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Rose by Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After Hazen Paper Co. v. Biggins

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NOTES

A ROSE BY ANY OTHER NAME NO LONGER SMELLS AS SWEET: DISPARATE TREATMENT DISCRIMINATION AND THE AGE PROXY DOCTRINE AFTER *HAZEN PAPER CO. v. BIGGINS*

INTRODUCTION

For nearly three decades, the Age Discrimination in Employment Act of 1967 (ADEA)[1] has been used to combat age bias in the workplace. Seeking to eradicate unfounded, demeaning stereotypes about the productivity of older workers and to promote the employment of older workers based on their individual abilities rather than their age, the ADEA prohibits "arbitrary"[2] discrimination against workers age forty and older "because of age."[3] For age discrimination claims brought under disparate treatment discrimination theory—the theory employees most frequently rely on when asserting a claim under the ADEA—an employer's liability depends on whether the employee's age in fact motivated the employer.[4] Recognizing that an employer's discriminatory motive is often disguised and hence difficult to prove,[5] several courts, prior to *Hazen Paper Co. v. Biggins*, held that some factors, such as pension status, retirement eligibility, and seniority, are so closely correlated with age that decisions based on these factors are the functional equivalent of age-based decisions.[6] Applying the "age proxy" doctrine,[7] these courts equated employment decisions based on certain age-correlated factors with unlawful age discrimination under the ADEA.[8]

In an attempt to "clarify the standards for liability" under the ADEA and to thereby resolve a split among the circuits,[9] the Supreme Court in *Hazen Paper Co. v. Biggins*[10] narrowed the scope of the age proxy doctrine, rejecting the view that employment decisions based on factors empirically correlated with age constitute unlawful age dis-

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1 Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-634 (1994)).

2 29 U.S.C. § 621(b) (1994).

3 *Id.* § 623(a)(1).

4 *See infra* part I.B.1.

5 *See infra* notes 169-72 and accompanying text.

6 *See infra* part I.B.2.b.

7 *See infra* note 57.

8 *See infra* text accompanying notes 62-64.

9 Hazen Paper Co. v. Biggins, 507 U.S. 604, 606 (1993).

10 507 U.S. 604 (1993).

crimination under the ADEA.[11] Because age and factors empirically correlated with age are "analytically distinct," the Supreme Court held that an employer could "take account of one while ignoring the other," such that a decision based on the age-related factor was "not necessarily" age-based and therefore did not violate the ADEA.[12] Although the Supreme Court did not rule out the possibility that an employer could violate the ADEA by supposing a correlation between age and an ostensibly age-neutral factor and "act[ing] accordingly,"[13] the Court provided little guidance as to what remains of the age proxy doctrine and what role that doctrine should assume in disparate treatment discrimination cases following *Hazen Paper*.

This Note will examine the Court's narrow definition of the age proxy doctrine in *Hazen Paper* and will explore whether that definition adequately furthers the interests protected by the ADEA. Part I provides a brief overview of the legislative history and purposes of the ADEA and the development of the age proxy doctrine under disparate treatment discrimination theory. Part II discusses the Court's decision in *Hazen Paper* and its rationale for limiting the scope of the age proxy doctrine. Part III examines the likely impact of the *Hazen Paper* decision, analyzes the problems of proving age-based employment discrimination, and demonstrates the desirability of according the age proxy doctrine a more prominent role in ADEA cases. That Part asserts that the language of the ADEA, its purposes, and the policy considerations underlying its enactment support a broader application of the age proxy doctrine than the Court advanced in *Hazen Paper*. Finally, this Note concludes that it is disparate treatment discrimination theory supplemented by the age proxy doctrine that truly "captures the essence of what Congress sought to prohibit in the ADEA."[14] It proposes that broader application of the age proxy doctrine in age discrimination cases would effect a more appropriate balancing of employer and employee interests than would the application of disparate impact discrimination theory to ADEA claims.

I
BACKGROUND

A. Overview of the ADEA: Legislative History and Purpose

Enacted in 1967, the Age Discrimination in Employment Act was, in part, an outgrowth of the civil rights movement.[15] However, con-

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11 *Id.* at 609.
12 *Id.* at 611.
13 *Id.* at 613.
14 *Id.* at 610.
15 JOSEPH E. KALET, AGE DISCRIMINATION IN EMPLOYMENT LAW 1 (2d ed. 1990). The ADEA was preceded by the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified

cern about age discrimination in employment was by this time, nothing new. Legislative and executive initiatives to eliminate arbitrary age discrimination in employment appeared as early as the 1950s.[16] Among these early efforts to combat ageism[17] in the workplace were proposals to include protections for elderly workers in Title VII of the Civil Rights Act of 1964.[18] Although these proposals were ultimately

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at 29 U.S.C. § 206(d) (1994)), and Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 265, (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1994)).

The ADEA has often been called a "hybrid" piece of legislation. *See* BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 485 (2d ed. 1983); Monte B. Lake, *Substantive Requirements Under the ADEA, in* ADEA: A SYMPOSIUM HANDBOOK FOR LAWYERS AND PERSONNEL PRACTITIONERS 28, 35 (1983). Many of the ADEA's prohibitions parallel Title VII provisions. *Compare* 29 U.S.C. § 623(a) (1994) *with* 42 U.S.C. § 2000e-2(a) (1994). Other provisions, including the ADEA's "reasonable factors other than age" exception, 29 U.S.C. § 623(f)(1) (1994), closely resemble Equal Pay Act (EPA) provisions, and the ADEA explicitly incorporates Fair Labor Standards Act (FLSA), enforcement mechanisms and procedures, leaving courts and commentators to disagree on the applicability of Title VII, EPA, and FLSA case law to ADEA claims. For a discussion of the dangers in "transplanting" precedent developed under these other statutes to claims arising under the ADEA, see DANIEL P. O'MEARA, PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT 82-96 (1989) (appraising the role of FLSA and Title VII case law as applied to the ADEA); *see also* Lorillard v. Pons, 434 U.S. 575, 584-85 (1978) (applying FLSA precedent in determining the availability of a jury trial under the ADEA, although acknowledging that "the prohibitions of the ADEA were derived in haec verba from Title VII"); Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) ("That the [ADEA] is embodied in a separate act and has its own unique history at least counsel the examiner to consider the particular problems sought to be reached by the statute."); Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 WAYNE L. REV. 1093 (1993); Mack A. Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 TOLEDO L. REV. 1261 (1983).

16 *See Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 23 (1967) (statement of Sen. Javits). On February 12, 1964, President Johnson issued an executive order establishing a "federal policy" against age discrimination in employment. The policy banned age discrimination in employment by federal contractors and subcontractors on account of age, providing that federal departments and agencies should "take appropriate action to enunciate the policy." Executive Order No. 11,141, 3 C.F.R. 181 (1964-1965). Because it neither provided a mechanism for its enforcement nor authorized a private cause of action for its violation, the executive order was largely ineffective. *See* Kodish v. United Air Lines Inc., 628 F.2d 1301, 1303 (10th Cir. 1980); 1 EGLIT, AGE DISCRIMINATION § 2.02, at 2-7 n.33 (2d ed. 1994). For a summary of early federal legislative and executive efforts to eliminate age discrimination in the workplace, see Richard L. August, Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311, 1324-28 (1974).

17 "Ageism" has been defined as the "process of systematic stereotyping of and discrimination against people because they are old." *See* James E. Birren & Wendy L. Loucks, *Age Related Change and the Individual*, 57 CHI.-KENT L. REV. 833, 833 (1981) (quoting R. BUTLER, WHY SURVIVE? BEING OLD IN AMERICA 12 (1975)). Dr. Robert Butler is generally credited with coining the term. *Id.*

18 *See* 110 CONG. REC. 9911-16, 13,490-92 (1964) (Smathers amendment rejected in the Senate); 110 CONG. REC. 2596-99 (1964) (Dowdy amendment rejected in the House); 1 JOAN M. KRAUSKOPF ET AL., ELDERLAW: ADVOCACY FOR THE AGING § 3.31, at 77 n.2 (2d ed. 1993). This effort to include age discrimination among the practices prohibited by Title VII has been characterized by some commentators as a "disingenuous" attempt led by

rejected, Congress inserted a provision in the Civil Rights Act of 1964 instructing the Secretary of Labor to make a "full and complete study of the factors which might tend to result in discrimination in employment because of age" and to propose "recommendations for legislation to prevent arbitrary discrimination in employment because of age."[19]

In response to Congress's directive, then-Secretary of Labor W. Willard Wirtz issued a report entitled *The Older American Worker: Age Discrimination in Employment*,[20] detailing the problems older workers faced as they attempted to retain employment. The 1965 report documented the existence of widespread age discrimination in employment, but noted that ageism was very different from other forms of workplace discrimination.[21] Age discrimination in employment, unlike race and gender discrimination, was not due to any dislike, intolerance, or "antagonism" toward older workers, but rather was based on inaccurate stereotypes about older workers' declining abilities and productivity.[22] The report distinguished "arbitrary age discrimination" from job-related "circumstances," such as health factor differentials, educational requirements, and changes in technology, "which [adversely] affect older workers more strongly, as a group, than they do younger workers,"[23] and from a range of "institutional arrangements that indirectly restrict the employment of older workers."[24] The report concluded that "decisions about aging and ability to perform in individual cases . . . may or may not be arbitrary discrimination on the basis of age, depending on the individual circumstances."[25]

Wirtz's 1965 report focused almost exclusively on discriminatory hiring practices and employers' customary imposition of arbitrary age limits on candidates for job openings—both of which had a marked

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Southern opponents to Title VII to make the bill "so broad and 'unreasonable' as to keep it from passing . . . to load it up in order to sink it." O'MEARA, *supra* note 15, at 11-12.

19 Civil Rights Act of 1964 § 715, 42 U.S.C. § 2000e (1994).

20 U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965), *reprinted in* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 16-41 (1981) [hereinafter 1965 REPORT]. For a thorough analysis of this report and its role in the legislative history of the ADEA, see Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact, in* AGE DISCRIMINATION IN EMPLOYMENT ACT: A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS 68-115 (Monte B. Lake ed., 1982). Relying on the legislative history of the ADEA, Professor Blumrosen argues that intentional age discrimination "was the gravamen of age discrimination" and that actions which have a disparate impact on older workers were not intended to he prohibited under the ADEA. *Id.* at 73.

21 1965 REPORT, *supra* note 20, at 2.

22 *Id.* at 5-6.

23 *Id.* at 11-14.

24 *Id.* at 15-17.

25 *Id.* at 5.

effect on the employment of older workers.[26] Citing the nation's loss of productive manpower and the potential economic and psychological effects of arbitrary age discrimination on older workers, the report highlighted the injustice of judging workers based on group characteristics rather than on their individual abilities.[27] The report recommended legislative action to remedy this "arbitrary" age discrimination.[28]

Acting on Wirtz's recommendations, Congress enacted the ADEA in 1967.[29] Although the 1965 report was primarily concerned with discriminatory hiring practices, Congress went further with the ADEA, extending its proscription of arbitrary age discrimination in employment to all employment practices, including promotion, compensation, termination, and hiring decisions.[30] Specifically, the ADEA prohibits qualifying local, state, and private employers[31] from refusing to hire, discharging, or otherwise discriminating against older workers with respect to the compensation, terms, conditions, or privileges of employment "because of age."[32] Nor may a qualifying employer "limit, segregate, or classify his employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because of such

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26 *Id.* at 6-10.

27 *Id.* at 18-19.

28 Secretary of Labor Wirtz was thereafter directed, under the Fair Labor Standards Act Amendments of 1966, to prepare and submit a legislative proposal addressing the problems of age discrimination in the workplace. Fair Labor Standards Act Amendments of 1966, Pub. L. No. 89-602, § 606, 80 Stat. 845. On January 23, 1967, President Lyndon Johnson delivered a special message to Congress in which he recommended that Congress enact "a law prohibiting arbitrary and unjust discrimination in employment because of a person's age." *Aid for the Aged*, 113 CONG. REC. 1087-90 (1967), *reprinted in* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 60-61 (1981). The next day, Wirtz submitted what was to become the Age Discrimination in Employment Act of 1967. *See* 113 CONG. REC. 1377 (1967). The bill was amended and ultimately signed into law on December 15, 1967. *See* Williams v. General Motors Corp., 656 F.2d 120, 126 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); O'MEARA, *supra* note 15, at 14.

29 The ADEA went into effect on June 12, 1968, 180 days after its enactment. *See Williams*, 656 F.2d at 126; Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 820 (5th Cir. 1972).

30 *See* 29 U.S.C. § 623(a)(1) (1994).

31 The ADEA applies to employers "engaged in an industry affecting commerce" which employ at least 20 employees for 20 or more weeks annually. *Id.* § 630(b). Qualifying labor organizations and employment agencies are also bound by ADEA provisions. *See id.* § 630(c)-(d). The prohibitions imposed on employment agencies are set out at *id.* § 623(b), (d)-(e), and those imposed on labor organizations may be found at *id.* § 623(c)-(e).

The ADEA's protections also extend to most federal job applicants and employees. *See id.* § 633a. However, notwithstanding the ADEA, maximum hiring ages or mandatory retirement ages for certain federal employees are imposed by statute. *See* 1 KRAUSKOPF, *supra* note 18, § 3.33, at 79 n.4.

32 29 U.S.C. § 623(a)(1) (1994).

individual's age."[33] In addition to these statutory prohibitions, Congress instituted an "education and information program" as part of a continuing effort to "reduc[e] barriers to the employment of older workers and [to promote] measures for utilizing their skills."[34]

Congress's purpose in enacting the ADEA is set forth explicitly in the Act's preamble: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."[35] The general "theme of the ADEA is 'to shift [the] focus away from chronological age and age-related barriers.'"[36] The ADEA protects workers age forty and older from discrimination in the workplace "because of . . . age";[37] however, consistent with the recommendations made in the 1965 report, the ADEA proscribes only "arbitrary" age discrimination in employment.[38] Although the ADEA does not expressly prohibit employers from using age proxies,[39] many lower courts have

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33 *Id.* § 623(a)(2). The act also prohibits employers from reducing an employee's wages to comply with the ADEA. *See id.* § 623(a)(3).

The ADEA's prohibition of age discrimination in employment is not, however, absolute. See, for example, the exceptions embodied in *id.* § 623(f) (permitting age-based discrimination where age is a "bona fide occupational qualification" or where necessary "to observe the terms of a bona fide seniority system or . . . employee benefit plan") and in *id.* § 631(c) (permitting employers to impose mandatory retirement guidelines on "bona fide executives" or individuals in "high policymaking positions").

34 29 U.S.C. § 622(a) (1994).

35 *Id.* § 621(b).

36 Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Discrimination Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 272 (1995) (footnote omitted from title) (quoting Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 235 (1990)).

37 29 U.S.C. § 631(a) (1994). As originally enacted, the ADEA applied only to employees age 40 to 65. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-201, § 12, 81 Stat. 607. In 1978, Congress amended the ADEA, extending the upper age limit to 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3, 92 Stat. 189. The 1986 amendments to the ADEA eliminated the age ceiling altogether. Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342.

38 Unlike Title VII, the ADEA prohibits only "arbitrary" discrimination in employment. Although "arbitrary" is mentioned no less than three times in the Act's preamble, 29 U.S.C. § 621 (1994), nowhere does the ADEA specify what types of discrimination are considered "arbitrary" or what in fact constitutes "discrimination" under the ADEA. The ADEA's sparse legislative history likewise provides little guidance. However, in his 1965 report, *The Older American Worker: Age Discrimination in Employment*, Secretary of Labor W. Willard Wirtz described "arbitrary discrimination" as the "rejection [of older workers] because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions.*" 1965 REPORT, *supra* note 20, at 2.

39 Although the ADEA does not explicitly proscribe the use of age proxies, the ADEA's "reasonable factors other than age" exception, 29 U.S.C. § 623(f)(1) (1994), implicitly incorporates the age proxy doctrine, permitting differentiation among employees based on "*reasonable* factors other than age" (emphasis added). *See* discussion *infra* part III.A.1.

recognized the age proxy doctrine as a necessary complement to the ADEA's prohibition of arbitrary age-based employment discrimination.[40]

B. Disparate Treatment Discrimination and the Origins of the Age Proxy Doctrine

Employment discrimination claims have traditionally been amenable to analysis under both disparate treatment and disparate impact discrimination theories. However, the availability of disparate impact discrimination theory as a basis for employer liability under the ADEA remains an open question.[41] Thus, in asserting a claim under the ADEA, employees most frequently rely on disparate treatment discrimination theory.

1. *Disparate Treatment Discrimination*

As applied to ADEA cases, disparate treatment discrimination involves an employer's intentional unequal or dissimilar treatment of similarly situated employees because of age.[42] Proof of a discriminatory motive is required.[43] An employer engages in unlawful age discrimination if the employer relies on a formal, facially discriminatory policy that treats older workers adversely or if the employer is, on an ad hoc or informal basis, motivated by a protected employee's age in making an employment decision.[44] For an employer's actions to constitute unlawful disparate treatment discrimination under the ADEA, an employee's age need not be the "sole factor" the employer considers in making an employment decision. Age must, however, be "a determining factor," in that "but for" the employee's age the employee

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40 *See infra* notes 57-79 and accompanying text.

41 Disparate impact discrimination involves employment practices that are facially neutral in their treatment of different groups but which disproportionately affect members of a protected group. *See infra* part III.B.1. The Supreme Court initially crafted the disparate impact doctrine in Griggs v. Duke Power Co., 401 U.S. 424 (1971), a case involving charges of race discrimination in violation of Title VII of the Civil Rights Act of 1964. In Dothard v. Rawlinson, 433 U.S. 321 (1977), the Court extended *Griggs* and its progeny to sex discrimination cases. And in 1991, Congress expressly codified disparate impact discrimination under Title VII. *See* Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2 (1994).

It is not clear whether claims of unlawful age discrimination can be established by a showing of disparate impact. Although several of the lower courts have applied disparate impact discrimination theory to alleged ADEA violations, *see infra* notes 237-49 and accompanying text, the Supreme Court has "never decided" whether disparate impact theory is available under the ADEA. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

Moreover, in the aftermath of *Hazen Paper*, several courts, acting on dicta set forth in the case, have held that the disparate impact doctrine is not cognizable under the ADEA. *See infra* note 255 and accompanying text. For a discussion of the applicability of disparate impact theory to ADEA claims, see *infra* part III.B.

42 *See* discussion *infra* part III.A.2.

43 *See infra* text accompanying note 166.

44 *Hazen Paper*, 507 U.S. at 610.

would not have been subjected to the differential treatment.[45] Age proxy discrimination is a "species" of disparate treatment discrimination theory under the ADEA.[46]

2. *Origins of the Age Proxy Doctrine*

In the ADEA context, proxies may be used by employers in one of two ways. First, age may itself be used as a proxy for an employee's skills or attributes. Second, a factor that is empirically correlated with age, but not directly age-based, may be used as a proxy or surrogate for age.

a. *Using Age as a Proxy*

In enacting the ADEA, Congress sought to prohibit the arbitrary use of age as a proxy for an employee's productivity, ability, or competence.[47] As the Sixth Circuit explained in *Abbott v. Federal Forge Inc.*,[48] "[t]he ADEA is directly aimed at the evil of taking age into account in making employment decisions, or using age as a proxy for some legitimate factor, with which it is somewhat, but not totally correlated."[49] An employer may not, therefore, generally rely on age as a proxy for an employee's abilities or skills; the employer must, instead, focus on those factors directly.

The ADEA, however, contains an "escape clause,"[50] permitting employers, in very limited circumstances, to make age-based employment decisions. Commonly referred to as the "BFOQ" exception, an employer may lawfully engage in discriminatory practices that would otherwise be prohibited by the ADEA when "age is a *bona fide occupational qualification* reasonably necessary to the normal operation of the particular business."[51]

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45 *See, e.g.*, Tuck v. Henkel Corp., 973 F.2d 371, 374 (4th Cir. 1992), *cert. denied*, 507 U.S. 918 (1993); Krodel v. Young, 748 F.2d 701, 706 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984); EEOC v. Borden's, Inc., 724 F.2d 1390, 1393 (9th Cir. 1984); Laugesen v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975).

46 Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992); *see also* Robert J. Gregory, *There is Life in That Old (I Mean More "Senior") Dog Yet: The Age-Proxy Theory After* Hazen Paper Co. v. Biggins, 11 HOFSTRA LAB. L.J. 391, 393 n.14 (1994) ("The thrust of the proxy theory is that the age-related factor is a stand-in for age itself. Such a theory falls under the disparate treatment wing of the statute.").

47 *See, e.g.*, Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1399 & n.2 (3d Cir.) (Adams, J., dissenting) ("Apparently cognizant that the aging process can affect capability, Congress drafted the ADEA to distinguish carefully between those employment decisions that are arbitrary and those that are performance-related."), *cert. denied*, 469 U.S. 1087 (1984).

48 912 F.2d 867 (6th Cir. 1990).

49 *Id.* at 876.

50 Gately v. Commonwealth of Massachusetts, 2 F.3d 1221, 1225 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 1832 (1994).

51 29 U.S.C. § 623(f) (1994) (emphasis added).

In *Western Air Lines v. Criswell*,[52] the Supreme Court articulated a two-prong test for determining when an employer could legally take age into account when making business decisions. Under the first prong, an employer must show that the particular job qualification is "*reasonably necessary* to the essence of his [or her] business."[53] The second prong requires the employer to justify his or her use of age as a proxy for that qualification. The employer must show either (1) that age is almost perfectly correlative with the qualification, such that it is reasonable for the employer to believe that all or substantially all persons over a certain age would be unable to perform the duties of the job; or (2) that it is "highly impractical" for the employer to screen for the qualification on an individualized basis.[54] The BFOQ exception is, however, an "extremely narrow exception" to the ADEA's general prohibition of age-based employment practices.[55]

b. *The Age Proxy Doctrine*

Prior to the Supreme Court's decision in *Hazen Paper Co. v. Biggins*,[56] many lower courts recognized that an employment decision based on a seemingly age-neutral factor could operate as the functional equivalent of an overt, age-based employment decision. Applying what has become known as the "age proxy" doctrine, these courts equated employment decisions based on certain age-correlated factors ("age proxies") with unlawful age discrimination under the ADEA.[57] In *Finnegan v. Trans World Airlines, Inc.*,[58] for example, the Seventh Circuit intimated that an employer could not evade the ADEA's proscription of age discrimination in employment by differentiating

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52 472 U.S. 400 (1985).

53 *Id.* at 413 (adopting the two-part test outlined in Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235-36 (5th Cir. 1976)).

54 *Id.* at 414-20.

55 *Id.* at 412 (quoting Dothard v. Rawlinson, 433 U.S. 321, 334 (1977)). *See generally* Bernice L. Neugarten, *Age Distinctions and Their Social Functions*, 57 CHI.-KENT L. REV. 809, 822-23 (1981) ("[T]he validity of using age as a proxy depends on the correspondence between age and the characteristic for which it stands[;] . . . the presumed correspondence often is not based on good evidence, but age stereotypes.").

56 507 U.S. 604 (1993); *see* discussion *infra* part II.

57 In the first edition of his treatise on age discrimination Professor Howard Eglit described the age proxy doctrine as follows:

> Sometimes an employer, rather than using age as the basis for its decisions, will rely on such factors as cost or seniority. As it turns out, however, these factors are so closely correlated with age that most courts have pierced the rhetoric and rejected employers' efforts. In other words, because typically (although not inevitably) seniority—i.e., years on the job—will correlate with age, use of seniority by an employer as a basis for decisionmaking, such as selecting the most senior employees for discharge, will be seen as a disguised reliance on age.

2 HOWARD C. EGLIT, AGE DISCRIMINATION § 16.03A, at 2S-97 to 2S-98 (Supp. 1992).

58 967 F.2d 1161 (7th Cir. 1992).

among employees on the basis of grey hair.[59] Likewise in *EEOC v. Borden's, Inc.*,[60] the Ninth Circuit observed that an employer's dissimilar treatment of employees based on their retirement status violated the ADEA.[61]

Under the age proxy doctrine, liability for unlawful age discrimination ensues not because the consequences of an employer's decision tend to disproportionately affect older workers,[62] but because when an employer relies on certain age-correlated factors in making an employment decision, "it can be fairly assumed that age was in fact the reason for the decision."[63] In other words, the age-correlated factor is regarded as simply a mask for or a means of disguising the employer's discriminatory animus and motive.[64] Among the factors which, prior to *Hazen Paper*, many of the lower courts had deemed impermissible proxies for age are: seniority or years of service,[65] pension status,[66] retirement eligibility,[67] salary costs,[68] longevity or

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59 *Id.* at 1163.

60 724 F.2d 1390 (9th Cir. 1984).

61 *Id.* at 1393.

62 For a general discussion of disparate impact discrimination theory, see *infra* part III.B.

63 Gregory, *supra* note 46, at 421.

64 The applicability of the age proxy doctrine to a particular case is often addressed in the context of whether an employer's reliance on a factor ostensibly unrelated to age qualifies as a "reasonable factor other than age" for purposes of the ADEA's RFOA exception. 29 U.S.C. § 623(f)(2) (1994). *See, e.g.*, EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984) (retirement status is not a "reasonable factor other than age"); EEOC v. Community Unit Sch. Dist. No. 9, 642 F. Supp. 902, 905 (S.D. Ill. 1986) ("notification of an intent to retire is so inexorably linked with age that it cannot be viewed as a separate factor").

65 *See, e.g.*, Dace v. ACF Industries, Inc., 722 F.2d 374, 378 (8th Cir. 1983) ("[D]iscrimination on the basis of factors, like seniority, that invariably would have a disparate impact on older employees, is improper under the ADEA"). *But see* Williams v. General Motors Corp., 656 F.2d 120, 130 n.17 (5th Cir. 1981) ("[S]eniority and age discrimination are unrelated."), *cert. denied*, 455 U.S. 943 (1982).

66 *See, e.g.*, EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641, 646 (9th Cir. 1992) (union policy prohibiting retired members from seeking employment through its hiring hall while receiving pension benefits violates ADEA because it discriminates "on the basis of a factor very closely related to age"); Reichman v. Bonsignore, Brignati, & Mazzota P.C., 818 F.2d 278, 280-81 (2d Cir. 1987) (termination of employee to prevent pension from vesting constitutes a valid claim under the ADEA); EEOC v. Baltimore & O.R.R., 632 F.2d 1107, 1110 (4th Cir. 1980) (discharge based on employees' entitlement to pension benefits violates the ADEA), *cert. denied*, 454 U.S. 825 (1981); EEOC v. Babcock & Wilcox Co., 43 Fair Empl. Prac. Cas. (BNA) 736 (E.D.N.C. 1987) (policy excluding pension-eligible employees from receiving severance pay violates the ADEA).

67 *See, e.g.*, Tuck v. Henkel Corp., 973 F.2d 371, 376 (4th Cir. 1992) ("strong anecdotal evidence" that employer fires employees before they reach retirement age in order to save on retirement benefits was evidence of age discrimination), *cert. denied*, 507 U.S. 918 (1993); Castleman v. Acme Boot Co., 959 F.2d 1417, 1421 (7th Cir. 1992) (termination of employee only eight months before he reached retirement age was evidence of age discrimination); EEOC v. Borden's, Inc., 724 F.2d 1390, 1395 (9th Cir. 1984) (retirement status is not a "reasonable factor other than age"); Thompson v. Fieldcrest Mills, Inc., 51 Empl. Prac. Dec. (CCH) 39,411, 59,781 (S.D.N.Y. 1989) (denying employer's motion for summary judgment on grounds that the employer's termination of older, higher-paid em-

future work expectancy,[69] experience,[70] overqualification,[71] and tenure.[72]

Case law applying the age proxy doctrine can be divided into two categories. One category of cases involves employment decisions based on age-correlated factors which, by their nature, can affect only those individuals within the protected group. For example, characteristics such as retirement eligibility or pension status, when vesting is based on age or on many (*e.g.*, thirty) years of service, can be pos-

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ployees under reorganization plan could violate the ADEA); EEOC v. Community Unit Sch. Dist. No. 9, 642 F. Supp. 902, 905 (S.D. Ill. 1986) (reclassification of employees because of their intent to retire violates the ADEA); EEOC v. Great Atlantic & Pacific Tea Co., 618 F. Supp. 115 (N.D. Ohio 1985) (denial of severance pay to employees eligible for early retirement under employer's pension plan violates the ADEA); EEOC v. Curtiss-Wright Corp., 40 Fair Empl. Prac. Cas. (BNA) 666, 667 (D.N.J. 1982) (denial of severance pay to employees eligible for retirement constitutes unlawful age discrimination).

68 *See, e.g.*, EEOC v. City of Altoona, 723 F.2d 4, 6-7 (3d Cir. 1983) (singling out pension-eligible employees for involuntary retirement based on economic considerations violates the ADEA), *cert. denied*, 467 U.S. 1204 (1984); Hahn v. City of Buffalo, 596 F. Supp. 939, 953 (W.D.N.Y. 1984) ("An employer's desire to have the most cost-effective work force cannot justify age discrimination where age is not a BFOQ."), *aff'd*, 770 F.2d 12 (2d Cir. 1985); Marshall v. Arlene Knitwear, 454 F. Supp. 715, 728 (E.D.N.Y. 1978) ("Where economic savings and expectation of longer future service are directly related to an employee's age, it is a violation of the ADEA to discharge the employee for those reasons."), *aff'd in part, rev'd in part without opinion*, 608 F.2d 1369 (2d Cir. 1979).

69 *See, e.g.*, Hahn v. City of Buffalo, 596 F. Supp. 939, 953 (W.D.N.Y. 1984) (hiring based on projected longevity of employment does not justify age discrimination), *aff'd*, 770 F.2d 12 (2d Cir. 1985); *see also* Wolf v. Ferro Corp., 772 F. Supp. 139, 142 (W.D.N.Y. 1991) ("An 'expectation of longer service' by a younger, retained employee has been held an impermissible reason to discharge the older employee.") (quoting Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978)).

70 *See, e.g.*, Geller v. Markham, 635 F.2d 1027, 1033 (2d Cir. 1980) ("[T]he high correlation between experience and membership in the protected age group . . . would render application of the . . . [employment] policy discriminatory as a matter of law. . . ."), *cert. denied*, 451 U.S. 945 (1981).

71 *See, e.g.*, Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 118 (2d Cir. 1991) (although "a conclusory statement that a person is overqualified may easily 'serve as a mask for age discrimination,'" an employer may decline to place an employee in a position for which he is overqualified where overqualification may have a negative impact on performance); Binder v. Long Island Lighting Co., 933 F.2d 187 (2d Cir. 1991) (employer's claim that it did not offer 56-year-old employee a new position because he was overqualified could constitute age discrimination); Taggart v. Time, Inc., 924 F.2d 43, 47 (2d Cir. 1991) ("Denying employment to an older job applicant because he or she has too much experience, training or education is simply to employ a euphemism to mask the real reason for refusal, namely, in the eyes of the employer the applicant is too old."); *see also* EEOC v. District of Columbia Dep't of Human Servs., 729 F. Supp. 907, 915 (D.D.C. 1990) (observing that "the very term 'over qualified and over specialized' is almost a buzzword for 'too old'"). *But see* Stein v. National City Bank, 942 F.2d 1062 (6th Cir. 1991) (where employer defined "overqualification" in terms of an objective criterion—college degrees—failure to hire overqualified applicant did not violate the ADEA).

72 *See, e.g.*, Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983) (tenure-based faculty selection plan violates the ADEA).

sessed only by individuals over forty.[73] Such factors have been held to be "so inexorably linked with age" that they cannot reasonably be viewed as separate factors.[74]

In *EEOC v. Local 350, Plumbers & Pipefitters*,[75] for example, retired members of a local plumbers' and pipefitters' union challenged a union policy that prohibited members from making use of its employment services while receiving a pension from the union.[76] Rejecting the union's claim that its differentiation among members—based on the member's "decision to retire and remain retired"[77]—was permissible under the ADEA, the Ninth Circuit concluded:

> This proposed justification fails because it rests on pension receipt, a status closely related to age. "A retired member receiving a pension"—a member necessarily aged 55 or older—is treated differently from other members seeking employment, for example, from a member drawing unemployment benefits or a member employed in another trade.[78]

The second category of cases applying the age proxy doctrine encompasses decisions based on age-correlated attributes that workers both within and outside the protected group may possess. For example, salary-based employment decisions can affect young and old workers alike, since the extent to which salary is a function of age depends largely upon the age at which the employee began working for the organization and the organization's policies with respect to rewarding seniority and longevity in the form of higher wages. Some courts have distinguished between these two types of cases, applying the age proxy doctrine in the former category of cases, in which the age-related factor is perfectly correlated with age, but refusing to apply it in the latter.[79]

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73 *See, e.g.*, White v. Westinghouse Elec. Co., 862 F.2d 56, 62 (3d Cir. 1988) (employee discharged after 29 3/4 years to prevent payment of additional pension benefits which would have accrued upon 30 years of service).

74 EEOC v. Community Unit Sch. Dist. No. 9, 642 F. Supp. 902, 905 (S.D. Ill. 1986); *see also* EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641 (9th Cir. 1992) (union policy prohibiting retired workers from seeking employment through its hiring procedures while receiving a pension violated ADEA); EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984) (employer's policy denying severance pay to retirement-eligible workers violates the ADEA).

75 998 F.2d 641 (9th Cir. 1992).

76 *Id.* at 643.

77 *Id.* at 646.

78 *Id.* at 647.

79 Prior to *Hazen Paper*, although most courts adopted the age proxy doctrine in some form, courts disagreed as to the extent of correlation necessary between age and an age-correlated factor to warrant the age-correlated factor being accorded age proxy status. For instance, the 8th Circuit required a "close relationship" between age and the age-correlated factor. *See, e.g.*, Dace v. ACF Industries, Inc., 722 F.2d 374, 378 (8th Cir. 1983) ("close link between seniority and age"); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691 (8th Cir. 1983) ("close relationship between tenure status and age"). The Ninth Circuit

c. *Seniority, Longevity, and Retirement Status*

One of the earliest cases to apply the age proxy doctrine was *Laugesen v. Anaconda Co.*[80] In appraising the language of a separation notice, which the plaintiff-employee claimed was evidence of his employer's discriminatory motive for dismissing the employee, the Court of Appeals for the Sixth Circuit observed, "'too many years on the job' could have meant that the length of service itself, a factor inevitably related to age, was the basis for the discharge . . . and hence would show discrimination."[81]

Similarly, in *EEOC v. City of Altoona,*[82] the Court of Appeals for the Third Circuit held that seniority, as it applied to a statutory reduction-in-force plan, was "inexorably linked with age," and thus could not be viewed as a "separate factor."[83] The plan singled out pension-eligible firefighters for involuntary retirement, requiring that the most senior, retirement-eligible employees be laid off first. Emphasizing that "economic considerations . . . cannot be used to justify age discrimination," the court upheld employees' claims that the plan violated the ADEA.[84]

In *White v. Westinghouse Electric Co.*,[85] the Third Circuit further clarified its position regarding employers' consideration of age-correlated factors when making employment decisions. Finding that the timing of an employee's dismissal—just three months before the employee would have been entitled to increased pension benefits as a result of his thirty years of service—constituted evidence of his employer's unlawful use of an age proxy,[86] the court suggested that "common sense indicates that seniority and age are 'inexorably linked' in any context."[87]

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applied a similar standard. *See, e.g.*, EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641, 646 (9th Cir. 1992) (requiring a "very close connection between age and the factor on which discrimination is based"). Other courts have enunciated standards that would seem to encompass only those factors that correlate perfectly with age or are analytically indistinct from age. *See, e.g.*, EEOC v. Community Unit Sch. Dist. No. 9, 642 F. Supp. 902, 905 (S.D. Ill. 1986) (An age-correlated factor that is "inexorably linked with age . . . cannot be viewed as a separate factor."); *see also* Laugesen v. Anaconda Co., 510 F.2d 307, 313 (6th Cir. 1975) (A "factor inevitably related to age . . . would show discrimination.").

80 510 F.2d 307 (6th Cir. 1975).

81 *Id.* at 313.

82 723 F.2d 4 (3d Cir. 1983).

83 *Id.* at 6; *see also* Dace v. ACF Industries, Inc. 722 F.2d 374, 378 (8th Cir. 1983) (given the "close link between seniority and age," characterizes seniority as an age proxy). Actions taken pursuant to "a bona fide seniority system that is not intended to evade the purposes of [the ADEA]" are, however, permitted under the ADEA. 29 U.S.C. § 623(f)(2)(A) (1994).

84 *Altoona,* 723 F.2d at 7 (citing Smallwood v. United AirLines, Inc., 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied,* 456 U.S. 1007 (1982)).

85 862 F.2d 56 (3d Cir. 1988).

86 *Id.* at 62.

87 *Id.* at 62 n.9.

Other courts have applied a less exacting standard. In *Williams v. General Motors Corp.*,[88] for instance, the Fifth Circuit said simply, "seniority and age discrimination are unrelated."[89] The court explained:

> The ADEA targets discrimination against employees who fall within a protected age category, not employees who have attained a given seniority status. This is borne out . . . by the simple observation that a 35-year old employee might have more seniority than a 55-year old employee. . . . We state without equivocation that the seniority a given plaintiff has accumulated entitles him to no better or worse treatment in an age discrimination suit.[90]

Likewise, in *Arnold v. United States Postal Service*,[91] which involved the legality of a "senior-first" rule that mandated the transfer of the most senior postal inspectors to major metropolitan areas, the D.C. Circuit held that although "[t]here may well be cases in which seniority is simply a code word for age discrimination," the "senior-first" rule did not violate the ADEA.[92] The court reasoned that it was "neither fair nor reasonable" to assess the Postal Service's intentions in promulgating the policy "by uncoupling the rule from the other aspects of . . . [the] program."[93] The court concluded that when viewed in its proper context, "the purpose of the senior-first rule was not to require that the oldest postal inspectors be transferred, but to establish a rational and orderly system to ensure that all . . . inspectors serve a tour of duty in . . . [a major metropolitan area] prior to retirement."[94]

The correlation between age, seniority, and salary has similarly invited litigation by rejected job applicants and terminated employees challenging the legality of employment decisions based on the costs of employing older workers. In fact, prior to *Hazen Paper*, cases involving employment decisions based on the economics of hiring or retaining older workers commanded perhaps the most attention of all age proxy cases.

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88 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

89 *Id.* at 130 n.17.

90 *Id.*; *see also* Gray v. York Newspapers, Inc., 957 F.2d 1070, 1087 (3d Cir. 1992) (rejecting proposition that "the ADEA protects an employee from an adverse employment decision based on seniority") (emphasis omitted); Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 813 (5th Cir. 1991) (employee's assertions that his seniority and greater severance pay benefits affected employer's decision to terminate him was "not relevant to age discrimination, but seniority"); Ludovicy v. Dunkirk Radiator Corp., 922 F.2d 109, 111 (2d Cir. 1990) ("[The] elimination or derogation of seniority rights is not sufficient *by itself* to raise an inference of age discrimination.").

91 863 F.2d 994 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 846 (1989).

92 *Id.* at 1000.

93 *Id.*

94 *Id.*

d. *Salary: The Cost of Employing Older Workers*

Because salary and benefit levels are often tied to an employee's seniority within an organization, and experience frequently commands higher pay, employers often find older workers more costly to compensate than younger employees. Numerous courts have recognized the correlation between salary, seniority, and age and have held that termination of older, high-salaried employees in an effort to reduce costs "constitutes evidence" of an ADEA violation.[95]

The leading case involving salary-based employment decisions is *Metz v. Transit Mix, Inc.*[96] In *Metz*, a divided panel of the Seventh Circuit held that the salary savings an employer sought to realize by discharging an older employee and replacing him with a younger employee constituted an impermissible proxy for age in violation of the ADEA.[97] Metz, aged fifty-four, was the company's second most senior employee and, as result of his twenty-seven years of service and receipt of annual raises, was among its highest-paid workers.[98] The court reasoned that given the strong correlation between Metz's higher salary and his many years of satisfactory service, it would "defeat the intent" of the ADEA[99] to permit his employer to replace him

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95 *See, e.g.*, Jardien v. Winston Network, Inc., 888 F.2d 1151 (7th Cir. 1989) (replacement of older employee with younger employee to save salary costs is not a defense to an ADEA claim); Marshall v. Arlene Knitwear, 454 F. Supp. 715, 730 (E.D.N.Y. 1978) (where economic savings are "directly related to age," an employer's reliance on them in discharging an older employee constitutes age discrimination); *see also* EEOC v. Clay Printing Co., 955 F.2d 936, 946 (4th Cir. 1992) (Restani, J. dissenting) (observing that "numerous courts have recognized the correlation between salary, seniority and age, and have held that discharge of more senior and higher-salaried employees as a cost-savings measure constitutes evidence of a violation of the [ADEA]") (citations omitted). The interpretative guidelines of the Equal Employment Opportunity Commission (EEOC), the agency charged with the administration and enforcement of the ADEA, similarly prohibit differential treatment based on the cost of employing older workers. Section 1625.7(f) of the EEOC's interpretative gnidelines provides:

> A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the Act.

29 C.F.R. § 1625.7(f) (1995).

96 828 F.2d 1202 (7th Cir. 1987).

97 *Id.* at 1207-08.

98 *Id.* at 1203.

99 Holding that a tenure-based selection plan violated ADEA, the Eighth Circuit in Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983), similarly noted:

> [B]ecause of the close relationship between tenure status and age, the plain intent and effect of the defendants' practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts. If the existence of such higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated.

Id. at 691.

based solely on the higher cost of employing him.[100] Although recognizing the employer's use of "pay as a 'proxy' for age"[101] under the facts of *Metz*, the court cautioned that the age proxy doctrine should be "employed only on a case-by-case basis where the facts support its use."[102]

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100 *Metz*, 828 F.2d at 1207. *Metz* should not be read to prohibit the termination of older employees when dismissal is based on the employee's poor performance, rather than seniority or age. *Metz* merely proscribes the replacement of satisfactory employees with younger workers willing to perform the same tasks at a lower wage. *See id.* at 1206 n.7; *see also* EEOC v. MCI Int'l, Inc., 829 F. Supp. 1438, 1478 (D.N.J. 1993); Donnelly v. Exxon Research & Eng'g Co., 12 Fair Empl. Prac. Cas. (BNA) 417 (D.N.J. 1974), *aff'd without opinion*, 521 F.2d 1398 (3d Cir. 1975).

101 *Metz*, 828 F.2d at 1208.

102 *Id.* Although the *Metz* court stated that recognition of "pay as a 'proxy' for age" was "inescapable in this particular case," it did not specify what facts supported this conclusion. *Id.* Courts interpreting *Metz* have suggested, however, that the case might have come out differently had the employer offered to retain the older employee at the lower wage commanded by his younger replacement. *See, e.g.*, Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico, 929 F.2d 814, 821-22 (1st Cir. 1991) (employer's refusal to employ ADEA protected employees at the higher wages they had received under a collective bargaining agreement did not constitute age discrimination where the employees were offered but refused employment at a lower wage); Abbott v. Federal Forge, Inc., 912 F.2d 867, 876 (6th Cir. 1990) ("By offering the job to older employees on the same terms as younger, the employer would demonstrate that the employment practice is the cost-saving measure it purports to be and not a pretext for age discrimination."); *see also* Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 399 (1976) (suggesting that although courts "may be justified in according probative weight to evidence" that an employer failed to offer a position to an older worker at the lower wage, this position might conflict with 29 U.S.C. § 623(a) which prohibits employers from reducing the wage rate of an employee in order to comply with the ADEA). *But see* Peter H. Harris, Note, *Age Discrimination, Wages, and Economics: What Judicial Standard?*, 13 HARV. J.L. & PUB. POL'Y 715 (1990) (interpreting 29 U.S.C. § 623(a) to prohibit employers from lowering the salary of younger workers to match the salary of older, protected employees).

The District Court for the District of Connecticut apparently agreed with *Metz*'s case-by-case approach, for in Diamantopulos v. Brookside Corp., 683 F. Supp. 322 (D. Conn. 1988), the court distingnished those situations in which economic considerations would qualify for age-proxy status from those in which they would not. The court stated:

> Economic considerations which are simply a result of employing older employees do not constitute legitimate, non-discriminatory reasons for either a failure to hire them or their discharge. . . . Where economic considerations are not a proxy for age, however, such factors may constitute legitimate, non-discriminatory reasons justifying an employer's actions. An actionable ADEA claim cannot be premised on the mere fact that higher salaried workers were terminated because a person may not be within the ADEA protected class yet still receive a large salary because of particular qualifications, merit increases, or long tenure.

Id. at 328-29 (citations omitted).

Compare EEOC v. City of Altoona, 723 F.2d 4, 7 (3d Cir. 1983) ("[Economic] considerations cannot be used to justify age discrimination."), *cert. denied*, 467 U.S. 1204 (1984) *and* Orzel v. Wauwatosa Fire Dept., 697 F.2d 743, 755 (7th Cir.) (cost factors cannot justify mandatory retirement), *cert. denied*, 464 U.S. 992 (1983) *with* Holt v. Gamewell Corp., 797 F.2d 36, 38 (1st Cir. 1986) (where employee's salary was the result of merit raises and his managerial position, employer's decision to discharge higher-paid, older employee to save salary costs did not constitute unlawful age discrimination) *and* Nelson v. Kennicott Bros. Co., No. 91-1254, 1991 WL 270013 (7th Cir. Dec. 19, 1991) (plaintiff's salary increases

In an impassioned dissent, Judge Easterbrook objected to the majority's expansive application of the age proxy doctrine. Although conceding that when wage is "directly dependent on" age, as in a lockstep compensation program, courts should treat the two factors as identical, Easterbrook argued that in cases such as *Metz*, the cost of employing an older worker should qualify as a "reasonable factor other than age."[103]

Following Judge Easterbrook's lead, a number of lower courts have found employers' cost rationales convincing.[104] Some courts treat salary as an age-neutral, inherently reasonable criterion upon which employers may base employment decisions, unless it can be shown that an employer has used salary costs simply as a means of "targeting" older workers.[105] In *Bay v. Times Mirror Magazines, Inc.*,[106] for instance, the Second Circuit rejected an employee's claim that age was a critical factor in his dismissal. The employee maintained that

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based on performance, not seniority, so salary does not constitute a "proxy" for age under *Metz* approach); *see also* Gustovich v. AT&T Communications, Inc., 972 F.2d 845, 851 (7th Cir. 1992) ("[W]age discrimination can be a proxy for age discrimination, so that lopping off high salaried workers can violate the ADEA—although the circumstances under which this holds true remain to be determined.").

103 *Metz*, 828 F.2d at 1220 (Easterbrook, J., dissenting). As Judge Easterbrook explained further:

> Wage discrimination is age discrimination only when wage depends directly on age, so that the use of one is a pretext for the other; high covariance is not sufficient, and employers always should be entitled to consider the relation between a particular employee's wage and his productivity.

Id. at 1212.

104 *See, e.g.*, Wheeldon v. Monon Corp., 946 F.2d 533, 536 (7th Cir. 1991) (while conceding that "pensions may be used as a proxy for age," court declined "to rule that pension considerations always operate as such" and found that employer's alleged use of independent military pension in decision to discharge employee did not operate as an impermissible age proxy); Holt v. Gamewell, 797 F.2d 36, 38 (1st Cir. 1986) (where employee's salary was the result of merit raises and his managerial position, employer's decision to discharge sixty-three-year-old employee to save salary costs did not constitute unlawful age discrimination).

Even before *Hazen Paper*, the 7th Circuit, in Visser v. Packer Engineering Associates, Inc., 924 F.2d 655 (7th Cir. 1991), questioned the appropriateness of treating evidence of an employer's discharge of employees to save pension expenses as evidence of age discrimination:

> Age and pension expenses are correlated, though they are not the same thing. There is an analytical difference, certainly, between firing a person on the basis of a stereotyped view of older workers' energy, flexibility, initiative, and other employment attributes, and firing him to save money. Nevertheless a number of cases hold that it is age discrimination to replace an older employee with a younger one for the sole purpose of economizing on salary costs.

Id. at 658.

The *Visser* court ultimately concluded that neither the employee's age, nor the fact that he incurred a loss of pension benefits when discharged and was replaced by a younger worker was "evidence of age discrimination." *Id.* at 658-59.

105 See *infra* note 108 (listing relevant cases).

106 936 F.2d 112 (2d Cir. 1991).

since his high salary was "'a direct function of his longevity, experience, seniority or periodic salary raises,'" the employer's consideration of his high salary in deciding to discharge him violated the ADEA.[107] Finding no unlawful age discrimination, the court noted that the ADEA does not prevent employers from making reasonable economic choices so long as employers base their decisions on factual realities and not on stereotypical biases about the abilities of older workers:

> [T]here is nothing in the ADEA that prohibits an employer from making employment decisions that relate an employee's salary to contemporaneous market conditions and the responsibilities entailed in particular positions and concluding that a particular employee's salary is too high. To be sure, high salary and age may be related, but, so long as the employer's decisions view each employee individually on the merits . . . and are based solely on financial considerations, its actions are not barred by the ADEA.[108]

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107 *Id.* at 117 (quoting appellant's brief at 10-12).

108 *Id.* at 117; *see also* Hamilton v. Grocers Supply Co., 986 F.2d 97, 99 (5th Cir.) ("[T]his Court has not adopted the *Metz* line of reasoning, and we decline to do so in this case."), *cert. denied*, 508 U.S. 960 *and* 114 S. Ct. 77 (1993); Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 813 (5th Cir. 1991) (termination due to higher pay is "not relevant to age discrimination, but seniority"); EEOC v. Atlantic Community Sch. Dist., 879 F.2d 434 (8th Cir. 1989) (rejecting argument that when experience requires higher pay under employer's compensation schedule, employer's decision to hire a younger, less experienced individual to save money violates the ADEA); Gries v. Zimmer, Inc., 795 F. Supp. 1379, 1389 (W.D.N.C. 1992) ("The 'wage is a proxy for age' theory has been specifically rejected by this Court.") (citing Latimore v. University of North Carolina, 669 F. Supp. 1345 (W.D.N.C. 1987), *aff'd in part, remanded in part*, 856 F.2d 186 (4th Cir. 1988)); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1318-19 (E.D. Mich. 1976) (employer need not iguore costs associated with older worker's higher salary). Some courts have permitted employers to perform a cost-benefit analysis, comparing the return on the dollar of the performance levels and salary costs of older workers, so long as the calculation is done on an individual basis rather than based on the cost and benefits of employing older workers as a group. *See, e.g., Mastie*, 424 F. Supp. at 1319 (higher costs associated with employing older workers constitute a "reasonable factor other than age" so long as costs considered "upon an individual as opposed to a general assessment that the older worker's cost of employment is greater than for other workers"); *see also* O'MEARA, *supra* note 15, at 122-31; Clint Bolick, *The Age Discrimination in Employment Act: Equal Opportunity or Reverse Discrimination?*, POLICY ANALYSIS, Feb. 10, 1987; Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 399 (1976). *See generally* Kaminshine, *supra* note 36 (advocating a "halanced approach for assessing the legitimacy of seniority-salary criteria and employer cost needs under the ADEA" based on disparate impact analysis); Terrence P. Collingsworth, Note, *The Cost Defense under the Age Discrimination in Employment Act*, 1982 DUKE L.J. 580 (arguing that termination based on cost is consistent with the ADEA only if cost is based on employee's output, not absolute cost); Harris, *supra* note 102 (interpreting 29 U.S.C. § 623(a) as prohibiting employers from lowering the salary of younger employees to match the salary of older, protected employees); Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565 (1979) (discharging an older employee because of direct costs such as higher salaries and fringe benefits should be permissible "only if less detrimental alternatives are not economically practical").

Other courts have modified Judge Easterbrook's approach, permitting employers to consider the relative costs of employing older workers under a narrow set of circumstances. In *EEOC v. Chrysler*,[109] the Sixth Circuit developed a two-part test for determining when an employer might legitimately consider the additional salary and benefit costs incurred in employing older workers. When faced with the "prospect of imminent bankruptcy," the court held that an employer could justify a forced retirement policy, putting forth, as a "reasonable factor other than age," the economic needs of the company.[110] The employer must show: (1) a "real" need for "drastic cost reduction" and (2) that the employer's action was the "least—detrimental—alternative."[111]

As the foregoing discussion demonstrates, the case law reflects disagreement among the lower courts regarding the proper scope of the age proxy doctrine and what types of age-correlated factors should fall within its purview. However, nearly all of the lower courts that applied or considered applying age proxy discrimination theory in ADEA cases prior to the Supreme Court's decision in *Hazen Paper* recognized that there should be some limitation on an employer's ability to consider age-correlated factors when making employment decisions, and that at least in some circumstances, an employer's reliance on an age-correlated factor could support a finding of intentional age discrimination. In one fell swoop, however, the Supreme Court in *Hazen Paper* displaced nearly twenty years of age proxy jurisprudence, substantially narrowing the scope of the age proxy doctrine as it had previously been interpreted and applied by the lower courts.

II
DISCUSSION

A. *Hazen Paper Co. v. Biggins*

In *Hazen Paper Co. v. Biggins*,[112] the Supreme Court sought to clarify the scope of the age proxy doctrine. Walter Biggins, a sixty-two-year-old worker, claimed that he had been wrongfully discharged from his position as technical director of a paper company in violation of the ADEA, the Employment Retirement Income Security Act of 1974 (ERISA),[113] and state law. Biggins alleged that the defendants—Hazen Paper Company and its owners and operators, Thomas and Robert Hazen—terminated his employment in order to prevent his pension benefits from vesting. The Hazen Paper Company pension

109 733 F.2d 1183 (6th Cir.), *reh'g denied*, 738 F.2d 167 (6th Cir. 1984).
110 *Id.* at 1186.
111 *Id.*
112 507 U.S. 604 (1993).
113 Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1994).

plan had a ten-year vesting period and had Biggins worked only "a few more weeks," he would have qualified for pension benefits.[114] The defendants denied these allegations, maintaining that Biggins had been fired for doing business with the company's competitors and for his refusal to sign a confidentiality agreement.[115]

The case was tried in the District Court for the District of Massachusetts before a jury, which returned a verdict for Biggins on all three claims. The court, however, granted the defendants' motion for judgment notwithstanding the verdict on both the state law claim and the jury's finding that the defendants "willfully" violated the ADEA.[116]

Both parties appealed to the Court of Appeals for the First Circuit. The court of appeals upheld the district court's imposition of liability under the ADEA, reversed the district court's ruling as to "willfulness," and reinstated the liquidated damages award.[117] Concluding that there was "sufficient evidence" for a jury to find that the defendants intentionally fired Biggins because of his age, the court applied age proxy discrimination theory:

> Based on the foregoing evidence, the jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights vested and . . . that *age was inextricably intertwined with the decision* to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years.[118]

The Supreme Court granted certiorari to decide whether "an employer's interference with the vesting of pension benefits violate[s] the ADEA."[119] Seeking to resolve a conflict among the circuits as to "whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age,"[120] the Supreme Court issued, what is, in essence, an incomplete hornbook explanation of the age proxy doctrine.

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114 *Hazen Paper*, 507 U.S. at 607.

115 *Id.* at 606.

116 Willful violations of the ADEA give rise to liquidated damages. *See* 29 U.S.C. § 626(b) (1994).

117 Biggins v. Hazen Paper Co., 953 F.2d 1405, 1412, 1415 (1st Cir. 1992).

118 *Id.* at 1412 (emphasis added).

119 *Hazen Paper*, 507 U.S. at 608. The Supreme Court also considered the applicability of the Trans World Airlines v. Thurston, 469 U.S. 111 (1985), "willfulness" standard for liquidated damages to informal employment decisions, as well as to formal, facially discriminatory employment practices motivated by an employee's age. *Hazen Paper*, 507 U.S. at 608. The Court reaffirmed the *Thurston* "willfulness" standard and held that it applies to all disparate treatment cases under the ADEA—formal policies and ad hoc, informal decisions alike. *Id.* at 617.

120 507 U.S. at 608.

Noting that disparate treatment discrimination theory is applicable to ADEA claims, the Court commenced its analysis by specifying the requirements for establishing liability for disparate treatment discrimination:

> In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. . . . Whatever the decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.[121]

Relying on this analytical framework, the Court quickly condemned the use of age as a proxy for an employee's ability or skills. Citing *EEOC v. Wyoming*[122] and *Western Air Lines, Inc. v. Criswell*,[123] the Court observed that all employers must follow the ADEA's "commands":[124] "It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."[125] An employer may not, the Court noted, rely on an employee's age as a proxy for attributes such as productivity or ability, but must instead focus on those factors directly.[126] The Court, however, failed to reach the same conclusion when it considered the legal status of employment decisions based on age proxies—factors linked to and correlated with age, but not directly age-based.

Comparing *White v. Westinghouse Electric Co.*[127] and *Metz v. Transit Mix, Inc.*[128] with *Williams v. General Motors Corp.*[129] and *EEOC v. Clay Printing Co.*,[130] the Court "clarif[ied] that there is no disparate treatment under the ADEA when the factor motivating the employer is *some feature other than* the employee's *age*."[131] Noting that Congress's enactment of the ADEA was prompted by a concern that older workers were disadvantaged in the workplace due to "inaccurate and stigmatizing stereotypes"[132] about their abilities, the Court stated that when an employer's decision is "*wholly motivated by factors other than age*,

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121 *Id.* at 610.

122 460 U.S. 226 (1983).

123 472 U.S. 400 (1985).

124 *Hazen Paper*, 507 U.S. at 610-11.

125 *Id.* at 610.

126 *Id.* at 611.

127 862 F.2d 56 (3d Cir. 1988); *see supra* text accompanying notes 85-87.

128 828 F.2d 1202 (7th Cir. 1987); *see supra* text accompanying notes 96-100.

129 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *see supra* text accompanying notes 88-90.

130 955 F.2d 936 (4th Cir. 1992).

131 Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (emphasis added).

132 *Id.* at 610.

the problem of inaccurate and stigmatizing stereotypes disappears."[133] As a result of this analysis, the Court concluded that employers could lawfully differentiate among employees based on certain age-correlated factors, such as an employee's pension status when vesting is based on the employee's years of service. Finding an employee's age to be "analytically distinct" from his or her years of service, the Court reasoned:

> A decision . . . to fire an older employee solely because he has nine-plus years of service and therefore is "close to vesting" would not constitute discriminatory treatment on the basis of age. The prohibited stereotype ("Older employees are likely to be _____") would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an *accurate* judgment about the employee—that he indeed is "close to vesting."[134]

The *Hazen Paper* Court stressed that it did not decide the "special case" in which an employee's pension benefits are about to vest due to the employee's age and the employer terminates the employee in order to prevent the benefits from vesting.[135] A unanimous Court held simply that an employer does not violate the ADEA "just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service,"[136] rather than his age.[137]

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133 *Id.* at 611 (emphasis added).

134 *Id.* at 612.

135 *Id.* at 613.

136 *Id.*

137 *Id.* The Supreme Court did not, however, hold that an employer could lawfully interfere with an employee's pension benefits. As the Court recognized, regardless of whether pension eligibility was based on age or years of service, such conduct would be actionable under ERISA. *Id.* at 612. The *Hazen Paper* Court held simply that an employer's interference with service-based benefits, "without more" would not constitute an ADEA violation. *Id.*

The Court remanded the case to the Court of Appeals for the First Circuit "to reconsider whether the jury had sufficient evidence to find an ADEA violation." *Id.* at 614. Notwithstanding the Court's holding that evidence of pension interference alone could not support the imposition of liability under the ADEA, on remand, a three-judge panel of the court of appeals found sufficient evidence to support the jury's finding that the employer violated the ADEA. Biggins v. Hazen Paper Co., Nos. 91-1591, 91-1614, 1993 WL 406515, at *5 (1st Cir. Oct. 18, 1993).

Applying the *McDonnell Douglas/Burdine* burden-shifting formula, *see infra* discussion part III.A.2.a, the panel held that the plaintiff established a prima facie case of disparate treatment age discrimination and that disregarding any evidence of the employer's alleged interference with the vesting of the plaintiff's pension rights, sufficient evidence existed for a reasonable jury to disbelieve the reasons put forth by the defendants for their actions and to believe that age discrimination was the real reason. *Id.* at *4. In addition to the evidence of pension interference, the court noted that the plaintiff was asked to sign a confidentiality agreement, even though no other employee was asked to do so, and that his younger replacement was required to sign a less onerous agreement. *Id.* at *5. On the defendants' petition for rehearing, the court of appeals en banc withdrew the panel's opin-

The Court, however, failed to adequately identify what, if any, role the age proxy doctrine should assume in disparate treatment discrimination cases following *Hazen Paper*.

B. The Age Proxy Doctrine After *Hazen Paper Co. v. Biggins*

In *Hazen Paper Co. v. Biggins*, the Supreme Court narrowed the scope of the age proxy doctrine. Although the Court did "not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination," the Court expressly rejected the view that an employer could violate the ADEA when motivated by "some feature other than the employee's age."[138]

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ion and remanded the ADEA claim for a new trial, concluding that the "likelihood of verdict contamination" regarding the ADEA claim was "sufficiently great that the interests of justice require a full new trial on the age-discrimination claim." Biggins v. Hazen Paper Co., 899 F. Supp. 809, 816 (D. Mass. 1995) (quoting Biggins v. Hazen Paper Co., No. 91-1591, 1994 WL 377800 (1st Cir. June 27, 1994), *cert. denied*, 115 S. Ct. 614 (1994)) (on remand, denying motions for summary judgment on the age discrimination claim).

138 *Hazen Paper*, 507 U.S. at 609, 612-13. There are at least three variants of age proxy cases which are not expressly addressed by the Court's decision in *Hazen Paper*: first, the "special case" that the Court expressly stated that it "did not decide," in which pension vesting is based on age, rather than years of service; second, a mixed case, in which pension eligibility is based on some combination of age and years of service; and third, cases involving age-correlated factors that fall outside the pension context, such as salary costs, retirement eligibility, and seniority. At least one commentator has argued that when faced with the "special case," the Court would find an ADEA violation. *See* Gregory, *supra* note 46, at 409; *see also* Babich v. Unisys Corp., 842 F. Supp. 1343, 1351 (D. Kan. 1994) (observing that *Hazen Paper* "left the door open" for ADEA claims based on an employer's interference with an employee's entitlement to pension benefits as a result of the employee's age). *But see* Heath v. Massey-Ferguson Parts Co., 869 F. Supp. 1379, 1394 (E.D. Wis. 1994) ("The mere fact of a perfect correlation between pension status and the protected age group is insufficient" to raise "a genuine issue" of age discrimination under *Hazen Paper*.).

The Court explicitly sought to limit its holding in *Hazen Paper* to a particular set of facts. The Court emphasized, "Our holding is simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service." *Hazen Paper*, 507 U.S. at 613. Notwithstanding the contextual limitations the Court sought to impose upon its holding, since the Court purported to answer the question "whether an employer violates the ADEA by acting on the basis of a factor . . . that is empirically correlated with age," *id.* at 608, the Court's holding logically extends to employment decisions based on a myriad of factors that are empirically correlated with age but are not analytically indistinct from age. Following *Hazen Paper*, numerous lower courts have so interpreted the Court's decision. *See, e.g.*, Bialas v. Greyhound Lines, Inc., 59 F.3d 759, 763 (8th Cir. 1995) (evidence that employer terminated older employees because of their higher salaries "does not in itself support an inference of age discrimination"); Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 152 (5th Cir. 1995) (evidence that employer discharged employee because of high salary or retirement eligibility cannot support ADEA claim); EEOC v. Insurance Co. of N. Am., 49 F.3d 1418, 1420 (observing that under *Hazen Paper*, "[t]he fact that 'overqualification' might be strongly correlated with advanced age does not make use of this criterion necessarily a violation of the ADEA"); Allen v. Diebold, 33 F.3d 674, 676 (6th Cir. 1994) (holding that the ADEA "does not constrain an employer who acts on the basis of other factors—pension status, seniority, wage rate—that are empirically correlated with age"); Woroski v. Nashua Corp., 31 F.3d 105, 110 n.2 (2d Cir. 1994) ("[T]he ADEA does not prohibit an employer

Implicitly overruling *Metz*, the Court stated: "Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent . . . , but in the sense that the employer may suppose a correlation between the two factors and act accordingly."[139]

In light of its decision in *Hazen Paper*, the Court would seem to permit the application of the age proxy doctrine only when the non-age factor upon which the employer relied in making an adverse employment decision correlated perfectly with age[140] or in scenarios

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from acting out of concern for excessive costs, even if they arise from age-related facts—such as . . . seniority. . . ."); Gould v. Kempers Nat'l Insur. Cos., 880 F. Supp. 527, 532-33 (N.D. Ill. 1995) ("Years of service, seniority, and pension status may be legally considered by employers in making business decisions, because such business decisions are not 'necessarily age-based.'"); Adams v. Dupont Merck Pharmaceutical Co., 67 Fair Empl. Prac. Cas. (BNA) 1072 (E.D. Pa. 1994) (interpreting *Hazen Paper* to hold that "seniority is not a proxy for age" and that "terminating a highly salaried senior employee . . . would not violate [the] ADEA").

139 *Hazen Paper*, 507 U.S. at 613.

140 As the District Court for the Southern District of Illinois explained in EEOC v. Community Unit School District No. 9, 642 F. Supp. 902, 904 (S.D. Ill. 1986), a factor perfectly correlated with age is so "inexorably linked with age" it cannot be viewed as a separate factor. *See also* Metz v. Transit Mix, Inc., 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting) ("when wage is 'directly dependant on' age, the use of one is no better than the use of the other").

Since the Court expressly stated that it did "not consider the special case where an employee is about to vest in pension benefits as a result of his *age*, . . . and the employer fires the employee in order to prevent vesting," *Hazen Paper*, 507 U.S. at 613 (citing 1 J. MAMORSKY, EMPLOYEE BENEFITS LAW § 5.02[2] (1992)), *Hazen Paper* arguably should not affect courts' application of age proxy theory to cases in which a non-age factor correlates perfectly with age. *See, e.g.*, EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641, 648 n.2 (9th Cir. 1993) ("perceiv[ing] no conflict between [*Hazen Paper*]" and the court's finding that union's differential treatment of employees based on their retirement status violated the ADEA); EEOC v. California Micro Devices Corp., 869 F. Supp. 767 (D. Ariz. 1994) (denying employer's motion for summary judgment where the employer discharged an employee because of the employee's intent to retire); *see also* Motzny v. Hilander Food Stores, No. 94-1996, 1995 WL 16751, at *3 (7th Cir. Jan. 17, 1995) (fact that "an employee's salary tends to increase with his or her age, making age and compensation highly correlated . . . does not make an employer's salary consideration improper unless wage depends directly on age, such that the use of one is a pretext for the other"). *But see* Heath v. Massey-Ferguson Parts Co., 869 F. Supp. 1379, 1394 (E.D. Wis. 1994) ("The mere fact of a perfect correlation between pension status and the protected age group is insufficient" to raise "a genuine issue" of age discrimination under *Hazen Paper*.).

At least one lower court has held that *Hazen Paper* "vindicates" Judge Easterbrook's dissent in *Metz*. *See* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125-26 (7th Cir. 1994) (decisions based on salary considerations will not support an ADEA claim). Judge Easterbrook had argued that "[w]age discrimination is age discrimination only when wage depends directly on age, so that the use of one is a pretext for the other; bigh covariance is not sufficient." Metz v. Transit Mix, Inc., 828 F.2d 1202, 1212 (7th Cir. 1987) (Easterbrook, J., dissenting); *see also* EEOC v. MCI Int'l, Inc., 829 F. Supp. 1438, 1473 (D.N.J. 1993) ("Whatever force *Metz* may have had before has been undercut in *Hazen Paper*. . . .") (citations omitted). *But see* Micbael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 508 ("*Hazen Paper* . . . fails to resolve the ADEA cost problem because its narrow holding does not preclude older workers harmed by their employer's ostensibly cost-based employment practices from seeking relief under a disparate impact theory of liability.").

such as the following: Suppose an employer believes that older workers are less skilled, less intelligent, and less able. Knowing that the ADEA prohibits discrimination in employment based on age, and that only the company's oldest workers have qualified for a company pension, the employer decides to terminate all pension-eligible employees. Were all these facts (including the employer's hidden motivation) to come out at trial, even the *Hazen Paper* Court would find the employer's reliance on the employees' pension status to constitute an impermissible age proxy in violation of the ADEA, for the employer clearly "suppose[d] a correlation" between age and pension eligibility and "act[ed] accordingly."[141]

This hypothetical illustrates how the *Hazen Paper* Court perceived the role of the age proxy doctrine in proving claims of intentional age discrimination.[142] The Court stated that if an employee protected by the ADEA can prove that his or her employer used an age-correlated factor, such as pension status, to mask a discriminatory animus, the employer would be liable under the ADEA, notwithstanding the fact that the employer did not overtly discriminate against the employee on the basis of the employee's age. The Court would, however, require proof that the employer sought to do indirectly what he or she could not do directly: differentiate among employees on the basis of an age-correlated factor as a means of "getting at" age.[143]

Although *Hazen Paper* did not explicitly sound the death knell for the age proxy doctrine,[144] the Court's narrow application of the doctrine accords it little independent legal significance.[145] The *Hazen Paper* Court failed to recognize the evidentiary import of the age proxy doctrine. An employer rarely waves a red flag announcing his or her

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141 *Hazen Paper*, 507 U.S. at 613.

142 The Court in *Hazen Paper* made no mention of what if any role age proxy evidence should assume in establishing a prima facie case of age discrimination. *Hazen Paper*, 507 U.S. at 613. The Court simply stated that "inferring age-motivation . . . may be problematic in cases where other unsavory motives, such as pension interference, [are] present." *Id. But cf.* discussion *infra* part III.A.2.b.

143 Metz v. Transit Mix, Inc., 828 F.2d 1202, 1216 (7th Cir. 1987) (Easterbrook, J., dissenting) ("Intent means doing something because of, not in spite of, a particular consequence. . . . That means using wage to *get at* age.") (citations omitted).

144 *See supra* notes 138, 140.

145 The age proxy doctrine has little independent legal significance after *Hazen Paper* because if an employee could otherwise establish an employer's discriminatory intent (whether by direct or indirect evidence of age discrimination), the employee would not need to rely on the age proxy doctrine to prove his or her claims. Similarly, if an employee could establish that his or her employer based the challenged employment decision on a non-age factor that correlated perfectly with age or was analytically indistinct from age, proof that the employer relied on such a factor would likely be deemed tantamount to establishing that the employer based the employment decision on age itself. In other words, evidence of an employer's reliance on such a factor when making employment decisions would likely constitute circumstantial if not direct evidence of age discrimination, irrespective of the age proxy doctrine.

discriminatory intent.[146] Since courts are not privy to an employer's state of mind, they must rely on various forms of proof and evidentiary devices to uncover that which is hidden from view.[147]

The *Hazen Paper* Court viewed the age proxy doctrine not as an evidentiary tool for proving intentional age discrimination,[148] but as its conclusion. Once an employer's discriminatory motive has been proven, the Court would not hesitate to label the age-correlated factor on which the challenged employment decision was based a disguised "proxy" for age. The doctrine, as limited by the Court, does not, however, assist the employee in proving his or her claim of intentional age discrimination under the ADEA.[149]

III
ANALYSIS

> If a statute were directed at roses, and a grower described its flower as a fragrant multipetaled red bloom grown on a branch with thorns, is the flower any less a rose?[150]

The ADEA protects older workers from being dismissed, passed over for a promotion, or treated differently "because of" their "age."[151] Differential treatment based on retirement eligibility, pension status, or seniority is in many cases, nothing less than age discrimination by another name.

The age proxy doctrine, in its purest form, recognizes that an employer's discriminatory intent is rarely displayed for public view.[152] As the Fifth Circuit has observed, "[d]iscrimination exists . . . 'in forms as myriad as the creative perverseness of human beings can provide.'"[153] In light of the difficulties employees face when attempting to prove claims of disparate treatment discrimination under the ADEA, the age proxy doctrine should be accorded a more prominent

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146 *See infra* notes 169-71 and accompanying text.

147 *See* discussion *infra* part III.A.2.

148 Gregory, *supra* note 46, at 393.

149 *See, e.g.*, Heath v. Massey-Ferguson Parts Co., 869 F. Supp. 1379, 1394 (E.D. Wis. 1994) ("To raise an issue for trial on proxy discrimination [under *Hazen Paper*, the employee] must create an issue of fact as to whether [the employer] deliberately used the perfect correlation between its employees' pension status and their age as a shield to fire the older employees because of their age. The mere fact of a perfect correlation between pension status and the protected age group is insufficient to create a genuine issue of fact in this regard.").

150 Massarsky v. General Motors Corp., 706 F.2d 111, 128 (3d Cir.) (Sloviter, J., dissenting), *cert. denied*, 464 U.S. 937 (1983).

151 29 U.S.C. § 623 (1994).

152 *See supra* text accompanying notes 62-64.

153 Williams v. General Motors Corp., 656 F.2d 120, 128 (5th Cir. 1981) (quoting McCorstin v. United States Steel Corp., 621 F.2d 749, 753-54 (5th Cir.), *cert. denied*, 455 U.S. 943 (1982)).

role in ADEA cases than the Court's narrow application of the doctrine in *Hazen Paper* allows.[154] The language of the ADEA, its purposes, and the policy considerations underlying its enactment require a broader application of the age proxy doctrine.[155]

A. Toward an Expansive Definition of the Age Proxy Doctrine: Overcoming Problems of Proof

1. *Unreasonable Factors Other Than Age*

In *Hazen Paper*, the Supreme Court overlooked the ADEA's "reasonable factors other than age" (RFOA) exception.[156] The Court stated that when making employment decisions, the ADEA requires only that an employer iguore an employee's age; "it does not specify *further* characteristics that an employer must also ignore."[157]

The ADEA, however, does not permit employers to base employment decisions on "*any* factor other than age."[158] The ADEA limits the scope of its exception to "*reasonable* factors other than age,"[159] implicitly recognizing that there are "unreasonable" factors besides age which an employer may not use to differentiate among employees. Through its RFOA exception, the ADEA thus incorporates the age proxy doctrine. What little legislative history there is on the RFOA exception supports this construction of the statute.[160]

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154 *See infra* part III.A.2.b.ii.

155 *See infra* part III.A.2.b.i.

156 The ADEA's RFOA exception, 29 U.S.C. § 623(f)(1) (1994), permits employers to differentiate among employees or job applicants "where the differentiation is based on reasonable factors other than age." *See infra* notes 259-62 and accompanying text.

157 *Hazen Paper*, 507 U.S. at 612.

158 The ADEA's "reasonable factors other than age" exception arguably resembles the Equal Pay Act's "any factor other than sex" exception. *Compare* 29 U.S.C. § 206(d)(1)(iv) (1994) *with* 29 U.S.C. § 623(f)(1) (1994).

As the Supreme Court observed in EEOC v. Wyoming, 460 U.S. 226 (1982), the ADEA's RFOA exception insures that employers are "permitted to use *neutral criteria not directly dependant on age*" when making employment decisions. *Id.* at 232-33 (emphasis added). Several lower courts have, however, misinterpreted the ADEA's RFOA exception, extending the exception to *any* "factor other than age" not simply "*reasonable* factors other than age." *See, e.g.*, EEOC v. Francis W. Parker School, 41 F.3d 1073, 1077 (7th Cir. 1994) (interpreting the RFOA exception to permit any employment decisions "made for reasons independent of age but which happen to correlate with age").

159 29 U.S.C. § 623(f)(1) (1994) (emphasis added).

160 During the 1967 House debates on the ADEA, Representative Burton asked Secretary Wirtz whether the ADEA's prohibitions would override a collective bargaining agreement which contained references to seniority. The following exchange occurred:

> Secretary Wirtz: . . . If a seniority clause were so constructed or a retirement clause were so constructed that it unfairly attached significance to age, my answer would be "yes" to your question.
>
> Mr. Burton: Who would judge that?
>
> Secretary Wirtz: The Secretary of Labor.
>
> Mr. Burton: By what standards?
>
> Secretary Wirtz: By the standards of whether there is differentiation on the basis of age which the facts do not warrant.

Some age-related factors—such as retirement status or pension eligibility, when an employee becomes pension-eligible only upon reaching a certain age—may be so perfectly correlated with age that they cannot *reasonably* be viewed as factors "other than age."[161] Other age-correlated factors, such as seniority, pension eligibility based on years of service, and longevity, are not direct substitutes for age, but are nevertheless sufficiently age-correlated that employment decisions based on these factors could constitute the very stereotyped, group-oriented, "arbitrary" discrimination that the ADEA was enacted to combat.[162] Although an employer may, consistent with ADEA, base employment decisions on "reasonable factors other than age,"[163] an employer cannot lawfully defend his or her actions on the basis of such "unreasonable" factors, notwithstanding that these age-correlated factors are technically "factors other than age."

Disparate treatment analysis supplemented by an expansive application of the age proxy doctrine "captures the essence of what Congress sought to prohibit in the ADEA."[164] A non-age factor can readily correlate in an employer's mind with age.[165] The age proxy doctrine is simply a means of getting at that unexpressed motivation. An expansive application of the age proxy doctrine is therefore necessary to counteract the difficulties employees face when trying to prove a case of intentional age discrimination.

2. *Difficulties in Proving Age Discrimination*

The threshold question in every ADEA disparate treatment discrimination case is whether the defendant employer was motivated by the plaintiff's age.[166] An employee may prove his or her case by producing direct or circumstantial evidence of the employer's discriminatory intent. Direct evidence sufficient to sustain an ADEA claim[167]

Age Discrimination in Employment, Hearings Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess. 14 (1967).

161 29 U.S.C. § 623(f)(1) (1994) (emphasis added).

162 *Id.* § 621; *see supra* note 38.

163 29 U.S.C. § 623(f)(1) (1994).

164 Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

165 *See* Larry Alexander, *What Makes Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies*, 141 U. PA. L. REV. 149, 172-73 (1992) (observing that legal suppression of discrimination based on "proxies" such as age, sex, and race "will likely stimulate the invention and use of more ingenious proxies that correlate highly with the forbidden proxies").

166 *See supra* text accompanying notes 42-45.

167 There is some disagreement as to what constitutes direct evidence of discrimination in the employment discrimination context. Some courts are willing to consider as direct evidence any evidence that tends to establish a prejudicial or stereotyped view of the protected class of which the plaintiff is a member. Other courts require that such evidence be tied to the decisionmaking processes involved in the challenged action. *See* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 213-14 n.37 (1993).

may include evidence of age classifications, actions or statements by employers that reflect stereotyped perceptions about the abilities of older workers, or comments made by individuals directly involved in an organization's employment decisions that demonstrate a discriminatory attitude or animus.[168] However, in today's litigious environment "smoking gun" evidence of an employer's discriminatory intent is rarely present.[169] As the Supreme Court recognized in *United States*

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168 The elements of proof in a direct evidence or "pure discrimination" case are no different from those in any other case. *See, e.g.*, Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 897 (3d Cir.) (en banc), *cert. denied*, 483 U.S. 1052 (1987). If a plaintiff succeeds in proving a prima facie case of intentional age discrimination, the burden of persuasion shifts to the defendant to prove that one of the statutorily defined exceptions to the ADEA apply. An employer can take any action otherwise prohibited under the ADEA where: (1) age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business"; (2) "the differentiation is based on reasonable factors other than age"; (3) the employment practices at issue involve "an employee in a workplace in a foreign country, and compliance with [the ADEA] would cause such employer . . . to violate the laws of the country in which such workplace is located," 29 U.S.C. § 623(f)(1) (1994); (4) the contested action is necessary "to observe the terms of a bona fide seniority system that is not intended to evade the purposes of [the ADEA]," *id.* § 623(f)(2)(A); (5) the contested action is necessary "to observe the terms of a bona fide employee benefit plan," *id.* § 623(f)(2)(B); or (6) the action was taken "to discharge or otherwise discipline an individual for good cause," *id.* § 623(f)(3).

A claim of disparate treatment discrimination based on direct evidence of age discrimination may also be analyzed as a "mixed motive" case. "Mixed motive" analysis was first endorsed by the Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), a Title VII case. In 1991, Congress expressly codified mixed motive analysis under Title VII. *See* Civil Rights Act of 1991 § 706(g)(2)(B), 42 U.S.C. § 2000e-2 (1994). Courts have since applied "mixed motive" analysis to age discrimination cases. *See, e.g.*, Visser v. Packer Engineering Associates, Inc., 924 F.2d 655 (7th Cir. 1991). Since employment decisions typically involve a multitude of factors, virtually every direct evidence age discrimination case could conceivably be argued as a mixed motive case. *See* 2 EGLIT, *supra* note 16, § 7.42. At least one commentator has suggested that the *McDonnell Douglas/Burdine* model, which shifts the burden of production, but not the burden of proof to the defendant, may ultimately be "undercut" by mixed motive analysis, which shifts both burdens to the defendant. *See id.*

A third method of establishing intentional age discrimination is "pattern or practice" or systemic discrimination analysis. Under the ADEA, however, such cases are extremely rare. For a discussion of ADEA "pattern or practice" cases, see 2 *id.* § 7.36. Several courts have also recognized claims of age discrimination due to the existence of a hostile work environment. *See, e.g.*, Clemmer v. Enron Corp., Civ. A. No. H-93-3550, 1995 WL 334372 (S.D. Tex. Mar. 27, 1995) (citing cases).

169 The District Court for the Northern District of Illinois explained the infrequency with which one finds direct evidence of age discrimination as follows:

> It is a rare case . . . when a plaintiff can produce the "smoking gun" that proves age discrimination by direct evidence. Few employers write memos, for example, which state that a particular individual was fired or not hired because he or she was "too old." For that reason, plaintiffs are usually forced to prove age discrimination through indirect evidence, which calls into play a variation of the burden-shifting analysis used to resolve Title VII cases.

EEOC v. Francis W. Parker School, 61 USLW 2618, 1993 WL 106523, at *5 (N.D. Ill. Mar. 24, 1993), *aff'd*, 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995). "Employers have become increasingly adept at protecting themselves from discrimination lawsuits." McGinley, *supra* note 167, at 215 n.45 (citation omitted).

Postal Service Board of Governors v. Aikens,[170] "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes."[171] Most plaintiffs must, therefore, attempt to prove an ADEA violation by means of indirect or circumstantial evidence of age discrimination.[172]

a. *The McDonnell Douglas/Burdine Burden-Shifting Formula*

In disparate treatment discrimination cases, courts have regularly applied Title VII case law to the ADEA, adopting the burden-shifting formula set out in *McDonnell Douglas v. Green*[173] and *Texas Department of Community Affairs v. Burdine*[174] to enable ADEA plaintiffs to establish intentional age discrimination despite the absence of any direct evidence of an employer's discriminatory intent.[175] The *McDonnell Douglas/Burdine* framework[176] is not a strict model, but simply a guide, allocating burdens of production and establishing an order for the

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170 460 U.S. 711 (1983).

171 *Id.* at 716; *see also* Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (7th Cir.) ("[W]e do not require direct proof of age discrimination because . . . age discrimination, like other forms of discrimination, is often subtle. . . . 'Even an employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive and may communicate it orally to no one.'") (quoting LaMontague v. American Convenience Prods., 750 F.2d 1405, 1410 (7th Cir. 1984)), *cert. dismissed*, 483 U.S. 1052 (1987); Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 638 (5th Cir. 1985) ("Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree.").

172 A plaintiff seeking to establish a prima facie case of age discrimination through circumstantial evidence is not required to fill the *McDonnell Douglas/Burdine* prescription. Circumstantial statistical evidence or circumstantial evidence of employer subterfuge could also be used to establish a prima facie case of age discrimination independent of the *McDonnell Douglas/Burdine* model. *See* Williams v. General Motors Corp., 656 F.2d 120, 131 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *see also* 2 EGLIT, *supra* note 16, § 7.35 (discussing the use of circumstantial evidence to establish a prima facie case of age discrimination in a non-*McDonnell Douglas/Burdine* configuration).

173 411 U.S. 792 (1973).

174 450 U.S. 248 (1981).

175 Recognizing that in most cases, direct evidence of an employer's discriminatory intent will be "unavailable or difficult to acquire," the Supreme Court "articulated a method of proof that relies on presumptions and shifting burdens of production" now known as the *McDonnell Douglas/Burdine* formula. Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 897 (3d Cir.) (quoting Dillon v. Coles, 746 F.2d 998, 1003 (3d Cir. 1984), *cert. dismissed*, 483 U.S. 1052 (1987)).

176 In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), a unanimous Supreme Court clarified the allocation of burdens of proof in the burden-shifting formula originally set out in *McDonnell Douglas*. *Burdine* held that the employer need only produce evidence of a "legitimate, nondiscriminatory" reason for his or her actions; the employer need not persuade the factfinder that he or she was actually motivated by the asserted reasons. *Id.* at 255.

For a discussion of the evolution of the *McDonnell Douglas/Burdine* framework under Title VII, see Melissa A. Essary, *The Dismantling of* McDonnell Douglas v. Green: *The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385 (1994).

presentation of proof.[177] Courts have therefore adapted the *McDonnell Douglas/Burdine* formula to fit ADEA cases.

As adapted, an ADEA plaintiff must first establish, by a preponderance of the evidence, a prima facie case of intentional age discrimination. To establish a prima facie case of age discrimination, a plaintiff must present "evidence from which an intent to discriminate [on the basis of age] can be inferred."[178] The plaintiff must establish that he or she was: (1) a member of the protected class; (2) qualified for the position at issue; (3) adversely affected by the defendant's employment decision; and (4) replaced by a person sufficiently younger to permit an inference of age discrimination.[179]

If the plaintiff succeeds in establishing a prima facie case,[180] the *McDonnell Douglas/Burdine* model creates a presumption of intentional discrimination.[181] The burden of production then shifts to the defendant, who need only articulate a "legitimate, nondiscriminatory" explanation for the employment action in order to overcome this

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177 Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575-77 (1978) (The *McDonnell Douglas* test was "never intended to be rigid, mecbanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.").

178 *See* Ginwright v. Unified Sch. Dist. No. 457, 756 F. Supp. 1458, 1475 (D. Kan. 1991); Mull v. Arco Durethene Plastics, Inc., 599 F. Supp. 158, 162 n.3 (N.D. Ill. 1984), *aff'd*, 784 F.2d 284 (7th Cir. 1986).

179 *See* O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996).

In "reduction-in-force" cases, in which an employee's discharge results from a general reduction in the employer's workforce due to unfavorable economic conditions, the fourth element may be satisfied by showing "that there was some . . . evidence indicating that the employer did not treat age neutrally in deciding to dismiss the plaintiff." EEOC v. Western Elec. Co., Inc., 713 F.2d 1011, 1014-15 (4th Cir. 1983); *see also* Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990) (In reduction-in-force cases, "the plaintiff [must] show through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination.").

180 The plaintiff's burden in establishing a prima facie case of age discrimination is in and of itself not "onerous." It requires only the production of evidence which "'suggests' that the employment decision was based on age." Rose v. Wells Fargo & Co., 902 F.2d 1417, 1420 n.1 (9th Cir. 1990) (citing Diaz v. American Tel. & Tel., 752 F.2d 1356, 1361 (9th Cir. 1985)).

181 As the Court stated in Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), the prima facie case raises an inference of "discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Id.* at 580. The Court explained:

> [W]e are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts with *some* reason, based his decision on an impermissible consideration . . . .

Id. at 577.

presumption of discrimination.[182] The employer "need not persuade the court that it was actually motivated by the proffered reasons."[183] The burden of persuasion remains with the plaintiff at all times.

Once the employer has met his or her burden of production, the employee then has the opportunity to show that the employer's proffered justification for the alleged discriminatory practice is not the true reason for the employer's decision but merely a pretext for discrimination.[184] Prior to the Court's decision in *St. Mary's Honor Center v. Hicks*,[185] an ADEA plaintiff could, in many jurisdictions, establish pretext simply by "show[ing] that the employer's proffered evidence [was] unworthy of credence."[186] So long as the plaintiff disproved the defendant's proffered explanation for the alleged discriminatory action, the plaintiff could prevail.[187] In *Hicks*, however, a 5-4 majority of the Supreme Court "upped" the evidentiary "ante" for the plaintiff.[188] *Hicks* held that to establish pretext, an employee must prove "*both* that the [employer's] reason was false, and that discrimination was the real reason."[189] It is no longer enough, in other words, for the factfinder to simply "*disbelieve* the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination."[190] After *Hicks*, even if the plaintiff proved that the employer's proffered explanation for his or her actions was not credible, such a showing would not entitle the plaintiff to judgment as a matter of law; it would only permit the factfinder "to infer the ultimate fact of intentional discrimination."[191]

Although courts and commentators disagree as to the extent to which *Hicks* increased the plaintiff's burden, most concede that *Hicks* makes proving disparate treatment discrimination more difficult for plaintiffs.[192] In assessing the impact of the majority's decision, Justice

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182 In articulating a "legitimate, nondiscriminatory reason" for his or her actions, "'[t]he defendant must clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747 (1993) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981)).

183 *Burdine*, 450 U.S. at 254.

184 *Id.* at 256.

185 113 S. Ct. 2742 (1993).

186 *Burdine*, 450 U.S. at 256.

187 *See infra* note 192.

188 2 EGLIT, *supra* note 16, § 7.05, at 7-36; Robert Brookins, *Hicks, Lies, and Ideology: The Wages of Sin is Now Exculpation*, 28 CREIGHTON L. REV. 939, 943 (1995).

189 *Hicks*, 113 S. Ct. at 2752 (quoting *Burdine*, 450 U.S. at 253).

190 *Id.* at 2754.

191 *Id.* at 2749.

192 *See, e.g.*, Brookins, *supra* note 188, at 943 ("[T]he Court is selecting evidentiary rules that once were swords for victims of discrimination, melting those rules, and reforging them into shields for employers."); Dehorah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2232 (1995); Eileen Kaufman, *Employment Discrimination: Recent Developments in the Supreme Court*, 10 TOURO L. REV. 525, 535 (1994)

Souter stated in his dissent that the *Hicks* majority "saddle[s] the victims of discrimination with the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision."[193] Moreover, the decision creates a greater incentive for employers to fabricate nondiscriminatory reasons for their actions.[194]

The impact of *Hicks* is amplified by courts' increasing willingness to grant employers' motions for summary judgment in employment discrimination cases.[195] Once reluctant to use the summary judgment

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(noting that "[e]mployment discrimination claimants who cannot prove their case by direct evidence are bound to have a much more difficult time" after *Hicks*); Joe K. Windle, Comment, St. Mary's Honor Center v. Hicks: *Is the Supreme Court's Definition of Pretext Beneficial or Detrimental to Title VII Plaintiffs?*, 18 AM. J. TRIAL ADVOC. 213, 222 (1994) (observing that Hicks has probably increased the plaintiff's burden of proving employment discrimination at trial). *But see* Norma G. Whitis, Note, St. Mary's Honor Center v. Hicks: *The Title VII Shifting Burden Stays Put*, 25 LOY. U. CHI. L.J. 269 (1994) (arguing that *Hicks* merely clarifies the framework under which a plaintiff may prove intentional discrimination and that it does not make proving Title VII claims more difficult for plaintiffs).

Prior to *Hicks*, in evaluating whether an employer's proffered explanation for his or her actions was simply a pretext for discrimination, some courts applied a "pretext-only" rule, under which a plaintiff need only disprove the employer's reasons for the challenged action to be entitled to judgment as a matter of law. Other courts applied a "pretext plus" rule, requiring the plaintiff to prove that the employer intentionally discriminated against the plaintiff in order to prevail. *See* ECLIT, *supra* note 16, § 7.29 (citing cases). "Pretext-plus" jurisdictions thus placed a much higher burden of proof on plaintiffs than did "pretext-only" jurisdictions. Most commentators agree that *Hicks* falls somewhere in between. *See, e.g.*, Joseph R. Shannon, *Employment Discrimination: Shouldering the Burden of Proof After* St. Mary's Honor Center v. Hicks, 29 WAKE FOREST L. REV. 963, 988 (1994) (describing reactions to *Hicks*); Whitis, *supra*, at 291 (maintaining that *Hicks* adopted a "hybrid approach," which permits but does not require a finding of discrimination upon the plaintiff's disproof of the employer's proffered reasons for the action in question).

193 *Hicks*, 113 S. Ct. at 2758 (Souter, J., dissenting).

194 *See, e.g.*, *id.* at 2763-64 (Souter, J., dissenting) (The "majority's scheme . . . leads to the perverse result that employers who fail to discover nondiscriminatory reasons for their own decisions to hire and fire employees, not only will benefit from lying but must lie." Moreover, the majority's interpretation favors employers "by exempting them from responsibility for lies."); Donna G. Goldian, Note, *New Reason to Lie: The End of Proving Discriminatory Intent Proving By Pretext Only After* St. Mary's Honor Center v. Hicks, 30 WILLIAMETTE L. REV. 699, 719 (1994) (The "majority has gone to great lengths to protect employer defendants who . . . have advanced explanations that lack credulity."). Under the *McDonnell Douglas/Burdine* model, once an employee establishes a prima facie case of age discrimination, a presumption of discrimination arises. Unless the employer articulates a legitimate, nondiscriminatory reason for the challenged employment decision to rebut the employee's prima facie case, the employee prevails as a matter of law. Under *Hicks*, an employer has a greater incentive to proffer some nondiscriminatory reason for its action even if no such reason in fact existed. The factfinder may not believe the employer, but if the employer has articulated a legitimate, nondiscriminatory reason for its action, the factfinder is not compelled to find for the employee unless it finds both that the employer's proffered reason was pretextual and that it was a pretext for discrimination.

195 A "trilogy" of summary judgment cases decided by the Supreme Court in 1986—Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Celotex v. Catrett, 477 U.S. 317 (1986); and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)—changed the way courts approach summary judgment, making it much easier for defendants to obtain summary judgment and depriving many deserving ADEA plaintiffs of their

device in civil rights cases, which involve complex issues of intent, motive, and credibility,[196] courts now frequently decide disparate treatment age discrimination cases at the summary judgment stage.[197] Although some commentators have claimed that *Hicks* provides plaintiffs with the "ammunition" for surviving a summary judgment motion,[198] most acknowledge that following *Hicks*, a plaintiff will ultimately have greater difficulty surviving a defendant's motion for summary judgment.[199]

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right to a jury trial. *See* McGinley, *supra* note 167, at 228-42; *see also* Brookins, *supra* note 188, at 957; Thomas J. Piskorski, *The Growing Judicial Acceptance of Summary Judgment in Age Discrimination Cases*, 18 EMPLOYEE REL. L.J. 245, 254 (1992).

196 *See* Frank J. Cavaliere, *The Recent "Respectability" of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases: ADEA Case Analysis Through the Supreme Court's Summary Judgment "Prism"*, 41 CLEV. ST. L. REV. 103, 118 (1993) (discussing standards for granting summary judgment and directed verdict motions as applied in ADEA cases, noting that in most situations, the employer has "an advantage in the summary judgment contest"); *see also* Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 76-79 (1990) (outlining the history of summary judgment).

197 *See* 2 EGLIT, *supra* note 16, § 7.55, at 7-338.

198 Essary, *supra* note 176, at 393 ("[T]he majority opinion actually provides 'ammunition' for many plaintiffs to withstand a summary judgment motion . . . [but] [i]f the lower courts fails to rely on the 'ammunition' . . . and instead routinely base employer summary judgments on *St. Mary's*, the decision may be seen by employers as 'carte blanche' to perpetuate subtle, hidden discrimination . . . .").

The "ammunition" to which Essary and other commentators refer is the following statement by Justice Scalia:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that upon such rejection, "[n]o additional proof of age discrimination is required."

Hicks, 113 S. Ct. at 2749 (citations omitted). *But see* Windle, *supra* note 192, at 223-28 (arguing that while some courts "have interpreted *Hicks* as placing a heavy burden on a plaintiff seeking to oppose a motion for summary judgment," *Hicks* may in fact "prove beneficial to plaintiffs, at least at the summary judgment stage").

199 *See, e.g.*, Goldian, *supra* note 194, at 718-19 (After *Hicks* it is "doubtful that many plaintiffs (except perhaps the uncommonly fortuitous plaintiff who has direct evidence of discrimination on an illegal basis) will be able to . . . withstand a motion for summary judgment."). Many commentators have suggested that even before *Hicks*, employers had an advantage in the summary judgment "contest." *See, e.g.*, Cavaliere, *supra* note 196, at 118; McGinley, *supra* note 167, at 208 (attributing the rise in successful employer motions for summary judgment to a misreading of the 1986 "trilogy" of Supreme Court cases dealing with the summary judgment device).

In ADEA cases, motions for summary judgment are typically raised either following the plaintiff's initial presentation of evidence, with the defendant employer asserting that the plaintiff failed to establish an element of the prima facie case of intentional age discrimination, or, as is more commonly the case, after the defendant presents a nondiscriminatory reason for the challenged action, claiming that there is "no genuine issue of material fact" as to the pretextuality of the defendant's proffered justification. To survive a motion for summary judgment, an ADEA claimant need establish that a genuine issue of material fact exists.

The Court originally devised the *McDonnell Douglas/Burdine* framework to "compensate for the fact that direct evidence of intentional discrimination is hard to come by."[200] However, as modified by *Hicks*, plaintiffs in most jurisdictions will find it more difficult to prove an ADEA violation by means of this burden-shifting formula, particularly in light of the judiciary's growing acceptance of summary judgment in ADEA cases. Broad application of the age proxy doctrine is therefore necessary to counteract the difficulties ADEA plaintiffs face when trying to establish an employer's discriminatory intent. Employers should be held accountable not only for age-based employment decisions but also for employment decisions based on age-correlated factors, in which a discriminatory motive can be easily disguised.[201] The difficulty lies in formulating the definitional boundaries of the age proxy doctrine so that the doctrine adequately protects the legitimate interests served by the ADEA without unduly hindering employers' business autonomy.

b. *The Proper Scope of the Age Proxy Doctrine*

i. *Furthering the Purposes of the ADEA*

Delineating the proper scope of the age proxy doctrine and defining which factors should qualify as age proxies is difficult. The relationship between age and age-correlated factors such as pension eligibility, salary, and seniority often varies from organization to organization.[202] But simply because a proper definition of the age proxy doctrine may require case-by-case analysis to determine its applicability does not mean courts should hesitate to hold employers accountable for intentional age discrimination achieved through consideration of age-correlated factors.[203] Although age proxy status should not be limited to those factors which correlate perfectly with age or are analytically indistinct from age—which even decisions following *Hazen Paper* have allowed[204]—age proxy status should not be extended to every factor which might have a tenuous connection to age, nor even to those factors which on the whole, tend to correlate positively with age.

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200 Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring).

201 *See supra* text accompanying note 162. For instance, the age proxy doctrine implicitly recognizes that an employer who discharges his or her most senior employees is in most cases "motivated not by years of service, but rather by a 'disguised reliance on age.'" Louis Maslow II, Comment, *Dual Liability: The Growing Overlap of the Age Discrimination in Employment Act and Section 510 of the Employee Retirement Income Security Act*, 58 ALB. L. REV. 509, 512 (1994).

202 O'MEARA, *supra* note 15, at 122.

203 *See* Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 422 (1985) ("Congress expressly decided that problems involving age discrimination in employment should be resolved on a 'case-by case basis' . . . .").

204 *See supra* note 140.

In an attempt to justify the Court's narrow application of the age proxy doctrine in *Hazen Paper*, at least one lower court has reasoned that, unlike the laws and social policy of many European nations, the 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."[205] However, the ADEA was enacted not only to prohibit age discrimination but to help change attitudes about the capabilities of older workers. As expressed in the Act's preamble, when Congress addressed the social problem of age discrimination in employment it did so because "older workers f[ound] themselves disadvantaged in their efforts to retain employment, and . . . to regain employment when displaced from jobs";[206] because "certain otherwise desirable practices [worked] to the disadvantage of older persons";[207] and because the "incidence of unemployment, [was], relative to the younger ages, high among older workers."[208]

The ADEA strikes a certain balance between employer autonomy and the protection of older workers. As the Seventh Circuit has noted:

> [A]lthough the ADEA does not hand federal courts a roving commission to review business judgments, the ADEA *does* create a cause of action against business decisions that merge with age discrimination. Congress enacted the ADEA precisely because many employers or younger business executives act as if they believe that there are good business reasons for discriminating against older employees. *Retention of senior employees who can be replaced by younger, lower paid persons frequently competes with other values, such as profits or conceptions of economic efficiency. The ADEA represents a choice among these values.* It stands for the proposition that this is a better country for its willingness to pay the costs for treating older employees fairly.[209]

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205 Allen v. Diebold, Inc., 33 F.3d 674, 676 (6th Cir. 1994). Other courts have attempted to rationalize certain types of age discriminatory practices on the ground that older workers, on the whole, tend to benefit from institutional discrimination and employment policies rewarding seniority. As one court has noted, the strong correlation between seniority and age means that the ADEA's protected class typically benefits from compensation, promotion, and employee benefits programs that reward seniority. Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1162 (7th Cir. 1992). The force of such arguments should, however, be questioned in light of the ADEA's purposes and the difficulties older workers face as they attempt to remain employed, difficulties that prompted Congress's enactment of the ADEA. *See* discussion *supra* part I.A.

206 29 U.S.C. § 621(a)(1)-(3) (1994).

207 *Id.* § 621(a)(2).

208 *Id.* § 621(a)(3).

209 Graefenhain v. Pabst Brewing Co., 827 F.2d 13, 21 n.8 (7th Cir. 1987) (emphasis added), *quoted in* Metz v. Transit Mix, Inc., 828 F.2d 1202, 1210 (7th Cir. 1987).

The age proxy doctrine recognizes that the "inaccurate and denigrating generalization[s] about age,"[210] which the ADEA was designed to combat, are no less "stigmatizing" when cloaked in a clever disgnise. Age-based stereotypes and biases should not be perpetuated by permitting employers to rely on age proxies when making employment decisions as a substitute for explicit age-based discrimination.[211]

The age proxy doctrine should thus encompass those factors that are closely related to, directly correlated with, and dependent upon age. Age proxy status must, however, be limited to factors that are time-based, such as seniority, years of service, retirement status, pension eligibility, and longevity. Application of this standard will often require a case-by-case determination as to whether a factor qualifies as a "proxy" for age. For example, if an employer bases salary increases solely on job performance and skill, differential treatment on the basis of salary costs would not implicate the age proxy doctrine. If, on the other hand, an employer determines salary according to time-based, age-correlated factors, such as years of service or seniority, and uses salary costs as a means of eliminating higher-paid, older workers within the protected group, salary would qualify as a "proxy" for age under the formulation of the age proxy doctrine this Note proposes.[212]

As the language of the ADEA makes clear, Congress did not intend to provide a general remedy for the unemployment of older workers. Congress was concerned about the unemployment which resulted from employers' acting on inaccurate stereotypes about older workers' abilities and productivity and discriminating against older workers "because of [their] age."[213] In the ADEA, Congress did not proscribe only "age-based" employment decisions—employment decisions in which an employee's *age* is a determinative factor—it sought to prohibit employers from arbitrarily "discriminat[ing] against any individual . . . *because of* such individual's *age*."[214] Congress did not, however, specify what constitutes "arbitrary discrimination"[215] "because of . . . age."[216]

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210 Hazen Paper v. Biggins, 507 U.S. 604, 611 (1993).

211 *See infra* note 218.

212 Were an employer to base salary on both merit and an age-correlated criterion such as seniority, salary should qualify as an age proxy only if the age-correlated criterion constituted a determinative factor in the employer's decision, such that if the employee's seniority was not considered, the employer would have decided differently. *See supra* text accompanying note 46.

213 29 U.S.C. § 623 (1994). Congress's purpose in enacting the ADEA is explicitly set forth in the Act's preamble. *See* text accompanying *supra* note 35.

214 29 U.S.C. § 623(a)(1) (1994) (emphasis added).

215 *Id.* § 621(b). *See supra* note 38.

216 *Id.* § 623(a)(1).

The age proxy doctrine fills the gap between "age-based" employment decisions and permissible forms of differentiation among employees based on "reasonable factors other than age."[217] By requiring employers to justify all employment decisions in which a time-based factor is determinative, the age proxy doctrine holds employers accountable for arbitrary age discrimination accomplished not only through age-based factors, but age-correlated ones as well.[218]

ii. *The Legal Significance of Age Proxy Evidence*

In delineating the proper scope of the age proxy doctrine, one must consider not only what factors should be recognized as age "proxies" but, perhaps more importantly, the legal significance accorded age proxy evidence. The proper scope of the age proxy doctrine depends in part upon its role in the proof process. Prior to *Hazen Paper*, the lower courts permitted the introduction of age proxy evidence in disparate treatment cases as direct evidence of age discrimination,[219] as circumstantial evidence of age discrimination independent of the *McDonnell Douglas/Burdine* paradigm,[220] and as a means satisfying the evidentiary requirements of the *McDonnell Douglas/Burdine* burden-shifting model.[221]

This Note proposes that when an "age proxy"[222] is "a determinative factor" in an employer's decision, the decision should be treated

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217 *Id.* § 623(f)(1). *See* discussion *supra* part III.A.1.

218 As one commentator has noted:

> The practical reality is that certain characteristics, such as experience, wages based on seniority, pension status, and benefit plans, do correlate strongly with age and can be effectively used as proxies for age-based determinations. If this does not violate the ADEA, then employers will have a facially valid method for affecting limited "unintentional" age discrimination in their employment practices. This may result in a situation where age discrimination in employment is prohibited in form, but not in substance.

Pontz, *supra* note 36, at 321.

219 *See, e.g.*, EEOC v. Community Unit Sch. Dist. No. 9, 642 F. Supp. 902, 904 (S.D. Ill. 1986) (evidence of employer's reliance on employees' intent to retire in reclassifying employees constitutes direct evidence of age discrimination).

220 *See, e.g.*, Dace v. ACF Indus., Inc., 722 F.2d 374, 377-78 (8th Cir. 1983) (suggesting that evidence "that tended to show" that an employer demoted a more senior and, hence, older worker to "save money" could constitute "direct proof of age discrimination"); *see also* Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655, 658-59 (7th Cir. 1991) (addressing the use of age proxies as "circumstantial evidence" of age discrimination).

221 Courts have permitted employees to use age proxy evidence to establish the fourth element of the prima facie case and to establish that the employer's proffered "legitimate, nondiscriminatory" justification for his or her actions is simply a pretext for unlawful discrimination. *See, e.g.*, White v. Westinghouse Elec. Co., 862 F.2d 56, 62 (3d Cir. 1988) (holding that age proxy evidence could be used to establish the pretextuality of the employer's proffered explanation for his alleged discriminatory actions).

222 *See supra* text accompanying notes 203-12 (discussing those factors that should be accorded age proxy status under the formulation of the age proxy doctrine this Note proposes).

as the statutory equivalent of an age-based decision, triggering employer liability under the ADEA. Evidence of an employer's use of an age proxy when making an employment decision, be it direct or circumstantial,[223] would then be accorded the legal significance of comparable evidence of age-based employment discrimination. For example, evidence of employment classifications based on an age proxy or of actions or statements made by the employer that reflect an intent to differentiate among employees on the basis of the age proxy would constitute direct evidence of age discrimination.[224] The burden of persuasion would then shift to the defendant employer to prove that one of the statutorily defined exceptions to the ADEA applies.

B. Effecting an Appropriate Balance of Employer and Employee Interests

Most courts and commentators recognize that disparate treatment discrimination theory alone is insufficient to encompass all the forms of "arbitrary" age discrimination that Congress sought to proscribe by enacting the ADEA. Those courts and commentators that favor a narrow definition of the age proxy doctrine thus frequently rely on disparate impact discrimination theory to reach the arbitrary age discrimination that results when employers use age-related factors to differentiate among employees.[225] Disparate impact discrimination theory should not, however, be applied in ADEA cases. Application of the age proxy doctrine as herein defined would effect a more appropriate balancing of employer and employee interests than would the application of disparate impact discrimination theory to claims brought under the ADEA.

1. *Disparate Impact Discrimination Theory*

Disparate impact discrimination involves employment practices that are facially neutral in their treatment of different groups but which disproportionately affect members of a protected group. The reasoning behind disparate impact theory is that if an employment

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223 *See supra* note 167.

224 If, on the other hand, an employee chose to rely on the *McDonnell Douglas/Burdine/Hicks* model to establish unlawful age discrimination by his or her employer, age proxy evidence could be used to establish the elements of the plaintiff's prima facie case or the pretextuality of the employer's proffered nondiscriminatory reason for the challenged action. *See supra* note 221 and accompanying text.

225 *See, e.g.*, SULLIVAN ET. AL, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 11.4, at 723 (1980) ("[M]aximum effectuation" of ADEA principles requires acceptance of both disparate treatment and disparate impact theories of age discriminations); Gregory, *supra* note 46, at 404 ("To treat an employer's reliance on a neutral factor as a direct proxy for age is to trump the standards that exist for disparate impact claims.").

practice disproportionately affects members of a protected group, the employer should be required to justify the practice.[226] Disparate impact theory was developed in the Title VII context to identify situations in which companies, through inertia or insensitivity, maintained employment practices which, although not intentionally discriminatory, disproportionately disadvantaged members of a protected group.[227]

The Supreme Court first adopted disparate impact theory in *Griggs v. Duke Power Co.*,[228] striking down, as violative of Title VII, an employer's education and testing requirement which had the effect of disqualifying black applicants at a substantially higher rate than it did white applicants.[229] Citing Congress's desire to achieve equality of employment opportunities and to remove "artificial, arbitrary and unnecessary barriers to employment" through its enactment of Title VII, the Court interpreted the language of Title VII to prohibit employment practices that are "fair in form, but discriminatory in operation."[230] The Court reasoned that employment practices "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[231] Because the education and testing requirement proved to be unrelated to job performance,[232] and hence unlawfully discriminated among employees on the basis of race, the Court found that the practice violated Title VII.[233]

In *Hazen Paper*, the Supreme Court reminded the lower courts that it has not yet decided whether disparate impact theory applies to ADEA claims.[234] The Court maintained, however, that disparate treatment discrimination "captures the essence of what Congress sought to prohibit in the ADEA."[235] Justice Kennedy, in a concurring opinion joined by Chief Justice Rehnquist and Justice Thomas, underscored

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226 Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992).

227 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977).

228 401 U.S. 424 (1971).

229 *Id.* at 427-29. The employer required a high school diploma or a passing grade on an intelligence test as a condition of employment or transfer into one of the plant's higher paying "operating departments." *Id.*

230 *Id.* at 431.

231 *Id.* at 430.

232 *Id.* at 431-32.

233 *Id.* at 436.

234 Citing Justice Rehnquist's dissent in Markham v. Geller, 451 U.S. 945 (1981) (Rehnquist, J., dissenting), the Court emphasized "we have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here. Respondent claims only that he received disparate treatment." Hazen Paper Co. v. Biggins, 507 U.S. 606, 610 (1993).

235 *Id.*

this statement, stressing that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[236]

Although the Supreme Court has never decided whether disparate impact discrimination is cognizable under the ADEA, many lower courts, prior to *Hazen Paper*, did not hesitate to extend the doctrine to alleged ADEA violations.[237] The Second Circuit was the first to apply

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236 *Id.* at 618 (Kennedy, J., with whom Rehnquist, C.J., and Thomas, J., join, concurring). Justice Kennedy's concurrence states in relevant part:

> [N]othing in the Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII . . . . As the Court acknowledges . . . we have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA . . . . It is on the understanding that the Court does not reach this issue that I join in its opinion.

Id. (citations omitted); *see also* Markham v. Geller, 451 U.S. 945, 947 (1981) (Rehnquist, J., dissenting from denial of certiorari) (asserting that disparate impact discrimination theory is "inconsistent with the express provisions of the ADEA and is not supported by any prior decision of [the] Court"); Metz v. Transit Mix, Inc., 828 F.2d 1202, 1216-20 (7th Cir. 1987) (Easterbrook, J., dissenting) (maintaining that there is no support for disparate impact theory in the text, legislative history, or purposes of the ADEA).

237 *See e.g.*, *First Circuit:* Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986); *Second Circuit:* Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied* 451 U.S. 945 (1981); Maresco v. Evans Chemetics, 964 F.2d 106 (2d Cir. 1992); *Third Circuit:* Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1983), *cert. denied*, 464 U.S. 937 (1983); MacNamara v. Korean Air Lines, 863 F.2d 1135, 1148 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989); *Sixth Circuit:* Abbott v. Federal Forge, Inc., 912 F.2d 867 (6th Cir. 1990); Wooden v. Board of Educ., 931 F.2d 376, 379 (6th Cir. 1991); *Eighth Circuit:* Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); *Ninth Circuit:* Rose v. Wells Fargo & Co., 902 F.2d 1417, 1423 (9th Cir. 1990); Shutt v. Sandoz Crop Protection Corp., 934 F.2d 186, 188 (9th Cir. 1991), *amended and superseded*, 944 F.29 1431, *cert. denied*, 503 U.S. 937 (1992); *Eleventh Circuit:* MacPherson v. University of Montevallo, 922 F.2d 766, 770-71 (11th Cir. 1991); Allison v. Western Union Tel. Co., 680 F.2d 1318, 1321-22 (11th Cir. 1982).

Cf. Fifth Circuit: Akins v. South Central Bell Tel. Co., 744 F.2d 1133, 1136 (5th Cir. 1984) (declining to decide whether disparate impact theory is available in ADEA cases); *Seventh Circuit:* Davidson v. Board of Gov. of State Colleges & Univ., 920 F.2d 441, 444 (7th Cir. 1990) (observing that "this court, except for a possibly off-hand dictum in Monroe v. United Air Lines, Inc., 736 F.2d 394, 404 n.3 (7th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985) has merely assumed that [disparate impact analysis applies under the ADEA]"); Fisher v. Transco Servs.-Milwaukee, Inc., 979 F.2d 1239, 1244 n.3 (7th Cir. 1992) (clarifying that the Seventh Circuit only assumes the applicability of disparate impact theory under the ADEA); *Tenth Circuit:* Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1428 (10th Cir. 1993) ("The Tenth Circuit has never directly addressed whether a disparate impact claim is cognizable under the ADEA. . . . [W]e believe the prudent course is to merely assume the applicability of the disparate impact analysis without deciding whether it is a viable theory of recovery under the ADEA."); *D.C. Circuit:* Arnold v. United States Postal Serv., 863 F.2d 994, 998 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 846 (1989) (declining to decide whether disparate impact analysis is applicable to ADEA cases).

The EEOC also maintains the view that traditional disparate impact theory is applicable to claims brought under the ADEA. Section 1625.7(d) of the EEOC's interpretative guidelines provides:

disparate impact analysis to the ADEA in *Geller v. Markham*.[238] *Geller* involved a fifty-five-year-old teacher's challenge of a Connecticut school board's "sixth step policy."[239] To cut costs, the school board sought to hire teachers below a certain experience level, effectively excluding 92.6% of teachers within the protected age group and 62% of teachers under age 40.[240] The court held that the school board's policy violated the ADEA on both disparate treatment and disparate impact grounds.[241] Reasoning that disparate impact discrimination theory should be applied in age discrimination cases, the court relied principally on the textual similarity between ADEA and Title VII prohibitions and on the Supreme Court's statement in *Lorillard v. Pons*[242] that "the [substantive] provisions of the ADEA were derived *in haec verba* from Title VII."[243]

The Eighth Circuit was the next circuit to recognize the applicability of disparate impact discrimination theory to claims arising under the ADEA. In *Leftwich v. Harris-Stowe State College*,[244] the Eighth Circuit held that a college's tenure-based faculty selection plan disproportionately impacted older workers.[245] To reduce costs, the college reserved a certain number of positions for nontenured faculty.[246] The college dismissed the plaintiff, a forty-seven-year-old tenured biology professor, yet retained a younger, nontenured professor to fill a nontenured position.[247] Finding that the college failed to demonstrate that its selection plan was justified by "business necessity," the court

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> When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity.

29 C.F.R. § 1625.7(d) (1995). Although not legally binding, courts typically accord such interpretations considerable deference. *See, e.g,* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) ("The administrative interpretation[s] of the Act by the enforcing agency [are] entitled to great deference."); Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 748 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983). As the Court observed in Skidmore v. Swift Co., 323 U.S. 134, 140 (1944), *accord* Quinn v. New York State Elec. & Gas Corp., 569 F. Supp. 655, 660 (N.D.N.Y. 1983), however, the persuasive value of an interpretative guideline "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

238 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

239 *Id.* at 1030.

240 *Id.*

241 *Id.*

242 434 U.S. 575 (1978).

243 *Geller*, 635 F.2d at 1032 (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)).

244 702 F.2d 686 (8th Cir. 1983).

245 *Id.* at 690-91.

246 *Id.* at 689-90.

247 *Id.*

upheld the district court's finding that the selection plan violated the ADEA.[248]

The Eighth Circuit's decision to incorporate disparate impact discrimination theory under the ADEA has since been followed by a number of jurisdictions.[249] However, courts applying disparate impact theory to ADEA actions have typically done so without engaging in any meaningful analysis as to why it should apply.[250] Some commentators have sought to fill the gaps left by the courts, citing legislative intent, statutory language, and the principles behind *Griggs v. Duke Power Co.*[251] as grounds for extending disparate impact analysis to ADEA claims.[252]

The applicability of disparate impact discrimination theory to ADEA claims was first seriously questioned by the Seventh Circuit in *Finnegan v. Trans World Airlines, Inc.*[253] The court rejected employees' claims that their employer's across-the-board cuts in wages and vacation benefits violated the ADEA, reasoning that the application of disparate impact theory to ADEA cases "would mean that every time an employer made an across-the-board cut in wages or benefits he was prima facie violating the age discrimination law. Practices so tenuously related to discrimination, so remote from the objectives of civil rights law, do not reach the prima facie threshold."[254]

In the aftermath of *Hazen Paper*, several lower courts, acting on dicta announced in that case, have held that the disparate impact doctrine is not cognizable under the ADEA.[255] Thus there is no guaran-

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248 *Id.* at 692.

249 *See supra* note 237.

250 *See supra* note 237.

251 401 U.S. 424 (1971).

252 *See infra* note 253.

253 967 F.2d 1161 (7th Cir. 1992). Although the 7th Circuit was the first court to take a close look at the desirability of extending disparate impact discrimination theory to ADEA cases, commentators have been debating the appropriateness of applying disparate impact analysis to ADEA cases for well over a decade. *See generally*, O'MEARA, *supra* note 15, at 138-42; Blumrosen, *supra* note 20, at 68-115; Bolick, *supra* note 108, at 9-11, 13-14; Eglit, *supra* note 15; Kaminshine, *supra* note 36, at 229; Mack A. Player, *Proof of Disparate Treatment Under the ADEA: Variations on a Title VII Theme*, 17 GA. L. REV. 621, 625 n.18 (1983); Player, *supra* note 15; Donald R. Stacy, *A Case Against Extending the Adverse Impact Doctrine to the ADEA*, 10 EMPLOYEE REL. L.J. 437 (1985); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982); Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984); *see also* Evan H. Pontz, *supra* note 36; Sloan, *supra* note 140, at 517-25, 539-43.

254 *Finnegan*, 967 F.2d at 1165.

255 After *Hazen Paper*, the District Court for the Western District of Pennsylvania was the first lower court to reject disparate impact discrimination theory as applied to ADEA claims. In Martincic v. Urban Redevelopment Authority, 844 F. Supp. 1073 (W.D. Pa.), *aff'd without opinion*, 43 F.3d 1461 (3d Cir. 1994), the plaintiff instituted an ADEA action against his employer alleging discriminatory failure to promote. Citing the "logical incompatibility" between a plaintiff's burden of proof under the ADEA and disparate impact discrimination theory and Congress's failure to sanction the application of disparate im-

pact theory to ADEA cases when it codified the doctrine under Title VII, the court stated: "While we are hound by precedent in the United States Court of Appeals for the Third Circuit, which seems to suggest otherwise but pre-dates the United States Supreme Court's decision in *Hazen Paper Co. v. Biggins*, . . . we are convinced disparate impact is not a cognizable claim under the ADEA." *Id.* at 1076-77 (citations omitted).

In Hiatt v. Union Pacific Railroad, 859 F. Supp. 1416 (D. Wyo. 1994), *aff'd*, 65 F.3d 838 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 917 (1996), the District Court of Wyoming reached a similar conclusion. In *Hiatt*, the plaintiffs, originally employed by the defendant as brakemen, were required to accept mandatory promotions to conductor status pursuant to a congressional mandate. *Id.* at 1422. The plaintiffs alleged that the mandatory promotion policy deprived them of their seniority, impermissibly discriminating against them on the basis of age in violation of the ADEA. *Id.* at 1423. On the issue of whether disparate impact claims are cognizable under the ADEA, the *Hiatt* court concluded that because age is a mutable characteristic, "an employer's current employment practices cannot be said to perpetuate past discrimination against a particular group of older workers." *Id.* at 1436. The Tenth Circuit affirmed the decision on limited grounds, expressly declining to resolve the issue of whether disparate impact claims are cognizable under the ADEA. Hiatt v. Union Pac. R.R., 65 F.3d 838 (10th Cir. 1995).

The Seventh Circuit was the first federal circuit court to reject disparate impact discrimination theory as applied to ADEA claims. On facts remarkably similar to Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), *see supra* notes 238-43 and accompanying text, the Seventh Circuit in EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995), affirmed the district court's grant of summary judgment where a private school failed to consider a 63-year-old applicant with 30 years' experience for a teaching position because he would qualify for a much higher salary than younger, less experienced candidates. *Id.* at 1075. The court did not expressly denounce the applicability of disparate impact discrimination theory to the ADEA; however, the majority clearly based its decision on the "apparent theory" that *Hazen Paper* "precludes the use of the disparate impact theory of liability under the ADEA." *Id.* at 1078 (Cudahy, J. dissenting); *see also id.* at 1077 (observing 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" under the ADEA) (citing Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994)). Despite acknowledgment that years of service "may be age-correlative," the majority concluded that "'it is incorrect to say that a decision based on years of service is necessarily age-based,' unless the plaintiff can demonstrate that the reason given was a pretext for a stereotype-based rationale." *Id.* at 1078 (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993)).

In Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996), the Tenth Circuit joined the Seventh Circuit, expressly holding that disparate impact claims are not cognizable under the ADEA. *Id.* at 1007. In *Ellis*, the plaintiffs filed an ADEA action against United Airlines after United refused to hire the plaintiffs as flight attendants because the plaintiffs exceeded United's weight requirements for new flight attendants. *Id.* at 1000. The plaintiffs claimed that United's age-neutral weight requirements had a disparate impact on older applicants in violation of the ADEA. *Id.* at 1000-02. In concluding that disparate impact discrimination theory was not available to ADEA claimants, the court examined the langnage, structure, legislative history, and purposes of the ADEA. *Id.* at 1003-10.

Following *Hazen Paper*, the First, Third, Fifth, and Sixth Circuits have also expressed some reservations about extending disparate impact discrimination theory to ADEA claims. *See, e.g.*, Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 1004 (5th Cir. 1996) ("*Hazen Paper* indicates that disparate impact theory is not available under [the] ADEA."); Lyon v. Ohio Educ. Ass'n & Professional Staff Union, 53 F.3d 135, 139 n.5 (6th Cir. 1995) ("There is considerable doubt as to whether a claim of age discrimination may exist under a disparate impact theory . . . . However, this circuit has stated that a disparate impact theory of age discrimination may be possible."); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995) (plurality) ("[I]n the wake of *Hazen*, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA."); Graffam v. Scott Paper Co.,

tee that disparate impact discrimination theory will remain a viable source of protection for ADEA claimants.

2. *Too Broad A Sweep: Applying Traditional Disparate Impact Theory under the ADEA*

Whereas a strict application of disparate treatment theory is too narrow, permitting employers to evade the ADEA by implementing policies based on criteria that correlate highly with age but are not directly age-based, traditional disparate impact theory sweeps too broadly, limiting the range of employers' choices in too many circumstances. Broadening the scope of the age proxy doctrine would effect a more appropriate balancing of employer and employee interests than would the application of disparate impact discrimination theory in ADEA cases.[256]

Under disparate impact discrimination theory, a plaintiff must prove, typically by way of statistics, that the employment practice or policy in question has a disproportionate effect on members of the protected group. Where a significant disparate impact on a protected group has been established, an employer may defend his or her actions only by showing "business necessity" and "job relatedness."[257]

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60 F.3d 809 (1st Cir. 1995); *see also* Stutts v. Sears, Roebuck & Co, 855 F. Supp. 1574, 1579 (N.D. Ala. 1994) ("plaintiff has from the outset a heavy burden of persuading the court to find the existence of liability under a theory that the Supreme Court has explicitly stated it has not yet accepted"). *But see* Mangold v. California Pub. Utilities Comm'n, 67 F.3d 1470, 1474 (9th Cir. 1995) (noting that "existing Ninth Circuit precedent approves of a disparate impact theory under the ADEA"); Houghton v. SIPCO, Inc., 38 F.3d 953 (8th Cir. 1994) (applying disparate impact theory to an ADEA claim); Lumpkin v. Brown, 898 F. Supp. 1263, 1271 (N.D. Ill. 1995) (notwithstanding *Francis*, "it may fairly be assumed that as to federal employees the courts . . . would still recognize a disparate impact theory under Section 633a (as was done pre-*Francis*[])").

256 Many "disparate impact" cases could be more appropriately classified as disparate treatment/age proxy cases. For example, where an employer utilizes a factor directly correlated with and dependent on age, such as experience, pension status, seniority or tenure, in making an employment decision, such decisions will necessarily have a disproportionate impact on older workers. *See, e.g.*, Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), discussed *supra* text accompanying notes 238-48. By broadly applying the age proxy doctrine so as to encompass employment decisions involving time-based factors, one can still obtain the *Geller* and *Leftwich* results without extending ADEA liability to employment decisions based on legitimate non-age factors such as education or skill requirements, which although might disproportionately impact older workers, are not directly tied to and dependent upon age. *See, e.g.*, Beith v. Nitrogen Prods., Inc., 7 F.3d 702 (8th Cir. 1993) (where employee was fired because of a degenerative lumbar disease, the court stated that although back conditions may be more prevalent in older employees, this fact in and of itself did not bring the employment decision within the prohibitions of the ADEA); Stein v. National City Bank, 942 F.2d 1062 (6th Cir. 1991) (involving an employer who consistently refused to hire individuals with a college degree).

257 In Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), a Title VII case, the Supreme Court reformulated the law of disparate impact discrimination in a number of ways, including how the burden of persuasion is allocated when adjudicating disparate

impact claims. Prior to *Wards Cove*, once the employee demonstrated the disparate impact of an employer's employment practice, the burden of persuasion shifted to the defendant to show the "business necessity" and "job relatedness" of the contested practice. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Dothard v. Rawlinson, 433 U.S. 321, 331 (1977). In *Wards Cove*, however, the Supreme Court modified the allocation of and burdens of proof in disparate impact discrimination cases. A five-four decision, *Wards Cove* held that once a plaintiff succeeds in establishing a prima facie case of disparate impact discrimination, the burden of production, but not the burden of persuasion, shifts to the employer, who must provide evidence of a "business justification for his employment practice." *Wards Cove*, 490 U.S. at 659. As the Court explained, when considering the employer's business justification, the "dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* Although "a mere insubstantial justification . . . will not suffice," under *Wards Cove*, the challenged practice need not be "'essential' or 'indispensable' to the employer's business for it to pass muster." *Id.* Whereas the "touchstone" of this inquiry under *Griggs*, is "business necessity," 401 U.S. at 431, the "touchstone" is, under *Wards Cove*, "a reasoned review of the employer's justification for his use of the challenged practice," 490 U.S. at 659. The "business necessity" defense announced in *Griggs* was thus reduced to a "legitimate business justification" defense under *Wards Cove*. For a discussion of the impact of the *Wards Cove* decision on *Griggs* and its progeny, see Mack A. Player, *Is* Griggs *Dead? Reflecting (Fearfully) on* Wards Cove Packing Co. v. Atonio, 17 FLA. ST. U. L. REV. 1, 33-36 (1989).

In 1991, Congress codified disparate impact discrimination under Title VII and restored the doctrine to its pre-*Wards Cove* formulation. Civil Rights Act of 1991 § 105(a), 42 U.S.C. § 2000e-2(k) (1994). The Civil Rights Act of 1991 places the burden of persuasion as well as the burden of the production on the defendant to demonstrate "job relatedness" and "business necessity" once the plaintiff establishes that a specific employment practice has a disparate impact on members of the protected group. *Id.*

In his treatise on age discrimination, Professor Eglit observes that "[s]ince the disparate impact analysis formulated in *Griggs v. Duke Power Co.* and *Albemarle Paper Co. v. Moody* was supplanted in 1989 by *Wards Cove Packing Co. v. Atonio*, courts addressing disparate impact claims under the [ADEA] have looked to the latter decision for gnidance." 2 EGLIT, *supra* note 16, § 7.51, at 7-302 to 7-303. Eglit goes on to argue that since Congress did not amend the ADEA to incorporate *Griggs* principles, "even though it had to have known of the regnlar, repeated practice of ADEA courts relying on Title VII rulings . . . that *Wards Cove* was left alive and well, insofar as its analogical force for the ADEA is concerned." *Id.* at 7-306. However, nearly all of the courts which have applied *Wards Cove* analysis to ADEA disparate impact claims involve claims which arose prior to the effective date of the Civil Rights Act of 1991—November 19, 1991. *See, e.g.*, MacPherson v. University of Montevallo, 922 F.2d 766 (11th Cir. 1991); Abbott v. Federal Forge, Inc., 912 F.2d 867 (6th Cir. 1990). Courts are, moreover, split as to whether the 1991 Civil Right Act provisions should be applied retroactively, rendering attempts to draw conclusions from courts' application of *Wards Cove* analysis all the more difficult. *See, e.g.*, Houghton v. SIPCO, Inc., 38 F.3d 953, 959 (8th Cir. 1994) (disparate impact cases filed before the effective date of the 1991 Civil Rights Act governed by *Wards Cove*).

In fact, courts which have recognized disparate impact theory under the ADEA are generally split as to whether *Wards Cove* analysis, *Griggs* principles, or the 1991 Civil Rights Act provisions should govern the burden of proof in ADEA disparate impact cases. Most of the courts which have addressed the issue have managed to avoid deciding whether the disparate impact provisions of the 1991 Civil Rights Act should apply to ADEA claims. *See, e.g.*, Faulkner v. Super Valu Stores, 3 F.3d 1419, 1429 n.8 (10th Cir. 1993); Finnegan v. Trans World Airlines, 967 F.2d 1161, 1163 (7th Cir. 1992); Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1245 n.4 (7th Cir. 1992); Leidig v. Honeywell, Inc., 850 F. Supp. 796, 802 n.5 (D. Minn. 1994). However, one lower court has noted that if courts were to fail to apply the 1991 Civil Rights Act disparate impact provisions to ADEA cases, "[d]efendants would reap a windfall from the judicial misinterpretation of disparate im-

Since the statistical effect of a specific employment practice determines liability, an employer could be held in violation of the ADEA even if the employer had not been aware of the ages of his or her employees or of the impact such a decision might have on older workers. The ADEA by its terms does not subject employment decisions to a "business necessity" review but expressly permits employers to consider a range of "reasonable factors other than age" in making employment decisions.[258]

a. *Business Necessity v. The RFOA Exception*

The ADEA permits employers to differentiate among employees or job applicants "where the differentiation is based on reasonable factors other than age."[259] The ADEA's RFOA exception is a "mirror image" of the offense of age discrimination.[260] Unlike the BFOQ exception, where the employer admits to age-based discrimination and maintains its necessity, an employer who claims an RFOA exception asserts that there has been no age discrimination at all. Reasonable factors other than age may include "factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence."[261] Some courts have imposed a requirement that "reasonable factors" be job oriented, holding that physical fitness or educational requirements qualify as an RFOA only when such requirements are specifically related to, or necessary for, job performance.[262]

The RFOA exception[263] has often been overlooked by the courts. When it has been cited, it has been subject to a great deal of debate

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pact doctrine." Graffam v. Scott Paper Co., 870 F. Supp. 389, 394 (D. Me. 1994) (applying the 1991 Civil Right Act's disparate impact provisions to ADEA claims); *see also* Maidenbaum v. Bally's Park Place, Inc., 870 F. Supp. 1254 (D.N.J. 1994), *aff'd*, 67 F.3d 291 (3d Cir. 1995) (same).

Given that Congress has demonstrated its general aversion to disparate impact discrimination theory as formulated by *Wards Cove* and that courts have been reluctant to apply *Wards Cove* principles following Congress's enactment of the 1991 Civil Rights Act Amendments, I have limited my critique of disparate impact theory to traditional disparate impact theory—that formulated under *Griggs* and its pre-*Wards Cove* progeny—which places the burden of proving "job relatedness" and "business necessity" on the defendant.

258 29 U.S.C. § 623(f)(1) (1994).

259 *Id.* § 623(f)(1).

260 Massarsky v. General Motors Corp., 706 F.2d 111, 132 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983).

261 Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979).

262 *See, e.g.*, *Massarsky*, 706 F.2d at 132-33 (Sloviter, J., dissenting) (citing cases).

263 The ADEA's legislative history provides little guidance as to the role and import of its RFOA exception. Introducing the four exceptions to the ADEA, Senator Yarborough explained the RFOA provision in only the most general of terms:

> Where differentiation is based on reasonable factors other than age. For example, if a test shows that a man cannot do certain things. He might fail to pass the test at 35; he might fail to pass the test at 55. Some men slow up

not only with respect to the scope of the doctrine but also with respect to its role in the proof process.[264] For instance, some courts and commentators have posited that the RFOA exception "overlaps" the business necessity defense applied in disparate impact cases.[265] Others

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sooner than others. If the job requires a certain speed and the differentiation is based upon factors other than age, the law would not apply.

113 CONG. REC. 31253 (1967), *reprinted in* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 144 (1981).

Secretary of Labor Wirtz, testifying in support of the ADEA in 1967, did little better. When asked by Senator Randolph whether an airline's refusal to train a 45-year-old man to be a pilot—given that the FAA mandated retirement at age 60 and that the training program took three years and was very expensive—would violate the ADEA, Secretary Wirtz responded:

> I would think that where there is a training requirement, that would be a legitimate factor; that you would weigh the period of usefulness of that person against the period of training that was required, taking full account of the cost factors and human factors . . . . I would not think it would be a violation of the provision to deny employment on those terms.

Age Discrimination in Employment, Hearings on S. 830 Before the General Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st. Sess. 49 (1967).

264 Courts and commentators disagree as to how the RFOA exception should be regarded. Some argue that since the RFOA exception follows the BFOQ exception, which is an affirmative defense to a claim of age discrimination, the RFOA exception should likewise be characterized as an affirmative defense. *See, e.g.*, EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641, 647-48 (9th Cir. 1992); Criswell v. Western Airlines, Inc., 709 F.2d 544, 552 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985); Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959-60 (8th Cir. 1978); Laugesen v. Anaconda Co., 510 F.2d 307, 315 (6th Cir. 1975).

Others equate the RFOA exception with the "legitimate, nondiscriminatory" explanation an employer must articulate to rebut a presumption of intentional discrimination. *See, e.g.*, EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 222-23 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984); Iervolino v. Delta Air Lines, Inc., 796 F.2d 1408, 1415-16 (11th Cir. 1986), *cert. denied*, 479 U.S. 1090 (1987); Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 591-92 (5th Cir. 1978), *reh'g denied*, 582 F.2d 466 (5th Cir. 1978); CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION LAW AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS § 3:89, at 3-38 (2d ed. 1994) (arguing that the RFOA exception "is more properly seen as a refutation of plaintiff's *prima facie* case"). Still others combine the two. *See, e.g.*, Massarsky v. General Motors Corp., 706 F.2d 111, 132 (3d Cir.) ("reasonable factors" defense will "overlap the legitimate, nondiscriminatory reason which defendant must articulate to rebut intent to discriminate"), *cert. denied*, 464 U.S. 937 (1983).

For a thorough exposition of RFOA doctrine, including the history of the exception, what constitutes an RFOA, and its use in both disparate treatment and disparate impact discrimination cases, see generally, Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Defense*, 66 B.U. L. REV. 155 (1986) (maintaining that the RFOA exception should constitute an affirmative defense in some, but not all, situations).

265 *See, e.g. Massarsky*, 706 F.2d at 132 (Sloviter, J., dissenting) ("[I]n disparate impact cases, the 'reasonable factors' defense will overlap the business necessity upon which the defendant must rely . . . . In such cases the 'reasonable factors' must be justified as job related . . . reasonably necessary for the specific work."); Laugesen v. Anaconda Co., 510 F.2d 307, 315 (6th Cir. 1975) (differentiations based on factors other than age can disproportionately impact older workers, requiring employer to show job-relatedness); *see also* EEOC v. Governor Mifflin Sch. Dist., 623 F. Supp. 734, 743-45 (D.C. Pa. 1985) (rejecting the argument that the existence of the RFOA exception forecloses the application of disparate impact analysis under the ADEA).

have gone so far as to equate the two, asserting that the RFOA exception simply codifies business necessity.[266]

But these courts and commentators fail to recognize the incompatibility between the ADEA's "reasonable factors other than age" exception[267] and disparate impact theory's "business necessity" defense.[268] The business necessity defense is defined not in terms of

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266 *See, e.g.*, Eglit, *supra* note 264; Player, *supra* note 15, at 1271-72, 1278-79 (proposing that, once an employee establishes a prima facie case of disparate impact discrimination, the employer be required to show that his or her decision was "reasonable"); *see also* 29 C.F.R. § 1625.7(d) (1995).

267 In light of their textual similarity, the ADEA's RFOA exception has often been compared to the Equal Pay Act's "factors other than sex" exception. 29 U.S.C. § 206(d)(1)(iv) (1994). In County of Washington v. Gunther, 452 U.S. 161, 170-71 (1981), the Supreme Court interpreted section 206(d)(1) of the Equal Pay Act to preclude application of disparate impact theory with its "business necessity" defense to claims under the EPA, leading some to argue that a similar conclusion should be reached with respect to the ADEA. *See, e.g.*, Ellis v. United Airlines, 73 F.3d 999, 1007-08 (10th Cir. 1996).

268 "The Supreme Court has not been monolithic in its references to 'business necessity.'" Peter M. Leibold et al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043, 1073 (1993). For instance, although the Court initially formulated the defense in Griggs v. Duke Power Co., 401 U.S. 424 (1971), in each of five cases which intervened between *Griggs* and Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)—in which the Court rewrote disparate impact discrimination theory in significant part—the Court defined the "business necessity" defense differently. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court phrased the "business necessity" defense as requiring a showing of job-relatedness on the part of the defendant employer. The *Albemarle* Court held that the challenged employment practice must be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job . . . for which candidates are being evaluated." *Id.* at 431 (citing 29 C.F.R. § 1607.4(c)). The Court alternatively defined "business necessity" to mean "essential to effective job performance," Dothard v. Rawlinson, 433 U.S. 321, 331 (1977), "based on legitimate business reasons," Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988), or to require a showing of "legitimate employment goals . . . significantly served" by the challenged employment practices "even if they do not require [it]," New York Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979). *See* Leibold et al., *supra*, at 1073-74; Pamela L. Perry, *Balancing Equal Employment Opportunities With Employers' Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination Under Title VII*, 12 INDUS. REL. L.J. 1, 11-28 (1990).

In 1991 when Congress codified disparate impact discrimination theory under Title VII, it purported to codify "the concepts of 'business necessity' and 'job relatedness' enunciated by the Supreme Court in Griggs v. Duke Power Co. . . . and in the other Supreme Court decisions prior to Wards Cove." 42 U.S.C. § 2000e-2(k) (1994). There has since been considerable disagreement as to whether Congress sought to impose a strict "business necessity" standard, as announced in *Griggs* and *Albemarle*, or a more relaxed standard based on the general relationship of the challenged employment practice to the employer's needs. *See, e.g.*, Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011 (1993); Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921 (1993); Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 910-13 (1993). As amended, however, Title VII requires an employer to show both "business necessity" and "job relatedness," 42 U.S.C. § 2000e-(2)(k)(1)(A)(i) (1994). If the plain meaning of the statute is to be given any effect, the statute must be read to require that an employer prove much more than a rational relationship between his or her business needs and the employment practice in question. Although the 1991 Civil Rights Act provisions that codified disparate impact theory under Title VII do not directly apply to ADEA cases, those courts which have recog-

reasonableness but rather in terms of necessity. Reasonableness implies a spectrum of alternatives; as to which alternative is the best, reasonable minds may differ. Business necessity, on the other hand, is much narrower, "limited to those cases where an employer has no other choice."[269] Once a plaintiff establishes that a facially neutral employment practice has a significant discriminatory impact, an employer must, under the analysis advanced by *Griggs* and its progeny, demonstrate that the job practice or requirement has a "manifest relationship" with the employment to defeat a finding of unlawful disparate impact discrimination.[270] Even if the employer sustains its burden of persuasion, an employee may nevertheless prevail if he or she can establish that a less discriminatory alternative would have served the employer's interests.[271]

Age discrimination in employment is inherently different from employment discrimination based on race or sex, to which disparate impact discrimination theory has traditionally been applied. Unlike race and gender discrimination, ageism in the workplace is not a remnant of a "legacy of discrimination," nor does it perpetuate a history of past discrimination.[272] The dissimilarity between age discrimination in employment and other more invidious forms of workplace discrimination justifies the application of different theories of liability in age discrimination cases than are applied in Title VII cases.[273] By focusing on the intent of the employer, rather than on the effect of his or her actions, disparate treatment discrimination theory, as supplemented by the age proxy doctrine, would most clearly effectuate the purposes

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nized disparate impact claims under the ADEA have tended to apply a strict "business necessity" standard as defined by *Griggs*. *See supra* note 257.

269 Watkins v. Scott Paper Co., 530 F.2d 1159, 1181 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976).

270 *Griggs*, 401 U.S. at 432.

271 *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). As applied in the ADEA context, see, for example, Criswell v. Western Airlines, Inc., 709 F.2d 544 (9th Cir. 1983), *aff'd*, 472 U.S. 400 (1985).

272 *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). Unlike race or sex, age is not a suspect or quasi-suspect classification under the Equal Protection Clause of the 14th Amendment; age classifications are therefore subject to only a rational basis review. As the Supreme Court has noted:

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. . . . [O]ld age does not define a "discrete and insular" group . . . in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live out our normal span.

Id. at 313-14.

273 *See* Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 383-88 (1976).

and policy considerations underlying the ADEA's prohibition of "arbitrary" age discrimination in employment.

CONCLUSION

The ADEA is an important weapon in combating ageism in employment.[274] Seeking to eradicate demeaning stereotypes about the abilities and productivity of older workers, the ADEA proscribes "arbitrary"[275] discrimination in employment "because of" age.[276] Full effectuation of its purposes, however, requires that courts recognize that employers who arbitrarily discriminate "because of"[277] age rarely communicate their discriminatory intent.

The Court took a wrong turn in *Hazen Paper Co. v. Biggins.* Substantially narrowing the scope of the age proxy doctrine, *Hazen Paper* permits employers to evade the ADEA by implementing employment decisions based on seemingly non-age criteria that correlate highly with age. Disparate impact discrimination theory is not an appropriate substitute for safeguarding the legitimate interests protected by the ADEA. Traditional disparate impact theory sweeps too broadly, limiting the range of employers' choices in too many circumstances.

In light of the difficulties employees face when attempting to prove claims of disparate treatment discrimination under the ADEA, the age proxy doctrine should be accorded a more prominent role in age discrimination cases than the Court's narrow application of the doctrine in *Hazen Paper* allows. The language of the ADEA, its purposes, and the policy considerations underlying its enactment support a broader application of the age proxy doctrine.

As Judge Sloviter of the Third Circuit explained in his dissent to *Massarsky v. General Motors Corp.*,[278] "[t]here may be some unavoidable instances where the ADEA's protection of the older worker has a countervailing impact on another worthy policy."[279] But Congress thought that protecting older workers was worth it. By requiring employers to justify all employment decisions in which a time-based factor is determinative, a more expansive application of the age proxy doctrine would hold employers accountable for arbitrary age discrimi-

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274 As the Seventh Circuit has observed, the ADEA "is a major source of federal litigation and a growing factor in American labor markets." Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655, 656 (7th Cir. 1991). In fiscal year 1993, for instance, ADEA claims accounted for 22.6% of all charges filed with the EEOC, and that percentage is rising. *See* 1 EGLIT, *supra* note 16, § 2.01, at 2-6 (1994) (citing EEOC Compliance Manual, News and Developments 3 (Jan. 31, 1994)).

275 29 U.S.C. § 621(b) (1994).

276 *Id.* § 623(a)(1).

277 *Id.* § 623.

278 706 F.2d 111 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983).

279 *Id.* at 135 (Sloviter, J., dissenting).

nation accomplished not only through age-based factors, but through age-correlated factors as well. Broader application of the age proxy doctrine would ensure that older workers receive the full protection from arbitrary age discrimination in employment to which they are entitled under the ADEA.

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