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ADEA Disparate Impact in the Sixth Circuit

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I. INTRODUCTION

There are two basic types of employment discrimination cases. The first, disparate treatment, involves intentional discrimination.[1] The second, disparate impact, involves unintentional discrimination and occurs when an employer makes an employment decision based upon a facially neutral criterion, such as education or physical strength, that has the effect of disproportionately excluding applicants based on a protected criterion, such as race or sex.[2]

Since its enactment in 1967, the Age Discrimination in Employment Act ("ADEA")[3] has provided federal protection against age discrimination in the workplace.[4] Modeled after and almost identical to Title VII of the Civil Rights Act of 1964 ("Title VII"),[5] the ADEA, generally, has been interpreted similarly to Title VII.[6] For this reason, and until relatively recently, courts assumed that, like disparate treatment,[7] disparate impact was applicable to ADEA cases just as it is to Title VII cases.[8]

In the 1993 decision of *Hazen Paper Co. v. Biggins*,[9] Justice Kennedy, in a concurrence, questioned the continued viability of the disparate impact cause of action in ADEA cases.[10] The majority left the issue undecided.[11] Since then, the circuits have split on the continued viability of disparate impact in ADEA cases.[12] Some circuits have continued to allow disparate impact claims under the ADEA,[13] while others have held that the ADEA precludes the use of a disparate impact cause of action.[14] Other circuits, including the Sixth Circuit, have remained undecided.[15] Some of these

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1. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).
2. *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
3. 29 U.S.C. §§ 621-634 (1994).
4. *Id.*
5. 42 U.S.C. §§ 2000e-2000e17 (1994).
6. Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980) (holding that disparate impact is a substantive theory warranting the same treatment under the ADEA as under Title VII).
7. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (stating that the language of 29 U.S.C. § 623(a) clearly makes the disparate treatment theory available under the ADEA).
8. *See infra* notes 57-75 and accompanying text.
9. 507 U.S. 604 (1993).
10. *Id.* at 618 (Kennedy, J., concurring).
11. *Id.* at 610.
12. *See infra* notes 83-157 and accompanying text.
13. *See, e.g.*, Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999) (distinguishing *Hazen Paper* and allowing for a disparate impact claim).
14. *See, e.g.*, EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994).
15. *See* Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135 (6th Cir. 1995); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995).

undecided circuits have made comments in dicta supporting the continued use of disparate impact, while others have forecasted its ADEA demise.[16] Faced with no clear guidance from the Supreme Court[17] and the mix of opinions of the various appellate courts,[18] lower courts and legal commentators continue to struggle with the issue.[19]

In light of the need for a definitive answer, this article discusses the continued viability of a disparate impact cause of action under the ADEA. Part II examines the background of disparate impact claims, including their availability under Title VII, under the ADEA, and in light of the Supreme Court's *Hazen Paper* decision. Part III describes how the circuits are divided three ways on the issue: some recognize ADEA disparate impact claims, some do not, and some have not yet ruled on the issue. This Part also discusses in detail the treatment of the issue by the Sixth Circuit, which is one of the circuits that has not yet ruled on the issue.

Part IV evaluates the various arguments both for and against recognizing a disparate impact theory under the ADEA. These debates tend to focus on the statutory language, the legislative history, subsequent legislative action, as well as policy considerations. This section concludes by arguing that

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16. *Compare* EEOC v. General Dynamics Corp., 999 F.2d 113 (5th Cir. 1993) (implying ADEA disparate impact is available), *with Lyon*, 53 F.3d 135 (implying ADEA disparate impact may no longer be available).

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

18. *See infra* Section III (reviewing the current circuit split).

19. *See, e.g.*, Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093 (1993); Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071 (1998); Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625 (1996); Jan W. Henkel, *The Age Discrimination in Employment Act: Disparate Impact Analysis and the Availability of Liquidated Damages After* Hazen Paper Co. v. Biggins, 47 SYRACUSE L. REV. 1183 (1997); Marla Ziegler, Comment, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984); Roberta Sue Alexander, Comment, *The Future of Disparate Impact Analysis for Age Discrimination in a Post-*Hazen Paper *World*, 25 U. DAYTON L. REV. 75 (1999); Miles F. Archer, Note, Mullin v. Raytheon Company: *The Threatened Vitality of Disparate Impact Under the ADEA*, 52 ME. L. REV. 149 (2000); Brett Ira Johnson, Note, *Six of One, Half-Dozen of Another:* Mullin v. Raytheon Co. *as a Representative of Federal Circuit Courts Erroneously Distinguishing the ADEA from Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303 (2000); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982); 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); Jonas Saunders, Note, *Age Discrimination: Disparate Impact Under the ADEA After* Hazen Paper Co. v. Biggins: *Arguments in Favor*, 73 U. DET. MERCY L. REV. 591 (1996); Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507; Brendan Sweeney, Comment, *"Downsizing" the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527 (1996).

allowing for a disparate impact theory under the ADEA is the best choice for the courts, the legislature, society, and most of all, for workers over the age of forty.[20]

II. BACKGROUND

In examining the possible end to ADEA disparate impact claims, it is first necessary to view their beginning. Part II starts with a brief discussion of the reasons leading to the enactment of the ADEA. This part next describes the two types of discrimination actions, disparate treatment and disparate impact. Each action is examined separately, focusing on proof requirements and availability under the ADEA and Title VII. This section concludes by discussing the *Hazen Paper* decision and its impact on the various circuits.

A. The ADEA

Title VII, enacted in 1964, contained a section requiring the Secretary of Labor to complete a detailed study surrounding the problem of age discrimination and its consequential effects.[21] The Secretary of Labor at the time, W. Willard Wirtz, submitted his report to Congress one year later.[22] The Report found widespread age discrimination and concluded that age discrimination has severe consequences for the individuals affected and the nation.[23] In his report, Wirtz described arbitrary discrimination based on mistaken assumptions about the effect of age on one's ability to do a job.[24] Moreover, he discovered that some of the employer programs and practices, which were intended to benefit older workers, actually served to disadvantage them.[25]

After receiving the Report, Congress held subsequent hearings to evaluate the information and discuss its ramifications.[26] After confirming the Report's findings,[27] and based upon the concerns raised in it, Congress passed

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20. The ADEA limits the protected class to those workers over 40. 29 U.S.C. § 631 (1994).

21. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964).

22. 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 (June 1965) [hereinafter THE REPORT].

23. *Id.* at 97-104.

24. *Id.* at 14-17.

25. *Id.*

26. *See* EEOC v. Wyoming, 460 U.S. 226, 230 (1983).

27. *Id.* at 230-31; *see also* 29 U.S.C. § 621(a)(1)-(4) (1994) which states:

> (a) 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, and especially to regain employment

the ADEA in 1967.[28] The purpose of the ADEA was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[29]

The ADEA, essentially using the exact wording of Title VII,[30] prohibits employers from failing or refusing "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 age."[31] Likewise, the ADEA makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age[.]"[32]

Congress did not make the consideration of age an absolute prohibition. Rather, Congress provided employers with four statutory exceptions to liability.[33] The first exception is "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business,"[34] usually referred to as "BFOQ." The second exception, "where the differentiation is based on reasonable factors other than age,"[35] is known also

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

Id.

28. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1994)).

29. 29 U.S.C. § 621(b) (1994).

30. Title VII provides that it shall be an unlawful employment practice "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or 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." 42 U.S.C. § 2000e- 2(a)(1)-(2) (1994).

31. 29 U.S.C. § 623(a)(1) (1994).

32. *Id.* § 623(a)(2).

33. *Id.* § 623(f).

34. *Id.* § 623(f)(1).

35. *Id.*

as "RFOA." The third exception is "to observe the terms of a bona fide seniority system [or] to observe the terms of a bona fide employee benefit plan" when such plans are not used to "evade the purposes of the Chapter" and not used as a justification for not hiring an older worker.[36] The final exception is "for good cause."[37] These exceptions were intended to provide employers with some independent flexibility in managing their businesses, while still allowing workplace protection from age discrimination.

B. Discrimination Claims

Understanding the significance of the debate over disparate impact and the ADEA requires an understanding of the two types of discrimination claims permitted under Title VII. This section discusses both disparate treatment and disparate impact, focusing on the allocation of the burdens of proof.

1. Disparate Treatment

A disparate treatment[38] claim, clearly available under both Title VII and the ADEA,[39] is the most common and easily understood type of discrimination action.[40] This form of discrimination occurs when an employer discriminates against an individual because of the individual's age or other protected characteristic.[41] When an individual alleges disparate treatment, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred."[42]

There are two basic ways to prove disparate treatment. First, a plaintiff may prove the employer's decision was discriminatory and based upon age by

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36. 29 U.S.C. § 623(f)(2)(A)-(B).

37. *Id.* § 623(f)(3).

38. For recent articles discussing this procedural framework, see Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks, *Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 187-92 (1997); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 703-11 (1995); Kevin W. Williams, Note, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans with Disabilities Act*, 18 BERKELEY J. EMP. & LAB. L. 98, 103-04 (1997).

39. Alexander v. Local 496 Laborers' Int'l Union of N. Am., 177 F.3d 394 (6th Cir. 1998) (disparate treatment theory available under Title VII); Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (disparate treatment theory available under ADEA).

40. *Hazen Paper Co.*, 507 U.S. at 609 (quoting International Bd. of Teamsters v. United States, 431 U.S. 324, 335-36 & n.15 (1977)).

41. *Id.*

42. *Id.*

introducing direct evidence, such as a facially discriminatory policy.[43] However, this type of evidence is rare because employers are not likely to be so careless as to leave behind strong evidence of discrimination.[44] Thus, when a policy is not explicitly discriminatory, a plaintiff must rely on the second method of proving disparate treatment, the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*.[45] To establish a prima facie case under this framework, a plaintiff must introduce evidence showing membership in the protected age group (40 or older), that an adverse employment action was suffered, that the plaintiff is qualified for the position lost or not gained, and that her replacement is substantially younger.[46] Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to present a "legitimate, nondiscriminatory reason" for the challenged action.[47] If the employer meets this burden, thereby rebutting the presumption of discrimination created by the prima facie case, the burden shifts back to the plaintiff to show by a preponderance of the evidence that the employer's reason was a mere pretext for age discrimination.[48]

2. Disparate Impact

The disparate impact theory is another means by which an individual can prove discrimination. A disparate impact claim involves a facially neutral policy that disproportionately affects one or more protected groups, which is not justified by a business necessity.[49] In contrast to disparate treatment, disparate impact does not require a discriminatory motive.[50]

To prove a disparate impact claim, an individual must make a prima facie case. A prima facie case of disparate impact consists of two parts: first, the

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43. *See, e.g.*, TransWorld Airlines, Inc. v. Thurston, 469 U.S.111 (1985) (illustrating intentional discrimination by direct evidence). For general discussions of this branch of disparate treatment cases, see Steven M. Tindall, Note, *Do As She Does, Not As She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in* Price Waterhouse v. Hopkins, 17 BERKELEY J. EMP. & LAB. L. 332, 367 (1996); Joseph J. Ward, Note, *A Call for* Price Waterhouse II: *The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627, 629 (1997); Michael A. Zubrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STAN. L. REV. 959, 986 (1994).

44. Anna Laurie Bryant & Richard A. Bales, *Using the Same Actor "Inference" in Employment Discrimination Cases*, 1999 UTAH L. REV. 255, 259.

45. 411 U.S. 792 (1973).

46. Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1081 (6th Cir. 1994).

47. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

48. *Id.* at 804; *see also* Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097 (2000) (explaining that plaintiff's prima facie case, together with sufficient evidence for the factfinder to reject the employer's proffered explanation, may be sufficient to sustain a finding of discrimination).

49. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

50. *Id.*; *see also* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

identification of the harmful practice, and second, by making a statistical showing which demonstrates that the practice in question causes a substantial disparity between the protected and non-protected groups.[51] Regarding the first part of the prima facie case, the plaintiff must identify a specific employment practice that causes the disparity, rather than merely rely on the bottom line numbers of the employer's workforce.[52]

Once the plaintiff has made a prima facie case by showing an adverse affect was suffered because of membership in a protected group,[53] the defendant must then justify the practice by showing that it is job related or a business necessity.[54] If the defendant makes this showing, the plaintiff may still prevail by showing that the employer's reason was a pretext[55] or that there is another practice, which is less discriminatory and still effectively serves the employer's interests.[56] Thus, the requirements for the plaintiff's prima facie case and the defendant's burden thereafter demonstrates one difference between the disparate treatment and disparate impact theories.

Similarly, the historical development of the disparate impact theory highlights other differences between disparate treatment and disparate impact. While both theories are explicitly recognized in Title VII,[57] only the disparate treatment analysis is expressly available in the ADEA context.[58] The disparate impact theory was first recognized by the Supreme Court in *Griggs v. Duke Power Co.*[59] There, Griggs alleged racial discrimination when his employer instituted a policy requiring high school diplomas and the passing of general intelligence tests as an employment condition for all but the lowest level jobs.[60] Expressly adopting a disparate impact theory under Title VII,[61] the Supreme Court noted that the objective of Congress in passing Title VII was the achievement of equal employment opportunities and the removal of

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51. Smith v. Xerox Corp., 196 F.3d 358, 364-65 (2d Cir. 1999) (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)).

52. *Watson*, 487 U.S. at 994.

53. *Id.*

54. *Griggs*, 401 U.S. at 431 (business necessity is touchstone).

55. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 435 (1975).

56. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988) (plurality opinion) (stating factors like burden, cost, and effectiveness of the suggested alternative are relevant to assessing the alternative practice).

57. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (disparate treatment theory available under ADEA); *see* Alexander v. Local 496 Laborers' Int'l Union of N. Am., 177 F.3d 394, 402-05 (6th Cir. 1999) (disparate treatment theory available under Title VII).

58. *Hazen Paper Co.*, 507 U.S. at 610 (stating that the Court has not decided whether the disparate impact theory is available under the ADEA).

59. 401 U.S. 424 (1971).

60. *Id.* at 427-28.

61. *Id.* at 436.

barriers that operate to favor certain groups.[62] Chief Justice Burger further stated that "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 classifications*."[63] Thus, the Supreme Court, looking to the policies behind Title VII, adopted the disparate impact theory of discrimination.

After *Griggs*, the Court continued to expand the contours of the disparate impact doctrine.[64] However, in 1989, the Court's decision in *Wards Cove Packing Co. Inc. v. Atonio*[65] arguably shifted the previous course. There, the Court lowered the employer's burden set forth in *Griggs*, by requiring the employer to bear only the burden of *producing* (rather than proving) some evidence of a business *justification* (rather than necessity) for the challenged employment practice.[66] Congress responded by amending Title VII with the Civil Rights Act of 1991.[67] This Act, which was primarily aimed at restoring the *Griggs* business necessity standard,[68] again placed the burden on the employer "to demonstrate that the challenged practice is job related . . . and consistent with business necessity[.]"[69] Moreover, the Act specifically codified the availability of a disparate impact cause of action under Title VII.[70]

Like the development of Title VII disparate impact, ADEA disparate impact has developed along a less than steady course. Courts initially assumed that the disparate impact cause of action was equally applicable to the ADEA, and allowed such claims without discussion.[71] For example, in

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62. *Id.* at 429-30.

63. *Id.* at 431 (emphasis added).

64. For example, in *Connecticut v. Teal*, 457 U.S. 440, 453 (1982) the Court held that Title VII liability would result where a specific aspect of an employment practice causes a disparity for a protected group, even if the whole policy produces no disparate impact. Likewise, in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) the Court held that disparate impact is applicable to both subjective and objective hiring practices.

65. 490 U.S. 642 (1989).

66. *Id.* at 659. For those circuits still allowing a disparate impact cause of action, whether the *Wards Cove* business necessity standard or the 1991 Title VII amendment's reformulation applies to ADEA disparate impact is an open question. *See* Smith v. City of Des Moines, 99 F.3d 1466, 1471 (8th Cir. 1996) (assuming without deciding that business necessity standard is the same under ADEA and post-1991 Title VII). *Cf.* Johnson, *supra* note 19, at 307 n.18 ("*Wards Cove* should have either had no effect upon the ADEA business necessity defense, leaving no need for the 1991 amendments to restore it; or if it did apply to the ADEA, the 1991 Title VII amendments should have restored the ADEA business necessity defense to the pre-*Wards Cove* standard.").

67. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in various sections of Title 42).

68. *See* 42 U.S.C. § 2000e-2(k) (1994) (detailing the burdens of proof needed in Title VII disparate impact).

69. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

70. *Id.* § 2000e-2(k)(1)(B)(i).

71. *See, e.g.*, Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 690 (8th Cir. 1983); Holt v.

Geller v. Markham,[72] the Second Circuit assumed that the disparate impact coverage was identical under Title VII and the ADEA.[73] Citing *Griggs* and other Title VII cases, the *Geller* court concluded that disparate impact was a legitimate cause of action under the ADEA.[74] However, dissenting from the Supreme Court's denial of certiorari in that case, Chief Justice Rehnquist stated that he was not sure that the ADEA allowed for a disparate impact claim.[75] That statement spread the earliest seeds of doubt surrounding the availability of an ADEA disparate impact claim.

C. Hazen Paper Co. v. Biggins

Prior to *Hazen Paper*, nearly every circuit confronted with the issue continued to allow disparate impact claims under the ADEA, notwithstanding Chief Justice Rehnquist's comment in *Geller*.[76] Since *Hazen Paper*, however, the circuits have been divided on the issue. The *Hazen Paper* case involved the firing of Walter Biggins, age 62, allegedly to prevent his pension from vesting.[77] The Supreme Court held that an employer's interference with the vesting of pension benefits, without more, did not violate the ADEA.[78] Moreover, the Court stated that there is no ADEA liability when an employer's decisions are motivated by reasons other than age, even when those reasons correlate with age.[79] Specifically, the Court stated that a decision based on years of service is not necessarily age-based because age and years of service are analytically distinct.[80]

Although this case involved only a disparate treatment cause of action, the Court noted in dicta that it has "never decided whether a disparate impact theory of liability is available under the ADEA[.]"[81] Thinking this statement did not go far enough, a concurring opinion, written by Justice Kennedy and joined by Chief Justice Rehnquist and Justice Thomas, stated that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII . . . . [A]nd there are

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Gamewell Corp., 797 F.2d 36 (1st Cir. 1986); Monroe v. United Air Lines, Inc., 736 F.2d 394 (7th Cir. 1984).

72. 635 F.2d 1027 (2d Cir. 1980).

73. *Id.* at 1032.

74. *Id.*

75. *See* Markham v. Geller, 451 U.S. 945, 947 (1981) (Rehnquist, J., dissenting).

76. *See, e.g.*, *Monroe*, 736 F.2d at 407 & n.4; EEOC v. Borden's Inc., 724 F.2d 1390, 1394 (9th Cir. 1984); Allison v. Western Union Tel. Co., 680 F.2d 1318, 1323 (11th Cir. 1982).

77. Hazen Paper Co. v. Biggins, 507 U.S. 604, 606-07 (1993).

78. *Id.* at 612.

79. *Id.* at 611.

80. *Id.*

81. *Id.* at 610.

substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[82] These hints of discontent gave way to a full debate about disparate impact liability under the ADEA. Currently, some circuits think *Hazen Paper* is distinguishable, while others see it as a signal that the Supreme Court eventually will rule that disparate impact is inapplicable for claims arising under the ADEA.

III. THE CIRCUIT COURT SPLIT

The circuits currently are split over the issue of disparate impact availability under the ADEA after *Hazen Paper*.[83] This Part, focusing on post-*Hazen Paper* decisions, begins by examining the circuits that have held that disparate impact is still viable under the ADEA. Next, this Part examines the circuits that have rejected the disparate impact theory in ADEA cases. Finally, this Part considers the circuits that have raised, but not decided, the issue.

A. Circuits Recognizing an ADEA Disparate Impact Claim

Several circuits have expressly adopted a disparate impact theory for age discrimination under the ADEA. Unfortunately, most courts that have adopted the theory have done so with little analysis of the arguments favoring such a claim.[84]

One circuit recognizing ADEA disparate impact is the Second Circuit. As noted above, *Geller v. Markham* is a Second Circuit case that found disparate impact a viable cause of action under the ADEA. Relying on this precedent, in *Smith v. Xerox Corp.*,[85] the Second Circuit again held that disparate impact claims are appropriate under the ADEA.[86] While acknowledging that the availability of disparate impact is far from settled among the other circuits,[87] the court held that it "generally assesses claims brought under the ADEA identically to those brought pursuant to Title VII, including disparate impact claims."[88] In *Xerox*, the plaintiffs claimed that the decision-making process used to implement Xerox's involuntary reduction in

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82. Hazen Paper Co. v. Biggins, 507 U.S. 604, 618 (1993) (Kennedy, J., concurring).

83. *See, e.g.*, Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999) (distinguishing *Hazen Paper* and allowing for a disparate impact claim); EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994) (implying disparate impact not available under ADEA); *see also infra* notes 79-117 and accompanying text.

84. *See, e.g.*, Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996) (assuming, without deciding, that disparate impact analysis applies to age discrimination claims).

85. 196 F.3d 358 (2d Cir. 1999).

86. *Id.* at 367.

87. *Id.* at 367 n.6.

88. *Id.* at 367.

force had a disparate impact on older workers.[89] The court distinguished *Hazen Paper* on the grounds that, although the *Hazen Paper* decision allows an employer to consider certain factors that correlate with age, in this case, "Xerox [did] not purport to have relied on any such factors in making its decisions[.]"[90] Thus, the Second Circuit is one that continues to recognize disparate impact claims under the ADEA.

The Eighth Circuit also appears to recognize the availability of an ADEA disparate impact cause of action. In cases decided before *Hazen Paper*, the Eighth Circuit allowed disparate impact as a theory for age discrimination, assuming that the coverage under the ADEA was identical to that of Title VII.[91] The issue arose again in the post-*Hazen* case of *Smith v. City of Des Moines*.[92] There, Smith, age 55, alleged that a fire department's fitness tests to measure an individual's ability to use oxygen efficiently had a disparate impact on older firefighters.[93] The court stated that even if *Hazen Paper* cast doubt on the validity of prior circuit law, the previous circuit decision in *Houghton v. SIPCO, Inc.*,[94] which also post-dated *Hazen* and allowed ADEA disparate impact, represented the law of the circuit.[95] As such, the court in *Smith*, allowed the plaintiff to bring a disparate impact claim.

Relying on this precedent, the Eighth Circuit again recognized ADEA disparate impact in *Lewis v. Aerospace Community Credit Union*.[96] Though holding that the plaintiff failed to make a prima facie case, the court stated in dicta that the Eighth "[C]ircuit continues to recognize the viability of . . . [ADEA disparate impact] claims."[97] In *EEOC v. McDonnell Douglas Corp.*,[98] the court, citing *Smith* and *Lewis*, stated that "the law of this circuit is that disparate-impact claims are cognizable under the ADEA."[99] Although the court ultimately held that the plaintiffs did not make out a sufficient case, once again the Eighth Circuit panel considered the disparate impact issue resolved by the *Smith* and *Lewis* cases.

A month later, however, a different Eighth Circuit panel in *Allen v. Entergy Corp., Inc.*,[100] stated that the Eighth Circuit had not resolved the

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89. *Id.* at 363 & n.2.

90. Smith v. Xerox Corp., 196 F.3d 358, 367 n.5 (2d Cir. 1999).

91. *See* Abbott v. Federal Forge, Inc., 912 F.2d 867, 872 (6th Cir. 1990) (maintaining that disparate impact theory of age discrimination may be possible).

92. 99 F.3d 1466 (8th Cir. 1996).

93. *Id.* at 1468.

94. 38 F.3d 953 (8th Cir. 1994).

95. Smith v. City of Des Moines, 99 F.3d 1466, 1469-70 (8th Cir. 1996).

96. 114 F.3d 745 (8th Cir. 1997).

97. *Id.* at 750.

98. 191 F.3d 948 (8th Cir. 1999).

99. *Id.* at 950.

100. 193 F.3d 1010 (8th Cir. 1999).

ADEA disparate impact issue.[101] In ruling for the defendant, the court noted that the Eighth Circuit "has not expressly analyzed the application of the disparate impact theory to ADEA cases since *Hazen Paper* was decided."[102] As support for this conclusion, the court declared that the *Smith* and *Lewis* cases incorrectly relied on three prior opinions, two of which "pre-dated *Hazen Paper* and in the third case, in which [the] . . . opinion post-date[d] *Hazen Paper*, the jury verdict was rendered more than one year prior to *Hazen* . . . [and] makes no mention of the *Hazen Paper* analysis."[103] Thus, though the issue does not appear entirely settled in the Eighth Circuit, the weight of authority appears to support the continued viability of the disparate impact cause of action in ADEA cases.

The Ninth Circuit, like the Second, unambiguously permits claims to be brought under an ADEA disparate impact theory. For example, in *EEOC v. Local 350, Plumbers & Pipefitters,*[104] the EEOC challenged a hiring policy that adversely affected only retirees.[105] In reversing the district court's award of summary judgment for Local 350, the court held that "in this circuit, a plaintiff may challenge age discrimination under a disparate impact analysis."[106] Further, the court stated that there was "no conflict between *Hazen* and . . . [the] decision in this case."[107] Thus, this court expressly reaffirmed ADEA disparate impact after *Hazen Paper*, albeit with little analysis of the issue.

Similarly, the Ninth Circuit case of *Arnett v. California Public Employees Retirement System*[108] was a class action challenging the calculation of disability benefits under the California Public Employees Retirement System ("CPERS").[109] The plaintiffs all were hired at age 40 or later and were retired due to industrial disabilities.[110] Under CPERS, disability benefits were calculated using the employee's final compensation and years of potential service.[111] Since the calculation of the potential service years was entirely based upon the employee's age at hire,[112] the court found that the plaintiffs

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101. *Id.* at 1015 n.5.
102. *Id.*
103. *Id.*
104. 998 F.2d 641 (9th Cir. 1992).
105. *Id.* at 643.
106. *Id.* at 648 n.2.
107. *Id.*
108. 179 F.3d 690 (9th Cir. 1999).
109. *Id.* at 692.
110. *Id.*
111. *Id.* at 693.
112. *Id.* at 694. This case involves a different issue than the one presented in *Hazen Paper* which dealt with actual years of service. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993). Here, "[the] disability retirement benefits [were limited] to the *lesser* of 50% or 2% *x* (55 - age at hire)." Arnett v. Cal.

had adequately stated a disparate impact claim.[113] Noting that the issue remains unresolved among the circuits, the court followed the precedent established by *Local 350*, and it reaffirmed the viability of disparate impact.[114] Thus, the Ninth Circuit, like the Second and, apparently, like the Eighth, permits plaintiffs to challenge age discrimination under a disparate impact analysis.

B. Circuits Not Recognizing an ADEA Disparate Impact Claim

On the other hand, an equal number of circuits have held that the ADEA precludes disparate impact liability. Recently, the First Circuit ruled against ADEA disparate impact in *Mullin v. Raytheon Co.*[115] In that case, Mullin contended that his demotion and subsequent pay cut violated the ADEA. However, after addressing the issue in detail, the court found that intentional discrimination is a prerequisite for ADEA liability.[116] After analyzing the statutory language, the *Hazen Paper* decision, the legislative history, and the Civil Rights Amendments of 1991, the Court concluded "that *Hazen Paper* foretells the future, [and] that Griggs is inapposite in the ADEA context[.]"[117] Thus, the First Circuit affirmed the district court's entry of summary judgment for Raytheon.

Similarly, in *Gehring v. Case Corp.*,[118] the Seventh Circuit held that disparate impact is a theory of age discrimination that is unavailable in that circuit.[119] However, the court offered little discussion of the issue, relying instead on circuit precedent that was less than clear.[120]

The Tenth Circuit has likewise rejected a disparate impact theory of age discrimination. In *Ellis v. United Airlines Inc.*,[121] the plaintiffs, two flight attendants, sued United Airlines after the company refused to hire them when they applied for positions after the bankruptcy of their former employer,

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Pub. Employee Retirement Sys., 179 F.3d 690, 693 (9th Cir. 1999).

113. *Arnett*, 179 F.3d at 697.

114. *Id.* at 696-97.

115. 164 F.3d 696, 704 (1st Cir. 1999).

116. *Id.* at 700.

117. *Id.* at 701.

118. 43 F.3d 340 (7th Cir. 1994).

119. *Id.* at 342.

120. The *Gehring* court cited *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994) and *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994), as support for the proposition that ADEA disparate impact is unavailable, but neither case definitively ruled on the issue of whether disparate impact was available under the ADEA in the Seventh Circuit. *Gehring*, 43 F.3d at 342. *See also Francis W. Parker Sch.*, 41 F.3d at 1078 (Cudahy, J., dissenting) (noting that the majority stopped short of announcing disparate impact is unavailable). Likewise, *Anderson* only involved disparate treatment.

121. 73 F.3d 999 (10th Cir. 1996).

Frontier Airlines.[122] The plaintiffs argued that United's age-neutral weight requirement disparately impacted older flight attendants because of their age.[123] However, the court interpreted the statutory text and congressional intent to preclude disparate impact under the ADEA.[124] The court gleaned further support for its holding from the legislative history, the statutory language, and the *Hazen Paper* decision.[125] Thus, with the recent addition of the First Circuit in *Mullin*, three circuits have definitively ruled that the ADEA precludes the use of a disparate impact theory of age discrimination.

C. Circuits Remaining Undecided

The remaining circuits are undecided on the issue of ADEA disparate impact liability. This section examines these undecided circuits and their various opinions about ADEA disparate impact availability. Specifically, the Sixth Circuit is examined as typical of the ongoing confusion.

1. In General

Although these courts have yet to definitively rule on the issue, many of them continue to comment in dicta about the validity of disparate impact claims in the future.[126] Other courts simply have not decided the issue.[127]

The Third Circuit decision in *DiBiase v. SmithKline Beecham Corp.*,[128] is an example of the need for a resolution of this issue. There, DiBiase, age 51, was laid off as part of the defendant's reduction in force.[129] DiBiase alleged that the company's policy of providing enhanced benefits only to those terminated employees who signed a waiver of all claims violated the ADEA.[130] While the judge writing the opinion expressed doubt as to whether ADEA disparate impact claims survive the *Hazen Paper* decision,[131] the other two judges specifically declined to join the disparate impact analysis or decide the issue.[132] Thus, within the Third Circuit, the ADEA disparate impact debate remains unresolved.

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122. *Id.* at 1000.

123. *Id.* at 1000-01.

124. *Id.* at 1007.

125. *Id.* at 1008-09.

126. *See, e.g.*, DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732 (3rd Cir. 1995). "[I]n the wake of *Hazen*, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA." *Id.*

127. *See, e.g.*, Turlington v. Atlanta Gas Light Co., 135 F.3d 1428 (11th Cir. 1998).

128. 48 F.3d 719 (3rd Cir. 1995).

129. *Id.* at 722.

130. *Id.* at 722-23.

131. *Id.*

132. *Id.* at 731-32 nn.16-17.

The issue remains undecided in other circuits as well.[133] To date, the Fourth Circuit has not decided whether ADEA disparate impact remains available. [134] The Fifth Circuit, in dicta, has intimated that disparate impact is no longer a viable cause of action under the ADEA.[135] The Eleventh Circuit also has not resolved the issue. In *Turlington v. Atlanta Gas Light Co.*,[136] the Eleventh Circuit ruled that the plaintiff's claim did not incorporate a disparate impact theory, and as such, there was no need to decide whether the ADEA permits such a claim.[137] Further, the court noted that "neither the Supreme Court nor this Circuit have expressly allowed disparate impact claims under the ADEA."[138] Thus, within these circuits, the law regarding ADEA disparate impact liability is simply unclear.

2. The Sixth Circuit

The Sixth Circuit's interpretation of this issue is another example of the confusion confronted by lower courts trying to decipher disparate impact precedent. In *Laugesen v. Anaconda Co.*,[139] the Sixth Circuit, in dicta, recognized as discrimination the "policies of companies pertaining, for example, to physical fitness, educational requirements or the like, which are differentiations based on factors other than age, but which can in fact have a disparate impact upon older employees."[140] Thus, prior to the *Hazen Paper* decision, the Sixth Circuit found the Title VII and ADEA coverage identical.

Abbott v. Federal Forge, Inc.,[141] is another pre-*Hazen Paper* case. Relying on *Laugesen*, the *Abbott* court again looked with favor on the ADEA disparate impact theory. The plaintiffs, Abbott and 35 other employees, all age 40 or older, claimed that the defendant's moratorium against rehiring any former employees who demanded seniority pension benefits upon rehire disparately impacted older employees because the affected workers included

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133. *See, e.g.*, Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996) (assuming without deciding that a disparate impact claim is available under the ADEA).

134. *See* Jenkins v. Hallmark Cards, Inc., No. 94-1092, 94-1268, 94-169, 1995 WL 8016 (4th Cir. Jan. 10, 1995).

135. *See, e.g.*, Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) (DeMoss, J., concurring in part and dissenting in part). "*Hazen Paper* indicates that [a] disparate impact theory is not available under [the] ADEA." *Id.* at 1004. *But see* EEOC v. General Dynamics Corp., 999 F.2d 113, 114 (5th Cir. 1993) (assuming without deciding that the ADEA permits disparate impact claims).

136. 135 F.3d 1428 (11th Cir. 1998).

137. *Id.* at 1436 n.17.

138. *Id.*

139. 510 F.2d 307 (6th Cir. 1975).

140. *Id.* at 315.

141. 912 F.2d 867 (6th Cir. 1990).

a higher percentage of those over 40.[142] Although the court held that the plaintiffs here did not make out a prima facie case, in so doing, the court implicitly recognized the availability of an ADEA disparate impact claim.[143]

Three years after *Abbott*, the Supreme Court decided *Hazen Paper*. Two years after *Hazen Paper*, the same judge that authored the *Abbot* opinion authored *Lyon v. Ohio Education Ass'n & Professional Staff Union*.[144] In *Lyon*, the court sowed some doubt as to the continued validity of ADEA disparate impact claims in the Sixth Circuit. Although *Lyon* was a disparate treatment case, in explaining the plaintiff's mistaken attempt to infer discriminatory animus based on a disparate effect,[145] the court noted in dicta that "[t]here is considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory[.]"[146] At the same time, however, the court recognized prior circuit law expressing approval of such a claim.[147] Thus, the effect of *Lyon* remains unclear.[148]

In the 1998 case of *Gantt v. Wilson Sporting Goods Co.*,[149] the Sixth Circuit once again, in dicta, cast doubt on the continued viability of disparate impact under the ADEA. The plaintiff, Gantt, age 58, suffered an on-the-job injury requiring a leave of absence.[150] The company's leave of absence policy provided for a maximum leave of one year, at the expiration of which the employee would be terminated.[151] Not returning after one year, Gantt was fired.[152] She subsequently filed suit, alleging that the company's leave of absence policy had a disparate impact on older employees because older employees are more likely to require a leave of absence in excess of one year.[153] The court stated that although prior circuit law[154] allowed an ADEA

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142. *Id.* at 870.

143. *Id.* The Court stated that, "[a]lthough disparate impact analysis was developed by the Supreme Court in Title VII race discrimination cases, and has been used by the [Supreme] Court only in that context, other courts have widely applied disparate impact analysis to age discrimination cases brought under the ADEA." *Id.* at 872 (citing Laugesen v. Anaconda Co., 510 F.2d 307, 311 (6th Cir. 1975); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980)).

144. 53 F.3d 135 (6th Cir. 1995).

145. *Id.* at 139-40.

146. *Id.* at 139 n.5.

147. *Id.* at 140 n.5; *see also* Abbott v. Federal Forge, Inc., 912 F.2d 867 (6th Cir. 1990).

148. *Compare* Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999) (citing *Lyon* as holding that the ADEA does not recognize a cause of action premised on disparate impact), *with* Johnson, *supra* note 19, at 317 n.74 (stating that the *Lyon* court did not hold that disparate impact was unavailable, but rather expressly left the possibility open).

149. Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998).

150. *Id.* at 1044-45.

151. *Id.* at 1045.

152. *Id.*

153. *Id.* at 1045, 1047.

154. *See* Abbott v. Federal Forge, Inc., 912 F.2d 867, 872 (6th Cir. 1990) (explaining that disparate

disparate impact claim, subsequent courts found that ruling unsound.[155] The court then held that even if a disparate impact claim were cognizable, the plaintiff here did not make out a prima facie case.[156]

Thus, in the Sixth Circuit, as in many circuits, it is uncertain whether a plaintiff may bring a disparate impact case under the ADEA. This uncertainty is unfortunate for two reasons. First, uncertainty makes it difficult for plaintiffs to plead and prove their cases and for defendants to defend theirs if the parties do not know what the law is. Parties are likely to be reluctant to devote significant legal resources to a legal theory that may or may not be viable.

Second, the uncertainty may have the unintended consequence of altering the substantive law of disparate impact. Lower courts understandably want to avoid reversal. One way to avoid reversal is to avoid taking a stand on legal issues that are unsettled. Apparently, this is occurring with ADEA disparate impact claims. Lower courts, such as the Sixth Circuit in *Gantt*, are struggling to find other grounds to justify dismissal of ADEA disparate impact claims so that these courts can avoid having to rule directly on whether a disparate impact claim may be brought under the ADEA. The result may be a permanent narrowing of the disparate impact cause of action. Moreover, because courts usually "borrow" precedent from one employment discrimination statute for use in another such statute,[157] the narrowing of the ADEA disparate impact cause of action is likely to affect the substantive law of Title VII and other employment discrimination statutes as well.

For this reason, the authors believe that it is important that the Supreme Court provide immediate guidance to the lower courts regarding the viability of the disparate impact theory under the ADEA. The next Part of this article analyzes the various arguments that have been advanced on both sides of this issue.

IV. THE ARGUMENTS FOR AND AGAINST RECOGNIZING AN ADEA DISPARATE IMPACT CLAIM

The current circuit split has produced much debate concerning the propriety of recognizing disparate impact. Likewise, much academic analysis of the contemporary debates is available.[158] This section analyzes both sides of the issue and concludes that those arguments supporting the continued use of disparate impact are the more persuasive. The main arguments surrounding

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impact theory of age discrimination may be possible).

155. *See* Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1048 (6th Cir. 1998).

156. *Id.*

157. *See supra* notes 57-83 and accompanying text.

158. *See supra* note 19.

ADEA disparate impact may be categorized by their focus. The four categories, statutory language, legislative history, subsequent legislative action, and policy considerations, are discussed in turn.

A. Statutory Language

Most courts, whether allowing for ADEA disparate impact or not, usually begin their analysis of the issue by looking at the relevant statutory text. Those circuits rejecting ADEA disparate impact analysis interpret the language of section 623 to prohibit only intentional discrimination. They similarly interpret the language of the RFOA exception to specifically reject the disparate impact theory.[159] While neither side's arguments are extremely persuasive, the better interpretation allows for the continued use of disparate impact claims under the ADEA.

1. Language of section 623

The statutory language of the ADEA is nearly identical to that of Title VII.[160] Those circuits rejecting ADEA disparate impact liability, while conceding the Acts' similarity, claim that a plain reading of section 623(a)(2), which makes it unlawful to discriminate "because of" an individual's age, only prohibits intentional discrimination.[161] For example, the First Circuit, in *Mullin*, claimed that courts have wrongly applied the disparate impact theory, without analysis, to ADEA cases simply because of the similarity of the language.[162] As such, the court found ADEA disparate impact claims unavailable.

Other ADEA language is also said to augur against disparate impact liability. Although the term "arbitrary" is not used in the prohibitive language of the ADEA,[163] the Congressional Statement of Findings and Purpose, section 621,[164] manifest a congressional intent to prohibit arbitrary age discrimination.[165] In rejecting ADEA disparate impact liability, the *Mullin* court found that the Wirtz Report drew a distinction between intentional and arbitrary discrimination on one hand and institutional arrangements that adversely and disproportionately affect older employees on the other.[166]

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159. *See* Mullin v. Raytheon Co., 164 F.3d 696, 701-02 (1st Cir. 1999).

160. *See supra* notes 115-25 and accompanying text.

161. *See Mullin*, 164 F.3d at 700 (stating that the best reading of "because of" suggests the statute requires intentional discrimination).

162. *See id.* at 701 (stating that courts assumed *Griggs* settled the issue).

163. *See* 29 U.S.C. § 623(a) (1994).

164. *See* 29 U.S.C. § 621(a)(1)-(4) (1994). *See generally* THE REPORT, *supra* note 22.

165. *See* 29 U.S.C. § 621(a)(1)-(4) (1994).

166. *See* Mullin v. Raytheon Co., 164 F.3d 696, 703 (1st Cir. 1999).

Finding that the Report recommended the latter category be handled through educational programs and systematic restructuring, the court likened this type of discrimination to disparate impact.[167] Subscribing to this dichotomy, the court concluded that the ADEA's prohibitions were only aimed at the arbitrary discrimination, and the educational provisions were aimed at the "institutional arrangements" producing the disparate impact.[168] Thus, the court, equating "arbitrary" with disparate treatment theory, found that disparate impact was not actionable under the ADEA.[169]

However, neither argument is persuasive. The language, "because of," simply does not prohibit only intentional discrimination. In *Griggs*, the Supreme Court interpreted the same words in Title VII to permit the disparate impact theory, reasoning that the phrase codifies the requirement of a causal connection between the protected characteristic and the objectionable employment practice.[170] As the Supreme Court definitively ruled in the Title VII context that "because of" prohibits more than intentional discrimination, the Supreme Court has already effectively decided this issue. Moreover, arguing that a different analytical approach should be used to interpret such similar statutes violates the doctrine of *in pari materia*.[171] "[This] doctrine states that the interpretation of one statute 'may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships.'"[172] The *in pari materia* doctrine is particularly meaningful in the context of interpreting the ADEA "since the ADEA grew out of the debates on Title VII."[173] Moreover, both statutes apply to similar persons (employees) and relationships (employment context). Thus, the Supreme Court's interpretation of the language "because of," coupled with the doctrine of *in pari materia,* counsels for the continued recognition of ADEA disparate impact claims.

Similarly, the argument surrounding the word "arbitrary" is also unpersuasive. For instance, in *Griggs*, the Supreme Court found disparate impact claims necessary to deal with the problem of arbitrary discrimination.[174] Likewise, Judge Easterbrook, in his dissent in *Metz v.*

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167. *Id. See also* Archer, *supra* note 19, at 166.

168. Archer, *supra* note 19, at 166.

169. *Mullin*, 164 F.3d at 703.

170. Fentonmiller, *supra* note 19, at 1121.

171. Alexander, *supra* note 19, at 88.

172. *Id.* at 88 & n.98.

173. *Id. See also* Archer, *supra* note 19, at 151 ("Before enactment in its final form, Title VII contained a provision that banned employers from discriminating on the basis of an individual's age. Although this prohibition was removed from Title VII before it was passed. . . ." (footnotes omitted)).

174. The *Griggs* Court condemned "artificial, arbitrary, and unnecessary barriers to employment. . . ." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

Transit Mix, Inc., described the purpose of disparate impact as a remedy for arbitrary discrimination.[175] Secretary of Labor Wirtz, in his report to Congress, similarly included facially neutral policies in his definition of arbitrary discrimination.[176] Thus, the weight of authority militates against the idea that arbitrary is somehow synonymous with intentional. The better interpretation of the statutory language "because of" and "arbitrary" allows for the continued use of the ADEA disparate impact theory.

2. The RFOA Exception

Similar to the debate over the "because of" language in section 623, another debate involves the statutory language of one of the statutory exceptions to age discrimination liability. The RFOA exception provides that it is lawful for an employer "to take any action . . . based on reasonable factors other than age. . . ."[177] Those circuits finding ADEA disparate impact unavailable argue that the language of the exception specifically rejects the disparate impact theory of discrimination.[178] As such, the RFOA exception is said to "belie[] the application of disparate impact in the age discrimination context because the neutral policies attacked under disparate impact analysis are exactly what *is* allowed under the RFOA exception."[179] Moreover, while no RFOA exception exists under Title VII, an analogous provision does exist in the Equal Pay Act ("EPA").[180] The EPA analog authorizes wage differentials between men and women when the differentials are based upon "any other factor other than sex[.]"[181] Using this EPA provision as an analogy, the First Circuit, in *Mullin*, noted that the Supreme Court has hinted that this provision may preclude disparate impact under the EPA,[182] and as such, the RFOA exception should similarly preclude disparate impact under the ADEA.[183] Thus, another textual argument against the viability of disparate impact under the ADEA is that the RFOA exception by its very language may prohibit the disparate impact cause of action; arguably, this interpretation is buttressed by Supreme Court dicta interpreting similar language in the EPA.

However, there is another side to this debate. First, the RFOA exception only authorizes all *reasonable* policies, not all *neutral* policies. This is a

175. 828 F.2d 1202, 1215 (7th Cir. 1987) (Easterbrook, J., dissenting).
176. *See* THE REPORT, *supra* note 22.
177. 29 U.S.C. § 623(f)(1) (1994).
178. *See* Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999).
179. Archer, *supra* note 19, at 169.
180. 29 U.S.C. § 206(d) (1994).
181. *Id.* at § 206(d)(1)(iv).
182. *See Mullin*, 164 F.3d at 702.
183. *Id.*

critical distinction between the ADEA and the EPA exceptions. Thus, the idea that the language of the RFOA precludes disparate impact is faulty because although a policy may be neutral, that is no guarantee that it will be protected by an exception that authorizes only reasonable ones. The *Mullin* court's focus on neutrality is mistaken, as the language specifically requires reasonableness. The neutrality of the policy, instead, goes to the type of claim brought; facially neutral policies are brought under a disparate impact theory, while facially discriminatory policies are brought under a disparate treatment theory.[184]

Similarly, the EPA provision does not support the idea that the RFOA precludes ADEA disparate impact. The irony of this argument highlights its weakness. When comparing the statutory language of the ADEA and Title VII to preclude disparate impact, a dissimilar reading of almost identical statutes is advocated. Yet, when comparing the ADEA to the EPA to preclude disparate impact, the recommendation is for a similar reading of exceptions, which differ significantly. Under the EPA, if the employer relies on "any" factor other than sex, liability is precluded. However, under the ADEA, the plain language of the RFOA exception requires an employer to have relied on a reasonable factor. "Any" is not synonymous with "reasonable." For example, an employer whose policy has a disparate impact on older employees may be liable for age discrimination if the factors relied upon were not reasonable. Yet, if the same policy caused a difference in wages between men and women, the employer would not be liable unless the policy was based on sex. Thus, these exceptions cannot be read to mean the same thing unless the word "reasonable" is omitted from the RFOA exception.

Moreover, the idea that the congressional intent behind the RFOA exception was to preclude disparate impact is simply not plausible. When Congress passed the ADEA, the Supreme Court had not yet developed the disparate impact cause of action.[185] Thus, at the time, Congress most likely intended the RFOA to only apply to disparate treatment claims. For these reasons, the authors believe that the RFOA exception should not be read to preclude the use of a disparate impact theory in the ADEA.

B. Legislative History

The legislative history leading to the enactment of the ADEA is another focus of the debates surrounding the ADEA disparate impact theory. However, the legislative history is not directly on point because when

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184. *See supra* text sections II(B)(1)-(2).

185. A disparate impact cause of action was first developed by the Supreme Court in 1971. *See* Griggs v. Duke Power, 401 U.S. 424 (1971).

Congress enacted the ADEA in 1967, the Supreme Court had not developed the disparate impact cause of action.[186] Therefore, one of the arguments concerning the legislative history tends to focus on the underlying purposes of the legislation. Although the language of Title VII and the ADEA are almost identical, those circuits rejecting ADEA disparate impact theory believe that the statutes should be interpreted differently because when the Supreme Court developed disparate impact in *Griggs*, it relied on the specific policies behind the Title VII statute.[187] As such, the policies behind the ADEA are viewed as different than those relied on in *Griggs*; the primary purpose of the ADEA should be to prohibit an employer from firing an employee "because the employer believes that productivity and competence decline with old age."[188] Thus, the argument is that because age discrimination does not have a similar history tied to past discrimination, there is no need for disparate impact claims under the ADEA.[189]

Another argument against allowing ADEA disparate impact focuses on the Report by Secretary of Labor Wirtz to Congress.[190] That Report is said to draw a distinction between arbitrary discrimination and arguably neutral factors that tend to disfavor older workers.[191] The claim is that the Report's distinction is significant because only intentional discrimination was to be prohibited by the legislation, whereas the neutral factors were to be handled by other congressional programs.[192] Thus, only intentional discrimination was to be prohibited by the ADEA.

However, these arguments are unpersuasive. First, the textual similarity between Title VII and the ADEA imply congressional intent to provide equal protection under the two statutes.[193] Second, there is no reason why past discrimination should be a necessary pre-condition for the recognition of disparate impact theory. The *Griggs* Court did not posit past discrimination as the sole reason for disparate impact under Title VII; the *Griggs* Court merely said that disparate impact was necessary to remedy this type of discrimination.[194] Moreover, there is no requirement under Title VII that an individual must make a showing of past discrimination in order to state a

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186. *See id.*

187. Specifically, the contention is that the *Griggs* Court was trying to further Title VII's unique goals of removing barriers tied to past discrimination. *See, e.g.*, Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999).

188. Hazen Paper Co. v. Biggins, 507 U.S. 64, 610 (1993).

189. *See* Archer, *supra* note 19, at 168.

190. *See* THE REPORT, *supra* note 22.

191. *Id.* at 3-17.

192. *See Mullin*, 164 F.3d at 703.

193. Johnson, *supra* note 19, at 336.

194. *Id.* at 340.

disparate impact claim.[195] Thus, as the language of the ADEA and Title VII are similar and the policies behind both statutes are similar, the protection available under both, including the disparate impact theory, also should be similar.

Moreover, the alleged distinction in Wirtz's Report between arbitrary discrimination and neutral factors that disfavor older workers is more semantic than real. One commentator, arguing that no such dichotomy exists in the Wirtz Report, states that each of the neutral factors discussed in the Wirtz report are specifically covered in the various statutory exceptions to the ADEA.[196] This negates, he states, the argument that Congress did not intend to legislatively deal with those factors.[197] Furthermore, the existence of a comprehensive set of statutory exceptions can be taken as evidence that all age discrimination not specifically excepted should constitute a violation of the ADEA.[198] Thus, the legislative history, including the Wirtz Report and the policies behind the statute, arguably supports the continued viability of ADEA disparate impact claims.

C. Subsequent Legislative Action

Another source of debate is the subsequent legislative action, specifically the Civil Rights Act of 1991.[199] This Act was passed in direct response to the Supreme Court's decision in *Wards Cove*, which had lessened the employer's burden of showing a business necessity.[200] In holding disparate impact unavailable under the ADEA, the Tenth Circuit in *Ellis* thought it particularly significant that while Congress specifically codified disparate impact under Title VII, Congress failed to do so under the ADEA.[201] The argument is that if Congress had intended for ADEA disparate impact claims to continue to be available, Congress would have amended the ADEA in similar fashion, knowing the Supreme Court's hostility towards disparate impact claims as evidenced by *Wards Cove*.

However, inferring congressional intent from congressional inaction is risky. Justice Scalia once noted that "vindication by congressional inaction is a canard."[202] Moreover, congressional silence could similarly be interpreted as legislative approval of the courts' continued use of disparate impact under

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195. *Id.*
196. *See* Fentonmiller, *supra* note 19, at 1100-03.
197. *Id.*
198. *Id.*
199. The Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 (1991).
200. *See* Johnson, *supra* note 19, at 313.
201. Ellis v. United Airlines, 73 F.3d 999, 1008 (10th Cir. 1996).
202. Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

the ADEA: *i.e.*, prior to *Ward's Cove*, courts uniformly assumed that disparate impact was available under both Title VII and the ADEA; *Ward's Cove* changed the legal standard for TitleVII cases; therefore, the only legislative response that was required to restore the *status quo ante* was a legislative amendment to Title VII.[203] Alternatively, Congress may simply have been exercising legislative restraint in amending only Title VII.[204] Regardless, the 1991 Civil Rights Act, aimed only at amending a Title VII case, coupled with congressional inaction as to the ADEA, is not particularly persuasive either way.

Congress did, however, amend the ADEA in 1990, by adding the Older Workers Benefit Protection Act ("OWBPA").[205] This was in response to a common employer practice of offering compensation to employees in connection with lay-offs and early retirement in exchange for the employee waiving any discrimination claims.[206] The OWBPA was passed to ensure that older workers waiving their discrimination claims do so knowingly and voluntarily.[207] To that end, the statute requires an employer to provide the employee with information regarding the ages of the workers offered severance pay and those who were not let go before the employee waives her potential discrimination claims.[208] These statistics, comparing the ages of those terminated and those retained, would be of little relevance if the employee could not bring a disparate impact claim.[209] Thus, although the Title

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203. In 1991, when the Civil Rights Act was passed, most circuits that had confronted the issue allowed for disparate impact claims arising under the ADEA. *See e.g.*, Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 690 (8th Cir. 1983) (applying disparate impact analysis); MacPherson v. University of Montevallo, 922 F.2d 766, 770 (11th Cir. 1991) (utilizing disparate impact analysis); Abbott v. Federal Forge, Inc., 912 F.2d 867, 872 (6th Cir. 1990) (noting that disparate impact theory of age discrimination may be possible); Rose v. Wells Fargo & Co., 902 F.2d 1417, 1423 (9th Cir. 1990) (applying disparate impact analysis); Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1376 (2nd Cir. 1989) (holding disparate impact claim may be brought); MacNamara v. Korean Air Lines, 863 F.2d 1135, 1148 (3rd Cir. 1988) (assuming the existence of, but not imposing, disparate impact liability); Arnold v. United States Postal Serv., 863 F.2d 994, 998 (D.C. Cir. 1988) (assuming disparate impact theory exists); Holt v. Gamewell Corp., 797 F.2d 36, 37 (1st Cir. 1986) (applying disparate impact analysis); Monroe v. United Air Lines, Inc., 736 F.2d 394, 404 n.3 (7th Cir. 1984) (approving trial court's use of disparate impact analysis). *But see* Akins v. South Cent. Bell Tel. Co., 744 F.2d 1133, 1136 (5th Cir. 1984) (choosing not to decide).

204. *See* Alexander, *supra* note 19, at 98-99.

205. 29 U.S.C. §§ 623, 626, 630(f) (1994).

206. *See* Alexander, *supra* note 19, at 99.

207. 29 U.S.C. § 626(f)(1) (1994).

208. 29 U.S.C. § 626(f)(1)(E)-(G), (H)(ii) (1994).

209. Admittedly, "statistics are sometimes used to buttress a disparate treatment claim when employing the *McDonnell Douglas* shifting-burden test. However, as a practical matter, in reduction-in-force ('RIF') cases, such statistics will not be sufficient to prove age animus." Alexander, *supra* note 19, at 100 n.187.

VII amendments are not persuasive on either side of the debate, the addition of OWBPA is significant and favors the argument that the disparate impact theory of discrimination should continue to be available under the ADEA.

D. Policy Considerations

Unlike the other arguments, policy considerations cover a range of topics. This section examines three such topics and discusses each in turn.

1. Difference Between Age Discrimination and Other Types of Discrimination

The first consideration is that age discrimination is different in certain respects from other types of discrimination, such as racial discrimination. For instance, whereas racial minorities have suffered past discrimination, the same is not necessarily true of those who are older. Similarly, some of the stereotypes about older workers' productivity and competence are not irrational,[210] as some skills do deteriorate with age, thereby making older workers inherently unequal to younger workers.[211] Moreover, age is a continuum, which makes defining the disparately-impacted group more imprecise than defining a group impacted by race or sex.[212]

Yet, age discrimination is actually very similar to other types of discrimination, and those differences that do exist are insignificant. As noted above, the *Griggs* Court found past discrimination as a reason to develop the disparate impact doctrine, but it never made past discrimination a requirement for a disparate impact cause of action.[213] Therefore, any differences between age and other types of discrimination in terms of a history of past discrimination are irrelevant. Similarly, the Supreme Court has rejected the idea that the protected classes must be inherently equal. For example, men and women are not completely equal, yet Title VII continues to prohibit gender discrimination.[214] Moreover, the Supreme Court ruled in a gender discrimination case that even true stereotypes cannot justify discrimination.[215] Thus, the fact that some of the stereotypes about a worker's age may be rational does not justify differentiating age discrimination from other types of discrimination. Likewise, the imprecision involved in defining the protected groups should not pose undue problems since the courts can use a case-by-

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210. Alexander, *supra* note 19, at 95.
211. *See* Metz v. Transit Mix, Inc., 828 F.2d 1202, 1213 (7th Cir. 1987) (Easterbrook, J., dissenting).
212. Archer, *supra* note 19, at 172.
213. *See* Johnson, *supra* note 19, at 340.
214. *Id.*
215. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978).

case approach to age claims[216] just as they currently do with disability claims.[217] Thus, the differences between age discrimination and other types of discrimination do not justify the preclusion of ADEA disparate impact claims.

2. Practical Problems

A related issue concerning the adoption of ADEA disparate impact is whether it will cause any practical problems for the courts or for society. The fact that age is a continuum and thus, imprecisely defines the protected group is raised as one such problem.[218] However, disability, too, is a continuum, and the Supreme Court has explicitly stated that disability must be defined on a case-by-case basis.[219] There is no reason to believe that age cases should present any greater problem than disability cases.[220]

A second "practical" problem is that the adoption of an ADEA disparate impact claim will lead to excessive litigation.[221] That, however, is no more reason to reject disparate impact under the ADEA than it is to reject the same theory under Title VII. Moreover, in the years prior to *Hazen Paper*, it was widely assumed that the disparate impact theory was available under the ADEA; the volume of cases brought at that time hardly brought the federal judiciary to its knees.

However, a significant problem may arise if a disparate impact cause of action is not adopted in the ADEA context. Any plaintiff who is unable to

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216. *See* Archer, *supra* note 19, at 172.

217. Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999) (explaining that evaluations concerning whether a person is "disabled" under the ADA must be on an individual case-by-case basis and not by classifying persons based upon their diagnosis); Perry Meadows, M.D. & Richard A. Bales, *Using Mitigating Measures to Determine Disability Under the Americans With Disabilities Act*, 45 S.D. L. REV. 33, 40 (2000); R. Bales, *Libertarianism, Environmentalism, and Utilitarianism: An Examination of Theoretical Frameworks for Enforcing Title I of the Americans With Disabilities Act*, 1993 DET. C. L. REV. 1163, 1165 (1992); R. Bales, *Once Is Enough: Evaluating When a Person Is Substantially Limited in Her Ability to Work*, 11 HOFSTRA LAB. L.J. 203, 234 (1993); Richard A. Bales, *Title I of the Americans With Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J.L. & PUB. POL'Y 161, 176 (1992).

218. Archer, *supra* note 19, at 172.

219. *See supra* note 217.

220. *See* Alexander, *supra* note 19, at 102 (arguing that disparate impact analysis does not prejudice employers because it provides sufficient employer safeguards from liability). *See also* Laugesen v. The Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975).

221. *See* Archer, *supra* note 19, at 173. Recent empirical evidence on the "litigation explosion" is equivocal. LAURA J. COOPER ET AL., ADR IN THE WORKPLACE 627-28 (2000); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1103-09 (1996); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 958 (1999); *see also* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 287-89 (1989) (reviewing debate over litigation explosion).

point to a facially discriminatory policy or circumstantial evidence of intentional discrimination will be left virtually unprotected. Seemingly odd is that Congress would choose to leave older workers so vulnerable to employer discrimination after having enacted the ADEA in response to that very problem. The ADEA legislation provides a balance whereby the prohibitive language protects older employees with the statutory exceptions offering employers protection as well. Thus, the problems allegedly resulting from the adoption of ADEA disparate impact are illusory and do not justify leaving older workers without the protection of a disparate impact cause of action to remedy age discrimination.

V. CONCLUSION

Tremendous uncertainty exists on the issue of the continued availability of the disparate impact theory in ADEA cases. The circuits are split, and lower courts are straining to avoid ruling on an unsettled issue. This creates unnecessary burdens for litigants. Even worse, it threatens to undermine the substantive law of disparate impact generally, as courts search for rationales to justify the dismissal of ADEA disparate impact claims so that the courts can avoid ruling on the open issue.

The ideal answer is for Congress to legislatively intervene to codify the disparate impact cause of action under the ADEA. A second-best alternative is for the Supreme Court to accept certiorari on a case presenting the issue and to rule that disparate impact is available in ADEA cases just as it is in Title VII cases.

In the meantime, the Sixth Circuit should avoid the temptation to follow the lead of other post-*Hazen Paper* circuits that have rejected ADEA disparate impact claims. The authors believe that the Sixth Circuit should, itself, take the lead by re-affirming the viability of disparate impact under the ADEA. In so doing, the Sixth Circuit would provide federal district courts within the Sixth Circuit with much needed guidance on this issue. Moreover, a well-reasoned opinion, likely, would stir further debate concerning the important policy choices involved and may prompt the Supreme Court to resolve the issue.

The workplace has changed dramatically since Congress enacted the ADEA in 1967. However, the protection of older workers should remain constant. The authors believe that the retention of the disparate impact cause of action under the ADEA is necessary to eliminate the age discrimination upon which the ADEA was premised. Resolution of this issue will have far-reaching consequences, not the least of which is that it will determine the type of society in which we choose to grow old.