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DISPARATE IMPACT DISCRIMINATION AND THE ADEA: COMING OF AGE

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ABSTRACT

Although the theory of disparate impact discrimination was not initially cognizable under Title VII, the Supreme Court in *Griggs v. Duke Power Company* recognized its viability [1]. Prior to *Griggs*, individuals could only make a claim under Title VII if they could prove disparate treatment, which occurs when an employer intentionally treats members of a protected class less favorably because of their status in that class. Disparate impact discrimination occurs when an employer's facially neutral employment practice adversely affects a person in a protected class, and that fact cannot be explained by business necessity. While disparate impact actions have been recognized under the Civil Rights Act since 1971, the circuit courts disagreed whether this theory of discrimination applied to the Age Discrimination in Employment Act. This article examines the 2005 Supreme Court decision that recognized the ADEA authorizes recovery in disparate impact cases.

It is commonly known that Title VII of the Civil Rights Act of 1964 makes a number of employment actions unlawful [2]. At the time the act was passed, Congress considered and rejected amendments to the act that would have included older workers in the protected classes of Title VII [3]. However, the secretary of labor subsequently investigated the issue of age discrimination and concluded that it was common for employees to be discriminated against the workplace because of their age and inaccurate stereotypes about the abilities of older workers [4]. As a

result, in 1967, Congress passed the Age Discrimination in Employment Act in an effort to eradicate arbitrary discrimination based on negative stereotypes abut the performance level of older workers [5].

The ADEA's purpose is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment" [6]. The ADEA prohibits discrimination against individuals older than forty because of their age, and also prohibits covered entities from depriving individuals of employment opportunities or taking any other adverse action against such individuals because of their age. Comparable to the statutory language of Title VII, the ADEA makes it unlawful for a covered employer "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter" [7]. The ADEA also shares the goal of Title VII with respect to the removal of artificial, arbitrary, and unnecessary barriers to employment when those barriers operate invidiously to discriminate on the basis of criteria that are irrelevant to job performance.

Because the ADEA is in many ways patterned after other civil rights legislation, courts often follow developments in other areas of civil rights law in interpreting the ADEA. For example, sexual harassment can be a form of discrimination under Title VII, and many courts recognize the viability of hostile working environment claims, originated in that area, under the ADEA [8]. But the courts do not always follow this pattern. For example, while the Supreme Court recognizes reverse discrimination and has held that Title VII protects Caucasians from being discriminated against in favor of racial minorities [9] and it protects men as well as women from discrimination based on sex[10], the Court recently declined to recognize the viability of reverse discrimination claims under the ADEA. The Court interpreted the text and legislative history of the ADEA as allowing an employer to set minimum age requirements for some employee benefits and to treat older members of a protected class more favorably with respect to the provision of certain benefits without liability.

DISPARATE IMPACT

This article examines the relationship between the concept of disparate impact and the ADEA. The theory of disparate impact discrimination provides that facially neutral employment criteria may violate Title VII if they have a disparate impact upon members of a protected class and cannot be justified

by a business necessity. This situation occurs when an employer specifies certain requirements for a job that operate to disqualify otherwise capable prospective employees, when those specified requirements do not actually relate to the employee's ability to perform the job. They involve neutral job requirements that have a discriminatory effect. The Supreme Court initially interpreted Title VII so as to prohibit such practices, to prevent pretextual discrimination in the absence of direct evidence of discriminatory motive [11]. Subsequently, the Civil Rights Act of 1991 amended Title VII so as to expressly recognize such liability [12].

Prior to *Griggs v. Duke Power Company* [1], individuals could make a claim successfully under Title VII only if they could prove disparate treatment, which occurs when an employer treats a member of a protected class less favorably because s/he is in the protected class [13]. The recognition of disparate impact discrimination, however, protects individuals from practices that do not overtly discriminate and may be fair in form, but are discriminatory in operation [1].

If the individual can establish a *prima facie* case, that is identify a specific employment practice that disparately affects a protected class, along with proof of the existence of a causal relationship between the identified practice and the disparate impact, then purposeful discrimination need not be established [14]. After the plaintiff establishes such a *prima facie* case, then the employer may rebut with proof that its actions are based on a viable business necessity. If the employer succeeds, then in order to succeed the individual must show that the employer could have used other practices which serve the employer's legitimate interests, but do not have a discriminatory effect.

EARLY SUPPORTIVE DECISIONS

While this theory has long been cognizable under the Title VII, its application to the ADEA remained unclear for almost forty years after its passage. Initially, some federal circuit courts seemed willing to apply disparate impact theory to the ADEA. Then in 1980, the Second Circuit supported a disparate impact claim under the ADEA in *Geller v. Markham* [15]. Miriam Geller was a 55-year-old teacher who brought this action in the District Court for the District of Connecticut under the ADEA, claiming that defendants violated her rights by denying her employment as a teacher because of her age. She sought damages, equitable relief, and attorney's fees [15].

Geller alleged that her employer used a discriminatory cost-cutting policy, which resulted in her being replaced by a 25-year-old women. Before applying for a permanent position that became available, Geller had served as a substitute teacher for the school district. The cost-cutting policy that was used by the school district restricted recruiting for new teachers at levels below the sixth step of the salary schedule, which is the salary grade reached by teachers with more than five years of experience. At trial, Geller introduced statistical testimony establishing

that 92.6 percent of Connecticut teachers between 40 and 65 years old have more than five years of experience, while only 62 percent of teachers under 40 years old have taught more than five years. She also presented considerable evidence in the form of witnesses' testimony that individual defendants had discussed the sixth step policy with her, and had taken it into consideration when deciding to replace her [15].

Based on her statistical evidence and the testimony of witnesses, which supported her argument that the policy had led to her replacement, the trial judge concluded that, as a matter of law, the policy was discriminatory, and left it to the jury to decide whether the application of the discriminatory practice had made a difference in the decision to replace Geller with a younger woman. The trial resulted in an award of damages in her favor [15].

In post-trial motions, Geller applied for equitable relief, specifically requesting reinstatement, pension benefits, and attorney's fees. All of those requests except for the request for attorney's fees were denied. It is from this denial that she appealed [15].

When the Supreme Court denied certiorari in the case, the late Justice Rhenquist, who dissented from that denial, asserted his objections to the application of the theory of disparate impact to the ADEA:

> [T]he decision of the Court of Appeals is inconsistent with the express provisions of the ADEA and is not supported by any prior decision of this Court. . . . This Court has never held that proof of discriminatory impact can establish a violation of the ADEA, and it certainly has never sanctioned a finding of a violation where the statistical evidence revealed that a policy, neutral on its face, has such a significant impact on all candidates concerned, not simply the protected age group [16, p. 948].

In 1984, the Ninth Circuit had addressed the disparate impact/ADEA issue in *EEOC v. Borden* [17]. Borden fired most of its employees when the company closed its Phoenix plant, offering all of the discharged employees a severance package, except for employees who were eligible for retirement. This became the issue. While the defendants did not deny that they refused to give severance pay to all of its sixteen employees aged 55 and older, they claimed that the disparate impact theory of recovery was not available under the ADEA. The court of appeals disagreed, stating that the similarities between Title VII and the ADEA permitted disparate impact claims under the ADEA [17].

THE SUPREME COURT SPEAKS (BUT INDISTINCTLY)

However, after the Supreme Court's ruling in *Hazen v. Biggins* [18], this trend began to change. *Hazen* is, on the surface, a disparate treatment case. The employee, Biggins, was fired from Hazen Paper when he was 62 years old, a few

weeks before his pension would have vested at the completion of 10 years of service. He claimed that his age was a determining factor in the decision to fire him, while Hazen contended that he was fired for doing business with competitors. Biggins brought suit against the company in the U.S. District Court for the District of Massachusetts. He alleged that his firing violated the ADEA because his age had been a determinative factor in the company's decision to fire him. A jury rendered a verdict in favor of Biggins on his ADEA claim [18].

The First Circuit affirmed the judgment of the district court with regard to the company's ADEA liability [18]. The court of appeals found sufficient evidence to establish that the company either knew or should have known that its action violated the ADEA. On certiorari, the Supreme Court vacated the judgment of the court of appeals and remanded the case for further proceedings. The Court held that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service. The Court stated that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age, and specifically indicated that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service. The Court indicated that it would be incorrect to say that a decision based on years of service—which is analytically distinct from age—is necessarily age-based. Thus, disparate treatment does not automatically occur when the employee's motivation is a component other than age, even if there is a correlation [18].

Although *Hazen v. Biggins* was a disparate treatment case, the Court appeared to address disparate impact in dicta. Delivering the opinion of the court, Justice O'Connor addressed the fact that the Court had never decided whether the disparate impact theory of liability is available under the ADEA. However, she indicated that "disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA." [18, p. 610]. She also stated "[W]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . ." [18, p. 611]. This language would seem to suggest that the disparate impact theory of discrimination was inapplicable to the ADEA. This is apparent because claims that stress disparate impact involve employment practices that are facially neutral in their treatment of different groups, but that fall more harshly on one group than on another and cannot be justified by business necessity. Generally, the showing of factors that correlate with age is the very thing needed to establish a *prima facie* case of disparate impact. In a disparate impact case, the employer's decision, by definition, is motivated by factors other than age. It should also be noted that the Court acknowledged in *Hazen* that it has never decided whether a disparate impact theory of liability is available under the ADEA, and that it need not do so because Biggins claimed only that he received disparate treatment [18].

A SPLIT IN THE CIRCUITS

After *Hazen*, there was a split of authority in the lower courts as to the applicability of the theory of disparate impact to the ADEA. The First Circuit in *Mullin v. Raytheon*, a case in which the employee alleged that his position downgrade and salary reduction were indicative of age discrimination, denied the application of disparate impact claims under the ADEA based upon the text and structure of the ADEA, the legislative history of the act, and the amendments passed under the Civil Rights Act of 1991 [19].

Likewise, in *EEOC v. Francis W. Parker School* [20] the Seventh Circuit cited *Hazen* and its own reading of the ADEA, which provides in pertinent part that "it shall not be unlawful for an employer, employment agency or labor organization (1) to take any action otherwise prohibited under subsection (a) . . . of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age" [21]. The circuit court concluded "that decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited" [20, p. 1077].

In *Ellis v. United Airlines, Inc.* the Tenth Circuit also rejected disparate impact claims pertaining to age discrimination [22]. The appeals court compared the wording of the ADEA and the Equal Pay Act, both of which appeared to offer an exemption if the challenged practice is based on factors other than age or sex, respectively. The court relied on the Supreme Court's interpretation of the Equal Pay Act, which precluded disparate impact claims, as well as on the ADEA's legislative history, to conclude that ADEA claims cannot be based on a disparate impact theory of discrimination [22].

In contrast to the First, Seventh, and Tenth circuit courts, the Eighth Circuit recognized the viability of disparate impact theory in *Smith v. City of Des Moines* [23]. While Smith did not succeed in his disparate impact claim because of the specific facts of the case, the Eighth Circuit was willing to apply disparate impact theory to the ADEA claim. Smith was not successful in his action against the city because he failed to present appropriate evidence in opposition to the city's summary judgment motion, which was granted by the trial court and upheld by the Eighth Circuit Court of Appeals [23]. Citing *Houghton v. SIPCO, Inc*. [24] as the leading authority, the court acknowledged that it has on several occasions applied disparate impact analysis to age discrimination claims and that it was settled law within the circuit. In that case, Houghton alleged that SIPCO violated the ADEA by imposing discriminatory changes in its compensation and employee benefits. Because of procedural errors, the circuit court ordered a new trial on Houghton's disparate impact claims [24].

Similarly, the Sixth Circuit in *Lyon v. Ohio Education Association* concluded that the plaintiffs failed to establish a *prima facie* case of disparate impact discrimination, but cautioned instead that *Hazen* cast considerable doubt

concerning the theory's application to age claims [25]. The court stated that there is considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory. It based that determination on the fact that the Supreme Court had declined to confront the issue in *Hazen* [18, 25].

In this case, Lyon sued his employer and his union, alleging that an early retirement provision in the collective bargaining agreement between the defendants violated the ADEA. The net effect of the early retirement provision was to ensure early retirees the same benefits that they would receive had they continued to work until normal retirement date. Lyon was later joined in his lawsuit by 16 coworkers. The district court granted summary judgment to defendants, and plaintiffs appealed that ruling. Plaintiffs claimed that the early retirement provision's imputation of service clause violated the ADEA because younger persons who take early retirement received a higher pension amount than older persons taking a retirement with the same length of service. Because the plaintiffs conceded that the case was not a disparate impact case since the early retirement provision administered by defendants was not age-neutral, the court of appeals did not rule on that issue, but rather based its decision on the claim of disparate treatment age discrimination [25].

The Third Circuit reached the same conclusion concerning the viability of the theory in *Dibiase v. SmithKline Beecham* [26]. Dibiase was laid off by defendant as part of a planned reduction in staff. Defendant offered terminated employees a separation benefit plan, which provided a lump sum payment based on the employee's length of service as well as continued health and dental benefits. Additionally, the plan offered enhanced benefits to employees who were willing to sign a general release of all claims against defendant, including but not limited to all claims arising under the ADEA. Dibiase declined to sign the release. He contended that the policy violated the ADEA and later filed a complaint against defendant in district court. Relying on the ADEA section providing a cause of action only for persons at least 40 years old, the district court observed that "in order for an older employee to receive the same enhanced benefits as a younger employee, the older employee must release her right to file an ADEA claim" [27]. The court further observed that "this treatment is patently different because the younger employee cannot have an ADEA claim" [27]. From those observations, the district court concluded that SmithKline's policy facially discriminates against employees protected by the ADEA [26].

Dibiase contended, and the district court found, that older workers who signed SmithKline's release gave up more claims than younger workers who signed the release, since older workers, unlike younger workers, are protected by the ADEA. The district court based its conclusion that the policy constitutes facial discrimination on the fact that the ADEA provides a cause of action only to persons age 40 or older. By its terms, the ADEA differentiates employees on the basis of age, according to the district court, and leaves younger workers unprotected by the statute [26].

In rejecting the district court's reasoning, the appeals court held that the court erred in concluding that SmithKline's policy is facially discriminatory and, therefore, constitutes per se discrimination. The appellate court stated that determination of explicit facial discrimination must be apparent from the terms of the policy itself. The appellate court further stated that the SmithKline policy cannot be said to be discriminatory on its face, because the district court's conclusion that the plan was facially discriminatory required referencing a fact outside of the policy—namely the ADEA. The district court's conclusion that it could assume disparate impact because of its disparate treatment analysis was rejected by the appeals court, which stated that *Hazen* cast doubt on the viability of disparate impact theory under the ADEA and acknowledged that even within the circuit, the existence of disparate impact theory under the ADEA was an open question [26].

The Eleventh Circuit addressed the disparate impact controversy in *Adams v. Florida Power Corp*., determining that, while the language of the ADEA was similar to Title VII, it was sufficiently distinguishable to question extending the disparate impact theory to ADEA cases [28]. *Adams* presented an issue of first impression in the Eleventh Circuit regarding whether a disparate impact theory of liability is available to plaintiffs suing for age discrimination under the ADEA. That court ruled that disparate impact claims may not be brought under the ADEA. On appeal to the Supreme Court, the Court had an opportunity to settle the issue then, but dismissed the appeal after hearing oral arguments, determining that certiorari had been improvidently granted [29].

THE SUPREME COURT SPEAKS MORE CLEARLY

In *Smith v. City of Jackson*, decided in 2005, the Supreme Court settled the question of whether the disparate impact theory of recovery, which was announced in *Griggs* for cases brought under Title VII of the Civil Rights Act of 1964, is cognizable under the ADEA [30]. Police and public safety officers employed by the city of Jackson, Mississippi, contended that salary increases received in 1999 violated the ADEA because the raises were less generous to officers over the age of forty than to younger officers. Under the policy, employees who had less than five years of tenure received proportionately greater raises when compared to their former pay than those with more seniority. Although some officers over the age of forty had less than five years of service, most of the older officers had more years of service. The few officers in the two highest ranks were all over 40 years old. Their raises, though higher in dollar amount than the raises given to junior officers, represented a smaller percentage of their salaries, which, of course, were higher than the salaries paid to their juniors. They were the officers who complained of the disparate impact of the award [30].

The Court settled the philosophical issue when it held that the ADEA authorizes recovery in disparate impact cases comparable to *Griggs*, even though it

concluded that these employees failed to put forth a valid disparate-impact claim. The Court noted that "[E]xcept for substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of that provision in the ADEA is identical to that found in §703(a)(2) of the Civil Rights Act of 1964 (Title VII). Other provisions of the ADEA also parallel the earlier statute" [30, p. 233], such as the affirmative defense of bona fide occupational qualifications, which are reasonably necessary to the normal operation of the particular business. As a result of the language and circumstances surrounding the passage of both acts, the Court concluded that they should be interpreted similarly [30].

The Court noted, however, that unlike Title VII, the ADEA language significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age," referencing that part of the ADEA which provides that "[i]t shall not be unlawful for an employer, employment agency or labor organization (1) to take any action otherwise prohibited . . . 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" [21].

Justice Stevens announced the judgment of the Court and delivered its opinions with respect to Parts I, II, and IV, in which Justices Scalia, Souter, Ginsburg, and Breyer joined [30]

In Part III of this decision, a plurality of the Court, consisting of Justices Stevens, Souter, Ginsburg, and Breyer, cited *Griggs* for the proposition that Congress intended to address the *consequences* of employment practices, and not simply the *motivation* for those practices. The court explained that the ADEA makes it unlawful for an employer "to limit . . . his employees" (plural) "in any way that would deprive or tend to deprive any individual" (singular) "of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." The Court observed that there can be an incongruity between the employer's actions, which are focused on his employees generally, and the individual employee who adversely suffers because of those actions. "Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age—the very definition of disparate impact" [30, p. 14, n. 6].

Moreover, the plurality further concluded that the "reasonable factors other than age" (RFOA) provision of the ADEA, would be redundant in the absence of the recognition of disparate impact discrimination. This is especially true since disparate treatment cases by definition would involve acting on something other than reasonable factors. In other words, employers would be liable for disparate treatment discrimination if they discriminated based upon reasonable factors, which serve as a proxy for discrimination based upon age. Thus, the inclusion of the caveat for "reasonable factors other than age" must take into account disparate impact as a form of discrimination. The Court deduced that in "disparate-impact

cases, however, the allegedly 'otherwise prohibited' activity is not based on age . . . accordingly, [it is] in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable'. Rather than support an argument that disparate-impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion" [30, p. 239].

Finally, the plurality noted "that both the Department of Labor, which initially drafted the legislation, and the EEOC . . . have consistently interpreted the ADEA to authorize relief on a disparate-impact theory" [30, p. 239]. In sum, the plurality concluded that the text of the statute, as interpreted in *Griggs*, the RFOA provision, and the EEOC regulations all support the applicability of the disparate impact discrimination theory to the ADEA [30].

A majority of the Court determined in Part IV of the opinion that "[T]wo textual differences between the ADEA and Title VII make it clear that even though both statues authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII" [30, p. 240].

The first difference the Court identified was the RFOA provision, while the second was the amendment to Title VII contained in the Civil Rights Act of 1991. One of the purposes of this amendment was to modify the Court's holding in *Wards Cove Packing Co. v. Atonio* [31]. The amendment had the effect of overturning that portion of *Ward Cove* that relaxed the employer's burden and incorporated the Supreme Court's findings in *Griggs* into the new Section 703(k) of Title VII.

The Impact of *Wards Cove*

The *Wards Cove* case had narrowly construed the employer's exposure to liability on a disparate-impact theory. The Court concluded that since those amendments expanded the coverage of Title VII, but did not address the ADEA, *Wards Cove's* pre-1991 narrower interpretation of Title VII's language remains applicable to the ADEA. The Court opined that "Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. . . . Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group" [30, p. 240-241]. Of course, at the time the 1991 legislation was passed, the Court had not recognized disparate impact discrimination under the ADEA; therefore, Congress may not have considered it appropriate to make the application of disparate impact theory more flexible, since it had not yet been recognized. If anything, it would seem that Congress would have amended the

ADEA in the 1991 legislation specifically either to reject or accept disparate impact discrimination.

Nevertheless, on the facts of the case, the *Wards Cove* Court concluded that while disparate impact was a viable means of establishing a violation of the ADEA, the plaintiffs failed to identify "any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers" [30, p. 241]. Notwithstanding this failure, the Court also concluded that it was clear from the record that the city's plan, which increased salaries according to seniority and position in an effort to make them competitive within the regional labor market, was based on reasonable factors other than age. The Court surmised 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 [under Title VII], 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" [30, p. 243].

Justice O'Connor, in her concurring opinion, concluded that disparate impact claims are not cognizable under the ADEA, and that employers should not be subject to liability absent proof of intentional age-based discrimination. She opined that there would be a stronger argument for recognizing the theory if *Griggs* had been decided before the ADEA was enacted, since Congress would have been on notice of Title VII's interpretation with respect to such claims. While she did not agree that disparate impact claims should be recognized under the ADEA, she nevertheless agreed with the majority that such claims should be strictly circumscribed by the RFOA exemption, which requires "only that the challenged employment practice be based on a 'reasonable' nonage factor—that is, one that is rationally related to some legitimate business objective" [30, p. 267]. Justice O'Connor reiterated that disparate impact claims should be governed by the standards set forth in *Wards Cove Packing Co. v. Atonio*, in which the Court held that "a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack" [31, p. 657], and that once the employer has produced evidence that its action was based on a reasonable nonage factor, the plaintiff bears the burden of disproving this assertion.

EMPLOYMENT POLICY IMPLICATIONS

Suspect Policies and the "Reasonable Factors Other than Age" Defense

It is now settled that employment practices, which are age-neutral on their face, can be actionable if they have a disparate impact on older workers. However, as the Court most recently stated in *Smith v. City of Jackson*, it is not sufficient to allege a disparate impact alone. Plaintiffs must identify a specific test, requirement, or

practice that results in a disparate impact according to the precedent established for Title VII cases in *Wards Cove*. In that case, the Court held that plaintiffs alleging disparate impact under Title VII "must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack" [31, p. 657].

The plaintiffs in the case had alleged that several employment practices, such as nepotism, separate hiring channels, rehire preferences, as well as the use of subjective decision making to select noncannery workers, had a disparate impact on nonwhites, given that statistics suggested a disproportionately low percentage of nonewhites in the positions at issue. The court held, however, that even if nonwhites were underrepresented, that fact alone would not suffice to make out a *prima facie* case of disparate impact. "Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for white sand nonwhites" [31, p. 751], so that employers would not be potentially liable for innocent causes that may lead to statistical imbalances in the composition of their work forces. The dissenting justices, in contrast, argued that proof of numerous questionable employment practices ought to fortify an employee's assertion that the practices caused racial disparities [31].

Suspect Practices: Skill-Based Compensation Systems

What types of employment practices could be suspect? Head and Burke suggested that skill-based pay systems—those in which pay increases are linked to the number or depth of skills an employee acquires and applies—potentially could have a disparate impact on older workers, since promotion is not linked to longevity [32]. The focus on skill attainment for advancement may make it easier for younger workers to succeed. Of course, if senior employees have the skill and knowledge needed to increase a company's competitive edge, they too will likely be compensated accordingly. Additionally, because the reward and advancement system is tied to skill acquisition and development, skill-based pay systems appear inherently to discriminate against older workers, if they are not given the opportunity to acquire new skills or update their skill set.

> Like the temptation to terminate older workers, whose salary and benefits have become costly to an employer, under the auspices of belt-tightening or downsizing, or alternatively, to refuse to hire older workers under the pretense that they are too experienced and would be under-paid, skill based pay systems present the temptation to favor recently trained or educated workers over those with seniority [32, p. 303].

Nevertheless, it would seem that many employment practices that result in a disparate impact on older workers could be justified under the "reasonable factors other than age" caveat. Senator Yarborough, in addressing the RFOA

provision on the floor of Congress, explained by way of example that if a worker failed a test for a job requirement because the prospective employee, although able to pass the test at 35 years of age, could not pass the test at 55 years, the test would have a disparate impact, but would nevertheless be based upon a reasonable factor other than age [33]. The defense seemingly is more liberal than that of the business necessity defense under Title VII. In other words, a practice could be reasonable without being *necessary* or the *least* discriminatory policy. For example, there are several advantages to skill-based pay systems, such as effective employee motivation, lateral flexibility, increase in cross functional capabilities, and enhanced organizational value [32]. If the employer can establish such a reasonable basis for the use of such a compensation system, then the employee under *Wards Cove* apparently would have the burden of persuasion to rebut that assertion.

Not Hiring Overqualified Workers?

What other types of employment tests, requirements, or practices could be at risk for a disparate impact claim? Some employers refuse to hire prospective employees because they are "overqualified." It would seem that such a reason could have a disparate impact on older workers, assuming that plaintiffs could produce sufficient proof of the correlation under the standards set forth in *Wards Cove*. Employers are likely to attempt to justify their practice of filtering out overqualified workers for fear of a high turnover rate, since the employee may not be sufficiently challenged. If that fact could be established, it would seem that the employees, according to *Wards Cove*, must then disprove that claim. One scholar has argued that "overqualification" as a means of eliminating candidates should be supported by objective standards in order to advance the policy goals of the ADEA by ensuring that older workers receive equal opportunity for jobs, while maintaining an employer's ability to seek out and retain the most suitable employees [34].

Costs as a Valid RFOA

Still other employers have a policy preference for hiring at entry-level positions. For example, a university might have a policy that new faculty hires should be at the assistant professor level and that requests to hire at a rank above assistant professor require a justification, such as the need to hire above that rank because senior-level positions are lacking, or because the program needs senior leadership or expertise. This policy would likely have a provable disparate impact on older faculty, who are likely to be full professors, not assistant processors. It is unclear as to why this policy would exist, other than the fact that full professors are paid more than assistant professors. But are cost savings a "reasonable factor other than age?"

In other words, would a policy of only hiring at entry-level positions, or in situations involving reductions in force, laying off only the highest-paid (usually older) workers, violate the statute, or be a reasonable economic response?

One commentator asserted that "cost is not a defense to discrimination, but it should be permissible for an employer to replace a highly paid worker with a lower-paid worker (or at least to offer the job to the highly paid worker at the lower rate). Such a practice would often have an adverse effect on older workers, but it is eminently reasonable" [33, p. 56]. Lidge concluded that policies designed to save money are not "artificial, arbitrary and unnecessary" employment barriers [35]. "[W]hen there is no intentional discrimination, the employer should have to show that a challenged practice significantly serves the employer's legitimate business interest. Such interests could include cost savings and efficiency, so long as these savings are more than de minimis. Similarly, an employer should not have to adopt a suggested alternative employment practice if the employer would have to spend a significant amount of money to adopt the practice" [35, p. 41]. He proposed using the test set forth under Title VII for religious discrimination, that is that employers should be required to make a reasonable accommodation so long as it does not result in an undue burden, defined as more than a de minimis cost. Another commentator concurred: "By permitting employers to make adverse employment decisions based on 'reasonable factors other than age', the ADEA countenanced an employer's reliance on factors that correlate with age, such as high wages, or spiraling benefit costs. The RFOA defense means that refusing to hire or firing an older worker to cut costs provides no evidence of discriminatory intent" [36, pp. 386-387]. In other words, rational, cost-saving business decisions, even those that incidentally disadvantage older workers, should be permissible under the ADEA.

Likewise, appeals court decisions following the Supreme Court's ruling in *Hazen Paper* seem to support the validity of allowing costs to be considered as a RFOA defense, given that an adverse employment decision, which is based on costs reflected in greater compensation and increased benefits for older workers, is a factor not based on age and could be reasonable, depending upon the circumstances [37]. While arguably cost savings are relevant but alone cannot establish a Title VII business necessity defense unless there is no other reasonable alternative, the RFOA defense according to the Court in *Smith*, is a less-burdensome one that focuses on the reasonableness of the policy, what Justice O'Connor would define as "one that is rationally related to some legitimate business objective" [30, p. 267]. This distinction from the business-necessity defense seems to support judging merely the reasonableness of the employer's cost-cutting plan or policy, since it is tied to a factor that is analytically distinct from age. But is this interpretation a good policy choice, or does it emasculate the ADEA?

Policy Considerations

One commentator has proposed that the RFOA defense should prohibit the use of age-correlated factors that enable opportunistic firings and other targeting of older workers, unless the employer can justify cutting costs by burdening older workers [38]. At a minimum, it would seem that if economics, not age, is allegedly the reason for the adverse employment decision, older employees should be given the opportunity to accept a salary cut [39], or to be hired at lower rank, or hired at a higher rank with a lower salary. Filtering out the overqualified or highest-paid employees without such options seems to negate the goals of the ADEA.

Further, most decisions in business center around money and generating profit. Nevertheless, Congress as a matter of policy shifted some responsibility, along with the commensurate economic burden, to employers in an effort to accommodate persons with disabilities in the workforce. Therefore, while it might be reasonable for a business teetering on the verge of bankruptcy to eliminate some of its higher-paid employees, that result seems less palatable as a matter of policy in the normal course of business simply as a means to generate greater profitability [37]. Just as the Americans with Disabilities Act (ADA) protects "qualified persons" with a disability who can perform the essential functions of the job, the ADEA should protect qualified older workers who can still perform their jobs from arbitrary termination designed simply to enhance profitability. If the ADEA as interpreted does not recognize such a responsibility, Congress should amend the statute to define "reasonable factors other than age," when the reasonable factor concerns costs that significantly correlate to the age of the employee, as one which does not result in an undue hardship to the employer, similar to the language used in the ADEA. Fischer concluded that it is bad public policy to allow unfettered salary-based terminations of older workers, and that empirical evidence and commentary from the disciplines of economics, business, psychology, and sociology show the negative effects of the current policy: "[P]utting some limits on salary-based terminations would better implement the language and purpose of the ADEA and would create better public policy" [40, p. 247].

In a different context, the Supreme Court interpreted the National Labor Relations Act so as to protect union organizers who attempt to organize nonunion workplaces [41]. In response, employers developed neutral criteria to exclude such organizers from the workplace [42]. In one such case, *Aztech Electric Company*, the National Labor Relations Board determined that a policy of not hiring or considering any applicant whose recent wage history differed by thirty percent from that of the Contractor's Labor Pool, a *nonunion* construction employee leasing company, violated the NLRA [43]. Although a finding of antiunion animus usually must precede a determination that such facially nondiscriminatory practices or policies constitute an unfair labor practice, the board determined that such a rule was so inherently destructive of the rights of employees that no proof of antiunion animus was necessary [43].

Similarly, it can be argued that using seemingly neutral criteria such as salary, rank, and experience—which are so strongly correlated in most employment situations with the age of an employee—to filter applicants or to serve as a basis for layoff decisions, is inherently destructive of the rights of older workers. As such, a practice of relying on those criteria should be considered unreasonable per se unless the failure to consider them would result in an undue burden to the employer. As one observer noted, "[T]here clearly is a correlation between age and salary, and courts should not be able to disregard this correlation as analytically distinct. Older employees deserve the protection of the laws as much—or more—than anyone else in this country. Furthermore, laws should not allow employers to use the employees until they feel that they can find someone younger. Because salary is so directly related to age, courts should take a second look at the impact of their decisions and admit their mistakes" [44].

Furthermore, prior to its decision in *Smith v. City of Jackson*, the Supreme Court in *General Dynamics Land Systems, Inc. v. Cline*, the case in which the court rejected reverse discrimination as being actionable under the ADEA, cited *Hazen* for the proposition that firing an employee because his pension was about to vest was analytically distinct from age discrimination, even though the termination would never have occurred without the employee's advanced years [3]. In *Cline* as in *Hazen*, the Court reiterated that discrimination on the basis of one's pension status was insufficiently related to the underlying concerns of the ADEA, such as the prohibited stereotype of the faltering worker and its attendant stigma, as well as arbitrarily imposed age ceilings, which were a common hiring practice at the time the ADEA was passed.

Therefore, one could argue that some facially neutral employment practices could violate the ADEA if their impact disproportionately affects older workers *and* the practice perpetuates the evils the remedial legislation was designed to prevent. For example, a practice of hiring only at the assistant professor level absent some showing of need for senior faculty adversely impacts older, experienced professors with greater longevity in academia and arguably represents an invidious bias against age that is inextricably linked to preconceived ideas of the desirability of younger, freshly minted faculty in contrast to the undesirability of the older, absent-minded professor stereotype. Perhaps this is the type of proof that employees should proffer to rebut or disprove the employer's assertion that the factor considered was a reasonable one based upon costs.

CONCLUSIONS

The ADEA was passed in an effort to remove employment barriers that operate to discriminate on the basis of criteria that are irrelevant to job performance. Even the Court acknowledged in *Smith* that "Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has

relevance to an individual's capacity to engage in certain types of employment. . . . Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group" [30, p. 240].

On the other hand, it would seem that employees' compensation and benefit costs are irrelevant to their job performance, although those factors may be significant if marginal costs to the employers are to be equated with job performance. However, it should also be relevant that salary increases are more likely to be tied logically to exceptional job performance. It seems incongruous, then, to penalize older workers at some arbitrary point, which is at the sole discretion of the employer, for above-average job performances that resulted in compensation augmentations over a career. What is the distinction between imposing such an arbitrary salary cutoff resulting in a termination decision, which is unrelated to job performance, and the arbitrarily imposed age hiring ceilings that were common when the ADEA was passed?

As for controlling spiraling benefit costs, other public policy mechanisms exist for keeping a check on such expenses without burdening the older workforce, a protected class to which all employees will inevitably belong. This particular cost problem, like the members of the protected class, also is characterized by longevity. Thus, while costs likely may be considered a reasonable factor, they are usually so intricately associated with age that to allow them to be successfully proffered as a justification for an adverse employment decision would render the ADEA significantly less effective. Therefore, costs as an RFOA defense should be subject to heightened scrutiny by courts and accepted as a justification only when they are significantly correlated to age if some version of Title VII's business-necessity test can be satisfied, or a failure to consider those factors would result in an undue burden to the employer.

While the supreme Court recognized disparate impact discrimination this year, the opinion leaves many questions unanswered, although cryptic hints may be deduced. First, a successful plaintiff will have to identify a specific policy, plan, practice, or test with sufficient clarity. Second, statistical proof, which is comparable to Title VII disparate impact cases, is likely necessary to link the policy to the adverse impact on the protected class. Third, the RFOA defense is less burdensome to employers than the business necessity defense, and examines the reasonableness of the allegedly discriminatory policy, plan, practice, or test, not whether it is necessary or the least burdensome on the protected class. If an employer successfully proves that a reasonable factor other than age justifies the policy, plan, practice, or test, the employee must rebut that evidence, quite possibly by establishing that the alleged defense is a pretext for arbitrary, stereotypical discrimination. While the Supreme Court left unsettled the extent to which costs may be considered as a valid RFOA defense, it would seem that courts should defer less to that employer justification when the defense relates to factors strongly correlated with age, as opposed to situations in which the factors directly

relate to job performance criteria. Given that the case was decided in part only by a plurality, and that the exact parameters of a successful *prima facie* case, as well as a successful defense, seem speculative at present, it will be interesting to see how employers will manage the risk of litigation under this newly recognized theory.

ENDNOTES

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