note 20.

45 *Services Broadbanding*, *supra* note 9.

46 Caudron, *supra* note 7. Hoyt Doyel, principal of Effective Compensation Inc. adds that if employees are in a narrow box, then they will want to get out of it. *Id.*

47 Heneman, *supra* note 1, at 143.

48 Caudron, *supra* note 7. *See also* Wolf, *supra* note 10, at 135.

moves,[49] these moves are often lateral ones.[50] In the past, individuals have been unwilling to take lateral promotions, much less downgrades, regardless of whether such a move would enhance their career.[51] Since cutbacks and the elimination of middle management have decreased the amount of jobs and promotional levels available, this type of horizontal career development has become a necessity.[52] Luckily, broadbanding has alleviated this need by collapsing the previously existing grades allowing people to develop by moving in unconventional ways.[53] Broadbanding assists in breaking down the focus on grades so that individuals are more willing to take the right job for the company and their careers, even if it involves a downward move.[54] In this new type of compensation system, movements are rewarded by the amount of value they add to the organization.[55] Therefore, any type of additional skill enhances an individual's value to an organization.[56]

Another advantage is the increase in cross-functional capabilities. Broadbanding dissolves barriers to teamwork and cooperation.[57] Since individuals are encouraged to gain new skills, team projects can be seen as promotional opportunities.[58] Broadbanding also provides a useful pay plan for organizations with team-orientation.[59] With the use of empowered teams, non-management workers are often given more authority.[60] With the reliance on employees to manage themselves, organizations are able to decrease management costs.[61] As employees become more skilled in different facets of the organization, they need

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49 Scott Hays, *Is Broadbanding Here to Stay? at* http://www.workforce.com/archive/feature/22/20/56/224173.php (visited Apr. 3, 2003).

50 Heneman, *supra* note 1, at 310.

51 Caudron, *supra* note 7.

52 *Id.*

53 Hays, *supra* note 49.

54 Caudron, *supra* note 7.

55 Heneman, *supra* note 1, at 310.

56 *Id.* Individuals may gain global experience by taking a lateral move to work on an international assignment or gain technical experience that may become necessary in a subsequent supervisory role by taking a downward move. *Id.*

57 Belanger & Rosen, *supra* note 28, at 135.

58 Heneman, *supra* note 1, at 310.

59 Henderson, *supra* note 10, at 369. New team members with less knowledge and skill can be placed at the low end of a pay band and can gradually increase through the band as they gain new knowledge, skills, and performance opportunities. *Id.*

60 *Id.*

61 *Services Broadbanding, supra* note 9.

less supervision; commensurately, the need for management decreases.[62] Since broadbanding focuses on core competencies, it also offers managers more latitude in rewarding individual contributions.[63] Employees are then more capable of receiving performance recognition.[64] The focus on skills and decentralization of management also makes companies better prepared to compete in the increasingly fast-paced business environment.[65]

Broadbanding also has disadvantages. The main disadvantage is the cost associated with implementation.[66] Since the maximum pay rates within each band are considerably higher than in traditional systems, costs of labor could rise dramatically.[67] The process of changing systems also is costly, since substantial amounts of money and time are required to restructure an organization.[68] While restructuring may be worthwhile, it is not right for all companies,[69] especially if the change is only superficial.[70] Also, broadbanding may not be compatible with the corporate culture of all organizations. Some organizations may not need to focus on career growth or cross lateral movements.[71] Others may just not have the mindset or resources needed to restructure.[72] Assigning pay grades to employees is also complex,[73] while a pay range structure is also more difficult to administer than the traditional single rate structures.[74] It is vital that a reliable and valid way to monitor individual contribution is established in order for a broadbanding system to function satisfactorily.[75]

Another potential problem with broadbanding is the effect that it may have on seniority. In skill-based compensation systems, firms are less likely to need an established seniority system to encourage workers

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62 Hays, *supra* note 49.

63 Heneman, *supra* note 1, at 142. Since bands overlap more, individuals in different bands have more opportunity to receive increases in pay. *Id.*

64 Wolf, *supra* note 10.

65 Jacobs, *supra* note 5, at R10.

66 Heneman, *supra* note 1, at 143. *See also* Wolf, *supra* note 10.

67 Henderson, *supra* note 10, at 370. *See also* Heneman, *supra* note 1, at 143.

68 *Services Broadbanding, supra* note 9.

69 Hays, *supra* note 49.

70 Belanger & Rosen, *supra* note 28, at 135.

71 Hays, *supra* note 49.

72 *Id.*

73 Henderson, *supra* note 10, at 213.

74 Heneman, *supra* note 1, at 143.

75 *Id.*

to invest in firm-specific training. This reality may cause a conflict with the interaction of skill-based pay and seniority.[76] Employees with high security needs and a focus on the practices of the traditional systems may suffer in the new environment.[77] In traditional systems seniority was used to indicate higher salary and superiority within organizations. With broadbanding, promotion is no longer linked to longevity.[78] The new focus on skill attainment may make it easier for younger works to advance while experienced senior workers may feel that they have nowhere to go. A young employee just hired could make as much, or even more, than someone who has been with the company for over ten years, which can cause dissent among employees. Nevertheless, long-term employees are not always more beneficial to the company than new, more skilled employees. Often, time with the company does not translate into higher productivity; however, if senior employees have the skill and knowledge needed to increase a company's competitive edge, then they will most likely be compensated accordingly.

Even though the systems are dissimilar, there are two possible links between broadbanding and skill-based pay. Some organizations consider broadbanding to be a type of skill-based pay, while others argue that it is only a new form of career development procedure rather than a novel compensation structure.[79] Many of those organizations that do not believe it includes skill-based pay, however, also choose to develop another form of competency or skill-based pay system.[80] In either instance as employees enhance their skills, knowledge, and abilities, they become more valuable to the company.[81] The company then promotes paying for the person and his or her skill, rather than the traditional strategy of paying for the job.[82] Movement is based on performance rather than longevity.[83]

The job evaluation system is integral in these types of compensation structures. Employers must decide what skills are most important, how to rate those skills, and how to associate increased pay

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76 William P. Curington, et al., *Labor Issues and Skill-Based Compensation Systems,* 37 LAB. L.J. 583 (1986).

77 Caudron, *supra* note 20.

78 *President wants broadbanding, supra* note 9.

79 Caudron, *supra* note 7.

80 Belanger & Rosen, *supra* note 28, at 134.

81 Wolf, *supra* note 10, at 132.

82 Foote, *supra* note 22.

83 *The President wants broadbanding, supra* note 9.

for the attainment of different abilities. One example can be seen from Northern Telecom's operation in the early 1990s.[84] All of the skills that Telecom found to be most important were listed in a *Skills Capability Record,* and each skill was assigned a point value. The skills were rated from two to forty, based upon the importance and difficulty of the skill, with forty being the most difficult to obtain. The points corresponded to salary ranges; as more skills were attained, more points were added, thus boosting an employee's position in the salary range.[85] Since the new system de-emphasizes seniority while promoting competency-based enhancement, it appears to be directed towards younger, vibrant workers who have recently finished degree programs. Older workers who have relied on consistency, stability and differentiated pay scales may very well be pushed to the side by the influx of *new blood.* Will broadbanding and competency-based pay systems place an unfair burden on older employees in the workforce?

III. Disparate Impact Discrimination

The Civil Rights Act of 1964 was created essentially to make segregation unlawful and to decrease the racism that was prevalent during the tumultuous 1960s. Title VII was enacted specifically to prohibit such discrimination in employment.[86] Title VII extended protection, not only to race, but also to specific protected classes including color, religion, sex, and national origin.[87] Congress intended

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[84] Caudron, *supra* note 20.

[85] *Id.* In applying these principles to the previous broadbanding example, consider Alex's position. Since Alex works for a company that uses broadbanding, the company would have a list of core competencies or skills that they valued. These skills integrate an emphasis on team-orientation, self-management, and constant attainment of new skills. During his employment evaluations, his superiors rate him on what new skills he has developed or what novel accomplishments he has contributed to the company. For example, if Alex's company was in the process of switching their computerized inventory system, then he could gain skill points for helping to implement it and learning how to use it. Another way Alex could gain points would be to participate in team projects. *See* Wolf, *supra* note 10, at 48 for a more in- depth example of competency ratings.

[86] Griggs v. Duke Power, 401 U.S. 424, 429 (1971). "The objective in enacting Title VII of the Civil Rights Act of 1964, which requires equal employment opportunities, was to achieve equality of employment opportunities and remove barriers which operated in the past to favor an identifiable group of white employers over other employees." *Id.* The Act extended protection to other protected classes other than race as well. *Id.*

[87] 42 U.S.C. § 2000e-2(a)(1)(2003). The Act covers employers whose business affects interstate commerce and who employ fifteen or more persons for twenty or more weeks a year. 42 U.S.C. § 2000e(b). Specifically, Title VII provides that:

to remove artificial, arbitrary, and unnecessary barriers to employment when those barriers operated invidiously to discriminate on the basis of race or other impermissible classification.[88] The theory of disparate impact was not initially cognizable under Title VII. It was recognized after the Supreme Court decision in *Griggs v. Duke Power Company.*[89] In *Griggs,* a group of African-American employees alleged that their employer, Duke Power, had violated Title VII by mandating a high school diploma requirement and an adequate intelligence test score to be eligible for a job.[90] The district court and the Court of Appeals for the Fourth Circuit held that unless a discriminatory purpose was evident, the diploma and test requirements were not unlawful.[91] The Supreme Court found that neither the diploma nor intelligence test requirements were accurate indicators of job performance.[92] Despite the fact that Duke Power may not have intended to discriminate,[93] the Supreme Court found that it could have been in violation of Title VII.[94] African Americans would have more difficulty obtaining a diploma and passing intelligence tests because of the inferior education African Americas received during segregation.[95]

Prior to *Griggs*, individuals could only successfully make a claim under Title VII if they could prove disparate treatment, which occurs when an employer treats a member of a protected class less favorably

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> [I]t 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 . . .

42 U.S.C. § 2000e-2(a)(1).

88 *Griggs*, 401 U.S. at 431.

89 *Id.* (prohibiting high school diploma requirement and intelligence testing on the grounds that it was not significantly related to job performance or success).

90 *Id.* at 427-28.

91 *Id.* at 428. The court of appeals did note that whites registered a lot better than African Americans on the requirements and that it was true that African Americans had received inferior education to whites because of segregation. *Id.*

92 *Id.* at 431. Individuals without the requirements performed just as well as those without a diploma or the stipulated intelligence score. *Id.*

93 *Id.* at 432.

94 *Griggs*, 401 U.S. at 428.

95 *Id.* The disparate impact theory was then officially added to Title VII through the amendments created by the Civil Rights Act of 1991. *See* Linda Greenhouse, *Supreme Court Hears Arguments on Major Issue in Age Bias Law,* N.Y. TIMES, Mar. 21, 2002, at A33.

because they are in that class.[96] Intent is a vital part of proving disparate treatment.[97] Disparate impact, on the other hand, extends the reach of liability claims available under Title VII. Disparate impact occurs when an employer's facially neutral employment practice more severely affects a protected class in fact or effect and cannot be explained by a business necessity.[98] It further protects individuals from practices that do not overtly discriminate and may be fair in form, but are discriminatory in operation.[99] Disparate impact does not focus on intent. The appearance of a fair intent or even the lack of discriminatory intent may not redeem employment procedures that are unrelated to job capability and create discrimination against protected groups.[100] This facet of the theory alleviates the burden of proof that must be met by the individual stating a claim. Intent can be difficult to prove and employers may be justifying insidiously discriminatory actions by claiming alternative motives. If those actions actually affect a protected class more harshly and the individual can establish a prima facie case,[101]

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96 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, 597 (1996).

97 McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In the absence of direct evidence of an intent to discriminate, the plaintiff may establish his case by circumstantial evidence according to a three stage, burden-shifting process. *Id.*; *see also* Tex. Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (describing the burden-shifiting process). For a prima facie discrimination case based upon disparate treatment, generally the employee must prove by circumstantial evidence that 1) s/he was a member of a protected class, 2) s/he suffered an unfavorable or adverse employment decision, 3) s/he was qualified to assume or retain the position, and 4) the employer did not treat race, gender, national origin, age or disability neutrally in making the decision. *McDonnell Douglas*, 411 U.S. at 802. Once established, these allegations create a rebuttable presumption that the employer violated the civil rights of the employee. *Id.* at 802-3. The burden then shifts to the defendant to establish a legitimate, nondiscriminatory reason for the adverse employment action, that is, that legitimate factors motivated it. *Id.* at 802. If the employer fails to establish a nondiscriminatory reason for the decision after the plaintiff-employee has established the prima facie case according to the trier of fact, then the court must enter judgment for the plaintiff. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

98 Saunders, *supra* note 96, at 596.

99 *Griggs*, 401 U.S at 431.

100 *Id.* at 432. "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Id.*

101 Watson v. Fort Worth Bank & Trust, 487 U.S 977, 994-95 (1988). In order to establish a prima facie case, the plaintiff must (1) identify the specific employment practice that is challenged, (2) show a disparate impact on one of the groups protected under Title VII and (3) show the existence of a causal relationship between the identified practice and

then disparate impact theory does not require that purposeful discrimination be proven. After the plaintiff establishes a prima facie case, then the burden of proof shifts to the employer to prove that their actions are based on a viable business necessity.[102] If the employer succeeds, then the individual must show that the employer could have used other practices that do not have a discriminatory effect, and can still serve the employer's legitimate interest in order to maintain their claim.[103]

IV. The Age Discrimination in Employment Act

A. *Background*

Although age was not included as a protected class in the Civil Rights Act of 1964, the Secretary of Labor reviewed the issue and concluded that it was common for employees to be discriminated against in the workplace because of age. Congress passed the ADEA as a result of that conclusion.[104] The stated purpose of the ADEA was "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."[105] The ADEA prohibits discrimination against individuals over the age of forty because of their age,[106] and also

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the disparate impact. *Id.*

[102] Ward Cove Packing Co. Inc. v. Antonio, 490 U.S 642 (1989). The burden of proof has fallen on different parties during the course of disparate impact recognition. *See Id.* at 659. (while employer must prove business necessity, the plaintiff must bear the final burden of persuasion). The Civil Rights Act of 1991 later changed the final burden, leaving it to the employer. *See* 42 U.S.C §2000e-2(k)(1)(A)(2003).

[103] Smith v. City of Des Moines, 99 F.3d 1466, 1473 (8th Cir. 1996).

[104] EEOC v. Wyoming, 460 U.S. 226 (1983). Congress passed the statute in an effort to eradicate arbitrary discrimination and negative stereotypes about the performance level of older workers. *Id.* The Act incorporates the anti-discrimination prohibitions of Title VII, while its remedial provisions incorporate by reference the provisions of the Fair Labor Standards Act of 1938. Lorillard v. Pons, 434 U.S. 575 (1978). It covers nonfederal employers engaged in interstate commerce which employ at least twenty non-seasonal employees, labor unions with at least twenty-five members or which operate as a hiring hall, employment agencies, state and local government employees in non-policy making positions and federal employees in certain sectors. 29 U.S.C. § 603 (2003).

[105] 29 U.S.C § 621(b)(2003).

[106] O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996). Although persons over forty are in the protected class, the Supreme Court has held that a covered employee who was replaced by another member of the protected class, that is a worker over forty years old,

prohibits covered entities from depriving individuals of employment opportunities or taking any other adverse action against such individuals because of their age.[107]

Prior to 1993, some circuit courts seemed willing to apply the disparate impact theory to the ADEA;[108] however, after *Hazen v. Biggins*[109] that trend began to change. Walter F. Biggins worked for Hazen Paper as a technical engineer from 1977 until his firing in 1986.[110] A few weeks before his pension benefits would have vested, he was fired.[111] Biggins claimed that his age was a determining factor in the decision to fire him, but Hazen contended that he was fired for doing business with competitors.[112] The Court of Appeals for the First Circuit upheld the company's liability under the ADEA, stating that a jury could have found that the company decided to fire Biggins before he could receive his pension rights and that age was "inextricably intertwined" since his pension rights would not have been so close to vesting if it were not for his age.[113] The Supreme Court vacated the judgment, however, clarifying that disparate treatment does not automatically occur when the employer's motivation is a component other than age, even if the component is correlated.[114] Although *Hazen*

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nevertheless can still establish that the termination decision was based upon age discrimination. *Id.*

[107] 29 U.S.C. § 623 (2003). Specifically, the ADEA makes it unlawful for a covered employer

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623 (a)(1)-(3) (2003).

[108] *See, e.g.*, EEOC v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984) (applying disparate impact theory to severance pay policy); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983) (affirming disparate impact and rejecting employee selection plan); Maresco v. Evans Chemetics, 964 F.2d 106 (2d Cir. 1992) (stating that disparate impact theory can be invoked to establish ADEA liability).

[109] 507 U.S. 604 (1993).

[110] *Id.* at 606.

[111] *Id.*

[112] *Id.*

[113] *Id.* at 607.

[114] *Id.* at 609.

v. Biggins was actually a disparate treatment[115] case, the Court appeared to address disparate impact in *dicta*.[116] Delivering the opinion of the Court, Justice O'Connor addressed the fact that the courts have never decided whether or not the disparate impact theory of liability is available under the ADEA.[117] She also stated, however, "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age. . ."[118] This comment would tend to suggest that the disparate impact theory of discrimination is inapplicable to the ADEA.[119] Justice Kennedy also asserted that the link between Title VII and the ADEA is not strong enough to ensure the application of disparate impact analysis.[120]

B. *Controversy Among the Circuit Courts*

Since *Hazen*, there has been considerable vacillation among the lower courts in their reasoning both for and against the application of the disparate impact theory to the ADEA,[121] as well as by legal commentators.[122] The First Circuit addressed the issue in *Mullin v.*

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[115] *See supra* notes 96-97 and accompanying text for description of disparate treatment discrimination.

[116] *Hazen*, 507 U.S. at 611.

[117] *Id.* at 610.

[118] *Id.* at 611.

[119] *See* Mullin v. Raytheon, 164 F.3d 696, 700-01 (1st Cir. 1999), *cert. denied* 528 U.S. 811 (1981). The court in *Mullin* concludes that disparate impact claims are indicative of the exact scenario Justice O'Connor describes. *Id.* "[T]he inescapable implication of her statements is that the imposition of disparate impact liability would not address the evils that Congress was attempting to purge when it enacted the ADEA." *Id.*

[120] *Hazen*, 507 U.S. at 618.

[121] The First, Seventh and Tenth circuits completely reject disparate impact claims pertaining to age discrimination. *See* Mullin, 164 F.3d at 705; Ellis v. United Airlines, 73 F.3d 999 (10th Cir. 1996); EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994). The Third and Sixth circuits also consider it doubtful that disparate impact is a viable theory of liability under the ADEA. *See* DiBiase v. Smithkline Beecham, 48 F.3d 719, 731(3d Cir. 1995); Lyon v. Ohio Education Association, 53 F.3d 135 (6th Cir. 1995). The Second, Eighth and Ninth Circuits recognize the viability of disparate impact theory, however. *See* Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980); Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996); EEOC v. Borden, 724 F.2d 1390 (9th Cir. 1983). The Fourth, Fifth, and D.C. Circuits have not addressed the issue.

[122] *See, e.g.*, Pamela Perry, *Two Faces of Disparate Impact Discrimination,* 59 FORDHAM L. REV. 523 (1991); Kyle C. Barrentine, Comment, *Disparate Impact and the ADEA: A Means to an End or Justice?*, 27 CUMB. L. REV. 1245 (1996); Miles F. Archer, Note, *Mullin v. Raytheon Company: The Threatened Vitality of Disparate Impact under the*

Raytheon.[123] William Mullin began employment with Raytheon Company in 1967. During his years at the company, his job descriptions varied.[124] Raytheon's salary classifications were based on grades that were tied to salary ranges.[125] Mullin was at grade 15 in 1995 and had achieved that level in 1979.[126] In 1994 and 1995, the defense industry suffered cutbacks and Raytheon underwent major restructuring.[127] After restructuring, Mullin was demoted to Manufacturing Program Manager, which was a grade 12 position.[128] Mullin then sued claiming that the downgrade and salary reduction were indicative of age discrimination.[129] Referring to the plaintiff's disparate impact claim, the district court recognized the controversy surrounding the issue.[130] Although the court assumed that disparate impact theory was applicable under the ADEA, it concluded that the evidence failed to substantiate Mullen's claims.[131]

ADEA, 52 ME. L. REV. 149 (2000); Brett Ira Johnson, *Six of One, Half-dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing the ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303 (2000); Peter Reed Corbin & John E. Duvall, *Employment Discrimination*, 53 MERCER L. REV. 1367 (2002); Saunders, *supra* note 100; Roberta Sue Alexander, Comment, *The Future of Disparate Impact Analysis for Age Discrimination in a Post-Hazen Paper World*, 25 DAYTON L. REV. 75 (1999).

123 Mullin v. Raytheon, 2 F. Supp. 2d 165 (D. Mass. 1998).

124 *Id.* at 167. From November 1979 to November 1986, Mullins held the title of Manufacturing Operations Manager and supervised over 2,000 employees in Andover, Massachusetts. *Id.* In 1986, he maintained the same title but was transferred to the Lowell Massachusetts plant where he was supervisor of about 400 employees. *Id.* Starting sometime in 1991, Mullin moved through a series of positions with little or no supervising responsibilities. *Id.* Finally in 1994, he became a troubleshooter, who supervised between 55 and 85 employees. *Id.*

125 *Id.* at 166-167. These grades were numbered 4 to 18 and each grade signified a specific salary range. *Id.* It was possible for employees to change grades without changing salaries, or vice-versa, in certain situations. *Id.* This set up appears to be similar to a broadbanding structure. Correlating the pay ranges based on criteria such as complexity of work could also support relation to broadbanding or other skill-based systems. *Id.*

126 *Id.* at 167.

127 *Id.* The restructuring included plant closings, salary freezes, and consolidations resulting in lay offs and reassignments for many employees, neither of which happened to Mullin. *Id.* During these processes, Raytheon analyzed the correlation between pay grades and job descriptions for the remaining employees. *Id.*

128 *Id.* Mullin was offered the maximum salary for a grade 12 position. *Id.*

129 *Mullin*, 2 F. Supp. 2d at *177*. Plaintiff felt that Raytheon chose to demote him rather than to reassign him to a position that would maintain his previous salary classification. *Id.*

130 *Id.* at 172 nn. 4-5.

131 *Id.* at 174. While the court concluded that Mullin satisfied the first two elements of a prima facie claim, he did not adequately show a "statistically measurable disparity between

The court of appeals responded more directly to the question of the applicability of disparate impact theory.[132] After analyzing the *Hazen* decision, the First Circuit denied the application of disparate impact claims under the ADEA based on three considerations: the text and structure of the ADEA, the legislative history of the Act, and the amendments created under the Civil Rights Act of 1991.[133] With respect to the text and structure, the appeals court analogized the ADEA to the Equal Pay Act.[134] The court also gave credence to the fact that Congress did not include age among the protected classes mentioned in Title VII.[135] The Secretary of Labor's report differentiated between arbitrary age discrimination and other procedures that have disproportionate effects on older workers.[136] The court held that the differentiation implied that Congress statutorily prohibits only intentional discrimination concerning age.[137] Further, Congress failed to add disparate impact to the ADEA at the time when it was simultaneously amending Title VII to specifically include the term.[138] Despite the fact that the ADEA mirrored Title VII in most respects, the First Circuit noted the structural discrepancy as a discrete, yet substantial one.[139] Citing *Allen v. Dibold, Inc,*[140] the court concluded 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,

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older and younger workers." *Id.* For that reason, summary judgment was granted to the defendants. *Id.*

132 Mullin v. Raytheon, 164 F.3d 696, 700 (1stCir. 1999).

133 *Id.* at 701-704.

134 *Id.* at 701-702. The Equal Pay Act was created to prohibit wage discrimination based on sex. *Id.* The Act specifically prohibits establishments from paying men and women different wages if they are working under similar working conditions. *See* 29 U.S.C. § 206(d) (2003).

135 *Mullin*, 164 F.3d at 702-703.

136 *Id.* at 703. Arbitrary discrimination mirrors disparate treatment while disproportionate effects indicate disparate impact claims. *Id.* "[The report] recommended that arbitrary discrimination be statutorily prohibited, but that systemic disadvantages incidentally afflicting older workers be addressed through educational programs and institutional restructuring." *Id.*

137 *Id.*

138 *Id.* at 703. "Congress' insertion of an express provision for a disparate impact cause of action in Title VII renders the absence of such a provision in the ADEA—which was undergoing revision at the same time by the same committees and in the same bill—highly significant." *Id.*

139 *Id.*

140 33 F.3d 674, 677 (6th6th Cir. 1994).

and relocations."[141]

In *EEOC v. Francis W. Parker School*[142] the EEOC alleged that the school's decision to set a low maximum salary limit for hiring a new drama teacher, excluded a disproportionate number of applicants over the age of forty.[143] In response to a faculty member's departure, the head of the department, Paul Durinsky, was put in charge of finding a replacement.[144] The principal informed Durinsky that because of budget constraints the annual salary for the new hire could not exceed $28,000.[145] After announcing the three finalists for the position, Durinsky was asked to review the resume of Harold Johnson.[146] Among other reasons, Johnson was denied the job because Parker could not afford the salary of someone with Johnson's qualifications.[147] The EEOC claimed that there was a statistically significant correlation between age and work experience;[148] however, as recognized in *Hazen v. Biggins*, age and years of service, or as in this case, work experience are analytically distinct, so one can be analyzed without taking the other into account.[149] The ADEA also provides a safe harbor[150] provision that allows employers to use a bona fide seniority system.[151] The Seventh Circuit used *Hazen* and its own reading of the ADEA[152] to conclude

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141 *Mullin*, 164 F.3d at 703. The court held that the ADEA does not offer a disparate impact theory and the district court's grant for summary judgment in favor of the defendants was affirmed. *Id.*

142 41 F.3d 1073 (7th Cir. 1994).

143 *Id.* at 1076. No business justification was suggested in defense of the process. *Id.*

144 *Id.* at 1075.

145 *Id.*

146 *Id.* Johnson was sixty-three at the time and claimed to have thirty years of experience. *Id.*

147 *Id.* Parker utilized a twenty-two-step salary system that linked salary to work experience. *Id.*

148 *Francis W. Parker School,* 41 F.3d at 1075.

149 *Hazen*, 507 U.S. at 611. "[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." *Id.* The plaintiff must prove that the alternative reason was merely a pretext for an underlying stereotype-based rationale. *Id.*; *see also* Anderson v. Baxter, 13 F.3d 1120 (7th Cir. 1994).

150 29 U.S.C. §623 (f)(2) (2003). The safe harbor provision under the ADEA allows age to be a consideration in employment decisions if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age," or where compliance might otherwise violate the laws of the host country. *Id.*

151 *Francis W. Parker School*, 41 F.3d at 1078, *citing* the ADEA 29 U.S.C. § 623(f)(2).

152 29 U.S.C. §623(f) (2003). The Act provides that "[i]t shall not be unlawful for an

"that decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited."[153] In dissent, Judge Cudahy suggested that disparate impact analysis should be allowed to proceed in order to determine if some adverse action did arise from stereotypical misconceptions about older workers.[154] He warned that discrimination is not always overt and outwardly apparent.[155] He contended that the ADEA codified the business necessity defense rather than precluded disparate impact availability,[156] and provided a loophole for employers to exclude older job applicants from lower-level jobs by claiming they are entitled to earn a higher salary.[157]

In *Ellis v. United Airlines, Inc.*[158] Crist Ellis and Norma Wong-Larkin sued after they were denied employment multiple times because of their inability to meet United Airlines weight requirements for flight attendants.[159] Plaintiffs filed a claim based on the ADEA.[160] The district court assumed that the disparate impact theory was available; however, the claim was not successful because plaintiffs had not produced sufficient evidence to establish liability.[161] On appeal, the Tenth Circuit scrutinized the applicability of disparate impact theory to ADEA claims[162] and resolved the issue within the circuit.[163] The court compared the wording of the ADEA and the Equal Pay Act,[164] which both

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employer, employment agency or labor organization (1) to take any action otherwise prohibited under subsection (a). . .of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." *Id.*

153 *Francis W. Parker School*, 41 F.3d at 1077. *See also Anderson*, 13 F.3d at 1120.

154 *Francis W. Parker School*, 41 F.3d at 1080. Justice Cudahy does not believe it is appropriate for the court to assume that denying Johnson a position had nothing to do with age. *Id.*

155 *Id.* "[Discrimination] is sometimes subtle and hidden. It is even at times hidden even from the decision maker herself, reflecting perhaps subconscious predilections and stereotypes." *Id.*

156 *Id.*

157 *Id.* at 1081.

158 73 F.3d 999 (10th Cir. 1996).

159 *Id.* at 1001.

160 *Id.* at 1000. Claims were also filed under the Airline Deregulation Act. *Id.*

161 *Id.*

162 *Id.* at 1006-1007.

163 *Id.* at 1007, *citing* Faulkner v. Super Value Stores, Inc., 3 F.3d 1419, 1428 (10th Cir. 1993), for the proposition indicating that the Tenth Circuit had yet to resolve the issue. *Id.*

164 *Ellis*, 73 F.3d at 1008.

appeared to offer an exemption if the differentiation is based on any reasonable factor other than age or sex respectively.[165] The appeals court relied on similar interpretations by other courts and the legislative history as discussed in *Mullin* to conclude that ADEA claims cannot be based on a disparate impact theory of discrimination.[166]

Representing the minority view in the controversy, the Eighth Circuit recognized the viability of disparate impact theory in *Smith v. City of Des Moines*.[167] Smith had been employed by the Des Moines Fire Department for thirty-three years before his dismissal.[168] In 1988, however, the city instituted testing policies measuring the ability to perform while wearing a self-contained breathing apparatus.[169] After failing to pass a series of tests, the department put Smith on sick leave and offered to allow him to remain on leave until he reached retirement eligibility.[170] When Smith failed to file for retirement when it was available to him, the city discharged him because of his failure to meet certain physical fitness standards.[171] Upon hearing Smith's claim, the district court held that the city had established an adequate business necessity defense because of the strenuous physical labor firefighters must endure.[172] On appeal, the Eight Circuit addressed the issue of disparate impact.[173] Rather than rely on the dicta in *Hazen*, the Eighth Circuit relied on previous rulings,[174] which fortified the continued

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165 *Id.* (*comparing* 29 U.S.C. § 623 (f) *with* 29 U.S.C. § 206(d)(1)).

166 *Id.* at 1001.

167 99 F.3d 1466 (8th Cir. 1996).

168 *Id.* at 1467.

169 *Id.* The court noted that "[e]ach firefighter underwent spirometry testing, which gauges pulmonary function by measuring the capacity of the lungs to exhale. Any firefighter whose forced expiratory volume in one second (FEV1) exceeded 70% of lung capacity was approved to wear a SCBA. If a firefighter scored less than 70%, he or she was required to take a maximum exercise stress test, which measures the capacity of the body to use oxygen effectively. The city required firefighters 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.*

170 *Id.* The physicians agreed that Smith was physically able to perform his duties as a firefighter. *Id.* This conclusion destroyed Smith's application for disability retirement. *Id.*

171 *Id.*

172 *Id.* The court simply assumed that Smith could meet the criteria for proofing disparate impact. *Id.*

173 *Smith*, 99 F.3d at 1469.

174 *See, e.g.*, Houghton v. SIPCO, Inc., 38 F.3d 953 (8th Cir. 1994); Nolting v. Yellow Freight Sys., Inc., 799 F.2d 1192 (8th Cir. 1986); Leftwich v. Harris-Stowe State Coll., 702 F.2d 686 (8th Cir. 1983).

recognition of disparate impact claims within that jurisdiction.[175] The court further assumed that Title VII parallelism extends beyond establishing a business necessity, if the plaintiff can show a nondiscriminatory alternative that serves the employer's legitimate interest.[176] While Smith did not succeed in his disparate impact claim because of the specific facts of his case,[177] the Eight Circuit's willingness to continue the application of disparate impact theory gives hope to those advocating the theory's application.

Over a decade before *Hazen v. Biggins* was decided, the Second Circuit addressed the issue of disparate impact claims under the ADEA in *Geller v. Markham*.[178] Geller filed her claim under the ADEA after being replaced by a twenty-five-year-old woman.[179] Geller's main allegation was that the West Hartford Board of Education was using a discriminatory cost-cutting policy, the "Sixth Step Policy."[180] Geller presented strong statistical evidence to fortify her argument.[181] Based on her statistical evidence and witness testimony that the "Sixth Step Policy"had instigated her replacement, Judge Blumenfeld concluded that, as a matter of law, the "Sixth Step Policy" was discriminatory.[182] He then left it to the jury to decide whether or not the application of the discriminatory practice had made a difference in the decision to replace Geller with a younger woman.[183] According to the court, Geller

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175 *Smith*, 99 F.3d at 1470 (stating that the Eighth Circuit will continue to follow the same analysis because of the lack of a "clear indication" that Houghton has been overruled).

176 *Id.* at 1473. Smith did not succeed on this point because it appeared that he had not argued the point in front of the district court and his proposed alternative did not persuasively show that it would have less disparate impact on older firefighters that the current system. *Id.*

177 *Id.* at 1472. The city successfully showed the correlation between physical fitness and job relatedness and furthered its cause by offering evidence of the carefully developed standards used to gauge physical fitness. *See id.* at 1473.

178 635 F.2d 1027 (2d Cir. 1980).

179 *Id.* at 1029. Geller began teaching on September 7 and was replaced by the younger woman who had not even applied for the position until September 10. *Id.*

180 *Id.* at 1030. The superintendent stated in the budget that with the exception of "special situations" the new teaching hires would be recruited from levels below the sixth step of the salary schedule. *Id.* The sixth step consisted of teachers with more than five years' experience. *Id.*

181 *Id.* Expert statistical testimony claimed that 92.6% of Connecticut teachers between 40 and 65 have more than 5 years experience, but only 62% of teachers under 40 have taught as much. *Id.* The statistics were over 600 times the level generally used for statistical significance. *Id.* at 1033.

182 *Id.*

183 *Id.* at 1031. The court observed: "There could have been more than on reason for

established a prima facie case, and the defendants failed to maintain a persuasive defense.[184] While the Supreme Court denied certiorari in the case,[185] Justice Rehnquist, who dissented from that denial, asserted that

> [T]he decision of the Court of Appeals is inconsistent with the express provisions of the ADEA and is not supported by any prior decision of this Court. . .This Court has never held that proof of discriminatory impact can establish a violation of the ADEA, and it certainly has never sanctioned a finding of a violation where the statistical evidence revealed that a policy, neutral on its face, has such a significant impact on all candidates concerned, not simply the protected age group.[186]

Notwithstanding that admonition, the Second Circuit continued to apply the disparate impact theory to claims in the early 1990s.[187]

Although not deciding the issue, the Sixth Circuit also addressed it in *Lyon v. Ohio Education Association.*[188] James Lyon sued the Ohio Education Association (OEA) and the Profession Staff Union based on the challenge that an early retirement provision of the Association, referred to as Option B, violated the ADEA.[189] Lyon contended that the policy in question allowed younger employees who take early retirement to receive a higher pension amount than older workers with the same length of service.[190] The district court granted summary judgment to the defendants concluding that no prima facie case had

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defendant's decision about [Geller's] employment but she is nevertheless entitled to recover if one factor was her [age] and if it made a difference in determining whether she would be employed. If it did not make any difference, if it was not a reason that entered into the decision, then of course she has not proved her case. But if it did, then she has." *Id.*

184 *Geller*, 635 F.2d at 1033 (affirming defendant's liability subject to disparate impact and disparate treatment theories).

185 Markham v. Geller, 451 U.S. 945 (1981).

186 *Id.* at 948.

187 *See, e.g.*, Maresco v. Chemetics, 964 F.2d 106 (2d Cir. 1992) (disparate impact doctrine, developed under Title VII, is also applicable to cases under the ADEA).

188 53 F.3d 135 (6th Cir. 1995).

189 *Id.* at 136. Sixteen of his co-workers later joined the suit. *Id.*

190 *Id.* at 137. The contention is based on the mathematical equations used to determine benefits. *Id.* "Option B assumes that early retirees had worked until age 62, [r]equiring OEA to impute the necessary years of service to each early retiree based on their present age. If a 56-year old employee with 21 years of experience selected Option B, the plan treats the employee as if she had worked six additional years: the worker would receive [(21 years worked) + (62-56) years imputed] x 2% = 62% of A[verage Monthly Compensation]. A younger employee with 21 the same experience would receive a larger benefit: a 52-year old who also had worked 21 years would receive [(21 years worked) + (62-52) years imputed] x 2% = 62% A[verage Monthly Compensation]." *Id.*

been established for disparate treatment.[191] It also concluded that Option B was a lawful early retirement incentive sanctioned under the ADEA.[192] The appeals court asserted that the plaintiffs failed to establish a prima facie case of either disparate treatment or disparate impact.[193] Nevertheless, the Sixth Circuit did comment that *Hazen* cast considerable doubt concerning the disparate impact theory's application to age claims.[194]

The Third Circuit, while failing to resolve the issue, reached the same conclusion concerning the viability of the theory. In *Dibiase v. SmithKline Beecham*[195] John Dibiase claimed that SmithKline fired him because of his age and also on the grounds that higher requirements were instituted for individuals over forty to receive the same additional separation benefits as younger workers.[196] As a result of extensive consolidation and employee reductions, SmithKline consequently laid off some of its employees.[197] The employees were offered a special separation benefit plan for individuals willing to sign a release of all claims, which included claims under the ADEA.[198] The district court concluded that since individuals under forty could not state claims under the ADEA, the employees over forty who signed the release were giving up more than the younger workers.[199] On appeal, the Third Circuit affirmed the disparate treatment claim, but rejected the district court's conclusion that it could assume disparate impact because of its disparate treatment analysis.[200] The court further stated that *Hazen* casts

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191 *Id.*

192 *Id.* Specifically, the court concluded that the plan was sanctioned by 29 U.S.C § 623 (f)(2)(B)(ii) (2003). *Id.*

193 *Id.* at 139 (citing Allen v. Diebold, 33 F.3d 674, 677 (6th Cir. 1994) (stating that plaintiffs must allege discrimination because they were old, not because they were expensive)). The plaintiffs, however, did state that their claim was not one of disparate impact because the provision was not age-neutral; therefore, the application of disparate impact was not in question. *Id* at 138.

194 *Id.* at 140 n.5. The court also mentions that the Sixth Circuit has deemed disparate impact age discrimination to be possible in Abbott v. Federal Forge, 912 F.2d 867 (6th Cir. 1990). *Id.*

195 48 F.3d 719 (3d Cir. 1995).

196 Dibiase v. SmithKline Beecham, 48 F.3d 719 (3d Cir. 1995).

197 *Id.* at 722.

198 *Id.*

199 *Id.* at 726. The claim was disparate treatment because it treated older individuals less favorable than younger ones. *Id.*

200 *Id* at 732.

doubt on the viability of disparate impact theory under the ADEA.[201] In one of its previous cases, *MacNamara v. Korean Air Lines*,[202] the court had implied that disparate impact could be shown under ADEA claims.[203] However, the case concerned a national origin claim under Title VII.[204] The statement concerning the ADEA was only *dicta,* which the subsequent decision in *Hazen* supplanted.[205] The court of appeals did not expressly conclude that disparate impact was unavailable under the ADEA, but it did entertain serious doubts about the applicability of the theory.[206]

Like the Second Circuit, the Ninth Circuit addressed the issue quite some time before *Hazen* in *EEOC v. Borden.*[207] Upon closing its Phoenix, Arizona plant, Borden fired almost all of its employees.[208] The discharged employees were offered a severance package, but the employees eligible for retirement were not entitled to the package.[209] The EEOC filed a claim against Borden for this action under the ADEA.[210] The district court found that the severance pay policy did have a discriminatory impact on older workers and that it was not a bona fide employee benefit plan.[211] The defendants did not deny that they refused to give severance pay to all of its 16 employees age 55 and older. However, they claimed that the disparate impact theory of recovery was not available under the ADEA.[212] The court of appeals

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201 *Id.*

202 863 F.2d 1135 (3d Cir. 1988).

203 Dibiase v. SmithKline Beecham, 48 F.3d 719, 732 (3d Cir. 1995), *citing* MacNamara v. Korean Air Lines, 863 F.2d 1135, 1148 (3d Cir. 1988). "Title VII and ADEA liability can be found where facially neutral employment practices have a discriminatory effect or disparate impact on protected groups, without proof that the employer adopted these practices with a discriminatory motive." *Id.*

204 *Id.* at 734.

205 *Id.*

206 *Id.* The court ruled that even if disparate impact claims were available in some situations, the case at hand was not one of them. *Id.*

207 724 F.2d 1390 (9th Cir. 1984).

208 *Id.* at 1391.

209 *Id.*

210 *Id.* at 1392.

211 *Id.* Under (ADEA) 29 U.S.C § 623(f)(2) a bona fide employee benefit plan must (1) be the type of "plan" covered by the section, (2) be bona fide, meaning the plan exists and pays substantial benefits, (3) be in observance of the plan and (4) must not be a subterfuge to evade the purposes of the act. *Id.* The court found that the pay policy was not a plan, thus failing to comply with § 623(f)(2). *Id.*

212 *Id.* at 1395.

disagreed, stating that the similarities between Title VII and the ADEA[213] allow disparate impact claims under the ADEA.[214]

The Eleventh Circuit addressed the disparate impact controversy most recently in *Adams v. Florida Power Corp.*[215] After the Energy Policy Act of 1992 opened the power industry to competitors, Florida Power could no longer be a monopoly.[216] Allegedly because of this extreme change in market structure, reorganization was an unavoidable business necessity to maintain competitiveness.[217] During a series of reorganizations, Wanda Adams and several other individuals were terminated between 1992 and 1996.[218] These individuals then sued on the basis of age discrimination.[219] The district court concluded as a matter of law that disparate impact theory was unavailable under the ADEA.[220] However, because of the controversy among the circuits, the district court certified the question to the court of appeals.[221] Upon review, the Eleventh Circuit first examined the statutory language.[222] It found that while the language of the ADEA is similar to Title VII,[223] it was distinguishable enough to question extending the disparate impact theory to ADEA cases.[224] First, the ADEA provides that an employer may "take any action otherwise prohibited. . .where the differentiation is based on reasonable factors other than age."[225] Second, the similarity in

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213 *Borden*, 724 F.2d at 1394. The court relied on similar language, structure, purpose, and analytic problems posed in interpretation to validate the carry over. *Id.*

214 *Id.*

215 255 F.3d 1322 (11th Cir. 2001).

216 *Id.* at 1323.

217 *Id.*

218 *Id.*

219 *Id.*

220 *Id.* at 1324 n.2. It also found that the disparate treatment claims were not similar enough to pursue as a class. *See Adams*, 255 F.3d at 1324 n.2.

221 *Adams*, 255 F.3d at 1323-1324. The court was asked to decide only if, as a matter of law, disparate impact claims could be brought under the ADEA. *Id.*

222 *Id.* at 1324. "Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said." *Id.* (citing United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998)).

223 *Compare* 29 U.S.C § 623(a)(1)(2003) *with* 42 U.S.C. § 2000e-2 (a)(1)(2003). The language is parallel and the sections prohibiting discrimination are almost identical.

224 *Adams*, 255 F.3d at 1322.

225 *Id.* (citing 29 U.S.C § 623 (f)(1) (2003)). The First Circuit addressed the distinction in *Mullin* when it reasoned that, if the ADEA was not meant to exclude disparate impact theory, then it created a circular construction. *Id.* (citing Mullin, 164 F.3d at 702: "if the exception contained in 29 U.S.C § 623(f)(1) is not understood to preclude disparate impact

statutory language of the Equal Pay Act and the ADEA[226] suggests that since disparate impact theory is not available under the Equal Pay Act, it is not available under the ADEA.[227] The court also observed the differences in the legislative history set forth in *Mullin* and *Ellis* as well.[228] The court found the reasoning in those cases to be most persuasive and concluded in conjunction that disparate impact claims are not available under the ADEA.[229]

In her concurring opinion Judge Barkett, however, asserted that the availability of disparate impact as a theory of recovery for discrimination should be decided on a case-by-case basis rather than denied generally on the inconclusive basis of *Hazen*.[230] Since disparate impact liability could be proven and applied in certain cases, it should not be determined as a matter of law that disparate impact cannot be applied to the ADEA.[231] She noted that the Supreme Court admitted that it did not consider a situation where pension status was based on age rather than years of service.[232] Since the purpose of the ADEA is to help eradicate age discrimination based on stereotypes, she reasoned that disparate impact offered a feasible way for protected individuals to prove discrimination when motive or intent is difficult to prove.[233] Judge Barkett considered the "reasonable factors other than age clause" of the ADEA to be a statutory description of the business necessity defense, and concluded that individual claimants should be allowed to prove whether or not disparate impact theory applied based on individual facts.[234]

The Supreme Court had an opportunity to settle this controversial

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liability, it becomes nothing more than a bromide to the effect that "only age discrimination is age discrimination").

226 *Id.*, (citing 29 U.S.C § 206 (d)(1)(iv)), which states that wage discrimination is not prohibited if the differential is based on any factor other than sex.

227 *Id.* The court does note that the Equal Pay Act does not require the other factor to be a reasonable one as the ADEA does. *Id. Compare* 29 U.S.C § 206 (d)(1)(iv) *with* 29 U.S.C § 623(f)(1).

228 *Adams*, 255 F.3d at 1325.

229 *Id.* at 1326.

230 *Id.*

231 *Id.*

232 *Id.* at 1330, *citing* Hazen, 507 U.S. at 613.

233 *Id.* at 1327.

234 *Adams*, 255 F.3d at 1326. She also noted that the EEOC interpretive guidelines suggest that the clause corresponds with the business necessity defense in Title VII. *Id. See also* 29 C.F.R. § 1625.7 (2000).

issue in *Adams v. Florida Power Corp.*[235] However, the Court dismissed the case after hearing oral arguments, determining that certiorari had been improvidently granted.[236] By dismissing the case, the Supreme Court left the issue unsolved and the venue for debate open. As a result, many employers may continue to employ business procedures that adversely affect older workers under the guise of unintentional discrimination, and pursue the maximization of corporate capital, at the possible expense of human capital.

V. Implications for Broadbanding

It is yet unsettled as to whether or not the disparate impact theory of discrimination is applicable to the ADEA, even though disparate impact actions have long been recognized under Title VII. Without the application of disparate impact, the ADEA may fail its original purpose of protecting older workers from the damaging effects of discrimination.[237] If the Supreme Court eventually rules that disparate impact theory is not available under the ADEA, that decision will have far-reaching consequences for an aging workforce.[238] Alternatively, if it is recognized as a viable theory of recovery, then that recognition could have an effect on those companies that have instituted broadbanding or other skill-based compensation systems.

The point systems used in broadbanding and other types of skill-based pay can be very ambiguous and hard to devise.[239] For that reason, a major concern with these types of systems is the risk of legal action given that the rated criteria are more subjective. If plans are not well developed and scrutinized, then they may be challenged under the proposition that they illegally discriminate against protected groups, including older workers.[240] Subjectivity in employment decisions inherently tends to breed litigation. If compensation is to be based on skill development and enhancement, it is crucial for employers to be

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235 255 F. 3d at 1322.

236 Adams v. Florida Power Corp., 535 U.S. 228 (2002). *See also* Jon Krause, *Age discrimination may be the next frontier for employers,* NAT'L L.J., Apr. 2002, at A29.

237 Peter Kuperstein, *Elder Law—The Unprotective ADEA: Disparate Impact Theory Inapplicable to the ADEA,* 30 SUFFOLK U. L. REV. 1253, 1259 (1997).

238 Alexander, *supra* note 122, at 76.

239 *Services Broadbanding, supra* note 9.

240 Gerald E. Ledford, Jr. & Robert L. Heneman, *Pay for Skills, Knowledge and Competencies, in* THE COMPENSATION HANDBOOK 143, 147 (Lance A. Berger & Dorothy R. Berger, eds. 2000).

vigilant in establishing objective criteria for ascertaining when pay augmentation or promotion is merited.

Further, the focus on skill attainment in broadbanding systems may cause employers to single out young workers for training, who are more likely to be retained for a longer period of time than older workers. Companies do not want to spend money to train employees who may not be able to work for a period of employment sufficient for cost recuperation. As a potential consequence, older workers may be locked into their positions, while younger workers are afforded opportunities to gain new skills and continue advancement. It is systematically unfair for the older workers to be required to maintain the operational duties, while younger employees are trained for success. As a consequence, employers which implement broadbanding must avoid adhering to stereotypes that make older employers seem less productive or less desirable as long-term assets to the company, or not suitable for human capital investment.

Additionally, because the reward and advancement system is tied to skill acquisition and development, broadbanding appears inherently to discriminate against older workers, if they are not given the opportunity to acquire new skills or update their skill set. Although older workers certainly can prosper in broadbanding systems, it is important for employers to provide training opportunities for those workers with seniority, rather than simply to permit newly hired employees with updated skill sets to outpace workers whose skills have become dated with their longevity. Like the temptation to terminate older workers, whose salary and benefits have become costly to an employer, under the auspices of belt-tightening or downsizing, or alternatively, to refuse to hire older workers under the pretense that they are too experienced and would be under-paid, broadbanding presents the temptation to favor recently trained or educated workers over those with seniority. While each of these seemingly neutral employment practices makes perfect sense from a business perspective, they undoubtedly adversely and disparately impact older workers. Although it appears unlikely that the lower courts will universally apply disparate impact theory to the ADEA absent a controlling precedent from the Supreme Court, Congress could pass legislation so as to apply the disparate impact theory of recovery to age discrimination claims, and perhaps it should in order to fully eradicate age bias in employment decisions.

Aside from legal obligations, however, employers owe ethical

obligations to their more senior workers. As it becomes more and more difficult for companies to remain competitive in the global markets, more people are willing to justify employment practices, which may adversely impact older workers, as being necessary for corporate success.[241] In tandem with this trend, courts are becoming increasingly reluctant to interfere with managerial decisions concerning such necessities.[242] Whether or not it is illegal, it is wrong for employers to provide advancement opportunities to younger workers with newly acquired skills and fresh educational accomplishments, and ignore older employees who have not had the opportunity to re-fresh their education. To satisfy ethical obligations, employers should make ample opportunities available for older workers to gain new skill so they can remain competitive in the labor market, just as employers strive to maintain their competitive edge in a global economy.

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241 Alexander, *supra* note 122, at 106.

242 Sophie E. Zdatny, Student Work, *West Virginia University v. Decker: The Future of Age Discrimination in West Virginia,* 98 W. VA. L. REV. 719, 751 (1996).