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Comment

“DOWNSIZING” THE AGE DISCRIMINATION IN EMPLOYMENT ACT: THE AVAILABILITY OF DISPARATE IMPACT LIABILITY

Since the passage of the Age Discrimination in Employment Act of 1967 (ADEA), age discrimination has progressively gained attention in the courts and in the popular media. When an employer terminates or fails to hire a worker who is over forty because of the employer’s belief that older workers are slower, more expensive or close-minded, the employer commits an illegal act. The illegality of such an act is as clear as the illegality of an act that discriminates on the basis of race, color, national origin, sex or religion under Title VII (42 U.S.C. § 1962).


2. See United States General Accounting Office, EEOC’s Expanding Workload—Increases in Age Discrimination and Other Changes Call for a New Approach 10 (1994). According to this report, in 1980, the first full year for which the EEOC had enforcement authority for the ADEA, there were 59,328 charges of discrimination filed; of these 11,076 (18.6%) were age discrimination charges. Id. In 1986, a total of 68,222 charges were filed of which 17,443 (25.3%) were age discrimination charges. Id. By 1992, 19,253 (27.4%) of a total of 70,339 charges were age discrimination charges. Id. In 1993, a total of 88,000 charges were filed; 22.6% of these were age discrimination charges. Id.; see also The High Cost of Age Discrimination, St. Louis Post-Dispatch, Sept. 14, 1995, at B6 (finding that “the federal age discrimination law is being invoked frequently these days in response to corporate downsizing and other cost cutting moves”); Charles Strause, More and More Seniors Challenging Employers Over Age Discrimination, Miami Herald, Mar. 12, 1995, at A16 (reporting that 1,700 age discrimination complaints were filed with EEOC’s Florida office in 1994, representing one-third increase since 1990).


3. 29 U.S.C. § 623(a). The ADEA states: “It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of such individual’s age . . . .” Id. § 623(a)(1). The statute requires employers to ignore
age when making employment decisions. See, e.g., Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993) (stating that employer who makes adverse employment decisions on basis of age is liable under ADEA); Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 422 (1985) (finding that "under the [ADEA], employers are to evaluate employees between the ages of 40 and 70 on their merits and not on their age"). Plaintiffs who believe an employer intentionally disadvantaged them because of their age must prove their case under the "disparate treatment" model, which was developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). For a discussion of the distinctions between the "disparate treatment" and "disparate impact" theories of liability, see infra notes 28-37 and accompanying text.

Older workers are stereotyped as close-minded, less productive, less adaptable to new technology and ideas, slower, less physically active and more prone to sickness. See, e.g., Lehman v. Prudential Ins. Co. of Am., 74 F.3d 323, 330 (1st Cir. 1996) (describing meeting where consultant used handout that contrasted "Organizational Man" of "Ozzie and Harriet" generation who is pessimistic, cautious, oriented to bureaucracies and has 30-year career plan with "New Manager" of "Kuzak & Gracie of L.A. Law" generation who is risk taker, optimistic, well-educated and hardworking); Jack Levin & William C. Levin, Ageism: Prejudice and Discrimination Against the Elderly 74-76 (1980) (discussing various ageist stereotypes). Because most people will someday be in the protected group, the elderly cannot be considered a "discrete and insular minority" in need of "extraordinary protection from the majoritarian political process." San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). Decisions made on the basis of stereotypes, however, damage older workers and society. See Vance v. Bradley, 440 U.S. 93, 113-14 (1979) (Marshall, J., dissenting) ("Such generalizations stigmatize the aged as physically and mentally deficient, regardless of their individual capabilities. . . . Particularly in the area of employment, significant deprivations have been imposed on the basis of these stereotypes.") (citing 29 U.S.C. § 621(a); House Select Committee on Aging, Mandatory Retirement: The Social and Human Cost of Enforced Idleness, 95th Cong., 35, 37 (1977); C. Edelman & I. Siegler, Federal Age Discrimination in Employment Law 15-17 (1978); Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380, 380-81, 383 (1976)).

While there is no question that a person's ability to perform their job will eventually decline with age, empirical studies have shown that the assumption that this decline starts somewhere around age 65 is far from accurate. See Martin Lyon Levine, Age Discrimination and the Mandatory Retirement Controversy 108, 203 (1988) (citing Mildred Doering et al., The Aging Worker: Research and Recommendations (1983)) (discussing lack of evidence for widely held negative belief about performance of older workers). The legislators who passed the ADEA recognized that stereotyping of older workers is wrong. See 113 Cong. Rec. 31,256 (statement of Sen. Young):

The view that a man or woman is so old at 65 as to warrant compulsory retirement from industry stems from an era before the turn of the century and comes to us from a period when life expectancy was about half of the life expectancy of Americans and Europeans at the present time . . . . In fact, today [people] are not as old at 65 [in] thought, action, physical and mental ability as men and women . . . were at the age of 40 in the 1880's. Yet, for some reason or other, we Americans have adhered to this view of 65 as being the proper age for retirement notwithstanding the fact that this concept is today as outdated as are flint-lock muskets and candle dips of the eighteenth century.

Id.; see also 113 Cong. Rec. 31,254 (statement of Sen. Javits) (stating that assumptions about progressive uselessness of older employees are "widespread irrational belief[s]").
gality of adverse employment decisions made on the basis of race or sex. Further, most people would agree that such an employment decision is unjust. Conversely, when an employer, under economic pressure, decides to lay off its highest paid workers or refuses to hire workers whose experience commands a certain salary, it is more difficult to say that the employer has done something wrong—legally or morally—even though these decisions often disparately impact older workers.

The disparate impact theory was developed under Title VII of the Civil Rights Act of 1964 (Title VII) to combat practices by employers that are facially neutral, but have a significant adverse impact on a protected group. The ADEA was prompted by and modeled after Title VII, and the two acts have traditionally been interpreted by reference to one another.

It is clear that a plaintiff can use the disparate impact theory to prove

4. See generally Franks v. Bowman Transp. Co., 424 U.S. 747, 768 (1976) (observing "that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin").

5. See, e.g., McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879, 883 (1995) (stating that "[t]he ADEA... reflects a societal condemnation of invidious bias in individual employment decisions"); cf. Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 637 (5th Cir. 1985) (finding that Congress's enactment of ADEA was recognition that "one of the tests of a civilized society is its treatment of the elderly").

6. See, e.g., Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 152 (5th Cir. 1995) (refusing to impose liability on employer who terminated salesman because independent contractor was more efficient and stating: "[s]urely the ADEA does not require that an employer prove that it is in fact losing money before it can take a nondiscriminatory and legitimate course of action to make more."); EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994) (refusing to impose liability on school district which refused to hire teachers with more than five years of experience because of budget constraints); Allen v. Diebold, Inc., 33 F.3d 674, 677 (6th Cir. 1994) ("The ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations."); see also Joseph Nocera, Living With Layoffs, FORTUNE, Apr. 1, 1996, at 69 (finding that layoffs are incredibly painful to workers but are necessary response to competitive world).


8. See Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (establishing disparate impact theory). The disparate impact theory developed in response to employment policies enacted shortly after the effective date of Title VII, which appeared to have been enacted to avoid compliance with the statute. Id. For a discussion of the development of the disparate impact theory and the Griggs case, see infra notes 32-37 and accompanying text.

9. See, e.g., Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-58 (1979) (noting that ADEA is modeled after Title VII, resulting in comparability of terms and prohibitions); Loeb v. Textron, Inc., 600 F.2d 1005, 1016-17 (1st Cir. 1979) (same). For a discussion of the similarities and parallel histories of the ADEA and Title VII, see infra notes 38-70 and accompanying text.
liability under Title VII. The courts have not adequately resolved, however, the question of whether a plaintiff can use disparate impact analysis as a means of proving liability under the ADEA.

There are compelling policy arguments for and against disparate impact liability in the age discrimination context. As the baby-boomers grow older, stories of middle-aged workers losing their jobs as a result of "downsizing" are common-place. Advocates for older workers argue that


11. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA . . . and we need not do so here."). Uncertainty as to the availability of disparate impact analysis in age cases has been recognized for some time. See Markham v. Geller, 451 U.S. 945, 948 (1981) (Rehnquist, J., dissenting from denial of certiorari) ("This Court has never held that proof of discriminatory impact can establish a violation of the ADEA.").

12. For a discussion of the policy arguments for and against disparate impact under the ADEA, see infra notes 14-16 and accompanying text. Policy arguments are better left to Congress. For a discussion of a recommended legislative solution to this issue, see infra notes 216-22 and accompanying text.

13. See Age Discrimination Hovers over Older Displaced Workers, CHI. TRIB., Nov. 20, 1995, at 5 (describing specific cases of workers over 40 being laid off and their inability to find comparable employment); Michael Hammer, Who's to Blame for All the Layoffs?, WALL ST. J., Jan. 22, 1996, at A12 (discussing recent wave of layoffs); Robert Lewis, 'Downsizing' Taking a Higher Toll, AARP BULL., Nov. 1994, at 1 (discussing "massive" downsizing in recent years); Vivian Marino, For Middle-Aged Who Lose Jobs, Labor Market Is Tough, L.A. TIMES, Nov. 7, 1995, at D13 (same); Allan Sloan, The Hit Men, NEWSWEEK, Feb. 26, 1996, at 44 (discussing recent mass layoffs and CEOs who ordered them). But see Joann S. Lublin, Corporate Survey Finds Fewer Layoffs, Increase in New Jobs to Balance Cuts, WALL ST. J., Oct. 29, 1995, at A2 (finding that businesses which participated in survey are laying off fewer people than in past nine years and are creating almost as many new jobs as they are terminating); Bernard Wysocki, Jr., The Outlook: Big Corporate Layoffs Are Slowing Down, WALL ST. J., June 12, 1995, at A1 (discussing slowdown in corporate restructuring and finding that in first five months of 1995, U.S. companies eliminated 146,000 jobs, down 45% from previous year).

Recently, The New York Times ran a series of articles entitled "The Downsizing of America." On the basis of various polls, the Times found that in one-third of the households surveyed, a family member had involuntarily left a job since 1980, and that 40% of the people surveyed knew a relative or friend who had been laid off. See Louis Uchitelle & N.R. Kleinfield, On the Battlefields of Business, Millions of Casualties, N.Y. TIMES, Mar. 3, 1996, at A1 (listing statistics and framing issues). After analyzing statistics from the Department of Labor, the Times observed that while unemployment is relatively low, 35% of those who lose their jobs must accept new jobs at lower salaries and often in different fields. Id. The Times found that workers with some college education are being laid off at a higher rate than workers with no college education. Id. Further, workers with a salary above $50,000 have recently had their jobs eliminated twice as often as they did in the 1980s. Id. The Times noted that while two million people are victims of violent crime each year, three million people are victims of layoffs. Id.; see also N.R. Kleinfield, In the Workplace Musical Chairs: The Company as Family, No More, N.Y. TIMES, Mar. 4, 1996, at A1
older workers need the protection the disparate impact theory provides.\textsuperscript{14} Advocates for employers argue that the disparate impact analysis developed in cases involving race discrimination should not be “imported” into the age discrimination context because age is different than race, gender

(discussing changes in employer-employee relationship in atmosphere of mergers and changing employers); Rick Bragg, \textit{Big Holes Where the Dignity Used to Be}, N.Y. TIMES, Mar. 5, 1996, at A1 (discussing psychological issues caused by layoffs); Rick Bragg, \textit{More than Money, They Miss the Pride a Good Job Brought}, N.Y. TIMES, Mar. 5, 1996, at A17 (discussing disillusion caused by layoffs); Sara Rimer, \textit{A Hometown Feels Less Like Home}, N.Y. TIMES, Mar. 6, 1996, at 1 (discussing severe effects of downsizing on cities which were dependent on small number of large businesses and examining effect on Dayton, Ohio in particular); Kirk Johnson, \textit{In the Class of '70, Wounded Winners}, N.Y. TIMES, Mar. 7, 1996, at 1 (focusing on one college class whose members are in their mid-forties and discussing their anxiety about economic prospects, and fact that one of five lost their job in past fifteen years and one-third have been involved in laying off other people); Elizabeth Kolbert & Adam Clymer, \textit{The Politics of Layoffs: In Search of a Message}, N.Y. TIMES, Mar. 8, 1996, at 1 (discussing importance of issue of job security in 1996 presidential election); David E. Sanger & Steve Lohr, \textit{A Search for Answers to Avoid the Layoffs}, N.Y. TIMES, Mar. 9, 1996, at 1 (discussing alternatives to layoffs).


This phenomenon has been referred to as the “age wave” and the “senior boom.” See \textit{The Age Wave}, \textit{Training & Dev. J.}, Feb. 1990, at 22, 24 (coining term “age wave”); Jeffrey L. Sheler, \textit{The Aging Worker: Asset and Liability}, \textit{U.S. News & World Rep.}, May 4, 1981, at 76 (describing “senior boom”). The growing proportion of seniors is a result of a combination of factors: the age of the World War II baby boom generation, improved medical procedures and lower birth rates among the current childbearing-age generation. \textit{Id}.

or national origin. These advocates argue that everyone gets older and that there is, at some point, a correlation between age and ability.

The statutory language and legislative history of the ADEA can be used to support persuasive arguments for and against the availability of disparate impact liability. If the history and the language were the only materials relevant to this question, there would be no clear answer. Two advocates argue that everyone gets older and that there is, at some point, a correlation between age and ability. These advocates argue that everyone gets older and that there is, at some point, a correlation between age and ability.

15. See, e.g., Pamela S. Krop, Note, Age Discrimination and the Disparate Impact Doctrine, 34 Stan. L. Rev. 837, 838 (1982) (arguing that disparate impact theory should not apply in age cases because of fundamental differences between age and race discrimination). For a further discussion of this argument, see infra notes 85-88 and accompanying text.

16. See, e.g., Posner, supra note 2, at 319 (arguing that it is not necessarily unjust to make employment decisions based on age). Judge Posner argues that "[p]ractices that appear to discriminate against the elderly, such as mandatory retirement at fixed ages or late vesting of pensions—practices that the law has taken upon itself to change, though apparently with little effect—have strong efficiency justifications and little or no tincture of injustice." Id. Judge Posner describes the ADEA as "a particularly misbegotten venture in tilting at the windmills of ageism." Id. Judge Posner states "there really is a process called aging . . . generating palpable and occupationally relevant physical and mental differences between older and younger persons." Id.; see also Alfred W. Blumrosen, Interpreting the ADEA: Intent or Impact, in Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners 68, 106-15 (1982) (arguing that Secretary of Labor and legislators who drafted ADEA recognized difference between age discrimination and other forms of discrimination and that they never intended to authorize disparate impact liability); Donald R. Stacey, A Case Against Extending the Adverse Impact Doctrine to ADEA, 10 Employee Rel. L.J. 437, 438-39 (1985) (arguing that because older persons are not discrete and insular minority and because they have not been subjected to history of purposeful discrimination, they are not entitled to "extraordinary protection" of adverse impact doctrine); Evan H. Pontz, Comment, What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act, 74 N.C. L. Rev. 267 (1995) (arguing that disparate impact theory should not be applied because of effect it would have on number of age discrimination claims).

In a perfect world, employees who wish to stay with an employer for their entire career are afforded that opportunity. In that situation, the employer will pay the employee less than deserved, based on their productivity, earlier in the employee's career and more than deserved, later in their career when they are less productive resulting in a fair wage over the employee's life cycle. See Edward P. Lazear, Agency, Earnings Profiles, Productivity and Hours Restrictions, 71 Am. Econ. Rev. 606 (1981) (discussing wages over life cycle); Robert Hutchens, Delayed Payment Contracts and a Firm's Propensity to Hire Older Workers, 4 J. Lab. Econ. 439 (1986) (discussing wage-age system). Problems arise when these assumptions are applied in today's labor market because employees rarely stay with the same employer over their entire career.

17. Compare Kaminshine, supra note 14, at 286-306 (arguing that legislative history and text support extension of disparate impact analysis to ADEA), with Stacey, supra note 16, at 439-47 (arguing that legislative history and text evidence congressional intent to prohibit only intentional discrimination, not disparate impact).

18. See EEOC v. Governor Mifflin Sch. Dist., 623 F. Supp. 734, 740 (E.D. Pa. 1985) ("It is far from clear that Congress intended to limit the application of the ADEA to cases of intentional discrimination."). Compare Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980) (holding that text and legislative history supported extension of disparate impact to ADEA), with Markham v. Geller, 451 U.S. 945
relatively recent developments, however, suggest that disparate impact liability is not available under the ADEA as currently written.

First, in the Civil Rights Act of 1991, Congress amended Title VII to make disparate impact analysis a part of the statutory scheme and to establish the methods for proving and defending a disparate impact claim.\(^{19}\) Congress did not similarly amend the ADEA. Second, in \textit{Hazen Paper Co. v. Biggins},\(^{20}\) the Supreme Court held that when an employer makes an employment decision on the basis of factors other than age, there is no violation of the ADEA, even if those factors have a high correlation with age.\(^{21}\) While \textit{Hazen Paper} was a disparate treatment case, it has important implications for the disparate impact question.

Part I of this Comment discusses the history and policy underlying the disparate impact theory.\(^{22}\) Part II reviews the legislative history and the language of the ADEA and compares the statute to Title VII.\(^{23}\) Part III of this Comment discusses the significance of Congress's 1991 amendment of Title VII and its silence with regard to the ADEA, and Part IV analyzes the significance of the \textit{Hazen Paper} decision.\(^{24}\) Against this backdrop, Part V analyzes the cases that have considered whether disparate impact claims are cognizable under the ADEA in light of \textit{Hazen Paper}.\(^{25}\) Part VI of this Comment concludes that disparate impact is not available as a means of proving liability under the ADEA, and that from a policy standpoint, this is not a good result.\(^{26}\) Part VII of this Comment recommends that Congress


\(^{21}\) \textit{Id.} at 609 (holding that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age"); \textit{see also} Patricia A. Mitchell, Note, \textit{Hazen Paper Co. v. Biggins}: \textit{Extending the Disparate Impact Doctrine to ADEA Claims}, 29 \textit{GONZ. L. REV.} 675 (1994) (discussing significance of \textit{Hazen Paper} decision in detail).

The \textit{Hazen Paper} Court refused to decide the question of the availability of disparate impact analysis under the ADEA. \textit{Hazen Paper}, 507 U.S. at 609. For a discussion of the \textit{Hazen Paper} decision, see \textit{infra} notes 117-28 and accompanying text.

\(^{22}\) For a discussion of the disparate impact theory, see \textit{infra} notes 28-37 and accompanying text.

\(^{23}\) For a discussion of the legislative history of the ADEA, see \textit{infra} notes 38-57 and accompanying text. For a discussion of the language of the ADEA, see \textit{infra} notes 58-70 and accompanying text.

\(^{24}\) For a discussion of the Civil Rights Act of 1991, see \textit{infra} notes 84-95 and accompanying text. For a discussion of the decisions which preceeded \textit{Hazen Paper}, see \textit{infra} notes 97-116 and accompanying text. For a discussion of the \textit{Hazen Paper} opinion, see \textit{infra} notes 117-28. For a discussion of cases which have relied on \textit{Hazen Paper} for the proposition that disparate impact liability is not available under the ADEA, see \textit{infra} notes 151-75 and accompanying text.

\(^{25}\) For a survey of cases which have considered whether disparate impact is available under the ADEA, see \textit{infra} notes 129-94 and accompanying text.

\(^{26}\) For a detailed analysis of the availability of disparate impact under the ADEA, see \textit{infra} notes 195-215 and accompanying text.
amend the ADEA and provide older workers with the protection that they need in the current economy.27

I. THE DISPARATE IMPACT THEORY

Generally, a plaintiff may prove an employment discrimination claim by showing either "disparate treatment" or "disparate impact."28 In a disparate treatment case, employees attempt to prove that their employer treated them less favorably than other employees because of their age, race, color, religion or other legally protected characteristic.29 In a disparate treatment case, the plaintiff must prove that discriminatory animus motivated the employer to make the adverse employment decision.30 The

27. For a discussion of a proposed congressional amendment which would make disparate impact a part of the ADEA, see infra notes 216-22 and accompanying text.

A plaintiff, or group of plaintiffs, may also attempt to prove that an employer operated under a formal policy or maintained a "pattern or practice" of discrimination which adversely affected the plaintiff. See, e.g., Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 120-22 (1985) (ruling that airlines transfer policy facially discriminated against older employees); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716 (1978) (finding that policy which required women to contribute more than men to pension plan because women live longer was facially discriminatory); Teamsters, 431 U.S. at 394 (assessing liability because employer's "standard operating procedure" was to discriminate against racial minorities).


The order and allocation of the burdens of proof in a Title VII disparate impact case were set forth in a line of Supreme Court cases. See McDonnell Douglas, 411 U.S. at 802; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

Under the framework laid out in these cases, the plaintiff-employee has the burden of proving a prima facie case. McDonnell Douglas, 411 U.S. at 802. To establish a prima facie case the plaintiff must show: (1) membership in the class protected by the statute; (2) that plaintiff was qualified for the position sought or that their work met employer's legitimate expectations; (3) that the employer made an employment decision that was adverse to the plaintiff; and (4) that the employer sought other applicants with similar qualifications or replaced the plaintiff-employee with someone with similar qualifications. Id.
ADEA clearly contemplates disparate treatment claims.\textsuperscript{31} The disparate impact theory was created by the Supreme Court in \textit{Griggs v. Duke Power Co.}\textsuperscript{32} A disparate impact claim challenges "employment practices that are facially neutral in their treatment of different

If the plaintiff establishes a prima facie case, an inference of discrimination arises and the burden of production "shifts to the defendant... to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected... for a legitimate, non-discriminatory reason." \textit{Burdine}, 450 U.S. at 254. If the employer can show legitimate, nondiscriminatory reasons for the challenged hiring decision, the plaintiff is given an opportunity to show that the employer's reasons are actually a pretext for discrimination. \textit{Id.} at 256; see also \textit{EEOC v. Sears, Roebuck & Co.}, 839 F.2d 302, 308-09 (7th Cir. 1988) (examining requirements for rebutting prima facie case). The defendant may also show that the employment decision which is alleged to be discriminatory was based on a bona fide occupational qualification (BFOQ) or that the conduct is otherwise exempted from liability under the statute. See 29 U.S.C. § 623 (1994) (setting out BFOQ defense); 42 U.S.C. § 2000e-2(a)(3)(e) (1994) (same); Western Air Lines v. Criswell, 472 U.S. 400, 416-17 (1985) (applying BFOQ defense).

In \textit{Hicks}, the Supreme Court held that a plaintiff must show that the employer's proffered reasons were not only false, but were also discriminatory. 509 U.S. at 518. For a discussion of the \textit{Hicks} decision, see Louis Rappaport, Note, St. Mary's Honor Center v. Hicks: Has the Supreme Court Turned Its Back on Title VII By Rejecting "Pretext-Only", 39 \textit{VILL. L. REV.} 123, 126-32 (1994) (discussing significantly heightened burden of proof \textit{Hicks} imposed on employment discrimination plaintiffs).

A plaintiff may also prevail by showing that both discriminatory and nondiscriminatory factors contributed to the employer's adverse decision. See \textit{Price Waterhouse v. Hopkins}, 490 U.S. 228 (1989) (finding liability based on "mixed motives"). If the plaintiff establishes a prima facie case, the burden is on the employer to prove that it would have made the same decision if the discriminatory reasons had not been considered. \textit{Id.} at 242-45; see also 42 U.S.C. § 2000e-2(m) (1991) (amending Title VII to codify this "motivating factor" standard). See generally \textit{SCHLEI & GROSSMAN}, supra note 29, at 1317-18 nn.80-91 (discussing \textit{McDonnell Douglas} framework).

\textsuperscript{31} \textit{Hazen Paper}, 507 U.S. at 610 ("Disparate treatment... captures the essence of what Congress sought to prohibit in the ADEA."); see 29 U.S.C. § 623(a)(2) (prohibiting discriminatory decisions made "because of age"). Claims of disparate treatment because of age are analyzed under the same standards used to analyze disparate treatment claims under Title VII. See \textit{Thurston}, 469 U.S. at 121 (recognizing similarities between ADEA and Title VII); Woroski v. Nashua Corp., 31 F.3d 105, 108 (2d Cir. 1994) (applying \textit{McDonnell Douglas} standard in age case); Lindahl v. Air France, 930 F.2d 1434, 1437 (9th Cir. 1991) (same).

\textsuperscript{32} 401 U.S. 424 (1971). As support for creation of the disparate impact theory, the Court relied on the general purpose of the statute and on general language in Title VII. \textit{Id.} at 429-32. Section 703(a)(2) of Title VII states: It shall be an unlawful employment practice for an employer (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


The \textit{Griggs} Court stated: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. Absence of discriminatory intent does not redeem employment procedures or testing
mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability." Griggs, 401 U.S. at 432.

The disparate impact theory was developed in subsequent cases. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (setting out framework for litigating disparate impact claims); Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977) (explaining proof requirements and proper statistical comparisons in disparate impact case); Connecticut v. Teal, 457 U.S. 440, 456 (1982) (holding that employer's showing of nondiscriminatory "bottom line" is not defense to disparate impact claim); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) (approving of application of disparate impact analysis to subjective employment practices).

In general, under both Title VII and ADEA precedent, to establish a prima facie case of discrimination based on the disparate impact theory, a plaintiff must: (1) identify the specific employment policy or practice that is challenged and (2) demonstrate causation by offering "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." Watson, 487 U.S. at 994; see also Nanayakkara v. California State Univ., 60 F.3d 834 (9th Cir. 1995) (applying standards for prima facie case); EGLrr, supra note 13, at 7-288 (discussing elements of prima facie case). A disparate impact plaintiff must use statistics to establish a prima facie case. Watson, 487 U.S. at 987 (discussing need for statistical evidence in disparate impact cases); EGLrr, supra note 13, at 7-289. If the employee meets the initial burden, the employer has the burden of showing that the challenged practice is job-related and consistent with business necessity. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (placing burden of proving business necessity on employer); see also 137 CONC. REC. 15276 (codified at 42 U.S.C. § 703(k)(1)(A)(i)) (establishing business necessity defense); Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1117-19 (11th Cir. 1993) (discussing business necessity defense); EEOC v. Rath Packing Co., 787 F.2d 318, 331-32 (8th Cir. 1986) (noting that "the proper standard...is not whether [the discriminatory practice] is justified by routine business considerations but whether there is a compelling need for...that practice"). If the employer makes such a showing, the employee must show that other selection methods that have less discriminatory effects are available and are sufficient to serve the employer's legitimate needs. Albemarle, 422 U.S. at 425. See generally Palmer v. United States, 794 F.2d 534, 536-37 (9th Cir. 1985) (discussing requirements for prima facie ADEA case under disparate impact theory); Popko v. City of Clairton, 570 F. Supp. 446, 451 (W.D. Pa. 1983) (setting out framework for disparate impact case).

In certain instances, various employment practices have been held to have a disparate impact. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (finding that height and weight requirements had disparate impact based on gender); Washington v. Davis, 426 U.S. 229, 250 (1976) (finding that written test of verbal skills had disparate impact based on race); Albemarle, 422 U.S. at 425 (finding that, under particular set of facts, use of written aptitude test had disparate impact based on race).

The Court severely limited the scope of the disparate impact theory in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). However, the Civil Rights Act of 1991 legislatively overruled the parts of Wards Cove that dealt with disparate impact and reinstated much of the caselaw which preceded that decision. See 164 CONG. REC. H9528 (interpretive memorandum of Congressman Edwards) (stating that Congress's intent was to re-instate law as it had been in Griggs and its progeny). For a further discussion of the Civil Rights Act of 1991, see infra notes 84-95 and accompanying text. If disparate impact analysis is available under the ADEA, it is unclear whether the allocation of proof from the Civil Rights Act of 1991 or from Wards Cove would apply. Compare Houghton v. Sipco, Inc., 38 F.3d 953, 958 (8th Cir. 1995) (holding that allocation of burdens of proof set out in Wards Cove applies to ADEA disparate impact cases), with Day v. Board of Regents, 911 F. Supp.
groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." A disparate impact case does not require proof of discriminatory intent.

While liability under the disparate treatment model is based on different treatment of people who are alike in relevant ways, the disparate impact theory assumes people from different groups are different and bases liability on the reasons an employer offers to justify its policies that cause different effects. In disparate impact cases, "the touchstone is business


33. Hazen Paper, 507 U.S. at 609; Teamsters, 431 U.S. at 336 n.15. Prior to the 1991 amendments, Title VII did not specifically authorize disparate impact analysis; instead, the theory developed under a line of Title VII cases. See Griggs, 401 U.S. at 429-30 (authorizing use of disparate impact analysis in Title VII claims); Washington, 426 U.S. at 247 (same); Dothard, 433 U.S. at 321 (same).

In Griggs, on the day before Title VII was to take effect, an employer who had openly discriminated against African-Americans in the past, implemented testing and education requirements for promotions. Griggs, 401 U.S. at 427-28. African-Americans in the geographic area had long been denied educational opportunities and generally could not meet the education and testing requirements which the factory had imposed for the best jobs. Id. The requirements preserved the discriminatory status quo at the workplace. Id. The Griggs Court stated that allowing claims based on the disparate impact theory furthered the congressional purpose behind Title VII of "achiev[ing] equality of employment opportunities" and removing "artificial, arbitrary and unnecessary barriers to employment." Id. at 429-31. The availability of the theory is related to the recognition that direct evidence of discriminatory motive or animus will often not be available. See, e.g., Aikens, 460 U.S. at 716 (recognizing that "there will seldom be 'eyewitness' testimony as to the employer's mental processes"); Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 638 (5th Cir. 1985) (finding that "[u]nless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree"). But cf. Gillin v. Federal Paper Bd. Co., 479 F.2d 97, 102 (2d Cir. 1973) (finding direct evidence of sex discrimination).

34. Hazen Paper, 507 U.S. at 609. Discriminatory motive is irrelevant because impact analysis is designed to implement Congressional concern with "the consequences of employment practices, not simply the motivation." Griggs, 401 U.S. at 432.

The purpose of the disparate impact theory is to allow plaintiffs to make out a case without producing evidence of the employer's intent. Teamsters, 431 U.S. at 335 n.15. The focus is usually "on statistical disparities, rather than specific incidents, and on competing explanations for those disparities." Watson, 487 U.S. at 987. Statistical proof of discrimination is often the only evidence available to an employment discrimination plaintiff. Id.

35. See Douglas A. Laycock, Statistical Proof and Theories of Discrimination, 49 Law & Contemp. Probs. 97, 98-99 (1986) (examining principles underlying each method of proving discrimination); see also Metz v. Transit Mix, Inc., 828 F.2d 1202, 1215 (7th Cir. 1987) (Easterbrook, J., dissenting) (warning that disparate treatment and disparate impact methods of proof must be kept analytically separate); EEOC v. Warshawsky & Co., 768 F. Supp. 647, 652 (N.D. Ill. 1991) ("Disparate impact analysis recognizes that not all employees are similarly situated and, thus, a facially neutral employment policy may affect one group more than another because of the differences in the group."); Kaminshine, supra note 14, at 259 (explaining that "[d]isparate impact theory . . . is concerned with employment
The Civil Rights Act of 1991 was enacted to expressly make disparate impact part of Title VII's statutory scheme. As previously stated, the availability of disparate impact analysis under the ADEA is unclear.

II. THE LEGISLATIVE HISTORY AND THE TEXT OF THE ADEA: COMPARISONS WITH TITLE VII

This Section analyzes the portions of the legislative history and text of the ADEA that are relevant to the availability of disparate impact. The ADEA was inspired by and modeled after Title VII, and thus, any analysis of the statute includes comparisons with Title VII. This Section concludes that analysis of the legislative history and text of the ADEA does not lead to a clear answer as to whether disparate impact claims are cognizable under the ADEA.
A. The Legislative History of the ADEA

Congress first considered proscribing age discrimination by federal statute during the debates over Title VII of the Civil Rights Act of 1964. While age was not included in the final draft of Title VII, the statute ordered the Secretary of Labor to study the problem of age discrimination and report to Congress. The Secretary's report was the impetus and the blueprint for the ADEA.

The Secretary found that older workers had to overcome serious obstacles in the job market. The report discussed the problems of unemployed workers who have developed, over many years, firm-specific skills that cannot easily be transferred to a different job setting. The Secretary found that while "age discrimination rarely was based on the sort of animus motivating other forms of discrimination," it was based on stereotypes about the abilities of older workers that were generally refuted by empirical evidence. The Secretary concluded that arbitrary age discrimination was harmful to the national economy because it deprived the nation of

40. See EGLIT, supra note 13, at 7-10 (discussing history of ADEA); JOSEPH E. KALET, AGE DISCRIMINATION IN EMPLOYMENT LAW 1-3 (2d ed. 1990) (discussing legislative history of ADEA). A proposed amendment in the House of Representatives, that would have added age to Title VII's list of protected characteristics, was rejected by a vote of 123 to 94. 110 Cong. Rec. 2596-99 (1964). A similar amendment was rejected in the Senate by a vote of 63 to 28. 110 Cong. Rec. 9911-13 (1964); see also Blumrosen, supra note 16, at 106-15 (asserting that legislators attempted to include age in Title VII so that statute would be considered too broad and thus would not pass). See generally Kaminshine, supra note 14, at 235 (discussing events preceding passage of ADEA).


42. U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965), reprinted in EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (1981) [hereinafter Secretary's Report]. Willard Wirtz was the Secretary of Labor. See also Blumrosen, supra note 16, at 83 (finding that Secretary's Report was "the basic document shaping the thinking of Congress which led to the Age Discrimination Act").

43. Secretary's Report, supra note 42, at 11-15.

44. Id. at 11-17.

45. Id. at 3-6. The Secretary stated: "We have found no evidence of prejudice based on dislike or intolerance of the older worker." Id. The Secretary further stated: "[t]he 'discrimination' older workers have most to fear... is not from any employer malice, or unthinking majority, but from the ruthless play of wholly impersonal forces." Id. at 3. This can be contrasted with the Supreme Court's finding that Title VII's legislative history evidences a clear congressional intent to eradicate longstanding employment barriers that "operate invidiously to discriminate on the basis of racial or other impermissible classification." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); see also KALET, supra note 40, at 2 (detailing Secretary's findings).
productive workers and resulted in increased unemployment insurance and social security benefit costs. The Secretary found that age discrimination inflicted serious economic and psychological costs on older workers.

The Secretary's report distinguished "arbitrary age discrimination" from "factors which bear more strongly on older workers as a group than younger workers." The Secretary urged Congress to enact legislation prohibiting "arbitrary" age discrimination and to establish government-funded programs to increase the access of older workers to education, training and job referral opportunities. Congress passed the ADEA in 1967 largely as a result of the Secretary's report.

The Secretary's report is sometimes interpreted as targeting mandatory retirement policies and recommending that such practices be prohibited, while suggesting that the "other factors" which adversely affect

46. Secretary's Report, supra note 42, at 18.
47. Id.
48. Id. at 19. In EEOC v. Wyoming, 460 U.S. 226 (1983), the Supreme Court summarized the findings of the Secretary's report:

(1) Many employers adopted specific age limitations in those States that had not prohibited them by their own anti-discrimination laws, although many other employers were able to operate successfully without them. (2) In the aggregate, these age limitations had a marked effect upon the employment of older workers. (3) Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes. (4) Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers. (5) Finally, arbitrary age discrimination was profoundly harmful . . .

Id. at 231.

Mandatory retirement policies are obvious examples of arbitrary age discrimination. Secretary's Report, supra note 42, at 5-6. Education, training and testing requirements are examples of neutral standards that might have an adverse impact on older workers. Id.

49. Secretary's Report, supra note 42, at 21-25.
50. See Kalet, supra note 40, at 2 (discussing Secretary's report and concluding that "[t]he Report led directly to the enactment of the ADEA"); see also Wyoming, 460 U.S. at 230-31 (discussing legislative history of ADEA and noting that recommendations in Secretary's report were accepted by executive and legislative branches).

The structure recommended in the Secretary's report was adopted in the ADEA. See 29 U.S.C. § 621 (1994). The statute, as enacted, reflects the Secretary's distinction between "arbitrary discrimination" and "certain otherwise desirable practices [that] may work to the disadvantage of older persons." Id. at § 621(a) (2). The statute outlaws "arbitrary discrimination" and establishes education and research programs to address "the impact of age on employment." Id. § 621(b).

older workers should be dealt with through education and conciliation.\(^{51}\)

In other words, advocates for employers argue, the Secretary supported liability for disparate treatment, but opposed disparate impact liability.\(^{52}\) The Secretary acknowledged, however, that neutral policies which have an adverse impact on older workers might constitute "arbitrary" discrimination.\(^{53}\) Further, the fact that the Secretary's report was delivered six years

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51. See Blumrosen, supra note 16, at 76-79. Professor Blumrosen stated that: [T]he Secretary's report did not suggest that institutional practices which had an "adverse effect" on older workers should be declared illegal. On the contrary, it recommended that institutional pressures, such as those arising from pension systems, be eased by special programs which would not discourage hiring of older workers. The only practice which the report proposed to declare illegal was the setting of a specific age limit for hiring or termination in disregard of individual capacity. Such a practice would have to be "intentional" by its nature.

Id. at 79; see also Kaminshine, supra note 14, at 288 (conceding that Secretary of Labor regarded overt age ceilings as "most obvious" and "odious form of age discrimination").

52. See Ellis v. United Airlines, Inc., 73 F.3d 999, 1008 (10th Cir.), cert. denied, 116 S. Ct. 2500 (1996). The Ellis court found:

[T]he legislative history of the ADEA suggests it was not enacted to address disparate impact claims. Congress enacted the ADEA in large part on a report it commissioned from the Secretary of Labor . . . . That report differentiated between what it termed "arbitrary discrimination" based on age (intentional discrimination based on age stereotypes) and problems resulting from factors that "affect older workers more strongly, as a group, than they do younger employees" (disparate impact). The report then recommended that Congress prohibit "arbitrary discrimination," but that factors which "affect older workers" be addressed through programmatic measures to improve opportunities for older workers.

Id. (internal citations omitted); see also Blumrosen, supra note 16, at 10. Professor Blumrosen states: "The [Secretary's] report did not suggest that institutional practices which had an 'adverse effect' on older workers should be declared illegal . . . . The only practice which the report proposed to declare illegal was the setting of a specific age limit for hiring or termination in disregard of individual capacity." Id.; Stacey, supra note 16, at 439-43 (explaining that Congress enacted ADEA to prohibit only arbitrary age limitations). One commentator finds that the distinction between arbitrary discrimination and "other factors" which adversely impact older workers "permeates the legislative history of the ADEA." Id. at 440. This commentator concludes that "[t]he 'disparate impact' test of discrimination is implicitly rejected." Id. at 442.

53. Secretary's Report, supra note 42, at 5. The Secretary observed that "certain specific practices intended to favor older workers might constitute 'arbitrary' discrimination because of their unintended adverse effect." Id. at 15-17. (discussing seniority systems, promotion from within policies, and retirement and insurance plans).

One commentator points out that the Secretary almost surely did not intend to remedy the disparate impact of facially neutral rules that are completely unrelated to job performance by establishing government funded programs to assist older workers. See Kaminshine, supra note 14, at 294 ("It is one thing for the Secretary to propose tax-supported assistance for older workers who need training and cannot meet necessary education or testing standards; it would be quite extraordinary, however, to propose the use of government-sponsored programs to combat the effect of arbitrary, unnecessary, or illegitimate standards. In the latter circum-
before the Supreme Court's establishment of disparate impact analysis in *Griggs* weakens the argument that the Secretary was drawing a distinction between disparate treatment and disparate impact.\(^54\)

The congressional debates which preceded the passage of the ADEA do not mention the disparate impact theory.\(^55\) Title VII's legislative history is also silent on disparate impact.\(^56\) In *Griggs*, the Supreme Court relied on the broad purpose of Title VII as support for the holding that disparate impact analysis was consistent with Congress's intent.\(^57\) Arguably, the same reasoning could support extension of disparate impact to age discrimination claims. The legislative history of the ADEA does not, however, provide a clear answer as to whether Congress intended to provide for disparate impact liability under the ADEA.

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54. See Kaminshine, * supra* note 14, at 290-91 (stating that chronology of events indicates that legislature did not consider disparate impact). Professor Kaminshine states:

[T]he commentators in opposition [to the extension of disparate impact to the ADEA] infer too much from the Secretary's preoccupation with overt age restrictions

. . . . Theories about discrimination and disparate impact would not crystallize for several years and would not become established until the Supreme Court's decision in *Griggs v. Duke Power Co.* in 1971. While this chronology does not render the Secretary's report irrelevant, it arguably diminishes its capacity to reveal a specific intent about concepts and definitions that had yet to emerge in this new area of the law.

*Id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

55. See S. REP. NO. 90-723 (1967) (discussing floor debates preceding passage of ADEA); H.R. REP. NO. 90-805 (1967) (same), reprinted in 1967 U.S.C.C.A.N. 2213. There was some discussion in Congress of requiring rules to be "job related." See 113 CONG. REC. 31,253 (1967) (statement of Senator Yarborough) ("For example, if a test shows that a man cannot do certain things. He might fail to pass the test at 35; he might fail to pass the test at 55. Some men slow up sooner than others. If the job requires a certain speed and the differentiation is based upon factors other than age, the law would not apply."). The disparate impact theory did not crystallize, however, for several more years, and it was not directly considered by Congress during the passage of the ADEA. See *Griggs*, 401 U.S. at 429-31 (establishing disparate impact theory).

56. See Kaminshine, * supra* note 14, at 291 (noting "one searches in vain in the legislative history to Title VII to find any specific attention to, or awareness of, the concept of disparate impact liability").

57. *Griggs*, 401 U.S. at 429-31. The Court stated:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. . . . What is required by *Congress* is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

*Id.* (emphasis added). For a discussion of the *Griggs* decision and the disparate impact theory, see * supra* notes 32-36 and accompanying text.
B. A Comparison of the Text of the ADEA and the Text of Title VII

The text of the ADEA does not specifically authorize disparate impact analysis. The ADEA prohibits employers from basing adverse employment decisions on age. Section 623(a)(1) of the ADEA proscribes decisions not to hire "because of" a person's age. Section 623(a)(2) proscribes decisions which adversely limit, segregate or classify employees because of age. The term "because of such individual's age" indicates an intent to prohibit only intentional discrimination. Nevertheless, § 623(a)(2) does prohibit employment actions that "otherwise adversely affect" an employee. This language has been interpreted as authorization for disparate impact claims.

59. See id. § 623(a)(1)-(2) (proscribing adverse employment decisions "with respect to . . . compensation, terms, conditions or privileges" of employment which are made "because of . . . age"). Employers are also prohibited from reducing wages in order to comply with the statute. Id. § 623(a)(3). Similar prohibitions apply to employment agencies and labor organizations. Id. § 623(b)-(c). The statute also proscribes retaliation against employees who oppose practices made unlawful by the statute. Id. § 623(d).
60. Id. § 623(a)(1). The statute states: "It shall be 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." Id.
61. Id. § 623(a)(2). The statute states: "It shall be unlawful for an employer . . . (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." Id.
62. Id. § 623(a)(1)-(2). "It would be a stretch to read the phrase 'because of such individual's age' to prohibit incidental and unintentional discrimination that resulted because of employment decisions which were made for reasons other than age." Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir.) (citation omitted), cert. denied, 116 S. Ct. 2500 (1996); see also Hazen Paper Co. v. Biggins, 507 U.S. 604, 611-12 (1993) (finding that ADEA "requires the employer to ignore an employee's age . . . it does not specify further characteristics that an employer must also ignore").
63. 29 U.S.C. § 623(a)(2). The statute reads: "It shall be unlawful for an employer . . . (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." Id. (emphasis added).
64. See Kaminshine, supra note 14, at 300 (arguing that language could support extension of disparate impact to ADEA, but conceding that language alone "does not require an interpretation that would include disparate impact"). But see Krop, supra note 15, at 842-43 (arguing that grammatical arrangement of section does not support disparate impact theory). This Note has been cited with approval by a number of courts. See, e.g., Hazen Paper, 507 U.S. at 618 (Kennedy, J., concurring) (citing section of Note which discusses grammatical arrangement of statute). One commentator argues that the clause "because of such individual's age" modifies the infinitive clause at the beginning of the section, namely, "to limit, segregate, or clarify," but not the phrase "adversely affect," which is part of the verb for the dependent clause beginning with "which would deprive." Krop, supra note 15, at 842-43. This commentator interprets the section as prohibiting employers from limiting, segregating or classifying employees because of their age, in any way
The substantive language of the ADEA is derived, in large part, from the language of Title VII of the Civil Rights Act of 1964.^{65} The statutory prohibitions of the two acts are nearly identical.^{66} The language of Title

which would adversely affect their employment status. *Id.* at 843. In other words, age-based classifications are prohibited, but age-neutral classifications that may incidentally affect older workers to a greater degree are not prohibited. *Id.*

If disparate impact liability is based on the language of section 623(a)(2), that language applies to "employees," but does not explicitly apply to job applicants. *See id.* ("[S]ection 623(a)(2) addresses only actions taken by an employer which affect employees."). After *Griggs*, however, courts have gone beyond section 703(a)(2) of Title VII and have upheld Title VII disparate impact claims brought under section 703(a)(1), which applies to applicants. *See* Colby v. J.C. Penney Co., 811 F.2d 1119, 1127 (7th Cir. 1987) (rejecting argument that disparate impact analysis only applies to termination cases); Wambheim v. J.C. Penney Co., 705 F.2d 1492, 1494 (9th Cir. 1983) (applying disparate impact analysis in fringe benefit case). The language of section 623(a)(1) of the ADEA is taken from section 703(a)(1) of Title VII. If the argument is that the similar language, structure and purpose of Title VII and the ADEA justifies extension of disparate impact to age claims, then disparate impact should be available in claims challenging age discrimination in all aspects of the employer-employee relationship as it is under Title VII. *See* EEOC v. Borden's, Inc., 724 F.2d 1390, 1394 (9th Cir. 1984) (applying disparate impact in termination case based on reasoning set forth above).

^{65} *See* Lorillard v. Pons, 434 U.S. 575, 584 & n.12 (1978) (noting that substantive provisions of ADEA "were derived *in haec verba* from Title VII"); Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 820 (5th Cir. 1972) (observing that prohibitions of ADEA are almost identical to Title VII). For a discussion of the legislative history of the ADEA, see *supra* notes 41-57 and accompanying text.

The use of disparate impact as a theory of liability is one of the only areas in which the use of Title VII as a guide to interpreting the ADEA has been questioned. *See* Kaminshine, *supra* note 14, at 231 (commenting that ADEA's borrowing of disparate impact theory from Title VII is still controversial).

^{66} Compare 29 U.S.C. § 623(a)(1)-(2) (ADEA provision) which provides: *It shall be 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; *with* 42 U.S.C. § 2000e-2(a)(1)-(2) (1994) (Title VII provision) which provides: *It shall be an unlawful employment practice for an employer—*

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

*Id.* Prior to the 1991 amendments to Title VII, the availability of disparate impact under Title VII was based on 42 U.S.C. § 2000e-2(a). While the prohibitory language of the ADEA is derived from Title VII, however, the enforcement mechanisms are taken from both Title VII and the Fair Labor Standards Act. *See* Fair
VII did not specifically authorize disparate impact analysis. Rather, disparate impact was a judicial creation, based on the broad goals of Title VII and the general language of § 703(a)(2). Extension of disparate impact analysis to the ADEA is arguably supported by the analogous general purposes of the ADEA and Title VII and the similar language of ADEA § 623(a)(2) and Title VII § 703(a)(2). Based upon these similarities, several courts have concluded that disparate impact analysis is appropriate under the ADEA. The argument that the similar language of Title VII Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (setting out enforcement mechanisms of FLSA).


The ADEA’s stated purpose is (1) “to promote employment of older persons based on their ability rather than age;” (2) “to prohibit arbitrary age discrimination in employment;” and (3) “to help employers and workers find ways of meeting problems arising from the impact of age on employment.” 29 U.S.C. § 621(b); see also Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 409-12 (1985) (recognizing broad purposes of ADEA).

Advocates for the availability of disparate impact under the ADEA point to the broad goal of “promot[ing] employment of older persons” and argue that disparate impact liability is an effective means to this end. See Charles A. Sullivan & Michael J. Zimmer, Proving a Violation Under the Age Discrimination in Employment Act of 1967, 17 SETON HALL L. REV. 803, 831-32 (1989) (arguing that disparate impact is necessary to fulfill Congress’s goals); Ziegler, supra note 14, at 1038-40 (finding that objectives of statute support use of disparate impact analysis). Opponents of the extension of disparate impact analysis to age cases argue that the purpose is to “prohibit arbitrary age discrimination in employment” but not to provide relief when a neutral policy happens to have an adverse impact on those over age 40. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting).

Those who support the extension of disparate impact theory as a means of proving age discrimination argue that Title VII authorizes disparate impact analysis and that courts have traditionally depended on Title VII precedent to interpret the ADEA. See Monce v. City of San Diego, 895 F.2d 560, 561 (9th Cir. 1990) (ruling that complementary provisions of Title VII and ADEA are to be construed consistently); Bass v. City of Wilson, 835 F. Supp. 255, 257-58 (E.D.N.C. 1993) (same).

69. EEOC v. Borden’s, Inc. 724 F.2d 1390, 1394 (9th Cir. 1984) (reasoning that “the similar language, structure, and purpose of Title VII and the ADEA, as well as the similarity of the analytic problems posed in interpreting the two statutes has led us to adopt disparate impact in cases under the ADEA”). In EEOC v. Governor Mifflin School District, 623 F. Supp. 734 (E.D. Pa. 1985), the court held that disparate impact analysis applies to the ADEA because of the similarity of the language of the two statutes. Id. at 739-41; see also Note, The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act, 88 YALE L.J. 565, 566-67, 595 (1979) (concluding that disparate impact is available under ADEA); Note,
and the ADEA supports extension of disparate impact analysis to age cases is weakened, however, by the fact that Congress amended Title VII to expressly include disparate impact as part of Title VII's statutory scheme and did not similarly amend the ADEA.  

C. The "Reasonable Factors Other than Age" Affirmative Defense

The ADEA provides employers with an affirmative defense for employment decisions based on "reasonable factors other than age" ("RFOA"). There is no similar provision in Title VII.

The Equal Pay Act provides a similar statutory defense that allows an employer to pay men and women different amounts for equal work if the differentiation is "based on any other factor other than sex." This language has been interpreted to preclude disparate impact claims under the Equal Pay Act. The Equal Pay Act provision, however, exempts em-


It shall not be unlawful for an employer, employment agency, or labor organization—

(1) 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 the particular business, or where the differentiation is based on reasonable factors other than age.

Id. The employer has the burden of showing that it relied on reasonable factors other than age when it made its employment decision. See EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 222 (3d Cir. 1983) (stating that employer "bears the burden of going forward with evidence to demonstrate reasonable factors, other than age, justifying its action").

The ADEA provides other affirmative defenses. 29 U.S.C. § 623(f). An employer can avoid liability by showing that, while age was considered when an adverse decision was made, youth is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). An employer can also avoid liability by showing that the challenged decision was made in order to comply with a "Bona Fide Seniority System or Employee Benefit Plan." Id. § 623(f)(2)(A)-(B).

72. See City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978) (rejecting argument that cost was reasonable factor, other than sex, that employer should be permitted to rely on as defense to Title VII claim).


74. Id. § 206(d)(1) (prohibiting employers from paying men and women different wages "except where such payment is made pursuant to . . . a differential based on any other factor other than sex").

ployers from liability when they rely on “any other factor other than sex.”76 The ADEA provision only exempts employers who rely on a “reasonable factor other than age.”77

The creation of the RFOA defense in the ADEA is sometimes interpreted as precluding disparate impact analysis under the ADEA.78 Advocates for this position argue that structurally, the statute only makes sense if it is read so that the prohibitory language in § 623(a) authorizes disparate treatment liability while the exception in § 623(f)(1), for “reasonable factors other than age,” precludes disparate impact liability.79 These advo-


77. Compare 29 U.S.C. § 206(d) (EPA provision), with 29 U.S.C. § 623(f)(1) (ADEA provision). For the text of the ADEA “reasonable factors other than age” (“RFOA”) defense, see supra note 71. For the text of the EPA defense, see supra note 74. By limiting the exception to “reasonable” factors, Congress intended that some factors would be covered and others would not. Interpreting section 623 (f)(1) to bar all disparate impact claims would necessarily mean that all factors other than age are reasonable. This interpretation would render the word “reasonable” meaningless. See 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992) (“It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.”); see also EEOC v. Governor Mifflin Sch. Dist., 623 F. Supp. 734, 740 (E.D. Pa. 1985) (noting differences in phrasing of EPA and ADEA defenses).


78. See Metz, 828 F.2d at 1220 (Easterbrook, J., dissenting) (arguing that RFOA defense in § 623(f) should be read as taking disparate impact out of ADEA); see also Markham v. Geller, 451 U.S. 945, 947-49 (1981) (Rehnquist, J., dissenting from denial of certiorari) (asserting that because cost is “reasonable factor other than age,” Court should have reviewed this case and held that because policy at issue was based on cost and not age, there was no violation of ADEA). In the opinion of Judges Rehnquist and Easterbrook, the statutory exception for decisions based on “reasonable factors other than age” is facially inconsistent with liability based on the operation of a “neutral rule.” But see Governor Mifflin, 623 F. Supp. at 740 (determining that Supreme Court decision in County of Washington v. Gunther, 452 U.S. 161 (1981), was based on legislative history of Equal Pay Act and that interpretation of “any other factor other than sex” defense as precluding disparate impact cannot be extrapolated to interpret “reasonable factors other than age” defense because of ADEA’s different legislative history).

79. See Metz, 828 F.2d at 1220 (Easterbrook, J., dissenting). Judge Easterbrook argued:

Section 4(a) parallels Title VII in some respects but is different in others. One striking difference is § 4(f)(1), which says that “reasonable factors other than age” may be the basis of decision. . . . What else could be the purpose of this language? Surely it does not mean simply that “only age discrimination is age discrimination.” “The prohibition and the exception appear identical. The sentence is incomprehensible unless the Prohibition forbids disparate treatment and the exception authorizes disparate impact.”

Id. (quoting Douglas Laycock, Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues, 49 LAW & CONTEMP. PROBS. 53, 55 (1986)).
cates claim that to read the statute otherwise would reduce the RFOA exception to mean that "only age discrimination is age discrimination."\textsuperscript{80}

The ADEA's RFOA provision has conversely been interpreted as codifying the business necessity defense to disparate impact claims.\textsuperscript{81} This approach is based on the premise that Congress did not intend to prohibit age discrimination in § 623(a) and then approve of differentiation on the basis of age in § 623(f)(1).\textsuperscript{82} The administrative agencies charged with enforcing the ADEA have taken this approach.\textsuperscript{83} Nevertheless, just as the analysis of the ADEA's language and legislative history did not provide a clear answer, the inclusion of the RFOA defense in the ADEA does not provide a definitive answer to the question of whether Congress intended to provide for disparate impact age claims.

\textsuperscript{80} Metz, 828 F.2d at 1220 (Easterbrook, J., dissenting).

\textsuperscript{81} See Massarsky v. General Motors Corp., 706 F.2d 111, 132 (3d Cir. 1983) (Sloviter, J., dissenting) ("[I]n disparate impact cases, the 'reasonable factors' defense will overlap the business necessity upon which defendant must rely if it is to rebut plaintiff's prima facie case." (citation omitted)).

\textsuperscript{82} Id.

\textsuperscript{83} See 29 C.F.R. §§ 860.103(f)(1)(i), (f)(2) (1969) (superseded by EEOC regulations at 29 C.F.R. § 1625.7 (1988)) (interpreting "reasonable factors" defense). These interpretive regulations, which were issued by the Department of Labor at the time the ADEA was enacted, explained that in order to qualify as a "reasonable factor other than age," a neutral standard would have to be "reasonably necessary for the specific work to be performed" or "shown to have a valid relationship to job requirements." \textit{Id.} The Department of Labor rejected the interpretation of the reasonable factors defense as precluding disparate impact claims stating that:

To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

29 C.F.R. § 860.103(b); see also Kaminshine, supra note 14, at 303 (asserting that "the Department of Labor's contemporaneous understanding of the newly passed statute is unusually germane, given its involvement and influence in the legislation").

Research and enforcement responsibilities under the ADEA were originally delegated to the Secretary of Labor, but a 1978 amendment shifted these responsibilities to the EEOC. Reorganization Act of 1977, 5 U.S.C. §§ 901-912 (1994). The interpretive regulations of the EEOC also require that a neutral rule having a disparate impact on older workers be justified by business necessity. 29 C.F.R. § 1625.7(d) (1996). Interpretations by administrative agencies responsible for the enforcement of a statute are entitled to deference. \textit{See} EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) (stating that agency's interpretation of statute "need not be the best one by grammatical or any other standards. Rather, the [agency's] interpretation of ambiguous language need only be reasonable to be entitled to deference."); Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (holding that agency's interpretation need only be "based on a permissible construction of the statute").
III. COMPARING THE ADEA AND TITLE VII AFTER THE CIVIL RIGHTS ACT OF 1991

Title VII allows for disparate impact analysis.84 Courts have traditionally looked to the similar language, structure, purposes and histories of Title VII and the ADEA when interpreting the ADEA.85 The statutes and the wrongs they seek to remedy have never been identical.86 The


85. See, e.g., Western Air Lines v. Criswell, 472 U.S. 400, 412-17, n.23 (1985) (applying Title VII case law to interpret ADEA’s bona fide occupational qualification exception); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 754-58 (1979) (relying on Title VII to interpret parallel ADEA provisions governing relationship between federal and state enforcement procedures); Loeb v. Textron, Inc., 600 F.2d 1003, 1015 (1st Cir. 1979) (considering similarities between Title VII and ADEA and stating “one naturally might expect to use the same methods and burdens of proof”); Quinn v. Bowmar Publ’g Co., 445 F. Supp. 780, 784 (D. Md. 1978) (ruling that interpretation of Title VII procedures may be used to interpret ADEA procedures); see also Sullivan & Zimmer, supra note 68, at 881-39 (recommending that “more developed Title VII law should be examined” when litigating age claims). But see Hiatt v. Union Pac. R.R. Co., 859 F. Supp. 1416, 1436 (D. Wyo. 1994) (arguing that age discrimination is different from types of discrimination covered by Title VII and concluding that age discrimination cannot be evaluated under Title VII legal principles), aff’d, 65 F.3d 838 (10th Cir. 1995); Jeffrey L. Liddle, Disparate Treatment Claims Under ADEA: The Negative Impact of McDonnell Douglas v. Green, 5 Employee Rel. L.J. 549, 558 (1979) (arguing that courts should develop distinctive body of ADEA law and not simply rely on Title VII precedent); Peter H. Schuck, Age Discrimination Revisited, 57 Chi.-Kent L. Rev. 1029, 1032-36 (1981) (arguing that because age discrimination previously benefitted current members of protected class and because it is not invidious, it is different from racial discrimination); Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380, 410-11 (1976) (asserting that although substantive and procedural provisions of Title VII and ADEA are nearly identical, distinctions between age, race and sex discrimination justify different standards of proof and liability).

The similarity of the statutes alone has persuaded several courts to extend disparate impact analysis to the ADEA. See, e.g., EEOC v. Governor Mifflin Sch. Dist., 629 F. Supp. 794, 799-40 (E.D. Pa. 1985) (reasoning that because Title VII was “inspiration” for ADEA, interpretations of Title VII should be applied to ADEA). For a discussion of cases which have held that disparate impact is available under the ADEA because of the similarities between the ADEA and Title VII, see infra notes 101-03 and accompanying text.

86. See Lorillard v. Pons, 434 U.S. 574, 584 (1978) (finding that substantive provisions of ADEA were derived “in haec verba” from Title VII, but acknowledging that there are “significant differences” in “remedial and procedural provisions of the two laws”).

Title VII covers smaller employers than those covered by the ADEA. Compare 42 U.S.C. § 2000e(b) (employers with 15 or more employees), with 29 U.S.C. § 630(b) (1994) (employers with 20 or more employees). Title VII prohibits employers from “limit[ing], segregat[ing], or classif[ying] employees or applicants for employment” on the basis of race, sex, etc. 42 U.S.C. § 2000e-2(a)(2) (emphas added). The ADEA’s corresponding provision is confined to limiting, segregating or classifying “employees” only. 29 U.S.C. § 623(a)(2); see also Metz v. Transit Mix, Inc., 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting) (noting other differences between Title VII and ADEA, such as § 4(f)(3) of ADEA, which allows for dismissal for cause); Stacey, supra note 16, at 445-47 (noting other differ-
Supreme Court stated that age discrimination is different from discrimination based on race, national origin or gender. Stereotypes based on race and national origin are always arbitrary and irrelevant to job performance, whereas employment decisions based on age are sometimes justifiable because at some level, there is a degree of "correlation between age and ability."  

Congress amended Title VII in 1991 to codify the methods and burdens of proof in a disparate impact case, but chose not to similarly amend the ADEA. At least one court has held that Congress's failure to amend

ences between Title VII and ADEA, such as more lenient enforcement provisions of Title VII).

87. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976). The Court stated:

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced 'a history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. . . . But even old age does not define a 'discrete and insular' group, United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938), in need of 'extraordinary protection from the majoritarian political process.' Instead it marks a stage that each of us will reach if we live out our normal span.

Id.; see also Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977) (concluding that replacing older workers with younger ones "does not raise the same inference of improper motive that attends replacement of a black by a white person in a Title VII case").

88. See Hiatt v. Union Pac. R.R. Co., 859 F. Supp. 1416, 1435-37 (D. Wyo. 1994) (asserting that disparate impact theory was extended to Title VII to remove barriers unrelated to job performance, but that extension to age context is not appropriate because at some point there is correlation between age and ability), aff'd, 65 F.3d 838 (10th Cir. 1995), cert. denied, 116 S. Ct. 917 (1996); Richard A. Posner, Aging and Old Age 385 (1995) ("[T]here really is a process called aging . . . generating palpable and often occupationally relevant physical and mental differences between older and younger persons . . . ."). Opponents of the extension of disparate impact to the ADEA argue that discrimination based on immutable characteristics such as race and national origin is fundamentally different from discrimination based on age. Elizabeth Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947, 948 n.1 (1982). Professor Bartholet argues:

[T]he disparate impact doctrine adopted in . . . Griggs was predicated on the assumption that blacks and whites are inherently equal in ability and that, but for historical discrimination, they would be equally well situated in employment. . . . Similar assumptions cannot be made for all other protected groups. Indeed, some—such as the aged and the handicapped—may be protected, in part, because they are likely as groups to be less qualified for employment than others.

Id.; see also Stacey, supra note 16, at 438-39 (arguing that "[r]ace discrimination and age discrimination represent different kinds of societal problems" and asserting that "[a]ge discrimination, unlike race discrimination, is not a suspect classification that necessitates strict scrutiny").

the ADEA supports the conclusion that disparate impact analysis is not available under the ADEA.90 Reliance on congressional silence, however, is problematic.91

With respect to disparate impact and the 1991 Act, Congress's main purpose was to clarify the definition of "business necessity" and to set forth that the employer, and not the employee, has the burden of showing that a challenged policy is a "business necessity."92 Whether disparate impact rate impact theory and the business necessity defense roughly as they existed before the Supreme Court's decision in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (altering standards of proof in disparate impact claims so that burden of proof did not shift to employer after plaintiff made out prima facie case, and requiring employers to merely produce some evidence of "business justification" rather than requiring proof of business necessity); see also 137 Cong. Rec. S15276 (daily ed. Oct. 25, 1991), reprinted in 1990 U.S.C.C.A.N. 767 (clarifying that purpose of legislative provisions which dealt with disparate impact was to overrule changes made by Wards Cove and to return to status of law before that decision).

In general, the Civil Rights Act of 1991 was prompted by a series of Supreme Court decisions that were unfavorable for employment discrimination plaintiffs. See Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that § 1981 only prohibits discriminatory hiring decisions and not discriminatory harassment and discharge); Lorance v. AT&T Tech., Inc., 490 U.S. 900 (1989) (holding that statute of limitations for filing charge began to run from time when facially neutral policy was adopted and not from time when discriminatory effects were discovered); Wards Cove, 490 U.S. at 642 (requiring employee to prove business necessity); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that in "mixed-motive" case, employer may completely avoid liability by proving that it would have made same adverse decision even if admitted illegitimate consideration was not taken into account).


90. Martincic v. Urban Redevelopment Auth., 844 F. Supp. 1073, 1077-78 (W.D. Pa. 1994) (finding that Congress's failure to sanction disparate impact claims in ADEA was "significant" and "not an oversight").

91. See EEOC v. Governor Mifflin Sch. Dist., 623 F. Supp. 734, 741 (E.D. Pa. 1985) (finding Congress's failure to clarify that disparate impact was not available in ADEA cases, after courts had allowed disparate impact claims, persuasive evidence of congressional intent to permit such claims).

92. See H.R. Rep. No. 102-40, at 32-43 (1991) (explaining Congressional purposes). Several Senate sponsors compromised on the meaning of "business necessity." Id. at 32. These Senators stated: "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)." Id. The legislative history of the portions of the 1991 Act that relate to "business necessity" are restricted by § 105(b) of the statute:

No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.

Id.
claims were cognizable under Title VII was beyond peradventure. Nevertheless, Congress's failure to amend the ADEA merely creates ambiguity and cannot be relied on as authority for the proposition that Congress was rejecting disparate impact analysis under the ADEA. Further, the legislative history of the 1991 Act suggests that some members of Congress intended the amendments to Title VII to apply to antidiscrimination laws that were modeled after, and interpreted consistently with, Title VII.

IV. THE SIGNIFICANCE OF HAZEN PAPER CO. v. BIGGINS

A. The Controversy Before Hazen Paper

Prior to the Supreme Court's 1993 decision in Hazen Paper Co. v. Biggins, a large number of courts allowed plaintiffs to use disparate impact analysis as a means of proving a violation of the ADEA. Often, courts did so without questioning the propriety of extending the Title VII doctrine to age cases. Other courts noted that the extension of the disparate impact

93. See Griggs, 401 U.S. at 424 (establishing disparate impact analysis). For a discussion of the history of the disparate impact doctrine, see supra notes 32-37 and accompanying text.

94. See Michael C. Sloan, Comment, Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?, 1995 Wis. L. Rev. 507, 518 (finding it unpersuasive to read into congressional inaction that ADEA was similarly amended).


A number of other laws banning discrimination, including . . . the Age Discrimination in Employment Act . . . are modeled after, and have been interpreted in a manner consistent with Title VII. The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent [sic] with Title VII as amended by this Act. Id. (citations omitted); see also 4 EMPLOYMENT DISCRIMINATION COORDINATOR (CBC) ¶ 58,522 (Nov. 5, 1996) (stating that Congress intended that amendments to Title VII would apply to other antidiscrimination laws).


97. For a discussion of cases which considered the availability of disparate impact under the ADEA before Hazen Paper, see infra notes 98-104 and accompanying text.

98. See Maresco v. Evans Chemetics, 964 F.2d 106 (2d Cir. 1992) (finding that disparate impact doctrine is applicable in ADEA cases); Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 117 (2d Cir. 1991) (noting that "so long as the employer's decisions . . . do not impose a general rule that has a disparate impact on older workers . . . its actions are not barred by the ADEA") (citations omitted); Shutt v. Sandoz Crop Protection Corp., 934 F.2d 186 (9th Cir. 1991) (same); Wooden v. Board of Educ., 931 F.2d 376 (6th Cir. 1991) (analyzing plaintiff's ADEA claim under disparate impact theory without questioning propriety); MacPherson v. University of Montevallo, 922 F.2d 766, 770-73 (11th Cir. 1991) (allowing plaintiff to assert disparate impact claim without analyzing its propriety in ADEA cases); Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990) (stating that ADEA plaintiff may proceed under either disparate impact or disparate treatment theory of liability); Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1369 (2d Cir. 1989) (same); Holt v. Gamewell Corp., 797 F.2d 36, 37 (1st Cir.
Theorem was controversial, but assumed for purposes of the case before them that the theory was available.99

In *Geller v. Markham*,100 the Second Circuit held that disparate impact analysis is appropriate under the ADEA.101 The defendant argued that

99. See, e.g., Fisher v. Transco Servs.-Milwaukee, Inc., 979 F.2d 1239, 1244 (7th Cir. 1992) (choosing not to decide question of availability of disparate impact under ADEA because even if theory was available, plaintiff failed to make out prima facie case); Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992) (same); Davidson v. Board of Governors, 920 F.2d 441, 444 (7th Cir. 1990) (same); Arnold v. United States Postal Serv., 863 F.2d 994, 998 (D.C. Cir. 1988) (same); Massarsky v. General Motors Corp., 706 F.2d 111, 120 (3d Cir. 1983) (same); see also Akins v. South Cent. Bell Tel. Co., 744 F.2d 1133, 1136 (5th Cir. 1984) (choosing not to decide question of availability of disparate impact under ADEA, but remanding and instructing district court to explicitly consider issue).

100. 635 F.2d 1027 (2d Cir. 1980).

101. Id. at 1030. In *Geller*, a 55 year-old teacher with “considerable experience” was hired by the defendant school district. *Id.* After several weeks, the teacher was replaced by a 25 year-old teacher who had less than five years experience. *Id.* The school utilized a salary system that linked salary level to experience. *Id.* As a cost-saving measure, the school had a written policy of hiring teachers with less than five years experience. *Id.* The plaintiff’s statistical expert showed that 92.6% of the teachers in Geller’s state who were between ages 40 and 65 had more than five years teaching experience, while only 62% of the teachers under 40 had more than five years of experience. *Id.* The court agreed with Geller’s argument that this policy had a discriminatory impact on persons over age 40 and thus violated the ADEA. *Id.* at 1034. For a discussion of Justice Rehnquist’s dissent to the denial of certiorari in this case, which has become an important authority on this issue, see infra notes 107-10 and accompanying text.
"principles with respect to discriminatory racist impact in violation of Title VII should not govern age discrimination cases." The Geller court, along with other courts, rejected this argument by holding that the extension of disparate impact analysis to the ADEA is logical, because disparate impact is available as a means of proving discrimination under Title VII, and the language and purpose of Title VII and the ADEA are almost identical. The Geller court's reasoning has supplied the major argument in favor of the extension of disparate impact to the ADEA.

In Markham v. Geller, the Supreme Court decided not to review the decision of the Second Circuit. In a dissenting opinion to the denial of

Fourteen years later, in EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994), on almost identical facts, the Seventh Circuit held that disparate impact claims are not available under the ADEA. For a discussion of Parker, see infra notes 151-62 and accompanying text.

102. Geller, 635 F.2d at 1032.

103. Id. The Second Circuit relied on language from the Supreme Court: "the (substantive) prohibitions of the ADEA were derived in haec verba from Title VII." Id. (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)). The court found that the question of disparate impact as a means of proving a violation was substantive and therefore must have been adopted in the ADEA. Id. The court stated "[a]lthough the ADEA did not adopt Title VII's procedural rules entirely, the rule permitting a case to be established by a showing of discriminatory impact or treatment cannot reasonably be viewed as merely procedural." Id. (citing Oscar Mayer Co. v. Evans, 441 U.S. 750, 755-56 (1979)); see also Abbott v. Federal Forge, Inc., 912 F.2d 867, 872 (6th Cir. 1990) (relying on Geller to hold that disparate impact is available under ADEA); EEOC v. Borden's, Inc., 724 F.2d 1390, 1394 (9th Cir. 1984) (stating that "the similar language, structure, and purpose of Title VII and the ADEA, as well as the similarity of the analytic problems posed in interpreting the two statutes, has led us to adopt disparate impact in cases under the ADEA"); Reilly v. Prudential Property and Cas. Ins. Co., 653 F. Supp. 725, 729 (D.N.J. 1987) (same); Franci v. Avco Corp., 538 F. Supp. 250, 255 (D. Conn. 1982) (relying on Geller and similar language of ADEA and Title VII for conclusion that disparate impact is available under ADEA).

Several commentators have documented the parallel provisions of Title VII and the ADEA and have concluded, for that reason, that the extension of the disparate impact theory is a logical step. See Arthur Larson & Lex K. Larson, SAEmployment Discrimination: Age, Handicap, At-Will Exceptions and Appendices § 102.43, at 21-942 (1998) (finding that ADEA and Title VII prohibitions are generally parallel and that Title VII precedents should therefore apply to ADEA); Kaminshtine, supra note 14, at 299 (same). For a discussion of the similar language of the statutes, see supra notes 58-70 and accompanying text. Interpretive regulations issued by the EEOC also stated that disparate impact analysis is appropriate under the ADEA. 29 C.F.R. § 1625.7(d) (1993).


106. Id.
the petition for certiorari, then Justice Rehnquist set forth several arguments against the use of disparate impact analysis under the ADEA.107 Justice Rehnquist argued that the use of factors other than age in employment decisions, regardless of how high the correlation was between those factors and the employee's age, could not support liability under the ADEA.108 Justice Rehnquist further argued that cost is a "reasonable factor other than age," and thus an employer who bases its decision on cost can avoid liability by invoking the affirmative defense provided in the statute, regardless of the disparate impact on older workers.109 While Justice Rehnquist did not expressly state that disparate impact could never be invoked in an ADEA case, his dissent has been used to support that proposition.110

In Metz v. Transit Mix, Inc.,111 Judge Easterbrook of the Seventh Circuit Court of Appeals dissented in a case where the majority had imposed liability on an employer for terminating an employee because of a high salary.112 Judge Easterbrook's dissent focused on the majority's holding that characteristics which are correlated with age can support disparate impact liability under the disparate treatment model.113 After criticizing

107. Id. at 945-49 (Rehnquist, J., dissenting from denial of certiorari). Numerous commentators had questioned the propriety of the use of disparate impact in ADEA cases for many years. See, e.g., Mack A. Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme*, 17 Ga. L. Rev. 621 (1983) (arguing that disparate impact is inconsistent with purposes of ADEA); Schlei & Grossman, supra note 29, at 505-06 (arguing that disparate impact is not available under ADEA).

108. Markham, 451 U.S. at 948 (Rehnquist, J., dissenting from denial of certiorari). Justice Rehnquist wrote his dissent 12 years before the Court unanimously decided in *Hazen Paper* that employment decisions based on factors that have a high correlation with age do not violate the ADEA. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 608-09 (1993). For a discussion of *Hazen Paper*, see infra notes 117-28 and accompanying text.


110. See Markham, 451 U.S. at 948 (Rehnquist, J., dissenting from denial of certiorari) ("This court has never held that proof of discriminatory impact can establish a violation of the ADEA.").

111. 828 F.2d 1202 (7th Cir. 1987).

112. Id. at 1211-22 (Easterbrook, J., dissenting). In Metz, a 54-year-old plant manager was discharged after 27 years of employment. Id. at 1203 (Easterbrook, J., dissenting). The defendant asserted that the plaintiff was terminated because of his high salary and that the ADEA does not prohibit such a decision. Id. (Easterbrook, J., dissenting). The district court agreed. Id. (Easterbrook, J., dissenting). On appeal, the majority stated: "The sole issue . . . is whether the salary savings that can be realized by replacing a single employee in the ADEA age-protected range with a younger, lower-salaried employee constitutes a permissible, nondiscriminatory justification for the replacement." Id. at 1205 (Easterbrook, J., dissenting). The majority concluded that the employer had used salary as a proxy for age and thus had violated the ADEA. Id. at 1210-11 (Easterbrook, J., dissenting).

113. Id. at 1212-13 (Easterbrook, J., dissenting).
the majority for merging the disparate treatment and disparate impact theories, Judge Easterbrook was compelled to consider both theories. On the basis of a detailed analysis of the ADEA, Judge Easterbrook concluded: "[t]he language, structure, and history of the ADEA have led thoughtful people to conclude . . . that disparate impact analysis is inapplicable in ADEA cases." Therefore, before Hazen Paper, a considerable number of courts questioned the propriety of extending disparate impact analysis to the ADEA.

B. The Hazen Paper Decision

In Hazen Paper, the Supreme Court held that an employer is not liable under the ADEA when the factor motivating the employer's decision is something other than the employee's age. The Hazen Paper Court

114. Id. at 1214-15 (Easterbrook, J., dissenting). Judge Easterbrook stated: The two methods of proof should be kept separate. They are built on different premises: disparate treatment on the premise that employees are identical, so that differential treatment must be attributed to use of the prohibited characteristic, and disparate impact on the premise that because of a history of discrimination employees are different, so that employers must be prevented from using arbitrary tests and devices that play on that regrettable difference without advancing any legitimate interest. Putting the two theories together yields nothing but confusion. Id. at 1215 (Easterbrook, J., dissenting).


116. See, e.g., Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992) (questioning "whether disparate impact has ever been a viable theory of age discrimination"); EEOC v. Atlantic Community Sch. Dist., 879 F.2d 434, 437 (8th Cir. 1989) (rejecting jury instruction tendered by EEOC that would have required "finding of age discrimination whenever an applicant 40 and over is not hired by an employer who has agreed to pay salaries based on experience"); Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1428 (7th Cir. 1986) (stating that "[t]he adverse impact analysis developed in Title VII cases cannot be extended easily to age cases"); Diamantopoulos v. Brookside Corp., 683 F. Supp. 322, 328 (D. Conn. 1988) (finding that where defendant declined to hire plaintiff because his salary demands were too high, employer's reason was justifiable and stating that "[w]here economic considerations are not a proxy for age . . . such factors may constitute legitimate, non-discriminatory reasons justifying an employer's actions"); Cunningham v. Central Beverage, Inc., 486 F. Supp. 59, 62 (N.D. Tex. 1980) (noting that "the disparate impact analysis in race cases cannot be extended easily to age cases"); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1318 (E.D. Mich. 1976) (concluding that "higher labor costs associated with the employment of older employees constitute 'reasonable factors other than age' which an employer can consider"); cf. Donnelly v. Exxon Research & Eng'g Co., 12 Fair Empl. Prac. Cas. (BNA) 417, 422 (D.N.J. 1974) (noting that "it was not the purpose of the [ADEA] to maintain anyone in any position where the salary of the position was beyond the value of the services"), aff'd, 521 F.2d 1398 (3d Cir. 1975).

117. 507 U.S. 604, 608-09 (1993). In Hazen Paper, a 63 year-old employee was terminated a few weeks before his pension benefits would have vested. Id. at 606-07. The Court held that the discharge of an employee to prevent the vesting of pension benefits did not violate the ADEA. Id. at 608-15. In such a case, the em-
found that the ADEA was enacted because of Congress's concern that older workers were being deprived of employment on the basis of "inaccurate and stigmatizing stereotypes." The Court reasoned that policies that correlate with age, but are not themselves age-based, are not prohibited by the ADEA because inaccurate and stigmatizing stereotypes are not implicated.

The *Hazen Paper* case was, by its own terms, a disparate treatment case. The Court granted certiorari to settle a split in the circuit courts regarding the question of whether employment decisions made on the basis of factors that had a high correlation with age—such as salary and pension status—were sufficient to support liability in a disparate treatment case. The Court's reasoning and decision, however, also had a significant effect on the future of disparate impact analysis under the ADEA.

The employer's decision is not based on the employee's age; therefore, the employer does not violate the ADEA. *Id.*

The Court's decision settled a split among the circuits. For a further discussion of the circuit court cases leading up to *Hazen Paper*, see *supra* notes 98-116 and accompanying text. The Court noted: "[w]e 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 § 510 of ERISA." *Hazen Paper*, 507 U.S. at 611-13. For a detailed discussion of the *Hazen Paper* case, see Thomas Brown & Randell Montellaro, *Pension Interference Does Not Constitute Violation of the ADEA*: *Hazen Paper Co. v. Biggins*, 19 EMPLOYEE REL. L.J. 187 (1993-94) and Mitchell, *supra* note 21, at 675.

118. *Hazen Paper*, 507 U.S. at 609-11. The Court's decision was based on its finding that "an employee's age is analytically distinct from his years of service." *Id.* at 611. For a discussion of the stated purposes of the ADEA, see *supra* note 68.

119. *Hazen Paper*, 507 U.S. at 611 ("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 . . . .").

120. *Id.* at 609-11. The *Hazen Paper* opinion carefully defines "disparate treatment" and "disparate impact" as separate concepts and states that the case before the Court is a disparate treatment case. *Id.* at 609. The Court stated: "we long have distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination." *Id.*

121. Compare White v. Westinghouse Elec. Co., 862 F.2d 56 (3d Cir. 1988) (finding that firing of older employee to avoid liability for pension benefits violated ADEA), and Metz v. Transit Mix, 828 F.2d 1202, 1208 (7th Cir. 1987) (holding that use of salary as proxy for age when making employment decision violated ADEA), with EEOC v. Clay Printing Co., 955 F.2d 936, 942 (4th Cir. 1992) (noting that age and years of service are distinct); Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 117 (2d Cir. 1991) (holding that nothing in ADEA prohibits employer from using cost as part of employment decision even though "high salary and age may be related"), and Williams v. General Motors Corp., 656 F.2d 120, 131 n.17 (5th Cir. 1981) (declaring that seniority and age discrimination are unrelated); see also *Metz*, 828 F.2d at 1212 (Easterbrook, J., dissenting) (arguing that cost is valid reason for terminating employees, regardless of disparate impact such an approach may have on persons over forty). See generally Sloan, *supra* note 94, at 530-33 (discussing cases leading up to *Hazen Paper*).

In a disparate impact case, the employee is not claiming that the disputed employment policy was enacted because of discriminatory animus—
that is a disparate treatment case. By definition, a disparate impact claim challenges employment policies that are neutral in regard to protected characteristics. The reasoning of the post-\textit{Hazen Paper} courts which have held that disparate impact analysis is not available in ADEA cases can be summarized as follows: (1) \textit{Hazen Paper} held that the ADEA only prohibits actions that are actually motivated by age and (2) in a disparate impact claim, by definition, the employer’s decision is wholly motivated by factors other than age. Therefore, \textit{Hazen Paper} necessitates the conclusion that disparate impact claims are not cognizable under the ADEA.

\textit{Hazen Paper} also dispelled the assumption that Title VII doctrines can be imported into the ADEA without question. Prior cases which held

\begin{itemize}
  \item \textit{Hazen Paper} held that the ADEA prohibits only actions actually motivated by age and does not constrain an employer who acts on the basis of other factors—pension status, seniority, wage rate—that are empirically correlated with age; \textit{Dothard v. Rawlinson}, 433 U.S. 321 (1977) (imposing liability because of disparate impact of employer’s facially neutral policy); \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405, 425 (1975) (same).
  \item For a discussion of the disparate treatment and disparate impact theories of employment discrimination, see \textit{supra} notes 28-37 and accompanying text.
  \item \textit{Allen v. Diebold, Inc.}, 33 F.3d 674, 676 (6th Cir. 1994) (explaining that \textit{Hazen Paper} holds “that the ADEA prohibits only actions actually motivated by age and does not constrain an employer who acts on the basis of other factors—pension status, seniority, wage rate—that are empirically correlated with age”); \textit{see also} \textit{Dothard v. Rawlinson}, 433 U.S. 321 (1977) (imposing liability because of disparate impact of employer’s facially neutral policy); \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405, 425 (1975) (same).
  \item For a general discussion of the disparate impact theory, see \textit{supra} notes 32-37 and accompanying text.
  \item \textit{EEOC v. Francis W. Parker Sch.}, 41 F.3d 1073, 1076 (7th Cir. 1994) (“[T]he [\textit{Hazen Paper} Court’s examination of the ADEA is instructive here.”).
  \item \textit{But see} \textit{EEOC v. Local 350, Plumbers and Pipefitters}, 998 F.2d 641, 648 n.2 (9th Cir. 1993) (amending original opinion to note that \textit{Hazen Paper} decision does not preclude use of disparate impact analysis); \textit{EEOC v. Newport Mesa Unif. Sch. Dist.}, 893 F. Supp. 927, 930 (C.D. Cal. 1995) (criticizing Seventh Circuit’s conclusion that after \textit{Hazen Paper}, disparate impact theory cannot exist under ADEA). For a discussion of cases which have addressed this issue after \textit{Hazen Paper}, see \textit{infra} notes 130-94 and accompanying text.
  \item \textit{Rhodes v. Guiberson Oil Tools}, 75 F.3d 989 (5th Cir. 1996) (discussing differences between Title VII and ADEA and concluding that Title VII principles should not be automatically imported into ADEA cases); \textit{DiBiase v. SmithKline Beecham Corp.}, 48 F.3d 719, 734 (3d Cir. 1995) (noting that “disparate impact theory should not be applied [in ADEA cases] as a matter of course”); \textit{Laugesen v. Anaconda Co.}, 510 F.2d 307, 312 (6th Cir. 1975) (noting “[t]hat the [ADEA] is embodied in a separate act and has its own unique history at least counsel the examiner to consider the particular problems sought to be reached by the statute”); \textit{see also} \textit{Stacey}, \textit{supra} note 16, at 445-47 (listing differences between ADEA and Title VII).

On several other occasions, the Supreme Court has refused to allow the use of the disparate impact theory in employment discrimination legislation other than Title VII. \textit{See}, \textit{e.g.}, \textit{General Bldg. Contractors Ass’n v. Pennsylvannia}, 458 U.S. 575, 389-91 (1982) (finding that legislative history of 42 U.S.C. § 1981 shows that Congress intended only to proscribe intentional discrimination and did not intend to allow recovery for disparate impact); \textit{Personnel Adm’r v. Feeney}, 442 U.S. 256, 272

that disparate impact was available under the ADEA must, at least, be reconsidered.\footnote{128}

V. A Plurality Of Circuits Have Rejected Disparate Impact Analysis Under the ADEA After Hazen Paper

The *Hazen Paper* Court specifically refused to decide whether disparate impact analysis is available under the ADEA.\footnote{129} Since the *Hazen Paper* decision, however, a considerable number of courts have addressed this issue. This Section surveys the current state of the law on this question in each circuit.

A. Circuit Courts Which Continue to Allow Disparate Impact Liability Under the ADEA

In post-*Hazen Paper* opinions, the First Circuit noted that the availability of disparate impact in age cases is controversial, but assumed, arguendo, that the theory is available.\footnote{130} The Fifth and Eighth Circuits have continued to allow disparate impact age discrimination cases without anal-

\footnote{128} See, e.g., DiBiase, 48 F.3d at 733 n.20 (finding that *Hazen Paper* disposes of assumption "that interpretations of the ADEA parallel interpretations of Title VII"); EEOC v. Westinghouse Elec. Corp., 725 F.2d 211 (3d Cir. 1983) (premising opinion on belief that termination of employees because of their eligibility for early retirement violated ADEA); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983) (allowing plaintiff to use disparate impact theory after deciding that termination based on high salary could support ADEA claim).

\footnote{129} Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). Chief Justice Rehnquist and Justices Kennedy and Thomas concurred in the majority opinion on the understanding that the Court did not reach the disparate impact issue. *Id.* at 617-18. Justice Kennedy stated:

[N]othing in the Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII . . . . [W]e have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA. *Id.* at 618 (citations omitted).

\footnote{130} See Graffam v. Scott Paper Co., 60 F.3d 809 (1st Cir. 1995) (unpublished table decision), available at No. 95-1046, 1995 WL 414831, at *3 (1st Cir. July 14, 1995) (stating that "for purposes of this opinion, we assume arguendo that the district court correctly held that the ADEA supports a claim for age discrimination based on a disparate impact theory of liability"). The First Circuit ruled that even though the plaintiff showed that the employer's reduction in force had a disparate impact on persons over age 40, the employer showed that the procedures chosen were job related and consistent with business necessity. *Id.; see also* LeBlanc v. Great Am. Ins. Co., 6 F.3d 836 (1st Cir. 1993) (allowing disparate impact claim without discussion); Holt v. Gamewell Corp., 797 F.2d 36, 37 (1st Cir. 1986) (same); Caron v. Scott Paper Co., 834 F. Supp. 33, 35-36 (D. Me. 1993) (stating that Supreme Court has never decided whether disparate impact theory applies in age cases and arguing that theory should be available). For a further discussion of the *Caron* case, see infra notes 139-50 and accompanying text.
The Second, Sixth and Ninth Circuits have taken the approach that because the disparate impact theory was available under the ADEA before *Hazen Paper*, and *Hazen Paper* did not preclude its use, the theory is still available. No circuit court has analyzed this issue and clearly held

131. See Houghton v. Sipco, Inc., 38 F.3d 953, 958-59 (8th Cir. 1994) (applying disparate impact theory without analysis); EEOC v. General Dynamics Corp., 999 F.2d 113 (5th Cir. 1993) (reversing district court's exclusion of expert witness's disparate impact analysis without analyzing whether disparate impact was available); see also Day v. Board of Regents, 911 F. Supp. 1228, 1248 n.26 (D. Neb. 1995) (stating that there is "some doubt about the viability of an ADEA disparate impact claim," but assuming that theory is available because pre-*Hazen Paper* Eighth Circuit cases allowed it and *Hazen Paper* does not preclude such claims) (quoting *Leidig* v. Honeywell, Inc., 850 F. Supp. 796 (D. Minn. 1994)); Webb v. Derwinski, 868 F. Supp. 1184 (E.D. Mo. 1994) (recognizing controversy regarding availability of disparate impact, but assuming theory is available); *Leidig*, 850 F. Supp. at 801 (same). The pre-*Hazen Paper* cases include *Nolting* v. Yellow Freight System, Inc., 799 F.2d 1192 (8th Cir. 1986) (allowing disparate impact claim in age case), and *Leftwich*, 702 F.2d at 690 (same). For a discussion of cases which addressed the availability of disparate impact liability before *Hazen Paper*, see supra notes 98-116 and accompanying text.

The D.C. Circuit has not addressed the question of the availability of disparate impact under the ADEA in a post-*Hazen Paper* case. See *Arnold* v. United States Postal Serv., 863 F.2d 994, 996 (D.C. Cir. 1988) (noting controversy regarding availability of disparate impact, but assuming that theory applies); see also Csis ceri v. Bowsher, 862 F. Supp. 547, 574 (D.D.C. 1994) (stating that D.C. Circuit has not decided issue).

The approach in the Fourth Circuit is unclear. In *Fisher* v. Asheville-Buncombe Technology Community College, 857 F. Supp. 465, 468 (W.D.N.C. 1993), a district court allowed an ADEA plaintiff to proceed on a disparate impact claim. *Id.* The court noted that it had "some reservations" about the availability of the theory because the Fourth Circuit had not mentioned it in its recent ADEA opinions. *Id.* (citing Tuck v. Henkel Corp., 973 F.2d 371 (4th Cir. 1992); EEOC v. Clay Printing Co., 955 F.2d 996 (4th Cir. 1992)).

The Eleventh Circuit has also not decided whether disparate impact liability for age discrimination survived *Hazen Paper*. Older Eleventh Circuit cases allowed disparate impact claims. See *MacPherson* v. University of Montevallo, 922 F.2d 766 (11th Cir. 1991) (allowing disparate impact age claim without analysis).

132. See *Lyon* v. Ohio Educ. Assoc. & Prof'l Staff Union, 53 F.3d 135, 139 n.5 (6th Cir. 1995) (noting controversy but stating that circuit law prior to *Hazen Paper* supports disparate impact claims under ADEA (citing Abbott v. Federal Forge, 912 F.2d 867 (6th Cir. 1990)); *Kennel* v. Dover Garage, Inc., 816 F. Supp. 178 (E.D.N.Y. 1993) (allowing disparate impact analysis); see also *Brothers* v. NCR Corp., 885 F. Supp. 1043, 1049 (N.D. Ohio 1995) (stating that "[a]bsent express statutory language prohibiting the use of disparate impact in age discrimination cases, or a clear holding from the Supreme Court or the Sixth Circuit disallowing its use, a plaintiff may establish a violation of the ADEA by [proving the elements of a disparate impact claim]").

that disparate impact claims are cognizable after *Hazen Paper*.\textsuperscript{133} Several district courts have analyzed the issue, however, and have decided that disparate impact is available under the ADEA.\textsuperscript{134}

In *Brothers v. NCR Corp.*,\textsuperscript{135} the District Court for the Northern District of Ohio rejected the argument that disparate impact liability was not available under the ADEA.\textsuperscript{136} The plaintiff's disparate impact claim was dismissed because of a failure of proof.\textsuperscript{137} Before dismissing the claim, however, the court stated that because disparate impact claims were available under the ADEA before the Civil Rights Act of 1991 and *Hazen Paper*, and because neither the statute nor the Supreme Court's decision precluded disparate impact, disparate impact claims are cognizable under the ADEA.\textsuperscript{138}

In *Caron v. Scott Paper Co.*,\textsuperscript{139} a district court in Maine considered and rejected arguments for limiting disparate impact analysis to Title VII.\textsuperscript{140}
The court noted that several circuit courts which had addressed this issue had allowed disparate impact age claims.141 The court began its analysis by noting that the Supreme Court had “never decided whether a disparate impact theory of liability is available under the ADEA.”142

The defendants argued that disparate impact analysis should not be extended to the ADEA because the theory was created to protect groups which had suffered a history of discrimination.143 The defendants concluded that because older people had not been subject to a history of discrimination on the basis of immutable characteristics, disparate impact analysis should not be available under the ADEA.144

The court rejected this argument, stating that it was “based on a misunderstanding of the development of the [disparate impact] theory.”145 The court found that the impact of discrimination, and not the motivation for it, was the evil Congress prohibited in Title VII.146 The court also noted that the Supreme Court had not required other protected groups, such as women, to show a history of discrimination similar to that suffered by African-Americans before availing themselves of the disparate impact theory.147

As further support for its conclusion, the court first interpreted the phrase “it shall be unlawful for an employer . . . [to] otherwise adversely affect . . . status as an employee because of such individual’s age” as au-

the employer’s layoff policy had a disparate impact on older workers. Id. The plaintiffs pointed to the fact that the employer’s downsizing process had resulted in retention of 61.5% of employees who were over age 50 and retention of 91.5% of employees under age 50. Id.

141. Id. (citing Palmer v. United States, 794 F.2d 534 (9th Cir. 1986); Monroe v. United Airlines, Inc., 736 F.2d 394, 404 n.3 (7th Cir. 1984); Heward v. Western Elec. Co., 95 Empl. Prac. Cas. (BNA) 807 (10th Cir. 1984); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Allison v. Western Union Tel. Co., 680 F.2d 1318 (11th Cir. 1982); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980); Laugeson v. Anaconda Co., 510 F.2d 307, 316 (6th Cir. 1975)).


143. Id. at 37. The defendants argued that “the rationale adopted by the Supreme Court in Griggs was that if facially neutral factors operated to disadvantage racial minorities, it could be presumed that it was because past societal discrimination created a discriminatory status quo which the neutral factors were perpetuating.” Id.

144. Id.

145. Id. “Examination of the Supreme Court’s early disparate impact cases show that its reasoning was not based on past discrimination.” Id.

146. Id. “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.” Id. (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

147. Id. (citing Dothard v. Rawlinson, 433 U.S. 321 (1977)). In Dothard, the Supreme Court allowed a woman to assert a disparate impact sex discrimination claim. Id. “In doing so, the Supreme Court never discussed past discrimination but simply concentrated on the adverse effects of the employment policy on members of a protected group.” Id.
tion of disparate impact liability.\(^{148}\) Second, the court rejected the defendant's argument that the legislative history of the ADEA reveals an intent to limit the statute's prohibitions to intentional discrimination.\(^{149}\) The court concluded by predicting that when the First Circuit and the Supreme Court are squarely faced with this issue, both will hold that disparate impact analysis is available under the ADEA.\(^{150}\)

### B. Circuit Courts Which Have Held that Disparate Impact Claims Are Not Cognizable Under the ADEA

In *EEOC v. Francis W. Parker School*,\(^{151}\) the Seventh Circuit held, in essence, that disparate impact analysis is not appropriate in ADEA cases.\(^{152}\) The majority reasoned that the ADEA requires the employer to

\(^{148}\) *Id.* The court found that the language of the ADEA "not only prohibits intentional age discrimination but also forbids any policy having a more harmful effect on older people than on their co-workers." *Id.* at 38. For a detailed discussion of the text of the ADEA, see *supra* notes 58-70 and accompanying text.

\(^{149}\) *Caron*, 834 F. Supp. at 37. The court rejected the argument that the Secretary of Labor implicitly recommended that only disparate treatment claims would be available under the ADEA. *Id.* For a detailed discussion of the Secretary's Report and the legislative history of the ADEA, see *supra* notes 40-57 and accompanying text.

\(^{150}\) *Caron*, 834 F. Supp. at 38.

\(^{151}\) 41 F.3d 1073 (7th Cir. 1994), *cert denied*, 115 S. Ct. 2577 (1995).

\(^{152}\) *Id.* at 1077. *Parker* arose out of the rejection of an applicant for a teaching position. *Id.* at 1075. Under a collective bargaining agreement between the school and its faculty association, teachers' salary levels were determined by a "step" system, wherein each year of teaching experience commanded a higher salary. *Id.* The school's principal decided that the school could not afford a teacher whose experience would command a salary higher than $28,000, and thus any candidate with more than seven years of teaching experience was disqualified. *Id.*

The plaintiff, who claimed to have 30 years of teaching experience, was not selected for the position. *Id.* One of the reasons given for the decision was that Parker could not afford the high salary that the plaintiff commanded under the step system. *Id.* The EEOC brought an action against Parker on the plaintiff's behalf, alleging that the decision not to hire him violated the ADEA. *Id.* The suit included disparate treatment and disparate impact claims. *Id.* The district court, relying heavily on the Supreme Court's opinion in *Hazen Paper*, dismissed all of the claims at the summary judgment stage. *Id.* The EEOC only appealed the dismissal of the disparate impact claim. *Id.*

The *Parker* court stated 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." *Id.* at 1077 (citing Anderson v. Baxter Healthcare Corp., 15 F.3d 1120 (7th Cir. 1993)). The Seventh Circuit had addressed this question several times. *See* Metz v. Transit Mix, Inc., 828 F.2d 1202, 1204 (7th Cir. 1987) (allowing plaintiff to rely on disparate impact theory).

Writing in dissent, Judge Cudahy noted that "the majority stops ever so slightly short of . . . announcing [that *Hazen Paper* precludes the use of the disparate impact theory of liability under the ADEA] with perfect clarity. But that is the unmistakable import of the majority approach." *Parker*, 41 F.3d at 1078 (Cudahy, J., dissenting). Subsequent decisions in the Seventh Circuit have relied on *Parker* as authority for the proposition that a disparate impact claim is not cognizable under the ADEA. *See* Caponigro v. Navistar Int'l Transp. Corp., No. 93C0647, 1995 WL 238655, at *9 n.8 (N.D. Ill. Apr. 20, 1995) (citing Gehring v. Case Corp., 48 F.3d
ignore an employee's age when making hiring decisions and that the statute provides a remedy when employment decisions are motivated by stereotypical beliefs about older workers.\textsuperscript{153} The statute, however, does not require the employer to ignore any other characteristics.\textsuperscript{154} Therefore, under the ADEA as interpreted by the Hazen Paper Court, a decision by an employer which was motivated by any factor other than age cannot result in liability.\textsuperscript{155}

As further support for its conclusion, the Parker majority discussed the affirmative defense provided in the ADEA for employment decisions motivated by "reasonable factors other than age."\textsuperscript{156} The majority advanced

\textsuperscript{153} Parker, 41 F.3d at 1076. Following the reasoning in Hazen Paper, Judge Bauer stated that "inaccurate stereotyping of the elderly was 'the essence of what Congress sought to prohibit in the ADEA.'" Id. (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)). Judge Bauer stated that this was "[c]ritical to the [Hazen Paper] Court's analysis." Id. Examples of such stereotypical beliefs include beliefs that older workers are slower, less efficient or less productive. See id. (explaining that reliance on such factors is illegal under ADEA).

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 1076-77. If the employer is wholly motivated by factors other than age, even if the motivating characteristic is correlated with age, the statute does not provide a remedy because "'the problem of inaccurate and stigmatizing stereotypes disappears.'" Id. at 1076 (quoting Hazen Paper, 507 U.S. at 611). The Parker majority interpreted the Hazen Paper decision as leading to the conclusion that the Seventh Circuit reached in an earlier case "decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under the age of forty are not prohibited [by the ADEA]." Id. at 1077 (citing Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1993)). This reasoning is borne out by another statement from the Hazen Paper opinion: "age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age-based.'" Hazen Paper, 507 U.S. at 611. The Parker court stated that Hazen Paper did not violate the ADEA because its decision to fire Biggins was not based on misperceptions about the competence of older workers. Parker, 41 F.3d at 1077.

\textsuperscript{156} Id. The RFOA defense is codified at 29 U.S.C. § 623(f) (1994). For a discussion of the history and interpretation of the RFOA defense, see supra notes 71-83 and accompanying text.

Highlighting this exception as "particularly noteworthy," the Parker court reaffirmed its previous interpretation of this section as authorization for an employer to make decisions based on factors independent of age, even if those factors have a high correlation with age. Parker, 41 F.3d at 1077 (citing Anderson, 15 F.3d 1120;
that a "sensible" reading of this section reinforces the conclusion that the ADEA was enacted only to prohibit decisions based on stereotypes about age.\textsuperscript{157}

The majority discussed the parallels between Title VII and the ADEA, rejecting the argument that "because Title VII's prohibitions mirror those of the ADEA and Title VII permits disparate impact relief, 'similar acceptance in ADEA cases' is required."\textsuperscript{158} The court stated that "Parker's policy of linking wages to experience is an economically defensible and reasonable means of determining salaries."\textsuperscript{159} These factors, combined with the Hazen Paper Court's interpretation of the ADEA, led a majority of the court to conclude that disparate impact claims are not cognizable under the ADEA.\textsuperscript{160}

\textit{Metz}, 828 F.2d at 1220 (Easterbrook, J., dissenting)). The Seventh Circuit is not the only court to read this section as a bar to disparate impact claims. See Markham v. Geller, 451 U.S. 945, 945-49 (1981) (Rehnquist, J., dissenting from denial of petition for certiorari).

The Seventh Circuit majority notes that a similar affirmative defense in the Equal Pay Act, which allows discrepancies in wages paid to men and women based on "factors other than sex," has been interpreted to preclude disparate impact claims. \textit{Parker}, 41 F.3d at 1077 (citing County of Washington v. Gunther, 452 U.S. 161, 170-71 (1981)). The \textit{Parker} court does not discuss the fact that the ADEA's affirmative defense is for decisions based on "reasonable factors other than age" while the defense in the Equal Pay Act is for any "factor other than sex." 29 U.S.C. § 206(d) (emphasis added).

\textsuperscript{157} \textit{Parker}, 41 F.3d at 1077.

\textsuperscript{158} \textit{Id.} Judge Bauer found the dissent's reliance on Title VII precedent to be "most problematic" although he noted that such reliance is not unprecedented. \textit{Id.} For a discussion of the use of Title VII precedent in ADEA cases, see supra notes 65-70 and accompanying text.

\textsuperscript{159} \textit{Id.} at 1078. Although the court appeared to be justifying Parker's actions under a "business necessity" or "cost" rationale, the court noted, as support for its proposition, that the ADEA permits an employer to "observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of [the ADEA's prohibitions]." \textit{Id.} (quoting 29 U.S.C. § 623(f)(2)). The court stated that, in general, "disparate impact theory does not relieve the EEOC of its obligation to prove the error of the employer's ways." \textit{Id.}

\textsuperscript{160} \textit{Id.} Returning to the Hazen Paper rationale, the majority opinion reiterated that an employment decision based on years of service is not necessarily age-based, despite the fact that years of service and age may have a high correlation. \textit{Id.} The court concluded that a statistical correlation which shows that an employer's policy has a disproportionally adverse effect on older workers is insufficient to support liability under the ADEA. \textit{Id.} The plaintiff who makes this showing must also show that the reasons given for the policy are pretextual and that the employer's policy was actually predicated on some "stereotype-based rationale." \textit{Id.} This reasoning was based on the Supreme Court's decision in \textit{St. Mary's Honor Center v. Hicks}, 509 U.S. 502 (1993), which requires a plaintiff claiming disparate treatment to show not only that the reasons an employer offers to justify an adverse employment decision are false, but also that the true reasons are discriminatory. \textit{See id.} at 507-08 (interpreting Title VII to require plaintiff to show that reason offered by employer for employment decision "was not the true reason for the employment decision and that race was" once defendant meets burden of production).
In *Parker*, Judge Cudahy dissented on the grounds that the *Hazen Paper* decision and the RFOA affirmative defense do not preclude the use of disparate impact analysis under the ADEA. Judge Cudahy argued that disparate impact analysis should be available as a tool for answering the ultimate question of whether age was a determining factor in an employment decision that adversely affected the plaintiff.

In *Ellis v. United Airlines, Inc.*, the Tenth Circuit agreed that disparate impact claims are not cognizable under the ADEA. The court read

161. *Parker*, 41 F.3d at 1080 (Cudahy, J., dissenting).

162. Id. at 1079 (Cudahy, J., dissenting). The dissent and the majority agreed that an employer who offers a pretextual reason for a hiring decision to mask the fact that the employer was actually relying on stereotypes about older workers violates the ADEA. *Id.* at 1078-79 (Cudahy, J., dissenting). Judge Cudahy believed that the majority incorrectly focused on the underlying theories of ADEA liability, rather than focusing on permitted methods of proof. *Id.* at 1079 (Cudahy, J., dissenting). Instead, the dissent believed that the disparate impact theory should be available as a method of proving that the employer's proffered reasons for its hiring decisions are pretextual and that the case should proceed from there. *Id.* at 1078 (Cudahy, J., dissenting). Judge Cudahy argued that *Hazen Paper* does not preclude this possibility. *Id.* at 1079 (Cudahy, J., dissenting) ("'[W]e 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.'") (quoting *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 612-13 (1993)). As discussed above, the employee must not only show that the reasons offered by the employer are false, the employee must also show that stereotypes about older workers actually drove the employer's decision. *Hicks*, 509 U.S. at 507-08.

Judge Cudahy believed that to hold otherwise "is to say that 'overqualified' (i.e. overage) music teachers need not apply." *Parker*, 41 F.3d at 1078 (Cudahy, J., dissenting). Beyond this colorful language, the dissent focused on disparate impact as a method of proof, rather than as a theory of recovery. *Id.* at 1078-80 (Cudahy, J., dissenting).

The dissent's problem with the majority's opinion is that the majority opinion begins with its conclusion: that the decision to pass over the plaintiff was not based on misperceptions about the competence of older workers. *Id.* at 1078 (Cudahy, J., dissenting). Judge Cudahy stated that if this characterization was accurate, then the majority was correct in holding that *Hazen Paper* precludes ADEA liability. *Id.* (Cudahy, J., dissenting). If the decision was not based on misperceptions about older workers then, under the rule of *Hazen Paper*, it should not lead to liability. *Id.* (Cudahy, J., dissenting).

163. 73 F.3d 999 (10th Cir. 1996).

164. *Id.* at 1009-10. *Ellis* arose out of the defendant's failure to hire plaintiffs as flight attendants. *Id.* at 1000. The defendant asserted that the plaintiffs were not hired because they did not meet the airline's weight standards for flight attendants. *Id.* The defendant's policy required that new-hire flight attendants be within maximum weight requirements based on their height. *Id.* at 1001. Incumbent flight attendants must remain within weight maximums which are determined by their height and age—extra weight is allowed as a person ages. *Id.* The plaintiffs claimed that defendant's age neutral weight policy for flight attendant applicants had a disparate impact on older persons. *Id.* at 1000.

The court initially recognized that the availability of disparate impact analysis in age cases had not been decided in the Tenth Circuit before this decision. *Id.* at 1007; *see* Faulkner v. Super Valu Stores, 3 F.3d 1419, 1428 (10th Cir. 1993) ("The Tenth Circuit has never directly addressed whether a disparate impact claim is
the text of the ADEA as indicating an intent to prohibit intentional discrimination, but not incidental and unintentional discrimination that may result from neutral employment policies. The court recognized that the statutory language, considered in light of the tradition of interpreting the ADEA in accordance with Title VII, does not lead to a firm conclusion of this issue.

A number of other factors led the court to its conclusion. First, the court was persuaded by the fact that the ADEA provides an affirmative defense when an employer's actions are based on "reasonable factors cognizable under the ADEA.... [W]e reserve the legal determination of whether disparate impact is applicable to the ADEA until such time as the issue is properly presented and argued before this court.").

165. Ellis, 73 F.3d at 1007. The court's textual analysis focused on section 623(a)(1) of the ADEA because this was a failure-to-hire case. Id. at 1007 n.12. The court refused to "dwell" on the language of section 623(a)(2) because that section only applies to employees and not to applicants. Id. The court recognized that the Supreme Court relied on language similar to the language in section 623(a)(2) to create the disparate impact theory. Id. at 1007 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). Further, the court recognized that Griggs involved applicants. Id. at 1007 n.12. The court noted, however, that Congress amended the relevant portion of Title VII to include applicants, and it did not similarly amend the ADEA. Id. The court was also persuaded by the fact that both of the major prohibitory sections of the ADEA end with the phrase "because of such individual's age," indicating, in the court's view, a congressional intent to prohibit only intentional discrimination. Id. For a further discussion of the text of the ADEA, see supra notes 58-83 and accompanying text.

166. Ellis, 73 F.3d at 1007 & n.13.

167. Id. ("[T]he ADEA differs from Title VII in salient ways that counsel against interpreting the ADEA to recognize disparate impact claims and that reinforce our reading of the text of the ADEA."). The court found that the pertinent inquiry is whether the factors which drove Congress to create the disparate impact theory in Title VII cases also apply in age cases. Id. at 1007 n.13. The court found that the Griggs Court based its holding on the "larger objectives" underlying Title VII and not on its text. Id. The court also found that the ADEA and Title VII differ in these "nontextual" considerations, as well as in text and structure. Id.

In Hiatt v. Union Pacific Railroad Co., 859 F. Supp. 1416 (D. Wyo. 1994), aff'd on other grounds, 65 F.3d 838 (10th Cir. 1995), a Wyoming district court held that disparate impact analysis was not applicable in ADEA cases because the purposes and policies which support application of the doctrine were not applicable to age discrimination claims. Id. at 1433-34. The court reasoned that the policies underlying the disparate impact doctrine were not germane to ADEA claims because there is, at some point, a correlation between age and ability. Id. at 1431-37. The court stated:

While Griggs was rightly concerned with eliminating arbitrary barriers to employment on the basis of stereotypes that were not relevant to an individual's ability to perform a job, there is, at some level, a degree of correlation between age and ability. More importantly for present purposes, however, is the fact that this correlation cannot be traced to an [sic] history of past discrimination against these particular individuals who were previously younger and possibly the beneficiaries of any age discrimination. In Griggs, the critical fact was the link between the history of educational discrimination and the use of that discrimination as a means of presently disadvantaging African-Americans. These concerns simply are not present when the alleged disparate impact is based on age.
other than age" and by the Supreme Court's interpretation of a similar affirmative defense in the Equal Pay Act as a bar to disparate impact claims.\footnote{168} Second, the court found that the legislative history of the ADEA indicates that while Congress clearly intended to prohibit "arbitrary discrimination," it planned to address situations which would give rise to a disparate impact claim through programs which would improve opportunities for older workers.\footnote{169} The court interpreted the statute to reflect a disparate treatment and disparate impact dichotomy: while § 623 addresses arbitrary and invidious discrimination by prohibiting employment decisions made "because of an individual's age," § 622 addresses the "more benign problem of disparate impact" through education and research programs.\footnote{170}

\textit{Id.} at 1436. The Tenth Circuit expressly declined the opportunity to address the issue of the availability of disparate impact under the ADEA at that time because the district court's result could be affirmed on narrower grounds.\textit{Hiatt,} 65 F.3d at 842.

For further discussion of the differences between age discrimination and the types of discrimination covered by Title VII, see \textit{supra} notes 85-88 and accompanying text.

\footnote{168. \textit{Ellis,} 73 F.3d at 1008; see 29 U.S.C. § 623(f) (1994) ("It shall not be unlawful for an employer . . . (1) to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age."). Section 206(d) (1) of the Equal Pay Act provides a defense when an employer's policy is "based on any other factor other than sex." 29 U.S.C. § 206(d) (1); see \textit{County of Washington v. Gunther,} 452 U.S. 161, 170-71 (1981) (interpreting Equal Pay Act provision as bar to disparate impact analysis).

The \textit{Ellis} court did not discuss the fact that the defense in the ADEA is available when the factors other than age are "reasonable," while the defense in the Equal Pay Act is available when "any factor" other than sex is the motivation for a decision. See 29 U.S.C. § 206(d)(1) (providing defense when employer relies on "any other factor other than sex"). For a further discussion of this defense, see \textit{supra} notes 71-83 and accompanying text.

\footnote{169. \textit{Ellis,} 73 F.3d at 1008.

170. \textit{Id.} As discussed above, the most coherent source of legislative history on the ADEA is the report of the Secretary of Labor. \textit{Id.} The report distinguishes "arbitrary discrimination" from "problems resulting from factors that 'affect older workers more strongly, as a group, than they do younger employees.'" \textit{Id.} (citing Sloan, \textit{supra} note 94, at 511). The report is interpreted as recommending that Congress outlaw the former, but that it remedy the latter through programs that improve opportunities for older workers. \textit{Id.} The \textit{Ellis} court, like others, interpreted this as a recommendation for a statutory scheme which allows disparate treatment claims but which does not allow disparate impact claims. \textit{Id.} For a further discussion of the legislative history of the ADEA, see \textit{supra} notes 40-57 and accompanying text.

The \textit{Ellis} court also relied on the stated purposes of the ADEA to reach its conclusion. \textit{Ellis,} 73 F.3d at 1009. Section 621 of the ADEA states, in relevant part:

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment . . .

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons . . .
Third, the court found that a comparison of recent amendments of Title VII and the ADEA indicated that Congress did not intend for disparate impact to be part of the ADEA statutory scheme. Fourth, the court found that *Hazen Paper* was a strong indication that the Supreme Court does not believe that the ADEA contemplates disparate impact liability. Fifth, the court saw a "clear trend" in post-*Hazen Paper* decisions toward the conclusion that disparate impact claims are not cognizable under the ADEA. Finally, the court noted that permitting disparate impact age discrimination claims would create "practical problems" because the model is difficult to apply where the protected class is all persons over forty years-old. The reasoning and conclusion of the *Ellis* court is in accord with the Seventh Circuit's decision in *Parker*—the *Ellis* decision in-

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. 29 U.S.C. § 621. Considering the fact that the ADEA was drafted before the Supreme Court established the disparate impact doctrine in *Griggs*, the *Ellis* court may have given the drafters of the statute undue credit for their foresight.

171. *Ellis*, 77 F.3d at 1008. The court noted that Congress amended Title VII to include a cause of action for disparate impact claims and made no similar amendment to the ADEA, despite the fact that it amended other sections of the ADEA. *Id*; see Pub. L. No. 102-166, § 115; 105 Stat. 1071, 1079 (amending time period in which ADEA plaintiff may file civil action); *id.* § 302(2); 105 Stat. at 1088 (extending coverage of ADEA to congressional employees).

172. *Ellis*, 77 F.3d at 1008-09. The court recognized that the *Hazen Paper* Court refused to decide this issue and that the case is technically only a disparate treatment case, but nonetheless stated: "one cannot read that opinion without receiving the strong impression that the Supreme Court is suggesting that the ADEA does not encompass a disparate impact claim." *Id.* at 1009.

For a further discussion of the *Hazen Paper* opinion, see *supra* notes 117-28 and accompanying text.

173. *Ellis*, 77 F.3d at 1009 (citing Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 138-39 (6th Cir. 1995); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732-34 (3d Cir. 1995); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076-77 (7th Cir. 1994)). The court's assertion that *DiBiase* and *Lyon* "hold" that there is no disparate impact claim under the ADEA is questionable. For a further discussion of the *DiBiase* case, see *infra* notes 187-94 and accompanying text.


174. *Id.* Defining the class that is disparately impacted is difficult because a policy might have a positive effect on some members of the protected group (i.e. workers between ages 40 and 50) while it has a disparately adverse effect on other members of the protected group (i.e. workers over age 50). See Peter H. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27, 85-37 (1979) (discussing difficulties in applying disparate impact to age discrimination context).
dicates that the Seventh Circuit may have started a trend toward the conclusion that disparate impact is not available under the ADEA.\textsuperscript{175}

C. Mixed Signals from the Third Circuit

The availability of disparate impact liability in age discrimination cases brought in the Third Circuit is unclear.\textsuperscript{176} Third Circuit panels have affirmed, without opinion, district court rulings which have reached opposite results.\textsuperscript{177} While one circuit court judge has expressed disapproval of the extension of impact analysis to age cases, the circuit as a whole has not clearly ruled on the issue.\textsuperscript{178}

In Maidenbaum v. Bally's Park Place, Inc.,\textsuperscript{179} the United States District Court for the District of New Jersey held that disparate impact analysis is applicable in age discrimination cases.\textsuperscript{180} The court noted the contro-

\textsuperscript{175} For a discussion of the Parker decision, see supra notes 151-62 and accompanying text.


\textsuperscript{178} DiBiase, 48 F.3d at 732 (noting that “in the wake of Hazen Paper, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA”). Although Judge Greenberg wrote the court's opinion, the other two judges did not join in this section of the opinion. Id. at 731-32.

\textsuperscript{179} 870 F. Supp. 1254 (D.N.J. 1994).

\textsuperscript{180} Id. at 1259. In Maidenbaum, casino employees who had been terminated in a reduction in force brought age claims on both disparate impact and disparate treatment grounds. Id. at 1258. The casino modified a layoff system which had been based solely on seniority, so that employees who were licensed to deal more than one game were retained over more senior employees who were only licensed to deal one game. Id. at 1257. The plaintiffs were only licensed to deal one game and as a result, they were laid off. Id. Plaintiffs alleged that the casino’s modification of the existing seniority system had a disparate impact on older workers. Id. at 1258.
versy regarding the extension of disparate impact analysis to age cases after *Hazen Paper*. Nevertheless, relying on precedent from courts of appeals, district courts within the Third Circuit and the New Jersey Appellate Division, the court decided that disparate impact liability is cognizable under the ADEA.

In contrast, in *Martincic v. Urban Redevelopment Authority*, the United States District Court for the Western District of Pennsylvania ruled that disparate impact analysis is not available under the ADEA. The court reasoned that the disparate impact model is logically incompatible with the plaintiff’s burden of proving, under the ADEA, that age was a determining factor in the employment decision. Further, the court contended that Congress’s failure to sanction disparate impact in age cases—after it had sanctioned such claims in Title VII cases—“was not an oversight.”

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181. *Id.* at 1258-59. The court did not analyze the argument that disparate impact liability is logically inconsistent with the *Hazen Paper* holding, whereby the ADEA only proscribes decisions made on the basis of age and not decisions based on factors that correlate with age. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993). Instead, the court noted that Justice Kennedy’s concurrence “casts some doubt” on the applicability of disparate impact analysis in age cases. *Maidenbaum*, 870 F. Supp. at 1258.

182. *Maidenbaum*, at 1259. The court found that age discrimination claims under New Jersey’s Law Against Discrimination “are governed by the same standards and burden of proof structures applicable under the ADEA.” *Id.* at 1258 (citing *McKenna v. Pacific Rail Serv.*, 32 F.3d 820 (3d Cir. 1994)). The *Maidenbaum* court relied on several cases preceding *Hazen Paper* which allowed disparate impact claims. *Id.* at 1259. See *Cherchi v. Mobil Oil Corp.*, 693 F. Supp. 156, 165 (D.N.J.) aff’d without opinion, 865 F.2d 249 (3d Cir. 1988) (listing cases which allowed disparate impact); *Giammario v. Trenton Bd. of Educ.*, 497 A.2d 199, 202 (N.J. Super. Ct. App. Div. 1985) (affirming trial court’s application of disparate impact analysis).

183. 844 F. Supp. 1073 (W.D. Pa.), aff’d, 43 F.3d 1461 (3d Cir. 1994).

184. *Id.* at 1076-77. In *Martincic*, the plaintiff alleged that he was denied a promotion because of his age. *Id.* at 1074. The court’s opinion was in response to plaintiff’s motion in limine to admit a report by a statistical expert. *Id.* Therefore, the court’s ruling on the availability of disparate impact is dictum.

185. *Id.* at 1076-78. The court started from the premise that “to violate the ADEA the accused employer must have thought ‘I will discriminate against Doe because of Doe’s age.’” *Id.* at 1077. The court found that intent is a necessary element of an ADEA violation and “[d]isparate impact . . . requires no inquiry into the employer’s intent.” *Id.* The court raised an example under which an employer uses a promotion policy that is solely based on merit, but which results in disproportionate numbers of younger persons being promoted. *Id.* In this hypothetical, the plaintiff could make out a prima facie case of age discrimination even if age was not considered in the promotion decision. *Id.* The court stated that “[s]urely this cannot be age discrimination, at least not without Congress’s imprimatur.” *Id.*

186. *Id.* at 1078. The court found the failure to amend the ADEA to be “significant.” *Id.* at 1077. The court interpreted Congress’s silence as recognition “that disparate impact simply does not comport with the plaintiff’s burden of proof in ADEA cases.” *Id.* at 1078.
In DiBiase v. SmithKline Beecham Corp., Judge Greenberg agreed with the Martincic court, stating that "in the wake of [Hazen Paper], it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA." Judge Greenberg focused on the incompatibility of the Hazen Paper Court's interpretation of the ADEA and the disparate impact theory. He interpreted Hazen Paper as standing for the proposition that where an intent to discriminate is not proven, the policies behind the ADEA are not implicated and there can be no violation. Judge Greenberg approved of the Hazen Paper Court's focus on the congressional purpose behind the ADEA. He then distinguished the purposes underlying the ADEA and Title VII and found that, while the broad pur-
poses of the latter support disparate impact liability, the more limited purposes of the former do not support such liability. Judge Greenberg concluded that application of disparate impact analysis to age claims "could lead to results which Congress probably did not intend." The Greenberg opinion, which is in accord with the reasoning and conclusions of decisions from the Seventh Circuit and Tenth Circuit, is an indication that the Third Circuit is likely to join the trend toward rejecting disparate impact claims under the ADEA.

VI. Analysis

As stated above, a search of the text and legislative history of the ADEA does not clearly indicate whether disparate impact is available. Further, the RFOA defense is not a conclusive bar to disparate impact age claims. As a result, decisions in cases before Hazen Paper were split. The Hazen Paper decision, however, dictates the conclusion that disparate impact liability is not available under the ADEA.

192. DiBiase, 48 F.3d at 734. Judge Greenberg found that the rationale which supported the creation of the disparate impact theory in Griggs was the prohibition of policies, regardless of their neutral intent, which "froze" a discriminatory status quo. Id. In Griggs, "the critical fact was the link between the history of educational discrimination and the use of that discrimination as a means of presently disadvantaging African-Americans." Id. (quoting Hiatt v. Union Pac. R.R. Co., 859 F. Supp. 1416, 1436 (D. Wyo. 1994)). Judge Greenberg found that a doctrine based on these purposes is not easily transplanted into the ADEA, "the primary purpose of which is to prohibit employers" from acting upon stereotypes of the elderly. Id.

193. Id. Judge Greenberg referred to work schedules or decisions to eliminate medical insurance as examples of situations where an ADEA plaintiff, under a disparate impact theory, could force an employer to offer business justifications for its employment decisions. Id. at 734 n.21. According to Judge Greenberg, Congress probably did not intend such interference with business practices. Id. at 734.

194. Id. at 732-34. Judge Greenberg recognized that his opinion is nonbinding dicta:

I need not go so far as to say that disparate impact is never available under the ADEA. Rather, resolution of that issue must await another day.

I write this section to highlight my doubts and to say that, at any rate, disparate impact theory should not be applied as a matter of course.

Id. at 734. For a discussion of the analogous decisions from the Seventh and Tenth Circuits, see supra notes 151-75 and accompanying text.

195. For a discussion of the text of the ADEA, see supra notes 58-83 and accompanying text. For a discussion of the legislative history of the ADEA, see supra notes 40-57 and accompanying text.

196. For a discussion of the RFOA defense, see supra notes 71-83 and accompanying text.

197. For a discussion of the pre-Hazen Paper cases that considered whether disparate impact was available under the ADEA, see supra notes 97-116 and accompanying text.

198. For a discussion of the post-Hazen Paper cases which have rejected disparate impact, see supra notes 151-75 and accompanying text.
Analysis of the legislative history of the ADEA does not reveal whether Congress intended to provide for liability without proof of intent.\textsuperscript{199} The distinction in the Secretary of Labor's report between "arbitrary discrimination" and "other factors which adversely affect older workers" suggests that Congress may have only intended to prohibit disparate treatment.\textsuperscript{200} This conclusion, however, is weakened when it is considered in light of the fact that the Supreme Court had not established disparate impact liability at the time Congress passed the ADEA.\textsuperscript{201}

Congress's inclusion of the RFOA defense also does not provide a clear answer. The RFOA defense has been interpreted as precluding disparate impact analysis under the ADEA.\textsuperscript{202} The interpretation of the RFOA defense, however, as codifying the "business necessity" defense to disparate impact liability is equally plausible.\textsuperscript{203}

The strongest arguments for extending disparate impact analysis to the ADEA are based on the similarities between Title VII and the ADEA.\textsuperscript{204} Title VII was the impetus for the ADEA, and the substantive language of the ADEA was derived from Title VII.\textsuperscript{205} Title VII and the ADEA have similar, though not identical, purposes.\textsuperscript{206} Therefore, because disparate impact analysis is available under Title VII, it might be logical to extend it to the ADEA.\textsuperscript{207} This argument is greatly weakened, however, by Congress's 1991 amendments to Title VII and its failure to similarly amend the ADEA.\textsuperscript{208} Conversely, the language and legislative history of

\textsuperscript{199} For a discussion of the disparate impact theory, see supra notes 28-37 and accompanying text.

\textsuperscript{200} For a discussion of courts and commentators that have found that the legislative history of the ADEA indicates that Congress did not intend to impose disparate impact liability, see supra notes 51-52 and accompanying text.

\textsuperscript{201} See Kaminshine, supra note 14, at 290-91 (arguing that interpretation of Secretary's report as rejecting disparate impact is weakened by fact that report antedated Supreme Court's establishment of disparate impact in Griggs). For a discussion of the Supreme Court's opinion in Griggs, see supra notes 32-34 and accompanying text.

\textsuperscript{202} For a general discussion of the RFOA defense, see supra notes 71-83 and accompanying text.

\textsuperscript{203} See EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1080 (7th Cir. 1994) (Cudahy, J., dissenting) (arguing that RFOA defense was meant to codify business necessity defense for disparate impact claims). For a discussion of the dissenting opinion in Parker, see supra notes 161-62 and accompanying text.

\textsuperscript{204} For a discussion of the parallels between the ADEA and Title VII, see supra notes 58-70 and accompanying text.

\textsuperscript{205} For a discussion of the language of the ADEA and its similarities to Title VII, see supra notes 58-70 and accompanying text.

\textsuperscript{206} For a discussion of the purposes of Title VII and the ADEA, see supra note 68 and accompanying text.

\textsuperscript{207} For a discussion of the courts and commentators which have extended the disparate impact theory to ADEA claims on this reasoning, see supra note 69 and accompanying text.

the ADEA cannot be viewed as a conclusive bar to disparate impact analysis under the statute.

The *Hazen Paper* decision does, however, preclude disparate impact analysis under the ADEA.209 The *Hazen Paper* Court held that only decisions based on age are prohibited by the ADEA.210 Decisions based on any other factor, regardless of the correlation between that factor and age, do not involve "inaccurate and stigmatizing stereotypes" and thus do not violate the ADEA.211 By definition, disparate impact analysis involves policies that are facially neutral.212 The *Hazen Paper* Court held that such policies do not violate the ADEA.213 Any other argument is unavailing.

The reasoning of the *Parker* and *Ellis* courts on this point is sound.214 Both courts rely on the legislative history, statutory language and the differences between Title VII and the ADEA to support the rejection of disparate impact.215 Their conclusions, however, could have been adequately supported by reference to *Hazen Paper* and the logical inconsistency of its holding and the disparate impact theory.

VII. Recommendation

The scope of the ADEA's protection for older workers is seriously limited by the decisions in *Hazen Paper, Parker* and *Ellis*.216 Judge Cudahy's dissenting opinion in *Parker* correctly points out that the result of this approach is that a plaintiff is required to produce "smoking gun" evidence of impact. For a discussion of the amendment of Title VII, see supra notes 89-95 and accompanying text.

209. See Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). While the court stated: "we have never decided whether a disparate impact theory of liability is available under the ADEA, and we do not do so here," the Court's reasoning precludes disparate impact claims. Id. at 610.

210. For a detailed discussion of the holding in *Hazen Paper*, see supra notes 117-28 and accompanying text.


212. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (imposing liability because of disparate impact of employer's facially neutral policy). If an employer's policy overfly discriminated on the basis of age, the employer would be liable for disparate treatment under the ADEA. See generally *Hazen Paper*, 507 U.S. at 609-10. For a general discussion of the disparate impact and disparate treatment doctrines, see supra notes 28-37 and accompanying text.


214. For a discussion of the Seventh Circuit's decision in *Parker*, see supra notes 151-62 and accompanying text. For a discussion of the Tenth Circuit's decision in *Ellis*, see supra notes 163-75 and accompanying text.

215. See *Ellis* v. United Airlines, Inc., 73 F.3d 999, 1007-08 (finding that text and legislative history of ADEA indicate that Congress did not provide for disparate impact liability); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994) (same).

216. *Hazen Paper*, 507 U.S. at 604 (holding that employer's decision motivated by factors other than age, which have high correlation with age, does not violate ADEA); *Ellis*, 73 F.3d at 999 (rejecting use of disparate impact analysis under ADEA); *Parker*, 41 F.3d at 1073 (same).
When these opinions are considered in light of the Supreme Court's opinion in St. Mary's Honor Center v. Hicks, which requires that a disparate treatment plaintiff show not only that an employer's proffered reason for its employment action is false, but also that the true reason is discriminatory, the deck is heavily stacked against an age discrimination plaintiff. When one considers the plight of older workers in the current economy, it would appear that there is a need for greater, not less, protection. These shortcomings of the statutory scheme, however, should be addressed by Congress, not by the courts.

When a facially neutral employment policy disadvantages older workers as a group, there is at least a possibility that the employer unfairly targeted older workers. If disparate impact is not a part of the ADEA, a plaintiff cannot challenge the employer's policy without evidence of discriminatory intent. Such evidence is extremely rare. If a plaintiff can identify an employment policy and establish that the policy had a statistically disproportionate effect on older workers, disparate impact analysis requires the employer to justify its challenged policy as job-related and consistent with business necessity.

While the cost of proving that neutral policies are "job-related and consistent with business necessity" is admittedly high, this is a fair way of striking a balance between the competing interests of employers and employees. The business necessity defense is an effective protection against the improper imposition of liability in Title VII disparate impact claims. Congress has already decided that such costs are justified in the Title VII context because the costs are outweighed by the benefits of more effective

217. Parker, 41 F.3d at 1080 (Cudahy, J., dissenting). Courts have long recognized that direct evidence of discriminatory motive or animus is often not available. See Robert J. Gregory, There Is Life in that Old (I Mean, More "Senior") Dog Yet: The Age-Proxy Theory After Hazen Paper Co. v. Biggins, 11 Hofstra Lab. L.J. 391, 423 & n.171 (1994) (finding that "it is difficult to prove employer motivation" and listing cases that have recognized this difficulty).


219. Id. at 507-08. The Court adopted the "pretext-plus" approach to disparate treatment claims, under which a plaintiff must show not only that an employer's reasons for an adverse employment decision are pretextual, but also that the real reasons are discriminatory. Id. For a discussion of Hicks and the burdens of proof in a disparate treatment case, see supra note 30.

220. For a discussion of the massive numbers of layoffs in recent years and the particular effect of those layoffs on workers who are over forty years-old, see supra note 13 and accompanying text.

221. See Sloan, supra note 94, at 509 (asserting that dispute over availability of disparate impact "is fundamentally a policy dispute about the definition of age discrimination and the appropriate scope of the ADEA"); see also Pontz, supra note 16, at 271 (concluding that congressional action would be required to make disparate impact analysis available in age claims); Gilbert M. Roman, Courts Tossing Out More 'Disparate Impact' Claims, Rocky Mountain News, Feb. 11, 1996, at 3 (reporting on recent cases which rejected use of disparate impact theory in age cases and urging readers to write to their congressional representatives).
enforcement of antidiscrimination laws. This judgment should also apply in the ADEA context.

Congress should amend the ADEA to specifically provide for disparate impact analysis, just as it amended Title VII.\textsuperscript{222} The amendment should set out the burdens of proof and applicable defenses for an ADEA disparate impact claim. Such an amendment would provide older workers with greater protection from discriminatory age-based policies.

From the employer's perspective, the "business necessity" defense provides significant protection against unwarranted liability. Authorization of disparate impact analysis under the ADEA would not create a significant risk of imposition of liability in situations where an employer's policies are based on legitimate, nondiscriminatory business reasons. This risk is certainly no greater in the ADEA context than it is in the Title VII context. From the employee's perspective, older employees need all the protection they can get.

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\textsuperscript{222} See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (amending Title VII to provide for disparate impact). An amendment to the ADEA would be based on this language.