CORPORATE REORGANIZATIONS, JOB LAYOFFS, AND AGE DISCRIMINATION: HAS *SMITH V. CITY OF JACKSON* SUBSTANTIALLY EXPANDED THE RIGHTS OF OLDER WORKERS UNDER THE ADEA?

Aïda M. Alaka[*]

I. INTRODUCTION

The American workforce is aging. The Department of Labor's Bureau of Labor Statistics (BLS) forecasts a 10 percent overall increase in the civilian labor force between 2004 and 2014.[1] During the same period, however, the BLS predicts that the number of workers age fifty-five and older will increase by 49.1 percent—almost five times the overall growth rate.[2] The BLS estimates that by 2012, workers under the age of forty will comprise only 46.8 percent of the civilian labor force.[3]

These trends reflect the aging "baby-boom" generation—those individuals who were born between 1946 and 1964, all of whom are now over forty years old.[4] Of late, much has been made of the potential impact baby-boom generation workers may have once they leave the workforce. In anticipation of large numbers of baby-boomers retiring, and out of concern for concomitant underfunded payout obligations, for example, President George W. Bush unsuccessfully made "reforming" Social Security a key item on his second-term agenda.[5] Others have noted that private pension plans

[*] Associate Professor of Law, Washburn University School of Law. The author wishes to thank John Rury, Michael Green, and Jeffrey Jackson for their helpful comments. She would also like to thank Laura Steel, J.D. 2007, for her research assistance.

[1] Mitra Toossi, *Labor Force Projections to 2014: Retiring Boomers*, MONTHLY LAB. REV., Nov. 2005, at 25, 25, 26 tbl.1 [hereinafter Toossi, *2014 Projections*].

[2] *Id.*

[3] Mitra Toossi, *Labor Force Projections to 2012: The Graying of the U.S. Workforce*, MONTHLY LAB. REV., Feb. 2004, at 37, 55 tbl.8.

[4] Toossi, *2014 Projections*, *supra* note 1, at 25; *see* Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, BLS Releases 2002–12 Employment Projections (Feb. 11, 2004), *available at* http://www.bls.gov/news.release/archives/ecopro_02112004.pdf.

[5] *See* Strengthening Social Security for Future Generations,

will also be affected,[6] and indeed the Pension Benefit Guaranty Corporation reports that "[c]ompanies with underfunded pension plans reported a record shortfall of $353.7 billion in their latest filings" with the agency.[7] This number represents a 27 percent increase in the funding shortfall reported one year earlier.[8]

Whether or when to retire is obviously not always a function of personal choice, however. A recent national survey of close to 3,100 individuals showed that job loss or health issues caused four out of ten retired workers to leave their jobs earlier than they had intended.[9] The survey also showed that although 45 percent of the employed respondents intended to continue working after age sixty-five, only 13 percent of the retirees had actually done so.[10] Of the early retirees, 44 percent cited job loss as the reason they had left the work force.[11]

Corporate bankruptcy, company mergers or reorganizations, and relocation of work, often resulting in permanent worksite closures, can all result in involuntary retirement.[12] Whatever the reason, when older workers are terminated during these events, statistics indicate that they are likely to remain unemployed for a longer period than younger workers.[13] For example, while workers aged

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http://www.whitehouse.gov/infocus/social-security (last visited Oct. 2, 2006).

[6] *See, e.g.*, Patrick J. Purcell, *Older Workers: Employment and Retirement Trends*, MONTHLY LAB. REV., Oct. 2000, at 23–30 (discussing changes to Social Security, pensions, and other benefits that might ensue once the baby-boom generation retires).

[7] Press Release, Pension Benefit Guar. Corp., PBGC No. 05-48, Companies Report a Record $353.7 Billion Pension Shortfall in Latest Filings with PBGC (June 7, 2005), *available at* http://www.pbgc.gov/media/news-archive/2005/pr05-48.html. The "PBGC is a federal corporation created by the Employee Retirement Income Security Act of 1974. It currently protects the pensions of 44.1 million American workers and retirees in 30,330 private single-employer and multiemployer defined benefit pension plans." Pension Benefit Guaranty Corporation Homepage, http://www.pbgc.gov (last visited Oct. 2, 2006).

[8] *Id.*

[9] Jonathan Peterson, *Need to Stay on Job, but Forced to Retire Early*, CHI. TRIB., July 9, 2006, at Business 9 (reporting the result of a survey conducted by McKinsey & Co.).

[10] *Id.*

[11] *Id.*; *see* U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, GAO-06-80, OLDER WORKERS: LABOR CAN HELP EMPLOYERS AND EMPLOYEES PLAN BETTER FOR THE FUTURE *passim* (2005), *available at* http://www.gao.gov/new.items/d0680.pdf [hereinafter GAO REPORT: OLDER WORKERS] (finding that the retirement of older workers without college degrees is most often motivated by health, finances, and layoffs).

[12] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT 989, EXTENDED MASS LAYOFFS IN 2004, at 2–3 (2005), *available at* http://www.bls.gov/mls/mlsreport989.pdf [hereinafter MASS LAYOFFS IN 2004]. In 2004, for example, internal company restructuring accounted for 20 percent of the reported mass layoff events, and movement of work accounted for 11 percent. *Id.* at 2–3, 15 tbl.7.

[13] *See id.* at 4 ("Claimants aged 55 years or older were more likely to exhaust [unemployment] benefits than were the other age groups.").

fifty-five or older comprised 16.9 percent of those filing initial claims for unemployment benefits due to layoffs in 2004, 19.7 percent exhausted unemployment insurance benefits.[14] Not only are older workers who are laid off more likely than younger workers to remain unemployed, but they are more likely to be re-employed on a part-time basis.[15]

Although the labor participation rate for older workers is trending upwards, they can be disproportionately affected when employers conduct layoffs to cut costs, eliminate duplicative jobs, or streamline operations simply because they are paid the most or because of employer concerns regarding pension liability.[16] One question that has long troubled older workers is whether employers discriminate when they lay off workers for economic reasons such as higher salaries or potential pension liability. Because salary and pension eligibility are often correlated with age, layoff plans using such factors to determine which workers to cut often affect older workers in greater numbers.[17] Until recently, the question of whether older workers have any protection against these actions has been met with considerable controversy. In particular, courts and commentators have disagreed regarding whether layoff selection criteria may properly be based on economic factors highly correlated with age.[18]

In March 2005, the Supreme Court resolved an issue that had confounded the lower federal courts for years. In a case rising from the Fifth Circuit, *Smith v. City of Jackson*,[19] the Court held that a disparate-impact theory of recovery is available to workers suing their employers under the Age Discrimination in Employment Act of 1967 (ADEA).[20] As a result, older workers may challenge employer

[14] *Id.* at 28 tbl.20, 32 tbl.24. Together, workers age forty-five or over comprised 42.7 percent of workers filing initial claims for unemployment compensation in 2004. *Id.* at 32 tbl.24.

[15] U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE RANKING MINORITY MEMBER, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE, HOUSE OF REPRESENTATIVES, GAO-03-350, OLDER WORKERS: EMPLOYMENT ASSISTANCE FOCUSES ON SUBSIDIZED JOBS AND JOB SEARCH, BUT REVISED PERFORMANCE MEASURES COULD IMPROVE ACCESS TO OTHER SERVICES 27 (2003), *available at* http://www.gao.gov/new.items/d03350.pdf.

[16] Judith J. Johnson, *Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other Than Age" Defense and the Disparate Impact Theory*, 55 HASTINGS L.J. 1399, 1400–01 (2004).

[17] *Id.* at 1400, 1413–14, 1440, 1442 (referring to factors correlated with age).

[18] *See id.* at 1405, 1413–14; *see also infra* notes 25–27 and accompanying text.

[19] 544 U.S. 228 (2005).

[20] *Id.* at 243.

practices that have an adverse impact on employees over the age of forty without having to prove that their employer intended to discriminate against them.[21]

Conventional wisdom might suggest that the Court has now provided protected workers with a potent new weapon in the fight against employment discrimination and, indeed, initial reactions lauded the *Smith* decision as a significant victory for the rights of older workers. For example, one commentator warned that "[t]he decision is likely to have profound implications on a wide range of corporate decision-making regarding layoffs, reductions in force and employee benefit plans. It also significantly increases liability risks for age discrimination claims."[22]

The potency of *Smith* is doubtful, however. Although the Court did not speak in one voice regarding whether or why disparate-impact claims are cognizable under the Act, it unanimously agreed that the case before it failed to present facts entitling the plaintiff employees to relief under such a theory.[23] The Court's decision stands in direct opposition to the position taken by the appellate court, which had ruled that disparate-impact claims are categorically unavailable under the ADEA, while assuming that the facts alleged would present a valid disparate-impact claim if such claims were cognizable.[24] This dichotomy highlights what is sure to remain troublesome for lower courts grappling with disparate-

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[21] The ADEA makes it unlawful for an employer

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

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

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a) (2000). These protections are afforded individuals age forty and above. *Id.* § 631(a).

[22] Gerald L. Maatman, Jr., *New ADEA Ruling Huge for Employers*, NAT'L UNDERWRITER PROP. & CASUALTY/RISK & BENEFITS MGMT., June 2005, at 34; *see, e.g.*, Linda Greenhouse, *A Boon to Age-Bias Suits*, DESERET MORNING NEWS (Salt Lake City, Utah), Mar. 31, 2005 (explaining how employers can defend against intentional discrimination claims under the ADEA "by proving that the challenged policy was based on 'reasonable factors other than age'"); Linda Greenhouse, *Justices Remove Hurdle to Suits Alleging Age Bias*, N.Y. TIMES, Mar. 31, 2005, at A1 (describing the *Smith* decision as "[a]dopting a pro-worker interpretation" of the ADEA); Charles Lane, *Ruling Eases Way for Age Bias Lawsuits*, ST. LOUIS POST-DISPATCH, Mar. 31, 2005, at A1 (expressing the view that the *Smith* decision will make it easier for employees to sue under the ADEA, though not necessarily to win). Similar stories appeared in the Washington Post, Chicago Tribune, and other newspapers.

[23] *See infra* Part III.

[24] Smith v. City of Jackson, 351 F.3d 183, 195 (5th Cir. 2003).

impact claims in the future as well as employers that find that certain business practices have an unintentionally harsher effect on employees over age forty.

Before *Smith*, lower federal courts and commentators were at odds over whether the ADEA authorized disparate-impact claims. In fact, only the Second, Eighth, and Ninth Circuits recognized such claims,[25] while the remainder either disallowed them or were undecided.[26] The debate focused largely on legislative history, Equal Employment Opportunity Commission (EEOC) guidelines, Supreme Court analysis in other cases, and certain similarities and differences in the texts of the ADEA and Title VII of the Civil Rights Act of 1964 (Title VII).[27]

In this Article, the author does not intend to rehash the arguments made by the courts or other commentators regarding whether the ADEA authorizes disparate-impact claims. Nor does the author intend to challenge the wisdom of the Supreme Court's decision in *Smith*. Instead, the author seeks to analyze the extent to which employee rights have expanded as a result of the Court's analysis of the ADEA in *Smith*. This Article begins by briefly reviewing the evolution of the disparate-impact theory of recovery under Title VII and the ADEA. It then explores the confusion generated by the Court's decision in *Hazen Paper Co. v. Biggins*.[28] The Court's decision in *Smith* will then be examined. Finally, this Article analyzes the impact of *Smith* on the rights of older workers who may lose their employment or be otherwise affected by

[25] *See* Frank v. United Airlines, Inc., 216 F.3d 845, 856 (9th Cir. 2000); Criley v. Delta Air Lines, Inc., 119 F.3d 102, 105 (2d Cir. 1997) (per curiam); Lewis v. Aerospace Cmty. Credit Union, 114 F.3d 745, 750 (8th Cir. 1997).

[26] *See, e.g.*, Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999); Ellis v. United Airlines, Inc., 73 F.3d 999, 1006–07 (10th Cir. 1996); Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 139 n.5 (6th Cir. 1995) (noting that disparate-impact claims of age discrimination may be possible, but holding that plaintiffs did not present a prima facie case of disparate treatment or disparate-impact); DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076–77 (7th Cir. 1994).

[27] *See, e.g.*, Kenneth R. Davis, *Age Discrimination and Disparate Impact, A New Look at an Age-Old Problem*, 70 BROOK. L. REV. 361 (2004) (discussing the arguments for and against the recognition of disparate impact claims under the ADEA and ultimately concluding that the ADEA should be interpreted to preclude them for reasons of public policy); Lori D. Ecker & Joseph M. Gagliardo, *Allowing Disparate Impact Claims Under the ADEA*, 93 ILL. B.J. 198 (2005) (chronicling the *Smith* case through oral arguments in front of the U.S. Supreme Court and discussing the arguments on both sides); George O. Luce, Comment, *Why Disparate Impact Claims Should Not Be Allowed Under the Federal Employer Provisions of the ADEA*, 99 NW. U. L. REV. 437 (2004) (arguing that, among other factors, the legislative history of the ADEA indicated that the statute was intended to bar disparate impact claims).

[28] 507 U.S. 604 (1993).

employer cost-cutting practices.

II. DISPARATE IMPACT: A BRIEF HISTORY

In 1964, Congress enacted Title VII of the Civil Rights Act of 1964,[29] which prohibits employment discrimination on the basis of race, color, religion sex, or national origin.[30] Since that time, Congress passed several laws prohibiting discrimination in the workplace, the most significant of which were the ADEA in 1967 and the Americans with Disabilities Act (ADA) in 1990.[31] Because Title VII predates these laws, many of the operative principles developed by the courts when analyzing Title VII discrimination claims were adopted by the courts addressing such claims under the ADA and ADEA.

The disparate-impact theory of discrimination must be distinguished from the disparate-treatment theory, pursuant to which most employment discrimination actions are brought. In the latter case, the employer's intent is the key to recovery; that is, the plaintiff must show, through either direct or circumstantial evidence, that the employer intended to discriminate against the plaintiff because of her race, color, sex, religion, or other protected characteristic.[32] Because few employees have the proverbial smoking gun that would directly demonstrate an employer's discriminatory intent—an e-mail ordering an employee's termination because older men are incapable of word processing, for example—most disparate-treatment claims are analyzed on the basis of circumstantial evidence.[33] These cases are analyzed pursuant to the "burden-shifting" evidentiary paradigm first enunciated by the Court in *McDonnell Douglas Corp. v. Green* in

[29] 42 U.S.C. §§ 2000e–2000e-17 (2000).

[30] In relevant part, Title VII provides that

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2.

[31] *Id.* §§ 12101–12213.

[32] *E.g.*, Cota v. Tucson Police Dep't, 783 F. Supp. 458, 465–66 (D. Ariz. 1992).

[33] *See* Lochard v. Provena Saint Joseph Med. Ctr., 367 F. Supp. 2d 1214, 1220–21 (N.D. Ill. 2005) (discussing the evidentiary differences between direct and circumstantial evidence).

1973.[34]

In a nutshell, a circumstantial case requires a plaintiff to state a prima facie case sufficient to raise a rebuttable inference of discrimination.[35] To rebut the inference, the defendant must articulate a "legitimate business reason" for the challenged action or omission.[36] Finally, the burden shifts back to the plaintiff to prove that the defendant's stated reason is a pretext for discrimination.[37]

Though proof of pretext will naturally vary with the facts of every case, plaintiffs must show "more than just a decision made in error or in bad judgment; [pretext] means a lie or a phony reason for the action."[38] Thus, for example, "[t]he issue is not whether the employer's evaluation of the employee was correct but whether it was honestly believed."[39] Moreover, "[t]he employer's explanation can be 'foolish or trivial or even baseless' so long as the employer honestly believed in the reasons it offered for the adverse employment action."[40] Whatever the form the evidence takes, however, "circumstantial evidence must 'point directly to a discriminatory reason for the employer's action.'"[41]

A. Disparate Impact Under Title VII

While disparate-treatment analysis focuses on the deliberately

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[34] 411 U.S. 792 (1973). *McDonnell Douglas* is generally considered a pre-trial analytical formula and is used by courts considering pre-trial motions, including those for summary judgment.

[35] The prima facie case necessarily varies depending on the specifics of a plaintiff's case: whether the plaintiff is alleging race or sex discrimination, for example, or whether plaintiff claims to have been discriminated against with respect to a promotion or firing. One formulation might be that "(1) plaintiff has an identifiable national origin; (2) plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) plaintiff was rejected despite being qualified; and (4) after plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications." *Cota*, 783 F. Supp. at 466 n.8.

[36] *Id.* at 468. The defendant's burden is one of production, not persuasion. *Id.*

[37] *Id.*

[38] Townsend v. Weyerhaeuser Co., No. 04-C-563-C, 2005 WL 1389197, at *12 (W.D. Wis. June 13, 2005) (citation omitted).

[39] *Id.* (citations omitted).

[40] *Id.* (quoting Hartley v. Wis. Bell, Inc., 124 F.3d 887, 890 (1997)). The Seventh Circuit has grouped circumstantial evidence of intentional discrimination into three general categories: (1) "suspicious timing," ambiguous oral or written statements, or comments or behavior towards protected employees; (2) "systematically better treatment" of "similarly situated" employees not in the protected class; and (3) evidence that demonstrates that a plaintiff was qualified for a job but was passed over or replaced by a non-protected employee and that the employer's reason for the difference in treatment "is unworthy of belief." *Id.* at *7.

[41] *Id.* at *7 (quoting Adams v. Wal-Mart Stores, Inc., 324 F.3d 935, 939 (7th Cir. 2003)).

discriminatory acts of employers, disparate-impact analysis focuses on the presumably unintended effects of facially neutral policies. The disparate-impact theory was first given life in 1971 when the Supreme Court ruled in *Griggs v. Duke Power Co.*[42] that Title VII "proscribes not only overt[, intentional] discrimination but also practices that [may be] fair in form, but discriminatory in [practice]."[43]

> The issue in *Griggs* was whether Title VII prohibited an employer from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[44]

Two facts were key to the Court's considerations in *Griggs*. First, the company failed to produce evidence that the test and education requirements were actually related to job performance.[45] Moreover, the impact of these requirements was to maintain the historical racial segregation of the workforce.[46] Even assuming the lower courts correctly found that the education and testing requirements were adopted without discriminatory intent, the Court reasoned that Title VII was directed "to the *consequences* of employment practices, not simply the motivation."[47] Thus, the Court held that good faith alone was not dispositive: the objective of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[48] Moreover, "[u]nder the Act, practices, procedures, or tests 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."[49]

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[42] 401 U.S. 424 (1971).
[43] *Id.* at 431.
[44] *Id.* at 425–26.
[45] *Id.* at 431.
[46] *See id.* at 432, 436.
[47] *Id.*
[48] *Id.* at 429–30.
[49] *Id.* at 430.

Additionally, the Court stressed that "[t]he touchstone is business necessity."[50] If employers cannot show that their exclusionary practices are related to job performance, then they are prohibited, and individuals aggrieved by the administration of unnecessary exclusionary policies can properly seek redress under Title VII.[51]

The scope of the disparate-impact theory and the requirements for a successful claim were expanded and clarified in *Watson v. Fort Worth Bank & Trust*.[52] In *Watson*, the Court extended the rationale in *Griggs* to situations in which employment decisions are based not on precise or formal criteria—such as educational attainment or test results—but on the subjective assessments of supervisors familiar with the candidates and with the job to be filled.[53] Because the *Watson* Court recognized that it had previously used a disparate-treatment theory to analyze these types of cases, it acknowledged the need to ascertain whether the disparate-impact analysis could also be applied under "workable evidentiary standards."[54]

Finding the disparate-impact theory equally appropriate to assessing the purported effects of subjective and objective practices, the Court clarified the applicable evidentiary standards: plaintiffs alleging to have been victimized by facially neutral practices—whether objective or subjective—must (1) identify "the specific employment practice that is challenged"; (2) present statistical evidence of the disparity complained of; and (3) prove causation.[55] In other words, in addition to identifying with specificity the particular employment practice allegedly responsible for the adverse impact, "the plaintiff must offer statistical evidence of [the] kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."[56]

Like circumstantial disparate-treatment cases, disparate-impact cases are analyzed pursuant to a burden-shifting evidentiary paradigm. Thus, after the plaintiff has met this prima facie burden, the employer has the burden of showing that the practice

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[50] *Id.* at 431.

[51] *Id.* at 432.

[52] 487 U.S. 977, 994–98 (1988).

[53] *Id.* at 990–91. The *Watson* plaintiff was a black bank teller who applied for and was denied four promotions. *Id.* at 982. All of the supervisors who denied her promotion requests were white. *Id.*

[54] *Id.* at 989.

[55] *Id.* at 994.

[56] *Id.*

complained of is job related or justified by business necessity.[57] Once the employer has met this burden of production,[58] the plaintiff has the opportunity to demonstrate that alternative and equally effective policies or practices exist that would meet the employer's legitimate business goals without causing the disparate impact.[59] Mindful of the potential difficulties employers might face in justifying subjective or discretionary employment decisions, the Court emphasized that "'[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.'"[60]

One year after its decision in *Watson*, the Court had another occasion to clarify the requirements of a viable disparate-impact claim under Title VII. In *Wards Cove Packing Co. v. Atonio*,[61] the Court stressed that employees may not prevail by pointing generally to a bottom-line imbalance in the workforce, but must demonstrate that the application of a specific or particular employment practice causes the alleged imbalance.[62] The Court emphasized that "[t]o hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'"[63] Regarding the employer's justification—that the challenged practice is job related or justified by business necessity—the Court explained that "the dispositive issue is whether a challenged practice serves, in [some] significant way, the legitimate employment goals of the employer. . . . A mere insubstantial justification in this regard will not suffice . . . [even] though[] there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business."[64]

Of particular importance, however, was the Court's illumination of the burdens of proof in disparate-impact cases: once employees establish a prima facie case, the burden of production, not

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[57] *Id.* at 997–98.

[58] In his concurring opinion, which Justices Brennan and Marshall joined, Justice Blackmun argued that the Court had misstated the employer's burden: "Our cases make clear . . . [that] a plaintiff who successfully establishes this prima facie case shifts the burden of *proof*, not production, to the defendant to establish that the employment practice in question is a business necessity." *Id.* at 1001 (Blackmun, J., concurring).

[59] *Id.* at 998 (majority opinion).

[60] *Id.* at 999 (quoting Furnco Const. Corp. v. Waters, 438 U.S. 567, 578 (1978)).

[61] 490 U.S. 642 (1989).

[62] *Id.* at 656–57.

[63] *Id.* at 657 (quoting *Watson*, 487 U.S. at 992).

[64] *Id.* at 659 (internal citations omitted).

persuasion, shifts to the employer to demonstrate that the challenged practice was consistent with business necessity. The Court emphasized that the "'ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times*.'"[65]

B. The Civil Rights Act of 1991

In response to the Court's decision in *Wards Cove*, Congress amended the Civil Rights Act of 1964 by codifying the disparate-impact cause of action in the Civil Rights Act of 1991.[66] Believing that *Wards Cove* had "weakened the scope and effectiveness of Federal civil rights protections," Congress also codified the concepts of "business necessity" and "job related[ness],"[67] stating that the terms "are intended to reflect the concepts enunciated by the Supreme Court in [*Griggs*], and other Supreme Court decisions prior to *Wards Cove*."[68] Though they require employers to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity," the text of the 1991 amendments does not define business necessity or job relatedness.[69] Instead, courts and employers are to be guided by pre-*Wards Cove* Supreme Court jurisprudence. As demonstrated by the diversity of the appellate court opinions interpreting these decisions, however, no consensus existed as to what showing was required of employers to successfully defend policies or practices

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[65] *Id.* (quoting *Watson*, 487 U.S. at 997).

[66] Congress amended the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, by adding a new subsection (k). Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (1991). The Civil Rights Act of 1991 currently provides that

> An unlawful employment practice based on disparate impact is established under this subchapter only if—
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> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
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> (ii) the complaining party makes the demonstration . . . with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

§ 2000e-2(k).

[67] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

[68] 137 CONG. REC. 19, 28623 (1991) (citations omitted); *see* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

[69] § 2000e-2(k)(1)(A)(i).

shown to have a disparate impact on a protected group.[70]

Moreover, Congress effectively overruled that portion of *Wards Cove* that merely required a burden of persuasion from the employer.[71] Thus, employers now have the burdens of production and persuasion regarding the business necessity defense. As the Act makes clear, however, in order to prevail, the plaintiff still may need to demonstrate that feasible alternatives exist and that the employer refuses to abandon the offending practices.[72]

C. Disparate Impact Under the ADEA

Although Congress chose not to include age as a group protected under Title VII, it did commission a report to "'make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected.'"[73] When complete, the report "noted that there was little discrimination arising from dislike or intolerance of older people, but that 'arbitrary' discrimination did result from certain age limits" and that "discriminatory effects resulted from '[i]nstitutional arrangements that indirectly restrict the employment of older workers'"[74] Thus, when it passed the ADEA, Congress noted that

> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
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> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the

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[70] *See* Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1029–30 (1993). Alito organizes the opinions of the appellate courts interpreting the Court's decisions regarding the business necessity issue into three groups:

> (1) those requiring proof of either job-relatedness or necessity, or failing to distinguish between the two; (2) those requiring absolute necessity; and (3) those requiring reasonable necessity, including cases where the reasonableness of an employment criteria is determined on a sliding scale depending upon the nature of the employment and risks involved.

Id. (footnotes omitted).

[71] *See, e.g.*, Cota v. Tucson Police Dep't, 783 F. Supp. 458, 472 n.14 (D. Ariz. 1992).

[72] §§ 2000e-2(k)(1)(A)(i)–(ii).

[73] Smith v. City of Jackson, 544 U.S. 228, 232 (2005) (quoting Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964)).

[74] *Id.* (citation omitted).

> disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave.[75]

Because neither the Court nor Congress expressly extended disparate-impact liability to cases alleging age discrimination, controversy ensued when employees brought disparate-impact cases under the ADEA after *Griggs*, *Wards Cove*, and the Civil Rights Act of 1991.[76] In many instances, courts questioned whether disparate impact was a viable theory under the ADEA,[77] while others simply followed the lead of those that had already addressed the issue.[78]

As for the evidentiary burden relevant to such cases, courts adopted the three-pronged evidentiary paradigm for disparate-impact cases brought under Title VII.[79] Despite the apparently pro-plaintiff evidentiary model and the seemingly harsh burden on employers to establish business necessity, disparate-impact challenges under the ADEA were rarely successful. Although

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[75] 29 U.S.C. §§ 621(a)(1)–(3) (2000).

[76] The Civil Rights Act of 1991 amended five statutes: Title VII, the ADEA, the ADA, 42 U.S.C. § 1981, and the Civil Rights Attorney's Fees Awards Act of 1976. Elinor P. Schroeder, *Title VII at 40: A Look Back*, J. KAN. B. ASS'N, Nov./Dec. 2004, at 18, 22. In addition to the codification of the disparate-impact theory of liability and the related defense, the most significant amendment to Title VII provided for the recovery of compensatory and punitive damages in disparate-treatment cases and the right to a jury trial. *See id.* at 22–23. The amendments to Title VII regarding the disparate-impact theory of liability were not similarly made to the ADEA. Thus, the ADEA contains no express recognition of the disparate-impact cause of action.

[77] *See, e.g.*, Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992) (refraining from speculating whether "the theory of disparate impact, viewed as a judicial doctrine of general applicability to discrimination cases, survives *Wards Cove*" or what the impact of the Civil Rights Act of 1991 was since it did not make the relevant amendments to the ADEA "or whether disparate impact has ever been a viable theory of age discrimination" because the case before it made "no sense in disparate impact terms" (citations omitted)). Even early on, however, some commentators questioned the appropriateness of the disparate-impact theory in ADEA cases. *See* Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 838 (1982) (arguing that *Gellar v. Markham* improperly applied the "disparate impact doctrine to [the] ADEA and that only disparate treatment claims should be available in age discrimination cases").

[78] *See, e.g.*, Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980) (following Supreme Court precedent, noting that the substantive "prohibitions of the ADEA were derived *in haec verba* from Title VII").

[79] *See, e.g.*, *id.* (requiring the plaintiffs to establish "[a] prima facie case . . . by showing that an employer's facially neutral practice has a disparate impact" on the protected class, allowing the employer to defend the policy by showing that it is justified by business necessity or job relatedness, and providing the plaintiff with the opportunity to show that other equally viable but less adverse alternatives exist).

plaintiffs lost for a variety of reasons,[80] in the majority of cases, the challenge failed because the plaintiffs were unable to meet their prima facie burden: either the statistical evidence purporting to show a disparate impact on workers over forty was too weak to be meaningful[81] or the plaintiffs failed to identify the specific policy allegedly responsible for the adverse impact.[82]

The most successful cases involved challenges to policies correlated with age. In most cases, employers motivated by the desire to reduce operating costs, often in connection with a company reorganization or reduction in force, targeted workers with higher wages or benefits.[83] In the view of the Sixth Circuit, for example, "[a]lthough it is a legitimate business consideration, an employment practice directed at minimizing the cost of labor can run afoul of age discrimination laws if it systematically and adversely affects older employees or employment applicants."[84]

This conclusion was far from universal, however. In response to a disparate-impact challenge brought against a soon-to-be-bankrupt TWA, for example, the Seventh Circuit rejected the idea that cutting employee benefits and wages for cost-containment purposes

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[80] *See, e.g.*, United Indep. Flight Officers, Inc. v. United Air Lines, Inc., 572 F. Supp. 1494, 1506 (N.D. Ill. 1983) (noting that the plaintiffs were comparing themselves to the wrong groups and that there was no nexus between the challenged practice and their age).

[81] *See, e.g.*, Maresco v. Evans Chemetics, Div. of W.R. Grace & Co., 964 F.2d 106, 115 (2d Cir. 1992) (finding, inter alia, that eight employment terminations were "unlikely" to provide the necessary statistical evidence); Shutt v. Sandoz Crop Prot. Corp., 944 F.2d 1431, 1433–34 (9th Cir. 1991) (reversing a bench verdict for plaintiff on grounds that the court improperly considered a smaller sample than was relevant); Cotton v. City of Alameda, 812 F.2d 1245, 1247–48 (9th Cir. 1987) (finding that the plaintiff's failure to provide any statistical evidence prevented the court from assessing the presence of a disparate impact); Palmer v. United States, 794 F.2d 534, 538–39 (9th Cir. 1986) (agreeing with the district court that plaintiff used an inaccurate sample size and that he had not shown any relationship between the challenged practice and the effect alleged).

[82] *See, e.g.*, Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1370 (2d Cir. 1989) (finding that the plaintiffs appeared "unable to meet their burden of 'isolating and identifying the specific employment practices that [were] allegedly responsible for any observed statistical disparities'").

[83] *See, e.g.*, Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 691–92 (8th Cir. 1983) (finding that a cost-cutting faculty selection plan that reserved a certain number of positions for non-tenured faculty violated the ADEA because tenure status was correlated with age and rejecting the contention that the primary motivation of reducing costs, or the secondary motivation of "bring[ing] new ideas" to the institution, could be justified by business necessity); *Geller*, 635 F.2d at 1034 (holding that a teacher-selection plan that focused on hiring less experienced and less costly teachers was "discriminatory on its face" even though it was "a necessary cost-cutting gesture in the face of tight budgetary constraints").

[84] Abbott v. Fed. Forge, Inc., 912 F.2d 867, 875 (6th Cir. 1990). Although the court ultimately found for the defendant, it was not troubled by the fact that the statistical evidence demonstrated that only 44.7% of the individuals barred from employment during a moratorium were in the protected class. *Id.* at 873.

could violate the ADEA. Distinguishing such situations from the circumstances that gave rise to the disparate-impact theory in *Griggs*, the court stated that:

> The concept of disparate impact was developed for the purpose of identifying situations where, through inertia or insensitivity, companies were following policies that gratuitously—needlessly—although not necessarily deliberately, excluded black or female workers from equal opportunities. Often these were policies that had been adopted originally for discriminatory reasons and had not been changed when the employer ceased deliberately discriminating—if he had. . . .
>
> Across-the-board cuts in wages and fringe benefits necessitated by business downturns or setbacks are a far cry from the situations that brought the theory into being. . . . Their adverse impact on older workers is unavoidable too.[85]

Thus, the court explicitly recognized the key distinction between Title VII challenges to practices that froze the erstwhile intentionally discriminatory status quo and maintained a racially segregated work force and practices that adversely affected older workers who had historically not been the victims of intentional discrimination. The court further noted the untenable position courts could find themselves in if they were mandated to find violations of the ADEA in these types of circumstances: "every time a company tried to reduce its labor costs the federal courts would be dragged in and asked to redesign the reduction so as to shift the burden to some unprotected class of workers."[86]

The position of the courts' that the ADEA did not contemplate disparate-impact actions[87] was supported by the fact that the ADEA expressly provides employers a defense not similarly contained in Title VII. While both Title VII and the ADEA permit employers to take actions that would otherwise be unlawful if necessitated by a

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[85] Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1164 (7th Cir. 1992) (citations omitted); *see* Rose v. Wells Fargo & Co., 902 F.2d 1417, 1425 (9th Cir. 1990) (statistical showing that persons over fifty were terminated at a higher rate during a reorganization and merger can be explained by the nondiscriminatory reason that older workers "tended to occupy the duplicative management positions" that were cut).

[86] *Finnegan*, 967 F.2d at 1164. In *Metz v. Transit Mix, Inc.*, however, the court held, over a dissenting opinion, that a decision to cut costs by replacing a long-time, well-paid employee, without first asking him to take a pay cut, violated the ADEA. 828 F.2d 1202, 1208 (7th Cir. 1987).

[87] *See supra* text accompanying notes 85–86.

"bona fide occupational qualification," the ADEA also permits employers to take action on the basis of "reasonable factors other than age."[88] In some cases, this provision was used to rebut a plaintiff's prima facie case rather than the common "legitimate non-discriminatory reason" formula.[89] Conflicting interpretations of this provision in the ADEA was highlighted in 2005 when the Supreme Court decided *Smith.* By that time, however, the issue was further confused by an intervening Supreme Court decision regarding a disparate-treatment age discrimination claim.

D. Hazen Paper Co. v. Biggins*: A Disparate-Treatment Case Further Muddies the Field*

The issue of whether employers discriminate when they institute practices that are adversely correlated with age arose in both the disparate-impact and disparate-treatment contexts, where it also caused considerable consternation.[90] In 1993, the Court resolved

[88] The relevant provisions of Title VII provide that

> it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

42 U.S.C. § 2000e-2(e) (2000). In pertinent part, the ADEA provides that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited under . . . this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, *or where the differentiation is based on reasonable factors other than age*." 29 U.S.C. § 623(f)(1) (2000) (emphasis added).

[89] *See, e.g.*, Krieg v. Paul Revere Life Ins. Co., 718 F.2d 998, 1001–02 (11th Cir. 1983) (finding that an employer's discharge of an employee because of the employee's "unwillingness to continue performing his duties . . . and refus[al] to accept [a] production requirement" rebutted that employee's prima facie case).

[90] ADEA challenges to reductions in force (RIFs) were also brought under a disparate-treatment theory. In a study of 117 district court decisions on motions for summary judgment, all of which alleged disparate-treatment age discrimination, defendants prevailed in 73 percent of the cases, and summary judgment was denied in 27 percent. Peter H. Wingate et al., *Organizational Downsizing and Age Discrimination Litigation: The Influence of Personnel Practices and Statistical Evidence on Litigation Outcomes*, 27 LAW & HUM. BEHAV. 87, 97 (2003). Age discrimination plaintiffs who survive motions for summary judgment and obtain a favorable jury verdict, however, are consistently awarded more than prevailing plaintiffs alleging other forms of employment discrimination. *See* Press Release, Jury Verdict Research, Employment-Practice Jury Awards Rise 18%, Discrimination Awards Fall Slightly (May 17, 2004), http://www.juryverdictresearch.com/Press_Room/Press_releases/Verdict_study/verdict_study9.html [hereinafter JVR May 17, 2004 Press Release]; Press Release, Jury Verdict Research, Jury-Award Median in Employment Cases Up 14%; Age Discrimination Plaintiffs Win the Most Money (Sept. 2, 2003), http://www.juryverdictresearch.com/Press_Room/Press_releases/Verdict_study/verdict_study3.html [hereinafter JVR Sept. 2, 2003 Press Release]; Press Release, Jury Verdict Research, Jury-Award Median in Employment Cases Up 44%; Age Discrimination Plaintiffs Win the Most Money (Jan. 23, 2002), http://www.juryverdictresearch.com/Press_Room/Press_releases/

this issue in the disparate-treatment context in *Hazen Paper Co. v. Biggins*.[91] Although not a disparate-impact case, this case would add further fuel to the debate over whether disparate-impact challenges were cognizable under the ADEA.

In *Hazen Paper*, an employee who had worked for the defendant a few weeks short of ten years was terminated at the age of sixty-two.[92] Because his benefits under Hazen Paper's pension plan vested at ten years of employment, plaintiff sued under the Employee Retirement Income Security Act of 1974 (ERISA) alleging that defendant had fired him to prevent his pension benefits from vesting.[93] He also alleged that his age had been a "determinative factor" in Hazen Paper's decision to terminate him and brought a disparate-treatment age discrimination claim as well.[94] A jury found that the defendant violated ERISA and the ADEA under the facts presented.[95] After the district court entered judgment on the jury's verdict, the Court of Appeals for the First Circuit affirmed in relevant part.[96]

The Supreme Court granted certiorari, in part to determine whether "an employer's interference with the vesting of pension benefits violate[s] the ADEA" and noted that the appellate courts were divided regarding whether an employer violates the ADEA when it acts on a factor that is empirically correlated with age, such as pension status or seniority.[97] Although the plaintiff had only alleged a disparate-treatment theory of recovery, the Court took pains to discuss the difference between that theory and the disparate-impact theory of liability and noted that it had never

Verdict_study/verdict_study.html [hereinafter JVR Jan. 23, 2002 Press Release].

91 507 U.S. 604 (1993).

92 *Id.* at 606–07.

93 *Id.*

94 *Id.* at 606.

95 *Id.*

96 *Id.* at 607.

97 *Id.* at 608. The Court noted that

> The Courts of Appeal repeatedly have faced the question 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. Compare *White v. Westinghouse Electric Co.*, 862 F. 2d 56, 62 [(3d Cir. 1988)] (firing older employee to prevent vesting of pension benefits violates ADEA); *Metz v. Transit Mix, Inc.*, 828 F. 2d 1202 [(7th Cir. 1987)] (firing of older employee to save salary costs resulting from seniority violates ADEA), with *Williams v. General Motors Corp.*, 656 F. 2d 120, 130, n.17 [(5th Cir. 1981)] ("[S]eniorty and age discrimination are unrelated. . . . 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[.]").

Id. at 608–09.

resolved the issue of whether the latter was available under the ADEA.[98]

Addressing the issue before it, the *Hazen Paper* Court held that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."[99] The Court explained that ADEA disparate-treatment cases hinge on whether age actually motivated the employer's decision:

> Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA. 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. . . . Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes. . . .
>
> When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is.[100]

The Court was careful to note that employers who fire employees to prevent their pension benefits from vesting could be liable under ERISA.[101] It further clarified that it was not precluding the possibility that such an employer could also be liable under the ADEA if the employer either assumed a correlation between pension benefits and age, and acted accordingly, or if the employer was motivated by both age and pension benefits.[102] In *Hazen Paper*, because the pension benefits depended on the employee's years of service and not age, the employer did not violate the ADEA.[103]

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[98] *Id.* at 609–10 (stating that the Court had "never decided whether a disparate impact theory of liability is available under the ADEA, . . . and [it] need not do so here" (citation omitted)).

[99] *Id.* at 609.

[100] *Id.* at 610–11.

[101] *Id.* at 612.

[102] *Id.* at 613.

[103] *Id.* The severance pay plan at issue in *EEOC v. Borden's, Inc.* may be an example of such a plan. 724 F.2d 1390 (9th Cir. 1984). In *Borden's*, a severance pay plan, which denied benefits to retirement-eligible employees, was deemed to violate the ADEA under either a disparate-treatment or disparate-impact theory because employees were not eligible for retirement benefits until they reached the age of fifty-five. *Id.* at 1397.

*E. The Post-*Hazen Paper *Landscape*

Although *Hazen Paper* was a disparate-treatment case, it had far-reaching implications in the disparate-impact context. In the words of the First Circuit, "tectonic plates shifted when the Court decided . . . *Hazen Paper*."[104] Ultimately, all but the Second, Eighth, and Ninth Circuit Courts of Appeals would either skirt the issue or decide that disparate-impact was not a viable claim under the ADEA.[105]

Among the several factors influencing the courts following *Hazen Paper* was the Supreme Court's construction of congressional intent as being focused on disparate treatment and the elimination of inaccurate and stigmatizing stereotypes.[106] And, whereas many of the policies that adversely affected women or racial, ethnic, and religious minorities perpetuated the historically segregated workforces and were the product of entrenched discriminatory practices, age discrimination "correlates with contemporaneous employment-related conditions, not past discriminatory practices."[107] This form of discrimination was seen as fundamentally different from the historic patterns of exclusion and discrimination based on race and gender. Thus, age discrimination claimants required proof that assumptions about the abilities or productivity of older workers systematically worked to their disadvantage.

Another impetus for the courts' view that disparate impact was inapposite in the ADEA context may have been the factual context in which so many of the cases were brought. Notwithstanding the unambiguous holding in *Hazen Paper* that employers motivated by factors other than age do not run afoul of the ADEA, even when the motivating factor is correlated with age,[108] employees continued to challenge the cost-cutting practices of their employers. Though the Court's holding was that an employer does not engage in *intentional* discrimination when older workers are harshly treated because of

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[104] Mullin v. Raytheon Co., 164 F.3d 696, 700, 702–03 (1st Cir. 1999) (concluding on the basis of the *Hazen Paper* language quoted above, the legislative history, and the textual and structural dissimilarities of Title VII and the ADEA that the disparate-treatment theory was not available to employees alleging age discrimination).

[105] *See supra* notes 25–27 and accompanying text.

[106] *See supra* notes 99–103 and accompanying text.

[107] *Mullin*, 164 F.3d at 701.

[108] *See supra* notes 99–103 and accompanying text; *see also Hazen Paper*, 507 U.S. at 609.

non-age factors,[109] the Court failed to address its holding to the ADEA generally. Thus, while the plaintiff's bar may have viewed this omission as tacit approval for attacking facially-neutral, non-age motivated employer practices on a disparate-impact basis, the majority of the bench viewed the omission to imply that the disparate-impact theory was inconsistent with the purpose of the ADEA.[110] The logic of this conclusion is clear: an employer that is motivated to eliminate duplicative employment titles or trim wage and benefit costs is not engaging in "inaccurate and stigmatizing stereotypes."[111]

III. *SMITH V. CITY OF JACKSON*

Almost ten years after *Hazen Paper*, the Supreme Court declined the opportunity to address the inconsistent treatment of ADEA disparate-impact challenges in the lower courts. In *Adams v. Florida Power Corp.*, the Court first granted and then dismissed certiorari.[112] Finally, recognizing the confusion it engendered in *Hazen Paper*, the Court granted certiorari in *Smith v. City of Jackson*.[113]

In many respects, the facts of the case in *Smith* were straightforward and unexceptional, but the implications of the case were not. In their suit, the plaintiffs claimed to have been victims of age discrimination under both disparate-treatment and disparate-impact theories of liability.[114] The district court granted summary judgment for the defendants on both theories of liability and held that disparate-impact claims were not cognizable under the ADEA as a matter of law.[115]

On appeal, the Fifth Circuit squarely addressed the issue of whether the ADEA authorized disparate-impact claims. Over one judge's dissent, the majority concluded that disparate-impact claims are not available to disgruntled employees under the ADEA.[116] Like many courts before it, the court reviewed the textual similarities

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[109] *See Hazen Paper*, 507 U.S. at 610.

[110] *See id.*

[111] *Id.*

[112] 534 U.S. 1054 (2001) (granting certiorari); 535 U.S. 228 (2002) (dismissing writ of certiorari as "improvidently granted").

[113] 541 U.S. 958 (2004).

[114] Smith v. City of Jackson, 351 F.3d 183, 185 (5th Cir. 2003). Issues relating to the plaintiffs' disparate-treatment case are beyond the scope of this Article.

[115] *Id.*

[116] *Id.* at 187.

and differences between Title VII and the ADEA, legislative history, policy considerations, and the views of other appellate courts pre- and post-*Hazen Paper*.[117]

"After surveying the well-traversed arguments on either side of [the] debate," the court held that "the ADEA was not intended to remedy age-disparate effects that arise from the application of employment plans or practices that are not based on age."[118] Fundamental to the court's decision was

> the ADEA's express exception permitting employer conduct based on "reasonable factors other than age"—an exception absent from Title VII—and the inapplicability to the ADEA context of the policy justifications identified by the Supreme Court (in *Griggs*) for recognizing a disparate impact cause of action in the Title VII context.[119]

Affirming the district court's dismissal of the disparate-impact claims, the majority and dissent nevertheless assumed that the facts petitioners alleged would have entitled them to relief under *Griggs* if a disparate-impact theory was available under the ADEA.[120]

Recognizing that it had never directly tackled the issue since the enactment of the ADEA and that its decision in *Hazen Paper* had led some courts to conclude that the ADEA did not authorize a disparate-impact theory of liability, the Supreme Court granted certiorari.[121] Although all Justices would affirm the Fifth Circuit's ruling, the Court was split on the question of whether the ADEA authorized disparate-impact challenges.[122] Like the Fifth Circuit, the Supreme Court analyzed legislative history and congressional intent as well as the structure and text of the ADEA.[123] Again, these considerations were juxtaposed against the legislative history, congressional intent, structure, and text of Title VII.[124]

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[117] *Id.* at 188–95.

[118] *Id.* at 187.

[119] *Id.* at 187–88 (citation omitted).

[120] *Id.* at 195; *id.* at 202 (Stewart, J., dissenting).

[121] Smith v. City of Jackson, 541 U.S. 958 (2004).

[122] Smith v. City of Jackson, 544 U.S. 228 (2005). Justice Stevens wrote the opinion of the Court. *Id.* at 230. Justice Scalia concurred in part and concurred in the judgment and filed an opinion. *Id.* at 243 (Scalia, J., concurring). Justice O'Connor concurred in the judgment and filed an opinion in which Justices Kennedy and Thomas joined. *Id.* at 247 (O'Connor, J., concurring). Justice Rehnquist took no part in the decision. *Id.* at 243.

[123] *Id.* at 232–34, 240.

[124] *Id.* 232–34, 240–41.

A. The Pay Plan at Issue in Smith

A group of police officers and public safety dispatchers, all of whom were over forty-years old, sued the city and its police department claiming that the defendants discriminated against them on the basis of age in violation of the ADEA when they instituted a new salary plan.[125] The plan divided the positions of police officer, master police officer, police sergeant, police lieutenant, and deputy chief into a series of steps and half steps.[126] The defendants had established the wage rates for each range based on a survey of similar positions in comparable communities in the Southeast.[127] Employees were then assigned to the lowest step or half step within their positions that would guarantee them a two percent raise.[128]

To buttress their disparate-impact case, plaintiffs provided the district court with statistical data, which showed that older officers received smaller raises than their younger counterparts.[129] "Most of the officers were in the three lowest ranks," which were comprised of individuals under and over the age of forty.[130] "The few officers in the two upper ranks were all over [the age of forty]."[131] They too received raises, which were higher in actual dollars than those in the lower ranks, but lower in terms of percentage.[132]

The officers' evidence demonstrated that (1) 66.2% of officers under age forty received raises of more than 10% while 45.3% of the officers over age forty did; and (2) the average percentage increase for officers who had "less than five years of tenure was somewhat higher than the percentage for those with more seniority."[133] Because the more senior positions were filled with older officers, on average they received smaller raises when measured as a percentage of their salaries.[134] The defendants justified the pay plan on the basis that they wanted "to bring starting salaries for police officers up to the regional average, to develop a more generous pay scale within the confines of the city budget, and to

125 *Id.* at 230–31.
126 *Id.* at 240.
127 *Id.*
128 *Id.* at 241–42.
129 *Id.* at 242.
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*

consider tenure in the pay scale."[135]

Notwithstanding the data produced, the Court found two significant weaknesses in the employees' case. The first related to the evidence the employees presented and the second to the defendants' underlying rationale for the pay plan.[136]

With respect to the statistical evidence presented, the Court found that the plaintiffs had not met their prima facie burden because the officers failed to identify "any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers."[137] Referring to its decision in *Wards Cove*, the Court emphasized that it is not sufficient to "simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.'"[138] In this case, the Court found that the petitioners had simply established that the pay plan was "relatively less generous to older workers than to younger workers."[139] The Court further noted that failure to identify a specific practice, which was allegedly responsible for creating a disparate impact, could result in potential liability for employers for "'the myriad of innocent causes that may lead to statistical imbalances.'"[140]

The second factor that doomed petitioners' claims was the defendants' justification for the pay plan. The Court found "that the City's [pay] plan was based on reasonable factors other than age."[141] It is this finding and the weight the Court accorded it that is likely to determine the outcome of future disparate-impact age discrimination litigation.

B. Griggs*, Congressional Intent, "Reasonable Factors Other Than Age," and the Court's Analysis*

Like many of the district and appellate courts considering whether the ADEA's prohibition against age discrimination required a showing of discriminatory intent, the Court compared

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[135] Smith v. City of Jackson, 351 F.3d 183, 196 (5th Cir. 2003).
[136] *Smith*, 544 U.S. at 241–43.
[137] *Id.* at 241.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*

the text of Title VII with that of the ADEA and attempted to discern congressional intent.[142] The Court first noted that the text prohibiting discrimination in the ADEA is virtually identical to its counterpart in Title VII.[143] While the ADEA substitutes "age" for "race, color, religion, sex, or national origin," both acts make it unlawful for employers "'to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of'" age, in the ADEA, or, inter alia, race or color in Title VII.[144] Because the Court had consistently assumed that Congress intended these texts to have the same meaning, the Court found that its decision in *Griggs* was "preceden[ce] of compelling importance."[145] The Court further noted that the congressional intent that girded its decision in *Griggs*—that Title VII was directed at the consequences and not merely the intent of employer practices—was parallel to findings made in the report Congress commissioned prior to enacting the ADEA.[146] Thus, as in *Griggs,* congressional intent and statutory text convinced the majority of the Court that the ADEA prohibits employer practices that adversely affect employees because of their age, notwithstanding the fact that the employer was not motivated by age bias.[147]

Much of the debate in the Fifth Circuit and in the Supreme Court centered on a provision contained in the text of the ADEA, but not in the text of Title VII. Like Title VII, the ADEA provides employers with an affirmative defense to liability when they take otherwise prohibited actions in cases in which age is a "bona fide occupational qualification reasonably necessary to the normal

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[142] *See id.* at 228–41.

[143] *Id.* at 233.

[144] *Id.* (quoting 29 U.S.C. § 623(a)(2) (2000)).

[145] *Id.* at 234.

[146] *Id.* at 234–35. The Court noted that "Congress considered and rejected proposed amendments that would have included older workers among the classes protected from employment discrimination" during deliberations prior to enactment of the Civil Rights Act of 1964. *Id.* at 232. Instead, Congress commissioned a report from the Secretary of Labor regarding "'the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected.'" *Id.* (quoting Civil Rights Act of 1964, H.R. 7152, 88th Cong. § 715, 78 Stat. 265 (1964)).

[147] Justice Scalia concurred in the judgment and reasoning of the Court but would have deferred to the EEOC's previous interpretation that the ADEA prohibited employer practices resulting in a disparate impact on older workers rather than making an independent finding on the question. *Id.* at 243–45 (Scalia, J., concurring).

operation of [its] business."[148] Unlike Title VII, however, the ADEA contains language that the Court interpreted as "significantly narrow[ing] its coverage" by permitting employers to take "otherwise prohibited" actions when the actions are based on reasonable factors other than age—the so-called RFOA provision.[149]

In pertinent part, the ADEA provides that it shall not be unlawful for an employer "to take any action otherwise prohibited under . . . this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."[150] Although the justices differed regarding whether this provision supported or militated against a disparate-impact theory, they all agreed that petitioners' disparate-impact claims were not viable because of this provision.[151]

The Court specifically found that any disparate impact petitioners demonstrated was due to the City's decision to base raises on seniority and position. The Court stated that

> Reliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities. In sum, we hold that the City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a "reasonable facto[r] other than age" that responded to the City's legitimate goal of retaining police officers.[152]

The Court also noted that

> While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such

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[148] § 623(f)(1); 42 U.S.C. § 2000e-2(e) (2000).

[149] *Smith*, 544 U.S. at 233 (referring to § 623(f)(1)).

[150] § 623(f)(1).

[151] *Smith*, 544 U.S. at 242, 247–48. Justice O'Connor's concurring opinion focused largely on the RFOA provision, which she believed militated against finding that Congress intended to reach unintentional discrimination. In her view, the RFOA provision "expresses Congress' clear intention that employers *not* be subject to liability absent proof of intentional age-based discrimination." *Id.* at 251 (O'Connor, J., concurring).

[152] *Id.* at 242.

requirement.[153]

Thus, although it disagreed with the Fifth Circuit that the disparate-impact theory was unavailable as a matter of law, the Court affirmed its judgment.[154]

Despite giving the green light to future ADEA disparate-impact cases, the Court clearly did not remove all barriers to such claims. First, to survive dismissal, plaintiffs in ADEA disparate-impact cases will still be required to offer more than a statistical disparity to demonstrate that an employer's challenged policy creates an impermissible disparate impact.[155] Even if a policy is found to affect older and younger workers differently, a court must also find the policy either unreasonable or not based on a "factor[] other than age" for plaintiffs to prevail.[156] Presumably, plaintiffs in the latter case would be required to demonstrate that the challenged practice was based on age—which is prohibited by the ADEA under a disparate-impact theory in any event.

The necessity of undertaking an inquiry into whether an employer's policies are reasonable may cause considerable consternation in the courts. In disparate-treatment cases, it has become axiomatic that courts will refuse to engage in such an inquiry.[157] When analyzing the legitimacy of an employer's reasons and whether a disparate-treatment plaintiff has made the required showing of pretext, the courts recite the now-familiar refrain that they "do not sit as super personnel departments" and "second guess[]" the employer's business decisions.[158] Indeed, as the courts repeatedly point out, "[t]he law does not require an employer to make, in the first instance, employment choices that are wise,

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[153] *Id.* at 243.

[154] *Id.*

[155] *Id.* at 241.

[156] *Id.*

[157] In the typical disparate-treatment case brought pursuant to any of the anti-discrimination statutes, after an employee presents a prima facie case of discrimination, the employer must proffer a "legitimate, nondiscriminatory reason" for the challenged action. *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 49 & n.3 (2003). The burden then shifts back to the employee to demonstrate that the proffered reason is a pretext for discrimination. *Id.* at 49 n.3. In this context, a showing of pretext requires evidence that the employer's "legitimate, nondiscriminatory reason" was false, i.e. not the real reason for the challenged action. Thus, in a disparate-treatment action, the legitimacy of the employer's reason revolves around its genuineness, not its reasonableness. *See, e.g.*, *Raytheon Co.*, 540 U.S. at 52–53; *supra* notes 150–51 and accompanying text.

[158] Holdcraft v. County of Fairfax, No. 01-1868, 2002 WL 376680, at *2 (4th Cir. Mar. 11, 2002); *see, e.g.*, Haas v. Kelly Services, Inc., 409 F.3d 1030, 1036 (8th Cir. 2005); Townsend v. Weyerhaeuser Co., No. 04-C-563-C, 2005 WL 1389197, at *10 (W.D. Wis. June 13, 2005).

rational, or even well-considered, as long as they are nondiscriminatory."[159]

In essence, the result of *Smith* may be that an employer that adversely treats an older employee in a disparate-treatment case may act unreasonably, as long as it does not intentionally discriminate, but an employer who unintentionally treats older workers adversely, pursuant to a facially neutral policy, must act reasonably. Given the hesitancy of the courts to second-guess employer's business decisions, the burden on plaintiffs to demonstrate that perceived disparities arise from *unreasonable* factors other than age may be significant. Indeed, ADEA disparate-impact challenges resolved after *Smith* appear to bear that out.

IV. THE POST-*SMITH* LANDSCAPE

Since the Supreme Court definitively authorized disparate-impact liability, several courts have had to apply the *Smith* precedent to cases pending before them. In some circuits, the effect of *Smith* was to overrule previous decisions, which had held that employers could not be liable under a disparate-impact theory in age discrimination cases, and thus potentially expanded the bases for employer liability. In those circuits that already recognized the viability of that theory in such cases, the effect of *Smith* might actually be to narrow the scope of disparate-impact liability under the ADEA. In neither case, however, has the actual impact of *Smith* been "significant" or "profound."

A. Decisions from Jurisdictions That Did Not Recognize Disparate-Impact Liability Before Smith

Although *Smith* breathed new life into ADEA disparate-impact claims that had been dismissed, or might have been dismissed, on the basis of the courts' interpretation of *Hazen Paper*, that life was most often short-lived. For some or all of the following reasons, *Smith* could not salvage plaintiffs' disparate-impact claims: plaintiffs failed to provide the statistical foundation necessary for establishing a prima facie case;[160] plaintiffs failed to identify with specificity the policy or practice responsible for the alleged disparate

[159] *Holdcroft*, 2002 WL 376680, at *2.

[160] *See* Ackerman v. Home Depot, Inc., No. Civ.A.304CV0058N, 2005 WL 1313429, at *5 (N.D. Tex. May 31, 2005) (challenging a salary cap and limited overtime opportunities).

impact;[161] or the RFOA provision justified the employers' action and barred the claim.[162]

For example, in *Wilson v. MVM, Inc.*, the Pennsylvania District Court reconsidered its dismissal of the plaintiffs' ADEA disparate-impact claims, noting that it had erroneously concluded that the theory was not available.[163] Although the plaintiffs sought additional time to conduct discovery in light of *Smith*, the court granted the defendants summary judgment and denied the plaintiffs' motion for relief from judgment.[164]

Without much discussion, the court noted that "[a]s in *Smith*, plaintiffs cannot prevail on their disparate impact claims because MVM based its decision to terminate the plaintiffs upon reasonable factors other than age. MVM discharged the plaintiffs because . . . they were not medically qualified for [their] position[s] and MVM had no other positions available."[165]

Similarly, the *Smith* Court's emphasis that the ADEA "significantly narrows . . . coverage [for disparate-impact claims] by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age'"[166] persuaded an Ohio district court to reject an age-based challenge to revisions to the method by which new physician-shareholders bought into the defendant organization.[167] As in *Smith*, the court found that defendant's rationale for the change—to attract and retain new physician-shareholders—was a reasonable factor other than age.[168]

As can be expected, the struggle to determine the value of *Smith* has been highlighted in the context of a RIF. In *Townsend v. Weyerhaeuser Co.*, the plaintiff, who lost her job as part of a RIF, advanced several theories of employment discrimination, including a disparate-impact age discrimination claim.[169] Regarding this

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[161] *See* Lit v. Infinity Broad. Corp. of Pa., No. Civ.A. 04-3413, 2005 WL 3088364, at *3 (E.D. Pa. Nov. 16, 2005) (claiming that a change in music programming disparately impacted older broadcasters).

[162] *See id.* at *4; *see also* Duggan v. Orthopaedic Inst. of Ohio, Inc., 365 F. Supp. 2d 853, 862 (N.D. Ohio 2005) (contesting, inter alia, a revision to the method by which new physicians became shareholders of a related corporation).

[163] No. Civ.A. 03-4514, 2005 WL 1231968, at *18, (E.D. Pa. May 24, 2005).

[164] *Id.* at *18–*19.

[165] *Id.* at *18 (citation omitted).

[166] Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (quoting 29 U.S.C. § 623(f)(1) (2000)).

[167] *See* Duggan v. Orthopaedic Inst. of Ohio, Inc., 365 F. Supp. 2d 853, 862 (N.D. Ohio 2005).

[168] *Id.*

[169] *See* Townsend v. Weyerhaeuser Co., No. 04-C-563-C, 2005 WL 1389197, at *1 (W.D.

claim, she made the sweeping argument that plans "to reduce costs by eliminating job positions and reducing the workforce . . . *will always*" have a greater adverse impact on older workers because they generally earn more and have higher health care costs than younger workers.[170]

The Wisconsin District Court rejected this argument out of hand as insufficient to state a prima facie case of disparate impact because plaintiff failed to identify the specific practice within the RIF's plan that caused a disparate impact.[171] Most importantly, however, the court posited that employers would not incur liability under the ADEA "*as a matter of course*" during a RIF, even if the RIF resulted in the termination of a disproportionate number of protected employees.[172] Relying on the *Smith* Court's narrow interpretation of the RFOA provision, the court reasoned that "an employer that decides to terminate an employee to relieve itself of the burden of that employee's high salary or health care costs has based its decision on 'reasonable factors' other than the employee's age."[173]

Despite the high bar set by the Court's analysis of the ADEA's RFOA provision, the impact of *Smith* on pending cases has not been universally pro-defendant. For example, in *Williams v. Sprint/United Management Co.*, the Kansas District Court allowed the plaintiffs to amend their class action complaint to include a disparate-impact challenge to the defendant's "forced ranking" performance review system, which the defendant utilized during a RIF.[174] In this case, the court rejected the defendant's contention that the plaintiffs failed to identify the specific policy responsible for

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Wis. June 13, 2005).

[170] *Id.* at *14 (emphasis added).

[171] *Id.*

[172] *Id.* (emphasis added).

[173] *Id.*; *accord* Overstreet v. Siemens Energy & Automation, Inc., No. EP-03-CV-163-KC, 2005 WL 3068792, at *4 n.2 (W.D. Tex. Sept. 26, 2005) (stating that a RIF is a legitimate nondiscriminatory reason); *see also* Chavarria v. Despachos Del Notre, Inc., 390 F. Supp. 2d 591, 599 (S.D. Tex. 2005) (stating that "[a] RIF is a presumptively legitimate non-discriminatory reason that supports a termination action"). Although *Chavarria* and *Overstreet* were disparate-treatment cases, the courts also considered the impact of the *Smith* decision on the cases before them. The *Chavarria* court determined that the plaintiffs' failure to identify any specific tests, requirements, or practices responsible for the statistical disparity they introduced in support of their disparate-treatment claim rendered them unable to state a valid disparate-impact claim. 390 F. Supp. 2d at 600 n.11. In *Overstreet*, the court was unimpressed with the plaintiffs' statistical evidence and further noted that "there is a reasonable explanation other than age for the termination—namely the RIF." 2005 WL 3068792, at *4 n.2.

[174] No. 03-2200-JWL, 2005 WL 1801605, at *1 (D. Kan. July 29, 2005).

the alleged negative impact on older workers.[175] The court noted that the forced ranking system itself was the specific practice within the RIF that plaintiffs identified as having an adverse impact on older workers and caused them to be disproportionately affected by the RIF.[176]

Thus far, the impact of the *Smith* decision in jurisdictions that had not recognized disparate-impact ADEA claims has been somewhat mixed. Plaintiffs prevailed when courts ruled on motions early in the litigation, such as motions to dismiss claims or motions to amend pleadings.[177] It is important to note, however, that when the potential for disparate-impact liability was considered on the merits, defendants prevailed in each instance.[178] Although *Smith* bestowed an unambiguously bona fide new weapon in the arsenal of the plaintiff's bar, the RFOA provision appears to have blunted its effectiveness.

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[175] *Id.*

[176] *Id.* at *2; *see* Ricciardi v. Elec. Data Sys. Corp., No. 03-CV-5285, 2005 WL 2782932, at *2 (E.D. Pa. Oct. 24, 2005) (denying defendant's motion to dismiss plaintiffs' ADEA disparate-impact claim regarding the defendant's nationwide employee performance evaluation plan). Whether the plaintiffs will ultimately succeed in their challenge has yet to be determined. Forced ranking employee review systems are becoming increasingly popular methods of determining which employees should be terminated during company RIFs. *See, e.g.*, Tom Osborne & Laurie A. McCann, *Forced Ranking and Age-Related Employment Discrimination*, HUM. RTS. MAG., Spring 2004, at 6–10. They are also therefore coming increasingly under attack as methods that have a discriminatory impact on older workers and other protected groups. *Id.* at 6–10.

[177] *See Ricciardi*, 2005 WL 2782932, at *1 (denying defendant's motion to dismiss a disparate-impact claim in light of *Smith*); *Williams*, 2005 WL 1801605, at *4 (permitting plaintiff to amend the complaint to add a disparate-impact claim in light of *Smith*).

[178] *See* Lit v. Infinity Broad. Corp. of Pa., No. Civ.A. 04-3413, 2005 WL 3088364, at *3–*4 (E.D. Pa. Nov. 16, 2005) (finding that plaintiff failed to present statistical or other evidence of discriminatory impact as well as finding that defendant's desire to remain successful was, in any event, a RFOA that would have overcome any statistical evidence produced by plaintiff); *Overstreet*, 2005 WL 3068792, at *4 n.2 (determining that the failure to produce statistical evidence to support a disparate-impact claim as well as the fact that the reason for the plaintiff's termination was a RIF doomed any disparate-impact challenge); *Chavarria*, 390 F. Supp. 2d at 599 (granting defendant summary judgment because "[a] RIF is a presumptively legitimate non-discriminatory reason that supports a termination action"); *Townsend*, 2005 WL 1389197, at *13–*14 (finding that an employer's desire to reduce costs by reducing the size of its workforce was an RFOA "as a matter of course"); Ackerman v. Home Depot, Inc., No. Civ.A. 304CV0058N, 2005 WL 1313429, at *5 (N.D. Tex. May 31, 2005) (granting defendant's motion for summary judgment because plaintiff failed to identify a facially neutral policy or practice that impacted employees over forty and also failed to present statistical evidence to support her disparate-impact claim); Wilson v. MVM, Inc., No. Civ.A.03-4514, 2005 WL 1231968, at *18–*19 (E.D. Pa. May 24, 2005) (granting defendant summary judgment because defendant terminated plaintiffs for a RFOA); Duggan v. Orthopaedic Inst. of Ohio, Inc., 365 F. Supp. 2d 853, 862 (N.D. Ohio 2005) (determining that the challenged policy was motivated by an RFOA).

B. Decisions from Circuits That Recognized Disparate-Impact Liability Before Smith

To date, there are fewer published decisions to consider in jurisdictions that previously recognized the disparate-impact theory of liability under the ADEA. As in the jurisdictions that had not previously recognized disparate-impact claims, however, *Smith* does not appear to have tipped the scales in the plaintiffs' favor.

In most cases, *Smith* and the disparate-impact theory were simply not relevant and were thus summarily dismissed by the courts.[179] In one such case, the court noted that "*Smith* narrows the scope of disparate-impact liability under the ADEA that previously existed in this circuit" because the ADEA's RFOA provision "requires only that an employer show that its disputed decision was a reasonable one, and not, as was the law in the Second Circuit, that the employer's decision satisfied the more stringent 'business necessity' test."[180]

The distinction between the ADEA's RFOA inquiry and the more demanding "business necessity test" under Title VII was also highlighted by the Ninth Circuit in *Durante v. Qualcomm, Inc.*, which challenged a RIF in which forty-one percent of the affected employees were age forty or older.[181] For technical, as well as substantive reasons, the court rejected plaintiffs' attempt to establish a prima facie case of disparate-impact liability on the basis that the "RIF as a whole was an undisciplined and subjective employment practice."[182] The court found that the RIF incorporated

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[179] *See* Boise v. N.Y. Univ., No. 03 Civ. 5862(RWS), 2005 WL 2899853, at *5 (S.D.N.Y. Nov. 3, 2005) (finding *Smith* inapplicable in a case in which a tenured faculty member challenged his termination); Helfrich v. Lehigh Valley Hosp., No. Civ.A. 03-CV-05793, 2005 WL 1715689, at *21–*22 (E.D. Pa. July 21, 2005) (rejecting plaintiff's contention that *Smith* "removed the need, in any ADEA case" including plaintiff's disparate-treatment case, "to prove discriminatory intent"); Sloat v. Rapid City Area Sch. Dist., 393 F. Supp. 2d 922, 934–35 (D.S.D. 2005) (rejecting plaintiff's untimely attempt to add a disparate-impact claim in light of *Smith* because such claims were available when the case commenced and, in any event, the plaintiff had presented no statistics and identified no offending policy).

[180] Slattery v. Peerless Imps., Inc., No. 04 CV 0275(JG), 2005 WL 1527681, at *7 (E.D.N.Y. June 29, 2005). The court further found that the defendant met its burden of providing a reasonable factor other than age for the challenged actions. *Id.* at *8.

[181] 144 Fed. App'x 603, 604 (9th Cir. 2005).

[182] *Id.* at 605. Although plaintiffs' challenge originated as a disparate-impact action, they had previously focused on the defendant's use of a forced ranking system during the RIF. *Id.* at 604. After discovery closed, plaintiffs attempted to present a new theory of ADEA disparate-impact liability by focusing on the fact that different managers used different selection, evaluation, and ranking processes and criteria in the various departments affected by the RIF. *Id.* at 604–05, 607.

both subjective and objective criteria and that, in such cases, the plaintiffs were required to "isolate and identify the specific offending employment practice."[183] Because the plaintiffs failed to do so, the court held that they had failed to meet their prima facie burden.[184]

Moreover, the court found that, even assuming that plaintiffs established a prima facie case, the defendant used different RIF selection criteria in different departments "based upon the reasonable and diverse business needs of different departments within the corporation."[185] In finding no ADEA violation, the court quoted the Supreme Court's finding in *Smith* that

> While there may have been other reasonable ways for the [defendant] to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.[186]

As in jurisdictions that did not previously allow disparate-impact liability under the ADEA, the courts' focus on the RFOA provision in these cases demonstrates that the impact of *Smith* is likely to be minimal at best. The Ninth Circuit's emphasis on the distinction between the business necessity and RFOA tests and the New York district court's acknowledgement that the Second Circuit's previous reliance on the less deferential business necessity test demonstrate that the RFOA factor will dominate the courts' analyses of the cases before them.

C. Job Layoffs, Age Discrimination, and the Viability of Disparate-Impact Challenges

As noted at the outset of this Article, the American workforce is getting older and within less than a decade, a majority of all workers will be over the age of forty. A recent report from the BLS indicates that the labor force participation rates of Americans age fifty-five or older has increased because uncertainty about retirement income and other issues have kept many of them on the

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[183] *Id.* at 606–07.
[184] *Id.* at 607.
[185] *Id.*
[186] *Id.* (quoting Smith v. City of Jackson, 544 U.S. 228, 243 (2005)).

job longer than in the past.[187] The projected growth of this older cohort of workers, and their manifest ambivalence about leaving the labor force, sets the stage for a period of considerable conflict over questions regarding age discrimination in the immediate future. As the American labor force employs a record number of older workers, there can be little doubt that litigation over issues of age discrimination will increase. If the past is any indication, a sizeable number of these cases will entail the question of disparate impact.

Although few discrimination charges of any kind result in findings for the complaining party at the administrative stage,[188] age discrimination claims are even less successful.[189] When age discrimination claims do reach a jury, however, successful plaintiffs are awarded larger compensatory damages awards than victorious plaintiffs alleging other forms of discrimination.[190] According to one author, the cost of age-discrimination jury awards and settlements, not including legal fees and other factors, was $200 million between 1996 and 1998.[191] These costs are unlikely to go away.

Age bias and the fact that the consequences of unemployment are harsher on older workers may affect the occurrence of age discrimination actions.[192] Though Congress posited that "in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs,"[193] the same is true in times of decreasing productivity and affluence.

As job layoffs increase, so too do employment discrimination complaints. Age discrimination complaints in particular tend to track the rise and fall of the economy and the related number of

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[187] *See* Toossi, *2014 Projections*, *supra* note 1, at 36–37.

[188] For example, in 2005, the EEOC found reasonable cause to believe that discrimination occurred in only 5.7 percent of the charges it closed in contrast to the "no reasonable cause" findings it made in 62.2 percent of the matters it closed. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ALL STATUTES: FY 1992 – FY 2005, http://www.eeoc.gov/stats/all.html (last visited Oct. 3, 2006).

[189] The EEOC found "reasonable cause" in only 4.1 percent of the age discrimination charges it closed in 2005. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) CHARGES: FY 1992 – FY 2005, http://www.eeoc.gov/stats/adea.html (last visited Oct. 3, 2006) [hereinafter ADEA CHARGES 1992–2005].

[190] JVR May 17, 2004 Press Release, *supra* note 90; JVR Sept. 2, 2003 Press Release, *supra* note 90; JVR Jan. 23, 2002 Press Release, *supra* note 90.

[191] Sheldon Steinhauser, *Beyond Age Bias: Successfully Managing an Older Workforce*, http://clem.mscd.edu/~steinhas/beyond_bias.htm (last visited Oct. 3, 2006).

[192] *Id.*

[193] 29 U.S.C. § 621(a)(1) (2000).

corporate layoffs and reorganizations.[194] In the early 1990s, for example, aggrieved workers filed over 19,000 age-bias complaints per year at the EEOC.[195] That number dropped in 1995 to approximately 17,400 and continued dropping until 1999 when the EEOC received just over 14,000 charges alleging age discrimination.[196] By 2002, however, that number had skyrocketed to over 19,000,[197] coinciding with the recession that began in March 2001 and ended in November of that year.[198] Since 2002, age discrimination charges have been decreasing as have the number of mass layoff events and the number of individuals affected by such events.[199]

While it may be too early to tell, the "graying" of the workforce may keep age discrimination complaints fairly flat.[200] Indeed, some analysts expect age discrimination complaints to increase as the workforce ages, in part because baby-boomers may be more likely to

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[194] The percentage of age discrimination charges relating to firings or layoffs between 1992 and 2001 ranged from a low of 50 percent of all charges to a high of 80 percent. *See* Loring Spolter, *As Layoffs Mount, So Do Bias Complaints,* CAREERJOURNAL.COM, http://careerjournal.com/myc/legal/20020207-spolter.html (last visited Oct. 3, 2006); *see also* Samantha Marshall, *Age Bias Complaints Rise As the Workforce Grays*, CRAIN'S N.Y. BUS., May 12–18, 2003, at 1, 1.

[195] ADEA CHARGES 1992–2005, *supra* note 189. The EEOC is charged with enforcing several anti-discrimination federal laws, including the Age Discrimination in Employment Act. *See* U.S. Equal Employment Opportunity Commission, Federal Equal Employment Opportunity (EEO) Laws, http://www.eeoc.gov/abouteeo/overview_laws.html (last visited Oct. 3, 2006). Before filing suit in federal court, aggrieved workers must first file a "charge" at the EEOC, which has the authority to investigate. *See* U.S. Equal Employment Opportunity Commission, EEOC's Charge Processing Procedures, http://www.eeoc.gov/charge/overview_charge_processing.html (last visited Oct. 3, 2006). Whether or not the EEOC ultimately finds that it has reasonable cause to believe that discrimination occurred, charging parties are given a "right to sue" either upon request or at the end of the EEOC's investigation. *See id.*

[196] ADEA CHARGES 1992–2005, *supra* note 189.

[197] *Id.*

[198] Bureau of Labor Statistics, U.S. Dep't of Labor, *Labor Force Participation During Recent Labor Market Downturns*, Summary 03-03, ISSUES IN LAB. STAT., Sept. 2003, n.1, *available at* http://www.bls.gov/opub/ils/pdf/opbils51.pdf [hereinafter BLS: *Labor Force Participation*]. According to the BLS, "[i]n the third quarter of 2001 . . . employment among higher paid workers fell by about half a million. Bureau of Labor Statistics, U.S. Dep't of Labor, *Who Was Affected as the Economy Started to Slow*, Summary 01-05, ISSUES IN LAB. STAT., Nov. 2001, *available at* http://www.bls.gov/opub/ils/pdf/opbils44.pdf.

[199] *See* ADEA CHARGES 1992–2005, *supra* note 189; *see* MASS LAYOFFS IN 2004, *supra* note 12, at 10 tbl.2. Age discrimination complaints comprised 22 percent of all discrimination charges filed at the EEOC in 2005. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, CHARGE STATISTICS, FY 2002 THROUGH FY 2005, http://www.eeoc.gov/stats/charges.html (last visited Oct. 3, 2006). That figure is down from a high of 27.1 percent in 1992. *Id.*

[200] *See* Marshall, *supra* note 194 (noting that the baby boomers may be more likely to litigate their grievances if they are removed from the labor force before they are ready, especially those whose declining savings accounts require them to work longer).

sue their employers than younger workers.[201] Not only is the number of older workers increasing relative to the age of all workers,[202] but anxiety regarding changes to social security regulations and rising age-eligibility provisions, insecurity regarding the health of company pension plans, and volatile stock market performance and interest rates may all keep workers in the workforce longer.[203] The larger number of older workers and their higher relative labor costs should continue to make them targets during workforce reductions or eliminations, even if the percentage of such events stays flat or decreases.

For workers affected by such actions, *Smith* is unlikely to protect them. It is rare that layoffs, job restructuring, or pension and benefit revisions are motivated by age bias—that is, negative assumptions about the abilities of older employees. Instead, employers undertake these measures for economic reasons: the escalating costs of pensions and health insurance benefits, for example, or the feasibility of outsourcing labor costs. Even if not absolutely necessary, these motivations are not likely to be found to be unreasonable, regardless of the adverse impact they may have on older workers.[204]

A question facing the American workforce, and ultimately its elected officials, is whether considerations underlying the enactment of the ADEA, other than age bias, should result in a revision to the law or a major reinterpretation of the RFOA provision.[205] Though the "setting of arbitrary age limits regardless of potential for job performance" may not be as much of a concern today as it was when the ADEA was adopted, it is no less true that "certain otherwise desirable practices may work to the disadvantage of older persons," and "older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs."[206] This is particularly true when employers seek to reduce costs that are correlated with age, such as wages or pension benefits.

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[201] *Id.*; Spolter, *supra* note 194.

[202] *See supra* notes 1–3 and accompanying text.

[203] *See* BLS: *Labor Force Participation*, *supra* note 198.

[204] *See, e.g.*, Lee Franck, Note, *The Cost to Older Workers: How the ADEA Has Been Interpreted to Allow Employers to Fire Older Employees Based on Cost Concerns*, 76 S. CAL. L. REV. 1409, 1435 (2003); Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 318 (1990).

[205] *See supra* notes 9–13 and accompanying text.

[206] *See* 29 U.S.C. § 621(a) (2000).

In some cases, individuals forced out of the labor force at an early age find that reentering the workforce entails accepting unpalatable terms and conditions of employment. After years of paying their dues, and unable to locate positions at the same level of pay, benefits and job status, some simply drop out of the labor force.[207] When they exhaust unemployment compensation or severance-pay benefits, they turn to their savings, home equity, family, or government assistance, such as Medicaid or federal disability insurance.[208] Laid-off workers, and those who survive but are indirectly affected by layoffs, may suffer increased levels of alcohol consumption, depression, workplace injuries, and deteriorated physical health.[209] Ultimately, they, their families, former coworkers, employers, and finally society will pay for the long-term effects of forced early retirement.[210]

In a recent report, the Government Accounting Office sounded an alarm regarding the impact of "baby-boom" retirements on the economy, their employers and the workers themselves:

> With these retirements, employers may lose older workers' firm-specific and general knowledge and skills, and there may not be enough younger workers in the labor market to replace them. At the same time, older workers themselves may need additional income from employment because they face less secure retirements due in part to rising health care costs and more years spent in retirement.
>
> While many, including GAO, have reported on these trends and their likely consequences, little has been done to address them. . . . [F]ew employers have yet implemented widely available programs to recruit or retain older workers.
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> . . . .
>
> Enhanced public awareness of demographic trends, their likely consequences, and possible solutions that could help promote both economic growth and retirement security for individuals, could help mitigate the potentially serious

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[207] Louis Uchitelle & David Leonhardt, *Men Not Working, and Not Wanting Just Any Job*, N.Y. TIMES, July 31, 2006, at A1.

[208] *Id.*

[209] Sarah Moore et al., *Physical and Mental Health Effects of Surviving Layoffs: A Longitudinal Examination* 19 (Inst. of Behavioral Science, Univ. of Colorado at Boulder, Working Paper No. PEC2003-0003).

[210] *See* Judith D. Fischer, *Public Policy and the Tyranny of the Bottom Line in the Termination of Older Workers*, 53 S.C. L. REV. 211, 225–27, 232 (2002) (discussing the negative social, economic, psychological, and business effects of salary-based terminations).

> implications of the aging of the U.S. labor force, avoid possible knowledge and skill gaps in the future, and help ensure the financial security of older Americans.[211]

Older workers possess valuable skills and knowledge, and yet in its current form, the ADEA provides them with little protection. The GAO report suggests that sacrificing older workers for short-term economic gain may have long-term deleterious consequences. Just as Congress amended the Civil Rights Act of 1964 to codify the disparate-impact cause of action and the concepts of "business necessity" and "job relatedness," it may need to amend the ADEA if it intends "otherwise desirable practices," which disadvantage older workers, their coworkers, families, and, ultimately, their employers to violate the ADEA.

Yet this does not seem likely to happen. Given that Congress chose not to codify the disparate-impact cause of action in the ADEA when it did so with the Civil Rights Act, it is unlikely that older workers can expect Congress to write into the ADEA broader protections than it currently has. Indeed, despite its recognition that "otherwise desirable practices" can negatively impact older workers, Congress gave employers a significant shield when it wrote the RFOA provision into the ADEA to begin with. Thus, as long as cost-cutting measures are based on reasonable factors other than age and as long as the business climate rewards those companies that cut costs by reducing payroll, pension, and other benefit costs, employers are protected from ADEA disparate-impact liability.

V. CONCLUSION

While it may have settled the question of whether disparate-impact challenges are permissible under the ADEA, the potency of *Smith* is not equal to that of the RFOA provision. While a plurality of the Court was clear in affirming the availability of disparate-impact actions, the RFOA provision and the practical realities of today's business and legal environment make it highly unlikely that such litigation can succeed. As recent cases have demonstrated, in practical terms, the use of the RFOA provision has largely precluded the possibility of plaintiffs successfully issuing disparate-impact challenges to cost-motivated layoffs and other detrimental employer practices.[212] Given the courts' demonstrated reluctance to

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[211] GAO REPORT: OLDER WORKERS, *supra* note 11, at 30–32.

[212] In a recent article, one author opined that the *Smith* decision actually created a

make judgments about the reasonableness of business decisions presented by defendants in such cases, it is difficult to imagine scenarios under which disparate-impact cases might be fruitful. After years of litigation and debate, *Smith* may have provided older workers with a battlefield victory, but it may also have provided a certain loss in the war against involuntary early retirement through corporate reorganizations and job layoffs.

disincentive for elderly workers to sue their employers for age-correlated, cost-motivated employment practices. *See generally* Sandra F. Sperino, *Disparate Impact or Negative Impact?: The Future of Non-Intentional Discrimination Claims Brought by the Elderly*, 13 ELDER L.J. 339, 374–83 (2005) (discussing "new hurdles" for disparate-impact plaintiffs following the *Smith* decision).