

# ***Smith v. City of Jackson: Does It Really Open New Opportunities for ADEA Plaintiffs to Recover Under a Disparate Impact Theory?***

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## I. INTRODUCTION

The recent Supreme Court decision in *Smith v. City of Jackson*<sup>1</sup> has opened, or more properly reopened, a door previously closed in several federal appellate circuits for individuals alleging violations of the Age Discrimination in Employment Act (ADEA).<sup>2</sup> The ruling allows a plaintiff to prove that age discrimination has resulted from a facially neutral practice or policy that has a “disparate impact” on persons in the age group protected by the ADEA.<sup>3</sup> To prove discrimination by disparate impact, the

1. 125 S. Ct. 1536 (2005).

2. 29 U.S.C.A. §§ 621–634 (West 2005). 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.

*Id.* § 623(a).

3. See *City of Jackson*, 125 S. Ct. at 1540. The group protected under

plaintiff need not show that the employer discriminated intentionally.<sup>4</sup>

To appreciate the implications of this decision, it is necessary to take into account previous court rulings in cases where discrimination by disparate impact has been alleged. The difficulties encountered in the past by plaintiffs who have attempted to prove discrimination by disparate impact under Title VII of the Civil Rights Act of 1964<sup>5</sup> portend that those who undertake to do so under the ADEA will find it no easier. In fact, it will be more difficult. Even those circuits that have permitted ADEA disparate impact claims have been resistant to finding that the plaintiffs have met their burdens of proof under this theory.

## II. THE ORIGIN OF DISPARATE IMPACT

The Supreme Court first announced the disparate-impact order and allocation of proof in *Griggs v. Duke Power Co.*,<sup>6</sup> a race-discrimination action brought under Title VII. Chief Justice Burger's opinion held that a member of the protected class could make out a prima facie case of discrimination by showing that a facially neutral policy has a greater negative impact on that class than on those outside of the class.<sup>7</sup> It eliminated the need for proving in-

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the ADEA consists of individuals aged forty years and older. 29 U.S.C. § 631(a) (2005). The ADEA protects members of the protected group from actions that are more favorable to those younger than they are, even if the younger persons are within the protected group. See *O'Connor v. Coin Catering Corp.*, 517 U.S. 308, 312 (1996). Those within the protected group may not recover for the consequences of treatment that favors individual group members who are older than they are. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 601 (2004).

4. See *City of Jackson*, 125 S. Ct. at 1541 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)). Proof of disparate treatment, *i.e.* intentional discrimination, is a different matter which is beyond the scope of this article. For the order and allocation of proof of intentional discrimination, see *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and their progeny.

5. 42 U.S.C. §§ 2000e–2000e-17 (1964).

6. 401 U.S. 424 (1971).

7. See *id.* at 431.

tent as an element of discrimination;<sup>8</sup> *Griggs* focused on the result of the act rather than on the mental state of the actor.

The *Griggs* plaintiffs challenged their employer's policy requiring employees to have a high school diploma or, alternatively, to pass two aptitude tests in order to be hired for or transferred into any position other than labor.<sup>9</sup> These requirements disproportionately prevented African-Americans from obtaining the better-paying, more desirable positions.<sup>10</sup> While finding that the employer's criteria was not intended to discriminate, the Court further held that "good intent or absence of discriminatory intent does not redeem employment procedures . . . ."<sup>11</sup> The Court found that neither of the employer's requirements could be "shown to bear a demonstrable relationship to successful performance of the jobs for which [they were] used."<sup>12</sup> The Court reasoned "[T]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."<sup>13</sup> The Court stated, "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance."<sup>14</sup> The *Griggs* Court added that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."<sup>15</sup>

### III. THE HISTORY OF DISPARATE IMPACT UNDER THE ADEA

The inclination of courts to find disparate-impact analysis applicable in ADEA cases dampened after the Supreme Court decided *Hazen Paper Co. v. Biggins*.<sup>16</sup> In that case, the Court re-

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8. *See id.* at 432.

9. *Id.* at 425–28.

10. *See id.* at 430.

11. *Id.* at 432.

12. *Id.* at 431.

13. *Id.*

14. *Id.* at 436.

15. *Id.* at 432.

16. 507 U.S. 604 (1993).

jected the plaintiff's contention that his employer violated the ADEA by firing him in order to prevent him from vesting in his pension.<sup>17</sup> It reasoned, "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."<sup>18</sup> The Court specified that it was not deciding the case on the plaintiff's disparate-impact claim, but only on a disparate-treatment theory.<sup>19</sup>

That *obiter* observation, along with other comments in the *Hazen Paper* opinion, was widely interpreted as a signal that disparate impact was not applicable to the ADEA, causing lower courts to reconsider their previous views.<sup>20</sup> The First Circuit commented in *Mullin v. Raytheon Co.*, "The tectonic plates shifted when the Court decided [*Hazen Paper*]."<sup>21</sup> In rejecting the disparate-impact analysis for ADEA cases, the First Circuit noted, "Writing for a unanimous Court in *Hazen Paper*, Justice O'Connor declared that '[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA.'"<sup>22</sup> The *Mullin* court further observed:

The concurring opinion in *Hazen Paper* lends further support to this conclusion. In it, Justice Kennedy wrote for himself and two other Justices to underscore that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII. . . . [T]here are," he wrote,

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17. See *id.* at 607. The Court cautioned, "We do not mean to suggest that an employer *lawfully* could fire an employee in order to prevent his pension benefits from vesting. Such conduct is actionable under section 510 of ERISA, as the Court of Appeals rightly found in affirming judgment for respondent under that statute." *Id.* at 610 (emphasis in original).

18. *Id.* at 611 (emphasis omitted).

19. *Id.* at 610. ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here.") (citations omitted).

20. See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1543 (2005).

21. *Mullin v. Raytheon Co.*, 164 F.3d 696, 700 (1st Cir. 1999), *cert. denied*, 528 U.S. 211 (1999).

22. *Id.* (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

“substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.”<sup>23</sup>

The Eleventh Circuit likewise declined to let an ADEA action proceed on the disparate-impact theory in *Adams v. Florida Power Corp.*<sup>24</sup> The court read *Hazen Paper* to suggest that disparate-impact claims are not permissible in age-discrimination cases.<sup>25</sup> The court summarized the conflicting views of the various courts:

Several circuits have relied on the holding in *Griggs* to find that, because the language of the ADEA parallels Title VII, disparate impact claims also should be allowed under the ADEA. . . . The Second, Eighth, and Ninth Circuits have read *Hazen* literally and continue to allow disparate impact claims. In contrast, the First, Third, Sixth, Seventh, and Tenth Circuit have questioned the viability of disparate impact claims under the ADEA post-*Hazen*. These cases rely on language in *Hazen* and other factors that suggest that disparate impact claims are not viable under the ADEA.<sup>26</sup>

#### IV. THE DECISION IN *SMITH V. CITY OF JACKSON*

*Smith v. City of Jackson* was an action brought by police and public safety officers who complained of a pay plan that provided higher percentage wage increases to officers with less than five years of service than it did to those with more years of service.<sup>27</sup> They contended that the plan negatively impacted the raises of those who were over forty years old.<sup>28</sup> Emphasizing the similarity between the language employed by the ADEA and that appearing in the text of Title VII, the Court decided in favor of allowing disparate impact to prove age discrimination.<sup>29</sup> Both laws make it a

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23. *Id.* at 701 (citation omitted).

24. 255 F.3d 1322, 1326 (11th Cir. 2001).

25. *See id.* at 1325.

26. *Id.* at 1324–25 (citations omitted).

27. *Smith v. City of Jackson*, 125 S. Ct. 1536, 1539 (2005).

28. *Id.*

29. *Id.* at 1540–43. The Court denied relief to the plaintiffs, however, because they failed to articulate a disparate-impact claim under the order and

violation for an employer “to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,” because of such individual’s “age,” in the case of the ADEA,<sup>30</sup> or “race, color, religion, sex, or national origin,” in the case of Title VII.<sup>31</sup> The Court applied the principle “that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”<sup>32</sup>

The Court rejected the argument that the result under the two statutes should differ on account of the ADEA’s language permitting an employer “to take any action . . . where the differentiation is based on reasonable factors other than age,”<sup>33</sup> a provision not found in Title VII.<sup>34</sup> The Court reasoned that this provision is particularly applicable to disparate-impact claims.<sup>35</sup> The “Reasonable Factors Other Than Age” (RFOA) provision permits employers to engage in employment practices based on factors *unrelated to age* that have a disparate impact, but only if such factors are reasonable.<sup>36</sup> In *City of Jackson*, the Court gave weight to the interpretations of the ADEA announced by the Department of Labor, which originally had enforcement jurisdiction under the statute, and the Equal Employment Opportunity Commission (EEOC), which later took over its enforcement, both of which allowed for a disparate-impact analysis.<sup>37</sup>

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allocation of proofs set forth in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *City of Jackson*, 125 S. Ct. at 1545–46.

30. 29 U.S.C. § 623(a)(2) (2005).

31. 42 U.S.C. § 2000e-2(a)(2) (2005).

32. *City of Jackson*, 125 S. Ct. at 1541 (citation omitted).

33. 29 U.S.C. § 623(f)(1) (1999).

34. *City of Jackson*, 125 S. Ct. at 1543–44.

35. *Id.* at 1544.

36. *Id.* at 1543.

37. *See id.* at 1544. In his concurring opinion, Justice Scalia found, “This is a classic case for deference to agency interpretation.” *Id.* at 1546 (citing *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

## V. PROVING DISPARATE IMPACT

While *Smith v. City of Jackson* opened the door for ADEA plaintiffs to recover when a policy or practice disparately impacts members of their age group, it does nothing to help them through that door. The obstacles to proving a prima facie case remain, as do the obstacles to overcoming an employer's defense that a challenged practice is a business necessity.

A. *Obstacles to Proving a Prima Facie Case by Using Statistics*

## 1. The Need to Identify the Correct Pool From Which to Draw the Statistics

In *International Brotherhood of Teamsters v. United States*,<sup>38</sup> the Supreme Court established that a plaintiff may make out a prima facie case of discrimination under Title VII with statistics showing a disparate effect.<sup>39</sup> The Court warned, however, "that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances."<sup>40</sup>

Some of the stumbling blocks to proving a prima facie case with statistics are found in *Hazelwood School District v. United States*.<sup>41</sup> There, the Court elaborated on what constituted the correct pool of individuals from which to draw statistics in attempting to prove or disprove discrimination.<sup>42</sup> The Government contended that statistics showing that the percentage of African-American school teachers in the school district was smaller than the percentage of African-Americans in the community demonstrated discrimination.<sup>43</sup> The Court held that it was necessary to consider, not the population at large, but the number of African-American

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38. 431 U.S. 324 (1977).

39. *Id.* at 339.

40. *Id.* at 340.

41. 433 U.S. 299 (1977).

42. *Id.* at 308.

43. *Id.* at 310.

school teachers in the labor market from which teachers were hired.<sup>44</sup> The Court also found it necessary to consider such factors as competitive recruitment of African-American school teachers in the labor pool from neighboring communities, along with any preference of the African-American teachers for working in the neighboring communities.<sup>45</sup> The *Hazelwood* Court also contrasted the process of determining the availability of persons with special skills, such as teachers, with that of persons in the labor pool for jobs that do not require special skills.<sup>46</sup>

The analysis that the Court applied to the statistics in *Wards Cove Packing Company v. Atonio*,<sup>47</sup> a Title VII action, further illustrates the difficulties that can be encountered in proving disparate impact with statistics. The case involved two types of positions: unskilled cannery workers and non-cannery workers.<sup>48</sup> Most of the non-cannery workers' positions required skills.<sup>49</sup> The unskilled jobs were filled largely by minority group members—Filipinos and Native Alaskans.<sup>50</sup> White workers held most of the non-cannery jobs.<sup>51</sup> The Court held that disparate impact is not proved merely by a showing of disparity between minorities and non-minorities in the positions in issue.<sup>52</sup> The Court determined that “a comparison of . . . cannery workers who are non-white and the percentage of non[-]cannery workers who are non-white [does not] make[] out a prima facie case of disparate impact.”<sup>53</sup> The Court observed that “[i]f the absence of minorities holding such skilled positions is due to a dearth of qualified non-white applicants (for reasons that are not petitioners' fault) petitioners' selection methods . . . cannot be said to have had a 'disparate impact' on nonwhites.”<sup>54</sup>

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44. *Id.* at 308.

45. *Id.* at 312.

46. *Id.* at 308 n.13.

47. 490 U.S. 642 (1989).

48. *Id.* at 647.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 651.

53. *Id.* at 655.

54. *Id.* at 651–52.

The *Wards Cove* Court admonished that reliance on raw statistics

would mean that any employer who had a segment of his workforce that was—for some reason—racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the ‘business necessity’ of the methods used to select the other members of his work force. The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from other portions thereof; this is a result that Congress expressly rejected in drafting Title VII.<sup>55</sup>

The Court emphasized that “racial imbalance in one segment of an employer’s work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer’s other positions, even where workers for the different positions may have somewhat fungible skills . . . .”<sup>56</sup>

The Court again demanded more than statistical proof of a prima facie case of disparate impact in *Smith v. City of Jackson*.<sup>57</sup> In denying relief to the plaintiffs, the Court opined that

petitioners have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers. As we held in *Wards Cove*, it is not enough 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.” Petitioners have failed to do so. Their failure to

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55. *Id.* at 652. Title VII is not to be construed as granting preferential treatment because of an imbalance in the composition of the workforce. 42 U.S.C. § 2000e-2(j) (2005).

56. *Wards Cove*, 490 U.S. at 653.

57. 125 S. Ct. 1536, 1545 (2005).

identify the specific practice being challenged is the sort of omission that could “result in employers being potentially liable for ‘the myriad of innocent causes that may lead to statistical imbalances . . . .’”<sup>58</sup>

## 2. The Size of the Statistical Sample

Many reported decisions have rejected statistics as a means of establishing a prima facie case where the size of the statistical sample is too small. The First Circuit rejected the disparate impact theory as a basis for proving discrimination against a single employee in *Holt v. Gamewell Corp.*,<sup>59</sup> a pre-*Hazen Paper* ADEA case in which the court analyzed the complaint on both disparate-treatment and disparate-impact theories.<sup>60</sup> The court held:

[t]o establish a prima facie case of discriminatory impact, a plaintiff must show that the process used by the employer to select employees to be discharged resulted in unfavorable treatment of a disproportionate number of the members of the protected class. The fact that a neutral discharge policy has an adverse effect on a single employee or even a few employees does not itself create such a prima facie case.<sup>61</sup>

The Eighth Circuit, in *Harper v. Trans World Airlines, Inc.*,<sup>62</sup> considered whether the employer’s policy prohibiting spouses from working in the same department violated Title VII by disparately impacting women.<sup>63</sup> If employees working in the same department married each other, the employer allowed them to choose which one would leave the department.<sup>64</sup> The plaintiff’s evidence

58. *Id.* (citations omitted).

59. 797 F.2d 36 (1st Cir. 1986).

60. *Id.* at 37–38. The opinion contains no discussion of whether disparate impact is applicable in ADEA cases. The First Circuit later expressly found it not to be appropriate in ADEA cases in *Mullin v. Raytheon Co.*, 164 F.3d 696, 700–01 (1st Cir. 1999), *cert. denied*, 528 U.S. 811 (1999).

61. *Holt v. Gamewell Corp.*, 797 F.2d at 38 (citations omitted).

62. 525 F.2d 409 (8th Cir. 1975).

63. *Id.* at 410.

64. *Id.*

showed that, prior to their terminations, four out of five married women subjected to the rule chose to leave their employment.<sup>65</sup> The court held, “[S]tatistical evidence drawn from an extremely small universe, such as in the present case, has little predictive value, and must be disregarded.”<sup>66</sup> The Eighth Circuit similarly found a universe of three employees who lost their jobs in a reorganization to be too small to prove disparate impact in *Lewis v. Aerospace Community Credit Union*.<sup>67</sup>

The First Circuit, in *Fudge v. City of Providence Fire Department*,<sup>68</sup> found a considerably larger statistical sample too small to reliably prove disparate impact in the hiring of firefighters.<sup>69</sup> In that case, the employer attached considerable weight to a written test that had not been validated.<sup>70</sup> The evidence indicated that in 1974, out of 248 applicants, 24 were black, but only 1 was accepted, making an acceptance rate of four percent.<sup>71</sup> The employer accepted 29 out of 224, or thirteen percent, of white applicants.<sup>72</sup> This sample size was too small to support a finding that the test disparately and adversely affected black applicants.<sup>73</sup> The court

65. *Id.* at 412.

66. *Id.* (citation omitted).

67. 114 F.3d 745, 750 (8th Cir. 1997). In *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988), the First Circuit likewise found that the layoff of four protected-age-group employees did not by itself support an inference of discrimination. *Id.* at 279. In *Schuler*, the court refused to employ a disparate-impact analysis largely because of its finding that the plaintiff, point[ed] to nothing about the size of the pool of potentially affected employees, the age or kind of employee likely in the pool, the nature of the work force at Polaroid or in the Polarizer Division, or the way in which these employees were treated that would permit a fact finder to find actionable age discrimination.

*Id.* (citations omitted).

68. 766 F.2d 650 (1st Cir. 1985).

69. *Id.* at 657.

70. *Id.* at 654. The EEOC Uniform Guidelines on Employee Selection Procedure, 29 C.F.R. §§ 1607–1607.13 (1984), deal with the need for and means of validating employee selection procedures to prove that they do not have a disparate impact on those in a protected group. *Id.*

71. *Fudge*, 766 F.2d at 656–57.

72. *Id.* at 656.

73. *Id.* at 657.

reasoned that, in a sampling of this size, even a substantial difference in acceptance rates may be due to chance.<sup>74</sup> The court found that where a disparity may result from chance, the plaintiff must present additional evidence to support a prima facie case of disparate impact.<sup>75</sup>

The EEOC's Uniform Guidelines on Employee Selection Procedures apply an "eighty percent" or "four-fifths" rule.<sup>76</sup> Under that rule,

[a] selection rate for any race, sex or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.<sup>77</sup>

In *Fudge*, despite the differences in the selection rates of blacks and whites, the court still considered the sample size too small for the four-fifths rule to accurately prove disparate impact.<sup>78</sup>

### 3. Cases in Which Disparate Impact Has Been Found

Notwithstanding the difficulties that may be encountered in establishing a prima facie case of disparate impact, there are decisions in which statistics accomplished just that. In *Isabel v. City of Memphis*,<sup>79</sup> the Sixth Circuit found disparate impact where the minority selection rate was higher than four-fifths.<sup>80</sup> *Isabel* involved the use of a cutoff score on a written test that police sergeants were required to pass for promotion to lieutenant.<sup>81</sup> The test results disparately disqualified minorities.<sup>82</sup> The court held that alternative

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74. *Id.* at 657–58.

75. *Id.* at 658.

76. 29 C.F.R. § 1607.4(D) (2005).

77. *Id.*

78. *Fudge*, 766 F.2d at 658–59 n.10.

79. 404 F.3d 404 (6th Cir. 2005).

80. *See id.* at 412.

81. *Id.* at 409.

82. *Id.* at 412.

means of analyzing statistics may also be appropriate to prove disparate impact under Title VII.<sup>83</sup> The court applied the “T-test” and the “Z-test.”<sup>84</sup> The T-test measures the difference in mean scores between those in the protected group and those who are not.<sup>85</sup> The Z-test “measures statistical success across groups.”<sup>86</sup> Relying on these tests, the court agreed with the plaintiffs’ expert that there was a statistically significant difference in the pass rates of minorities and non-minorities on the test.<sup>87</sup>

Statistics that reflect the minority population in the community may not, in some instances, prevent a finding of disparate impact. *Connecticut v. Teal*<sup>88</sup> involved a state agency’s procedure for promotion to supervisor that included, among other criteria, passing a written test.<sup>89</sup> Black employees had a significantly lower pass rate on the test than white employees.<sup>90</sup> To bolster its percentages, the employer made additional promotions to supervisor from the list of black employees who had passed the test.<sup>91</sup> With these promotions, the “bottom line” resulting from the entire promotion process was not in itself discriminatory.<sup>92</sup> The Court found that the bottom line was not a defense where part of the promotion process was a discriminatory test.<sup>93</sup> The bottom line of the employer did not help the plaintiffs who were ineligible for promotion due to their not having passed the test. The Court reasoned, “It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees’ group.”<sup>94</sup> The Court found:

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83. *Id.* at 412–13.

84. *Id.* at 409.

85. *Id.* For a more detailed discussion of the T-test, see *Smith v. Xerox Corp.*, 196 F.3d 358, 366–67 (2d Cir. 1999).

86. *Isabel*, 404 F.3d at 409.

87. *Id.* at 412.

88. 457 U.S. 440 (1982).

89. *Id.* at 443.

90. *See id.*

91. *Id.* at 444.

92. *See id.*

93. *Id.* at 454.

94. *Id.* at 455.

[i]n sum, respondents' claim of disparate impact from the examination, a pass-fail barrier to employment opportunity, states a prima facie case of employment discrimination under § 703(a)(2) despite their employer's nondiscriminatory "bottom line," and that "bottom line" is no defense to this prima facie case under § 703(h).<sup>95</sup>

In *Dothard v. Rawlinson*,<sup>96</sup> the Alabama Department of Corrections denied the plaintiff employment as a correctional counselor because she was below the department's 120-pound minimum weight requirement for the job.<sup>97</sup> The state required correctional officers to weigh no less than 120 pounds and be no less than five-feet-two-inches in height.<sup>98</sup> The maximum weight and height requirements were 300 pounds and six feet ten inches in height.<sup>99</sup> The Court found that the minimum weight and height requirements disparately impacted women.<sup>100</sup> The Court pointed out that only 12.9% of Alabama's correctional counselors were women, although women over fourteen years of age constituted 52.75% of Alabama's population and 32.89% of its workforce.<sup>101</sup> The Court also considered national statistics which indicated that the 120-pound weight requirement would disqualify 22.29% of women in the applicable age group, but only 2.35% of men.<sup>102</sup> The combined height and weight requirements would disqualify 41.13% of women in the national population, while disqualifying less than 1% of men.<sup>103</sup>

The Court was not concerned that the statistics comparing the disqualification of women as opposed to men were drawn from national data rather than from Alabama's population. It surmised that Alabama was no different from the rest of the nation in this regard.<sup>104</sup> Neither was the Court concerned with drawing a statisti-

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95. *Id.* at 452.

96. 433 U.S. 321 (1977).

97. *Id.* at 323–24.

98. *Id.* at 324 n.2.

99. *Id.*

100. *Id.* at 331.

101. *Id.* at 329.

102. *Id.*

103. *Id.* at 329–30.

104. *Id.* at 330.

cal analysis from the actual applicants for correctional-counselor positions in the state.<sup>105</sup> It considered that “[t]he application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.”<sup>106</sup> In *Dothard*, the Court does not appear to have scrutinized the statistical analysis on which the plaintiffs prevailed to anywhere near the extent that it did in later cases such as *Hazelwood*, *Wards Cove*, and *City of Jackson*.

*B. Proof of Disparate Impact Resulting From Subjective Practices*

The Supreme Court decided in *Watson v. Fort Worth Bank & Trust*<sup>107</sup> that subjective practices which result in disparate impact may be found to violate Title VII.<sup>108</sup> The plaintiff in *Watson*, an African-American woman, complained of her failure to receive a promotion.<sup>109</sup> The defendant bank had no formal criteria for selecting individuals for promotion; rather, promotions were based on the subjective views of supervisors.<sup>110</sup> The supervisors were all white.<sup>111</sup> The Court was “persuaded that [its] decisions in *Griggs* and succeeding cases could largely be nullified if disparate-impact analysis were applied only to standardized selection practices.”<sup>112</sup> The Court additionally decided that selection procedures that combine subjective criteria with standardized selection procedures are to be considered subjective.<sup>113</sup>

A plurality of the *Watson* Court also dealt with the evidentiary standards to be applied where the complaint alleges that subjective procedures have resulted in disparate impact.<sup>114</sup> It warned against

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105. *Id.*

106. *Id.*

107. 487 U.S. 977 (1988).

108. *Id.* at 990.

109. *Id.* at 982.

110. *Id.*

111. *Id.*

112. *Id.* at 989.

113. *Id.*

114. *See id.* 992–93.

over-emphasis on statistics, reasoning that “the inevitable focus on statistics in disparate-impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.”<sup>115</sup> As in *Wards Cove*, the Court focused on the precept in Title VII that it does not require preferential treatment of those in the protected groups to cure a statistical imbalance.<sup>116</sup> The Court did not want its decision to invite employers to give preferential treatment or establish quotas.<sup>117</sup> Thus, the Court required that a plaintiff in a disparate-impact case must do more than demonstrate a statistical imbalance.<sup>118</sup> “The plaintiff must begin by identifying the specific employment practice that is challenged.”<sup>119</sup> The Court acknowledged that this might be more difficult to accomplish where subjective decision-making is involved than is the case with standardized tests.<sup>120</sup> Once the plaintiff has targeted a particular practice, he or she must prove that it is the cause of the disparate impact.<sup>121</sup>

Identifying a practice and proving that it is the cause of a disparate impact can be formidable tasks for a plaintiff. This is well-demonstrated by the remark in *Wards Cove* that

a Title VII plaintiff does not make out a case of disparate impact simply by showing that, “at the bottom line,” there is racial *imbalance* in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a specific . . . practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff’s prima facie case in a disparate impact suit under Title VII.<sup>122</sup>

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115. *Id.* at 992 (citation omitted).

116. *See id.*

117. *See id.*

118. *Id.* at 994.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Wards Cove*, 490 U.S. at 657.

The impediments that are likely to be encountered in identifying the practice are signaled by the *Wards Cove* Court's demand that on remand, the plaintiffs would "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 whites and nonwhites."<sup>123</sup> The Court's view that the access plaintiffs have to employers' records through discovery will keep this requirement from being "unduly burdensome"<sup>124</sup> offers little comfort to persons alleging disparate impact.<sup>125</sup>

The Second Circuit has taken a liberal view of what is required to identify a subjective practice that causes a disparate impact. In *Smith v. Xerox Corp.*,<sup>126</sup> an ADEA case with disparate-impact issues, the court noted that the 1991 Civil Rights Act<sup>127</sup> amended Title VII so as to ease *Wards Cove*'s requirement that the plaintiff point to a specific employment practice that caused a disparate impact.<sup>128</sup> Under the revised statute, "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking [sic] process are not capable of separation for analysis, the decisionmaking [sic] process may be analyzed as one employment practice."<sup>129</sup> The Second Circuit again acknowledged the mixed subjective/objective decision-making process analysis in *Meacham v. Knolls Atomic Power Laboratory*,<sup>130</sup> another disparate-impact ADEA case.<sup>131</sup> In *Meacham*, part of the

123. *Id.*

124. *See id.*

125. The Court opined that the extensive records that employers are required to keep under the Uniform Guidelines on Employee Selection Procedures', 29 C.F.R. §§ 1607.1-1607.13 (1988), will be valuable aids in obtaining such information to support a connection between specific practices and disparate impact. *Wards Cove Packing Co.*, 490 U.S. at 657-58.

126. 196 F.3d 358 (2d Cir. 1999).

127. Pub. L. 102-166, 105 Stat. 1071 (1991).

128. *Xerox*, 196 F.3d at 368 (citing 42 U.S.C. § 2000e-2(k)(1)(B)(i) (1994)).

129. 42 U.S.C.A. § 2000e-2(k)(1)(B)(i) (West 2005).

130. 381 F.3d 56 (2d Cir. 2004).

131. *Id.* at 73.

process of selecting those who were laid off in a reduction in force included subjective evaluations by managers.<sup>132</sup> The Second Circuit did not seem to be bothered, either in *Xerox* or in *Meacham*, by the fact, later expressed in *Smith v. City of Jackson*, that the cited section of the 1991 Civil Rights Act does not apply to the ADEA.<sup>133</sup>

It is obvious from the foregoing that establishing a prima facie case of disparate impact is a formidable task. Courts will scrutinize statistical proofs carefully, and they will commonly demand that these statistics be supported with anecdotal evidence.

## VI. AN ADEA DISPARATE IMPACT CASE AFTER THE PRIMA FACIE CASE

### A. *Wards Cove and Before*

In *Griggs*, the Court held that once a prima facie case of disparate impact under Title VII is presented, the employer has “the burden of showing that any given requirement [has] a manifest relationship to the employment in question.”<sup>134</sup> As stated in *Wards Cove*, “the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.”<sup>135</sup> The Court pronounced that

[t]he touchstone of this inquiry is a reasoned review of the employer’s justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be “essential” or “indispensable” to the employer’s business for it to pass muster:

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132. *See id.* at 63.

133. *Smith v. City of Jackson*, 125 S. Ct. 1536, 1545 (2005).

134. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

135. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) (citation omitted).

this degree of scrutiny would be almost impossible for most employers to meet . . . .<sup>136</sup>

Notwithstanding the Court's view in *Griggs* about the employer's burden of showing the "manifest relationship to the employment in question,"<sup>137</sup> the *Wards Cove* Court found the burden to be merely one of production.<sup>138</sup> It added that "[t]he burden of persuasion . . . , however, remains with the disparate-impact plaintiff . . . . This rule . . . conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration."<sup>139</sup> Thus, under *Wards Cove*, the employer's burden is modest, while the plaintiff's burden remains imposing.

#### B. *Defending Disparate-Impact Claims in ADEA Cases*

In *Smith v. City of Jackson*, the Court pointed out respects in which an employer's liability under the disparate-impact theory is more restricted under the ADEA than under Title VII.<sup>140</sup> First, the RFOA provision permits an employer to make use of a *reasonable* non-age-related factor that has a disparate impact on members of the protected age group.<sup>141</sup> The employee does not have the advantage of countering the RFOA defense by showing that a different means will meet the employer's needs, as is the case with the business necessity defense. The Court pointed out that:

While there may have been other reasonable ways for the City to achieve its goals, the one selected was not un-

136. *Id.* (citations omitted).

137. *See supra* note 134 and accompanying text.

138. *Wards Cove*, 490 U.S. at 659.

139. *Id.* at 659–60 (citations omitted). The Court remanded the case for a determination of whether there was evidence in the record to support a prima facie case of disparate impact, after having ruled that the lower court applied an incorrect analysis in its determination of that issue. *Id.* at 661. The Court's comments provided instructions on what the burdens would be if, in fact, the plaintiffs did present a prima facie case. *See id.* at 659–60.

140. *Smith v. City of Jackson*, 125 S. Ct. 1536, 1544–45 (2005).

141. *Id.* at 1545.

reasonable. 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.<sup>142</sup>

The second differentiation between the statutes grows out of the amendment to Title VII in the 1991 Civil Rights Act.<sup>143</sup> *Wards Cove* was one of the decisions that resulted in Congress' reexamining civil rights legislation in the 1991 Civil Rights Act.<sup>144</sup> In response to that decision, Title VII was amended by the addition of 42 U.S.C. § 2000e-2(k).<sup>145</sup> That amendment turned the clock back to before *Wards Cove* in two important respects. First, it required the employer to rebut a prima facie disparate-impact case with a showing that the challenged practice is a business necessity.<sup>146</sup> This is a more formidable burden than merely "producing evidence of a business justification for his employment practice."<sup>147</sup> The Eighth Circuit pointed out in *Houghton v. SIPCO, Inc.*<sup>148</sup> that the difference between business necessity and business justification is more than merely "semantic."<sup>149</sup> It found that the difference lies in *Wards Cove's* relief to employers from having to show that a challenged practice is "'essential' or 'indispensable.'"<sup>150</sup>

142. *Id.* at 1546.

143. See Pub. L. 102-166, 105 Stat. 1071 (1991).

144. *City of Jackson*, 125 S. Ct. at 1544-45.

145. See Pub. L. 102-166, 105 Stat. 1071 (1991).

146. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000). The statute directs that, [a]n unlawful employment practice based on disparate impact is established under this subchapter only if . . . 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*[.]

*Id.* (emphasis added).

147. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

148. 38 F.3d 953 (8th Cir. 1994).

149. *Id.* at 959.

150. *Id.* (quoting *Wards Cove*, 490 U.S. at 659).

The second way in which the 1991 Civil Rights Act undid *Wards Cove* was by clearly placing on the employer the burden of proving that the challenged practice is, in fact, a business necessity. Under *Wards Cove*, the employer merely has a burden of production.<sup>151</sup> It needs only to articulate a justification for the practice.<sup>152</sup> The burden of proof at all times remained with the plaintiff.<sup>153</sup>

Because section 2000e-2(k)<sup>154</sup> applies only to Title VII, the amendment does not affect actions under the ADEA.<sup>155</sup> In *Smith v. City of Jackson*, the court held that proof of disparate impact in an ADEA case is governed by the law as it existed to, and including, the decision in *Wards Cove*.<sup>156</sup> Thus, in an ADEA disparate-impact case, the employer merely has to articulate a justification for a practice that has a disparate impact.<sup>157</sup> The ball is then back in the plaintiff's court to disprove that justification or prove an alternate practice that will serve the employer's legitimate need without causing a disparate impact.<sup>158</sup>

### *C. A Reasonable Factor Other Than Age*

There are questions yet to be answered regarding the treatment of the RFOA defense. First, what will constitute an RFOA? Second, what are the burdens of proof with respect to the RFOA defense? There is a paucity of judicial authority to help answer either of these questions.

151. See *supra* note 138 and accompanying text.

152. See *supra* note 139 and accompanying text.

153. See *id.*

154. 42 U.S.C. § 2000e-2(k) (2000).

155. *Smith v. City of Jackson*, 125 S. Ct. 1536, 1545 (2005).

156. *Id.* at 1545.

157. See *id.*

158. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (“If an employer does then meet the burden of proving that its tests are ‘job related,’ it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable . . . effect, would also serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’” (citation omitted)). The 1991 Civil Rights act did not change this aspect of the burden of proof in disparate-impact cases. See 42 U.S.C. § 2000e-2(k)(1)(C) (2000).

### 1. What Constitutes a “Reasonable Factor Other than Age?”

As indicated previously, the Court in *Smith v. City of Jackson* found that the plaintiffs had failed to point to a specific practice that had a disparate impact on covered employees.<sup>159</sup> Thus, there was no prima facie case.<sup>160</sup> This finding could have ended the case. Nonetheless, the Court went on to find that the need of the city to compete with other communities in compensating lower-level officers was an RFOA.<sup>161</sup>

The Third Circuit confronted the question of whether a Pennsylvania statute prohibiting individuals over thirty-five years of age from taking a qualifying examination to become a police officer was an RFOA in *EEOC v. County of Allegheny*.<sup>162</sup> In that case, the court found that the state statute was not an RFOA.<sup>163</sup> Being in conflict with the ADEA, it was preempted by the ADEA pursuant to the Supremacy Clause of the Constitution.<sup>164</sup> In *EEOC v. Massachusetts*, the First Circuit similarly found ADEA preemption of a Massachusetts statute that required employees who reached the age of seventy to pass a physical examination to remain employed.<sup>165</sup> The court rejected the argument that the requirement was an RFOA, as it was based on fitness rather than age.<sup>166</sup> It found “that age is exactly what [the statute] is based on.”<sup>167</sup>

In *Geller v. Markham*,<sup>168</sup> the court found that a practice of declining to hire teachers with more than five years of experience had a disparate impact on those in the protected age group.<sup>169</sup> The purpose of the practice was economic because longer-service teachers required higher pay.<sup>170</sup> Although it did not discuss the employer’s

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159. See *supra* note 58 and accompanying text.

160. See *id.*

161. *Smith v. City of Jackson*, 125 S. Ct. at 1545.

162. 705 F.2d 679, 680–81 (3d Cir. 1983).

163. See *id.* at 682.

164. *Id.*

165. 987 F.2d 64, 71 (1st Cir. 1993).

166. *Id.* at 72–73.

167. *Id.* at 73.

168. 635 F.2d 1027 (2d Cir. 1980).

169. *Id.* at 1030.

170. *Id.* at 1033.

practice in terms of an RFOA, the court found that this economic reason for the employer's action was not a defense to the plaintiff's claim.<sup>171</sup> The court quoted 29 C.F.R. § 860.103(h) (1979), which in part provides that

a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies.<sup>172</sup>

The court's finding that the higher cost of employing older employees is not a defense to a policy that causes a disparate impact would not stand up to scrutiny in light of the Supreme Court's later finding in *Hazen Paper*.<sup>173</sup>

The *Geller* court did not target age; it targeted the cost of employing teachers with more than five years of experience.<sup>174</sup> In essence, it found that experience is equivalent to age. Similarly, the Seventh Circuit reasoned in *Metz v. Transit Mix, Inc.*,<sup>175</sup> that "pay [is] a 'proxy' for age . . . on a case-by-case basis."<sup>176</sup> This view is also no longer viable after *Hazen Paper*.

Of course, if it can be established that an employee's higher salary is an excuse for dismissing the employee, whereas the real reason is the employee's age, this would prove a violation of the ADEA. In *Hazen Paper*, the Supreme Court commented:

We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, but in the sense that

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171. *Id.*

172. *Id.* at 1034.

173. *See supra* notes 17–18 and accompanying text.

174. *See Geller*, 635 F.2d at 1034.

175. 828 F.2d 1202 (7th Cir. 1987).

176. *Id.* at 1208. In *Metz*, the plaintiff, a long-service employee, was let go because of his high wage, not his age. *See id.* at 1204.

the employer may suppose a correlation between the two factors and act accordingly.<sup>177</sup>

In such a case, the theory of recovery would be disparate treatment, not disparate impact. Proof would have to be presented in the manner established for intentional discrimination claims under *McDonnell Douglas v. Green*.<sup>178</sup> Thus, it is clear since *Hazen Paper* that an employee's high rate of compensation may be an RFOA.

In *EEOC v. Johnson & Higgins, Incorporated*,<sup>179</sup> the court held that a policy requiring mandatory retirement at a given age was not an RFOA.<sup>180</sup> The court stated: "We find [the Defendant's] argument to be without merit. The plain language of Section 623(f)(1) makes it clear that an employer has a defense if his policy is based on reasonable factors 'other than age,' not if the policy is reasonably based on age."<sup>181</sup>

## 2. The Burden of Proof of the RFOA Defense in an ADEA Case

The RFOA defense appears in the same section of the ADEA as the Bona Fide Occupation Qualification defense (BFOQ).<sup>182</sup> The relevant statutory language states:

It shall not be unlawful for an employer, employment agency, or labor organization to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of

177. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612–13 (1993).

178. *See supra* note 4. Economic necessity may be a defense to disparate-treatment ADEA cases. *See Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 117 (2d Cir. 1991); *see also EEOC v. Chrysler Corp.*, 733 F.2d 1183, 1186 (6th Cir. 1984) ("Forced early retirements based on economic necessity are unacceptable under the ADEA unless they meet two tests. First, the necessity for drastic cost reduction obviously must be real. . . . Second, the early forced retirements must be the least detrimental alternative means available to reduce costs." (citations omitted)).

179. 91 F.3d 1529 (2d Cir. 1996).

180. *Id.* at 1540.

181. *Id.* at 1541 (emphasis in original).

182. *See* 29 U.S.C.A. § 623(f) (West 2005).

the particular business, or where the differentiation is based on reasonable factors other than age . . . .<sup>183</sup>

The regulations promulgated by the EEOC treat these as affirmative defenses on which the employer has the burden of proof.<sup>184</sup> Where the BFOQ defense is claimed, the regulations place an even more demanding burden on the employer:

An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative . . . .<sup>185</sup>

There is a difference of opinion among the courts regarding the burdens of proof where the RFOA is asserted by an employer. In the Fifth Circuit, the assertion of an RFOA does not shift the burden of proof on that defense to the employer.<sup>186</sup> In *Marshall v. Westinghouse Electric Corp.*, an ADEA disparate-treatment case, the Fifth Circuit held that the plaintiff retains the burden of proving age discrimination even after the RFOA defense is asserted.<sup>187</sup> The court stated that the mere assertion of the RFOA meets the defendant's burden of going forward with the evidence.<sup>188</sup> The defendant's burden is merely one of production.<sup>189</sup> It needs only to ar-

183. *Id.*

184. *See, e.g.*, 29 C.F.R. § 1625.7(f) (2005) ("When the exception of 'a reasonable factor other than age' is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the 'reasonable factor other than age' exists factually.").

185. 29 C.F.R. § 1625.6(b) (2005).

186. *See Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591–92 (5th Cir. 1988), *reh'g denied en banc*, 582 F.2d 578 (5th Cir. 1988).

187. *Id.*

188. *See id.*

189. *See id.* at 592.

ticulate facts that suggest the RFOA defense.<sup>190</sup> The burden of proof to demonstrate age discrimination remains with the plaintiff.<sup>191</sup> This is the order and allocation set forth for proof of intentional discrimination in *Texas Department of Community Affairs v. Burdine*.<sup>192</sup> The court distinguished the treatment of the RFOA and good-cause defenses from the BFOQ defense.<sup>193</sup> The latter places the burden of proof on the defendant.<sup>194</sup> The reason for requiring the employer to prove the BFOQ defense is that it expressly permits age discrimination in that it allows actions adverse to persons in the protected age group that would otherwise be prohibited.<sup>195</sup> The court further reasoned that:

In contrast [to the BFOQ defense], the good cause and differentiating factors other than age exceptions stated in 29 U.S.C. § 623 (f) have not been treated as burden-shifting exceptions. The reason for that distinction is clear. A defendant who seeks to establish a BFOQ is essentially asserting an “affirmative defense”—one in the nature of confession and avoidance. An age-related BFOQ permits an employer to admit that he has discriminated on the basis of age, but to avoid any penalty. Establishment of a BFOQ relating to age justifies an employer’s violation of the heart of the ADEA, allowing him to apply a general exclusionary rule to otherwise statutorily protected individuals solely on the basis of class membership. The good cause and differentiating factor exceptions, on the other hand, are denials of the plaintiff’s prima facie case. Plaintiff says that the employer fired him because of his age; employer replies, in effect, not so, plaintiff was fired for excessive absences, general inability, or some other non-discriminatory reason. The natural tendency of the court to place the burden of proof upon the party desiring change and the special policy considerations disfavoring the statutory ex-

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190. *See id.*

191. *Id.*

192. 450 U.S. 248, 254 (1981); *see also supra* note 4.

193. *Marshall*, 576 F.2d at 591.

194. *Id.*

195. *See id.*

ceptions both justify the distinction between these defenses.<sup>196</sup>

In *Criswell v. Western Airlines, Inc.*,<sup>197</sup> the Ninth Circuit rejected the Fifth Circuit's rationale. The court reasoned, "Since we do not believe that a statutory exception may be properly analogized to the second stage of the case-in-chief under a disparate treatment theory, we decline to follow the Fifth Circuit's reasoning."<sup>198</sup> In affirming the Ninth Circuit's decision in *Criswell*, the Supreme Court declined to decide whether the employer has the burden of proof on the RFOA defense.<sup>199</sup> The Court viewed the challenged jury instructions as having placed the burden on the plaintiff to show age discrimination, thereby mooting the employer's claim of improper burden-shifting on the RFOA defense.<sup>200</sup> Whether the Fifth Circuit's view that the plaintiff has the burden of proof to overcome the RFOA will ultimately be adopted by the Supreme Court remains to be seen. The continued applicability of *Wards Cove* to the ADEA leaves this option open.

## VII. WHAT MIGHT HAVE BEEN

### A. Revisiting Cases in Which the Disparate-Impact Analysis Was Inapplicable to the ADEA

Some insights might be gained into the consequences of the decision in *Smith v. City of Jackson* by looking at earlier decisions holding that disparate impact is not applicable to the ADEA to see how they might turn out today. In *EEOC v. Francis W. Parker*

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196. *Id.* at 591 (citations and footnote omitted); *see also* *Aritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977) (holding that the burden of proof on the BFOQ defense is on the defendant).

197. 709 F.2d 544 (9th Cir. 1982), *aff'd*, 472 U.S. 400 (1985).

198. *Id.* at 553; *see also* *Marshall v. Baltimore & Ohio R.R.*, 461 F. Supp 362, 372 (D. Md. 1978), *modified*, 632 F.2d 1107 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981) ("The [c]ourt is of the opinion that this section represents an affirmative defense which defendant has the burden of proving.").

199. *W. Airlines, Inc. v. Criswell*, 472 U.S. 400, 408 n.10 (1985).

200. *Id.*

*School*,<sup>201</sup> the government brought a complaint on behalf of a sixty-three-year-old faculty member who was not permitted to apply for a vacant faculty position.<sup>202</sup> Budget constraints required the school to limit the salary for the position to \$28,000 annually.<sup>203</sup> The complaining party qualified for a salary over the school's budget.<sup>204</sup> In affirming the summary judgment granted to the defendant, the court decided, or at least suggested, that the disparate-impact analysis was not applicable to ADEA cases.<sup>205</sup> The result would be the same today. Following the reasoning in *Hazen Paper*, the court found that "[the defendant]'s policy of linking wages to experience is an economically defensible and reasonable means of determining salaries."<sup>206</sup>

The result in *Mullin*<sup>207</sup> would not likely be different if it were decided today. There, the plaintiff complained of a downgrade in his compensation resulting from a consolidation in operations that followed a loss of business by the company.<sup>208</sup> In the portion of the court's opinion rejecting the use of a disparate-impact analysis in ADEA cases, the court did not consider the substance of Raytheon's economic-necessity defense.<sup>209</sup> Even if it had done so, it would likely have been found to be an RFOA. The reasoning in the portion of the court's opinion rejecting the plaintiff's disparate-treatment claim would be equally applicable to a disparate-impact claim:

Raytheon advanced a strong, objectively verifiable set of reasons for consolidating operations, restructuring its work force, and downgrading Mullin: significant revenue loss stemming from massive Defense Department cutbacks, culminating in a reevaluation of all upper-

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201. 41 F.3d 1073 (7th Cir. 1994), *reh'g denied en banc*, No. 93-3395, 1994 U.S. App. LEXIS 32729, at \*1, (7th Cir. Nov. 18, 1994), *cert. denied*, 515 U.S. 1142 (1995).

202. *Id.* at 1075.

203. *Id.*

204. *Id.*

205. *See id.* at 1077.

206. *Francis W. Parker Sch.*, 41 F.3d at 1077.

207. *See supra* notes 21–23 and accompanying text.

208. *Mullin v. Raytheon Co.*, 164 F.3d 696, 698 (1st Cir. 1999).

209. *See id.* at 699–704.

echelon salaried employees. The appellant points to nothing that casts doubt upon the legitimacy of this reason, nor does he proffer any substantial evidence that would permit a rational jury to find that Raytheon rigged the restructuring in a fashion designed to ensure that the appellant's labor grade and/or compensation level would be reduced unfairly.<sup>210</sup>

The Third Circuit, in *DiBiase v. SmithKline Beecham Corp.*,<sup>211</sup> declined to decide whether discrimination under the ADEA can be proven by showing disparate impact.<sup>212</sup> The court did, however, make it clear that the plaintiff would not recover on that theory even if it were applied to the facts of the case. The plaintiff alleged that a severance plan offered to employees who were dismissed in a reduction in force discriminated against older employees.<sup>213</sup> The severance plan required those who accepted it to release the employer from liability under, among other laws, the ADEA.<sup>214</sup> The plaintiff complained that, though employees under the age of forty received benefits determined by the same formula as those in the protected age group, they gave up less since they had no ADEA claims to release.<sup>215</sup> The court determined that the plaintiff could not prevail even if disparate impact were invoked:

[T]he facts of this case simply do not implicate the policies underlying disparate impact theory. In the first place, . . . the policy does not *per se* affect older workers more harshly than younger workers. Second, there is absolutely no evidence that the company's policy does *in fact* affect older people adversely. Third, even if it did, such a neutral policy—which does not rely on an invidious stereotype about older employees, which clearly is not motivated by a discriminatory impulse, and which could be demonstrated to have a disparate impact only by the use of an incredibly sophisticated statistical

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210. *Id.* at 699.

211. 48 F.3d 719 (3d Cir. 1995).

212. *Id.* at 734.

213. *Id.* at 723.

214. *Id.* at 722.

215. *Id.* at 723.

analysis—simply cannot be the basis of ADEA liability. Fourth, this is not a case where finding liability would help eradicate the entrenched effects of past discrimination. Finally, use of statistical evidence demonstrating a disproportionate impact will shed little light on the employer's motive. In short, there can be no liability in this case based on disparate impact.<sup>216</sup>

The Tenth Circuit rejected outright disparate impact as a basis for finding an ADEA violation in *Ellis v. United Airlines, Inc.*<sup>217</sup> Even so, the reasoning of the court indicates that the plaintiffs' claims would have been dismissed even under a disparate-impact analysis. The plaintiffs argued that the employer's weight limitation for cabin attendants disparately impacted those in the protected age group.<sup>218</sup> In addressing the plaintiffs' parallel claim under the Airline Deregulation Act (ADA),<sup>219</sup> the court found weight requirements to be "job related criteria."<sup>220</sup> The court stated, "[W]e do not believe the ADA permits us to second-guess the business of employers any more than does the ADEA."<sup>221</sup>

*B. Revisiting Cases in Which the Disparate-Impact Analysis Was Found to be Applicable to the ADEA*

Many of the lower court decisions allowing plaintiffs to attempt to prove their cases by showing disparate impact have held against the plaintiffs for failure to meet the required standards of proof. These decisions are additional indicia that plaintiffs who wish to make use of the benefits of *Smith v. City of Jackson* will not find it easy to cross the threshold into the world of disparate impact.

The Eighth Circuit accepted that disparate impact can be used to show discrimination in violation of the ADEA in *Smith v. City of Des Moines*.<sup>222</sup> The plaintiff contended that the city's physical

216. *Id.* at 732.

217. 73 F.3d 999, 1007 (10th Cir. 1996).

218. *Id.* at 1000–01.

219. 49 U.S.C. §§ 42101–03 (1994) (repealed 1998).

220. *Ellis*, 73 F.3d at 1010.

221. *Id.*

222. 99 F.3d 1466, 1470 (8th Cir. 1996).

fitness requirements for firefighters discriminated against individuals in the protected class.<sup>223</sup> Holding that the city had the burden of proof of the business-necessity defense, the court found that the city had met that burden.<sup>224</sup> The court found that the city's requirements bore a "manifest relationship" to a firefighter's job requirements and were necessary to "safe and effective job performance."<sup>225</sup>

In *Leftwich v. Harris-Stowe State College*,<sup>226</sup> the Eighth Circuit found that a college's policy reserving non-tenured teaching posts for untenured faculty had an illegally disparate impact on individuals in the protected age group.<sup>227</sup> The challenged policy made the plaintiff, a tenured professor at an institution that was merged with the defendant college, ineligible for a non-tenured position after the merged college's board of regents declined to retain him as a tenured faculty member.<sup>228</sup> This decision was before *Hazen Paper* proscribed non-age-based criteria from being used as a proxy for age.<sup>229</sup> The result would be different today unless the plaintiff established that the criteria were used to weed out those in the protected age group.<sup>230</sup> In that instance, the case would involve disparate treatment rather than disparate impact.<sup>231</sup>

The Ninth Circuit's decision in *EEOC v. Bordens, Inc.*<sup>232</sup> found both age-related disparate treatment and disparate impact in the severance plan offered to employees discharged as a result of a plant closing.<sup>233</sup> Only employees who were not eligible for retirement qualified for severance pay.<sup>234</sup> To be eligible for retirement, one needed to be at least fifty-five years old and have ten years of

223. See *id.* at 1467–68.

224. *Id.* at 1471.

225. See *id.* (citing *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

226. 702 F.2d 686 (8th Cir. 1983).

227. See *id.* at 689–93.

228. *Id.* at 689.

229. See *supra* note 17 and accompanying text.

230. See *supra* notes 177–78 and accompanying text.

231. See *id.*

232. 724 F.2d 1390 (9th Cir. 1984).

233. *Id.* at 1391–95.

234. *Id.* at 1391–92.

service.<sup>235</sup> Had the court considered the case after *Hazen Paper*, its decision could have been very different. It would seem inconsistent with *Hazen Paper* to count retirement eligibility as a proxy for age, particularly since employees over fifty-five years old with fewer than ten years of service were ineligible for severance pay. This fact detracts from the persuasiveness of the court's view that age is a "but for" grounds for denial of severance pay.<sup>236</sup>

In *Criley v. Delta Air Lines, Inc.*,<sup>237</sup> the Second Circuit, while adhering to its precedent of permitting ADEA disparate-impact actions, found that the plaintiffs' claims were without merit.<sup>238</sup> The plaintiffs were pilots who worked for Pan American World Airways (Pan Am) when it went into bankruptcy.<sup>239</sup> The defendant (Delta) purchased Pan Am's assets and agreed to hire some of its pilots.<sup>240</sup> The plaintiffs complained of the procedure used to determine which pilots would be offered jobs by Delta.<sup>241</sup> Overall seniority with Pan Am was applied, but Delta offered positions only to those pilots who were qualified to fly the Airbus A-310 or the Boeing 707.<sup>242</sup> Since 94.1% of the pilots offered jobs were over forty years old, the court found no disparate impact.<sup>243</sup> It reasoned that the impact on the entire protected group (i.e., pilots over forty years old) must be considered.<sup>244</sup>

The Ninth Circuit considered a union's policy of refusing to allow retired members who were drawing pensions to seek work through its hiring hall in *EEOC v. Local 350, Plumbers & Pipefit-*

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235. *Id.* at 1392.

236. *See id.* at 1393.

237. 119 F.3d 102 (2d Cir. 1997).

238. *Id.* at 105 (citing *District Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 351 (2d Cir. 1997)).

239. *Id.* at 103.

240. *Id.*

241. *Id.*

242. *Id.* at 103–04.

243. *Id.* at 105.

244. *Id.* (citing *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1372–73 (2d Cir. 1989)). The court might have reached a different decision on the group that had to be taken into account in order to determine the impact if the case had been decided after the Supreme Court's decision in *O'Connor v. Coin Catering Corp.*, 517 U.S. 308 (1996). *See supra* note 3.

ters.<sup>245</sup> An employee had to be least fifty-five years old in order to retire.<sup>246</sup> The court found that the union's policy was discriminatory because of the close association of retirement status with age.<sup>247</sup> The court overruled the lower court's finding that the union's policy was a BFOQ.<sup>248</sup> The court pointed out that the EEOC did not specify whether it was claiming disparate treatment or disparate impact, but that the claim was "cognizable as a disparate impact challenge."<sup>249</sup>

### VIII. CONCLUSION

Viewing the history of disparate impact, with special focus on those disparate-impact claims in which plaintiffs have attempted to prove ADEA violations, shows that *Smith v. City of Jackson* will not open the floodgates to litigation initiated by those who have passed their fortieth birthdays. As with other theories, some will make futile attempts to cross the barriers behind which disparate impact lies. Some will try it as an add-on to intentional discrimination claims. Still, there may be valid claims brought by parties who have the resources to develop the data necessary to maintain a disparate-impact action. Therefore, employers planning general layoffs or other actions affecting groups of employees should have competent assistance in determining the age impact of their actions. Where there is a negative impact on those in the protected group, scrupulous analysis should be undertaken to determine if their plans are defensible.

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245. 998 F.2d 641, 643 (9th Cir. 1992).

246. *Id.* at 646.

247. *Id.*

248. *Id.* at 647.

249. *Id.* at 648.