

NOTES

THE COST TO OLDER WORKERS: HOW THE ADEA HAS BEEN INTERPRETED TO ALLOW EMPLOYERS TO FIRE OLDER EMPLOYEES BASED ON COST CONCERNS

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INTRODUCTION

The Age Discrimination in Employment Act (“ADEA”) was enacted to promote the ability of older workers to compete in today’s marketplace. It recognized a disturbing change in the way that companies were treating older workers. Historically, older workers were regarded as a valuable commodity because of their skill and experience. The advance of the modern age brought about a shift in ideologies in corporate America. Older workers came to be considered a liability in the fast-paced business world. Congress drafted the ADEA to eliminate unfounded stereotypes of older workers as less productive and more expensive to employ. It gave statutory protection against discrimination to anyone over forty years of age.

Courts have struggled with implementing uniform decisions regarding the scope of the ADEA and the protections that are afforded older workers.

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The ADEA parallels other remedial statutes, like Title VII, but also has its own unique provisions. These similarities and differences have caused scholars to debate whether the ADEA should be interpreted and applied in the same manner or more narrowly than Title VII.

The Supreme Court has left many issues regarding the ADEA unresolved since its major opinion in *Hazen Paper Co. v. Biggins*,¹ and lower courts have interpreted the ADEA in a variety of ways. The focus of this Note, however, is a more recent phenomenon in ADEA interpretation. Federal courts are increasingly willing to hold that employers do not violate the ADEA by terminating older workers based on their higher earnings. Specifically, courts have upheld employer decisions to terminate or lay off older workers because of their higher salaries and their impact on the profitability of the company. This new trend limits the ability of the ADEA to protect older employees in the workplace, and requires rethinking the extent to which the ADEA actually protects older workers from discrimination. Allowing courts to view employer costs as analytically distinct from age discrimination may result in a disproportionately adverse effect on the employment of older workers.

This new trend is another reason for the Supreme Court to allow disparate impact as a cause of action under the ADEA. Disparate impact focuses on discriminatory effect, rather than on discriminatory intent. It establishes an approach to proving discrimination when an employer's decision is facially neutral with respect to age, but has a disproportionately adverse effect on older employees. Disparate impact claims allow the employee to state a claim without identifying the employer's subjective motivations.

The circuits have been divided for some time over the question of whether disparate impact can be used to prove age discrimination under the ADEA. The Second, Eighth, and Ninth Circuits have held that disparate impact is available under the ADEA. In contrast, the First, Third, Sixth, Seventh, Tenth, and Eleventh Circuits have questioned the viability of disparate impact claims under the ADEA. The remaining circuits have not addressed the issue in their case law. The Supreme Court in *Hazen* specifically chose not to address this issue.

This Note focuses on the trend among circuit courts to allow employers to consider costs when making decisions about terminations and lay-offs, and why this new trend represents another reason to apply

1. 507 U.S. 604 (1993).

disparate impact analysis to the ADEA. Part I addresses the statutory language of the ADEA and the interpretation of the Act. Part II discusses the similarities and differences between the ADEA and Title VII. Title VII is a similarly drafted remedial statute that allows discrimination claims to be proven through disparate impact analysis. Many scholars have argued that because the two are so similar, the ADEA should be interpreted to allow disparate impact. Others focus on the differences between the two statutes, including several key provisions in the ADEA that are absent in Title VII. They contend that these differences foreclose the use of disparate impact analysis as a way of proving age discrimination in violation of the ADEA. Part III discusses how courts view employer costs in decisions to lay off older workers. It examines the recent court cases that have allowed for such action and the reasoning behind those opinions. This trend represents yet another reason why disparate impact should be considered in ADEA cases. Part IV addresses a recent Eleventh Circuit case involving a disparate impact claim. Although the Supreme Court initially granted certiorari, after hearing oral arguments they dismissed certiorari as being improvidently granted. The Eleventh Circuit did not extend disparate impact analysis to the ADEA. This case presents several of the traditional arguments for and against applying disparate impact to the ADEA. Part IV also addresses additional arguments regarding the use of disparate impact in this context and includes a discussion of some of the scholarly work for and against applying disparate impact to the ADEA. Part V discusses why this recent trend of allowing courts to consider employer costs in the termination process undermines the protections that Congress intended the ADEA to give to older workers, and presents several scholars' views on alternative ways to solve the problem of employer costs. This Part concludes that the effectiveness of the alternatives is limited, therefore presenting another reason to uphold disparate impact in the area of age discrimination. Part VI discusses how disparate impact cases are resolved and the consequences to both businesses and older workers that would result from allowing these claims under the ADEA.

I. THE HISTORY AND CREATION OF THE ADEA

Congress adopted the ADEA in 1967 to address a variety of concerns regarding older workers.² Specifically, "older workers [found] themselves

2. Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 stat. 602 (codified as amended at 29 U.S.C. §§ 621-34 (1994)). The ADEA applies to any employer affecting commerce with twenty or more employees and covered individuals who are at least forty years of age. 29 U.S.C. §§ 630-631 (1994).

disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs.”³ Additionally, Congress found that setting “arbitrary age limits regardless of potential for job performance [had] become a common practice, and certain otherwise desirable practices [might] work to the disadvantage of older persons.”⁴ Therefore, Congress’ purpose was 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.”⁵

Section 623 makes it unlawful for an employer 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.”⁶ It is also unlawful under this section to reduce the wage rate of any employee in order to comply with the Act.⁷

The ADEA allows an employer to take otherwise prohibited action 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.”⁸ Additionally, the ADEA allows the use of a “bona fide seniority system that is not intended to evade the purposes of [the Act].”⁹ The ADEA reflected many of the same concerns of other remedial anti-discrimination statutes, and not surprisingly was drafted using very similar language. In fact, the language of the ADEA closely parallels that of Title VII.¹⁰ This has led many courts to interpret the ADEA similarly to Title VII, while other courts have found that the two statutes are different enough to preclude parallel interpretations. Analyzing the similarities and differences between the two statutes clarifies the reasons behind these different interpretations.

3. *Id.* § 621(a)(1).

4. *Id.* § 621(a)(2).

5. *Id.* § 621(b).

6. *Id.* § 623(a)(1).

7. *Id.* § 623(a)(3).

8. *Id.* § 623(f)(1).

9. *Id.* § 623(f)(2)(a).

10. See *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (stating that “the prohibitions of the ADEA were derived *in haec verba* from Title VII”).

II. APPLYING TITLE VII ANALYSIS TO THE ADEA

The concern over age discrimination was initially discussed during the Title VII debates, where many House and Senate members argued that an age discrimination provision should be included in the statute.¹¹ Instead, Congress assigned to the Secretary of Labor the duty to prepare a report on age discrimination, which led to the creation of the ADEA.¹² The drafters of the ADEA relied to a large extent on the language of Title VII, and as a result the ADEA contains similar language to that of Title VII.¹³ In fact, the ADEA and Title VII have nearly identical sections forbidding discrimination.¹⁴ This has led many courts to apply the same standards for the ADEA that are applied to Title VII.¹⁵

Applying identical analyses to the two statutes is problematic in that several key provisions of the ADEA differ from those of Title VII. This makes a direct application of Title VII analyses to ADEA actions less feasible. For example, the ADEA stipulates that “[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age.”¹⁶ This so-called “reasonable factor other than age” defense allows employers to use factors other than age as grounds for employment-related decisions without violating the ADEA.¹⁷ This provision has no counterpart in Title VII.¹⁸

11. See 110 CONG. REC. 2596-99, 13490-92 (1964).

12. See Civil Rights Act of 1964, Pub. L. No. 88-352, §715, 78 Stat. 241, 265 (1964) (superseded by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 10, 86 Stat. 111, 132 (1972)). See also EEOC v. Wyoming, 460 U.S. 226, 229-33 (1983) (detailing the legislative history of the ADEA).

13. EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076 (7th Cir. 1994).

14. Compare 29 U.S.C. § 623(a)(1) (1994), with 42 U.S.C. § 2000e-2(a)(1) (2000).

15. See *Francis W. Parker Sch.*, 41 F.3d at 1076 (noting that terms traditionally used to describe theories of relief under Title VII have been incorporated into the ADEA lexicon).

16. 29 U.S.C. § 623(f)(1).

17. See *id.*

18. In fact, this provision is similar to a provision in the Equal Pay Act. See 29 U.S.C. § 206(d)(1) (2001). The Equal Pay Act does not prohibit paying different wages to equivalent employees if the “differential [is] based on any other factor other than sex.” *Id.* The Supreme Court has interpreted § 206(d)(1) of the Equal Pay Act to preclude a cause of action for disparate impact. See *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981). See also *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 710 n.20, 713 n.24 (1978) (reasoning the Equal Pay Act’s “other factors other than sex” exception disallows liability based on disparities caused by independent variables).

In addition, Title VII was amended in 1991 to codify the use of disparate impact as a cause of action.¹⁹ No similar codification of the ADEA occurred, despite the fact that Congress has amended other parts of the ADEA.²⁰ As a result, some courts have held that this aspect of Title VII analysis should not apply to the ADEA.²¹ Other courts have disagreed, arguing that the lack of a comparable amendment for the ADEA does not foreclose Title VII analysis.²² In *Camacho v. Sears, Roebuck de Puerto Rico*, for example, the court noted that Congress amended Title VII because many court opinions had limited its scope.²³ There was no comparable assault on the ADEA that would warrant an amendment.²⁴

Nevertheless, this Note argues that Title VII analysis should be applied to the ADEA in two specific areas. First, employer costs (or profits) do not justify discrimination under Title VII.²⁵ Title VII generally prohibits the use of discrimination irrespective of economic rationale.²⁶ Scholars have labeled this the “anti-cost” rule of Title VII.²⁷ Second, it is clear that Title VII allows for claims based on both disparate treatment and disparate impact.²⁸ If Title VII analysis is applied to the ADEA, it would

19. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (1991) (codified as amended at 42 U.S.C. § 2000e-2(k)).

20. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, § 114, 105 Stat. 1071, 1079 (codified as amended at 42 U.S.C. § 2000e-16(c)).

21. *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007–08 (10th Cir. 1996) (refusing to extend disparate impact analysis to the ADEA).

22. See *Camacho v. Sears, Roebuck de Puerto Rico*, 939 F. Supp. 113, 120 (D.P.R. 1996).

23. *Id.*

24. *Id.*

25. See *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (finding that an employer’s pension plan, which required female employees to make larger contributions than male employees, violated Title VII because female employees tended to live longer and would receive more monthly payments). See also *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 304 (N.D. Tex. 1981) (holding that a struggling airline could not restrict flight attendant job positions to females, even in the face of evidence that such restriction was vital to the airline’s marketing strategy and the reason for its profitability).

26. See *Manhart*, 435 U.S. at 716–17 (rejecting general cost defense for overt discrimination under Title VII).

27. See Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229–38 (1990). Kaminshine pointed out that Title VII prohibited “race-based treatment absolutely and provides no exception for rational or economically motivated discrimination.” *Id.* at 240. Also, while Title VII has a bona fide occupational qualification for other protected groups, cost justifications often are rejected in those groups. *Id.* See also Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 258–63 (1971) (explaining that fair employment laws have been understood to prohibit discriminatory practices even when they are instituted for rational economic reasons).

28. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation”). See also Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (1991)

become unlawful to consider economic rationale in discrimination cases and would allow disparate impact analysis as a way of proving age discrimination.

III. THE RECENT TREND ALLOWING EMPLOYERS TO TERMINATE OLDER WORKERS BASED ON THE HIGHER COSTS OF EMPLOYING THEM

Scholars have become concerned with the growing trend²⁹ in courts that allows employers to lay off older workers on the grounds that their salaries are too high and that they limit the profitability of the business.³⁰ In a recent article, Kester Spindler noted that a “string of cases around the country” focused on employer costs and “found for the employers on the employees’ charges of age discrimination.”³¹ The most recent is the First Circuit decision in *Mullin v. Raytheon Co.*, which looked at employer costs in the defense industry.³² In *Raytheon*, the defendant needed to make drastic cuts after the end of the Cold War because the volume of work potentially available to it decreased considerably.³³ The plaintiff had worked for Raytheon for twenty-nine years and had gained the status of a grade fifteen employee (highly paid manager).³⁴ As a result of downsizing, the defendant lowered Mullin’s wage grade to match the lower grade salary.³⁵ The court found that the defendant’s need to downsize articulated a legitimate, nondiscriminatory reason for both restructuring and demoting

(codified as amended at 42 U.S.C. §2000e-2(k)) (amending the Civil Rights Act of 1964 to include disparate impact as a cause of action by adopting the reasoning of the Supreme Court in *Griggs*).

29. This trend can first be attributed to the dissenting opinion of Judge Easterbrook in *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1211 (7th Cir. 1987) (Easterbrook, J., dissenting). He argued that age discrimination laws do not protect older workers from the harshness of the job market. *Id.* at 1212. Rather, it protected them only from prejudice based on inaccurate stereotyping, or from instances where the decision is a proxy for age. *Id.* The trend continued on from the Supreme Court’s decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993), to the Seventh Circuit decision in *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1126 (7th Cir. 1994). It continued with two decisions in the Eighth Circuit, *Bialas v. Greyhound Lines, Inc.*, 59 F.3d 759, 764 (8th Cir. 1995) and *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1208 (8th Cir. 1997). In 1997, in *Marks v. Loral Corp.*, 68 Cal. Rptr. 2d 1, 9–15 (Cal. Ct. App. 1997), a California court examined the issue under the ADEA and state laws. The First Circuit most recently addressed the issue in *Mullin v. Raytheon Co.*, 164 F.3d 696, 697–98 (1st Cir. 1999).

30. See Kester Spindler, *Shareholder Demands for Higher Corporate Earnings Have Their Price: How Courts Allow Employers to Fire Older Employees for Their Achievements*, 27 PEPP. L. REV. 807, 807 (2000).

31. *Id.*

32. See *Mullin*, 164 F.3d at 697–98.

33. *Id.* at 698.

34. *Id.*

35. *Id.*

the plaintiff.³⁶ Also, since the plaintiff had not proven that the legitimate nondiscriminatory reason was a pretext for age discrimination, the court held that there was no cause of action for intentional discrimination.³⁷ Additionally, the court took the opportunity to hold that violations of the ADEA could not be proven by evidence of disparate impact.³⁸

Raytheon is the most recent decision in a growing trend allowing employer profitability (or more generally, employer cost concerns) to limit the protection the ADEA gives to older workers. This has concerned commentators who have observed that when courts approve discrimination based on wages, the courts give employers a clear roadmap on how to rid their ranks of older, higher-paid workers.³⁹

This trend began with the Supreme Court's decision in *Hazen Paper Co. v. Biggins*. In *Hazen Paper*, the Court upheld a decision by the defendant to fire sixty-two-year-old Walter Biggins shortly before his pension plan would vest.⁴⁰ The Supreme Court held that pension-vesting rules based on years of service represent a reasonable-factor-other-than-age, because an employee's age is analytically distinct from the years of service.⁴¹ Additionally, the Court noted that as long as the employer's decision is based on a reasonable-factor-other-than-age it does not violate the ADEA, no matter how correlated the factor is with age.⁴² Although pensions often correlate with age, they can be seen as distinct because they vest according to years of service, not a particular age.⁴³ Even though it is more likely that an older employee has had more years in the workforce and has accumulated more years of service with an employer, the vesting criteria does not necessarily serve as a proxy for age.⁴⁴ Therefore, the Court held that the defendant did not violate the ADEA when the defendant fired Biggins, because its reason for preventing the pension from vesting was to save money rather than age discrimination.⁴⁵

36. *See id.* at 699.

37. *Id.*

38. *See Mullin*, 164 F.3d at 699–704.

39. *See Michael Higgins, Success Has Its Price: Courts OK Firing Older, Higher-Paid Workers to Save Money*, 84 A.B.A. J. 34, 34–35 (1998).

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

41. *Id.* at 611.

42. *Id.*

43. *Id.*

44. *See id.*

45. *See id.* at 611–12.

Since *Hazen Paper*, “courts have been inclined to side with employers who fire older, higher-paid employees in order to cut costs.”⁴⁶ Four post-*Hazen Paper* cases have upheld employer cost concerns.⁴⁷ The first is a 1994 decision by the Seventh Circuit Court of Appeals in *Anderson v. Baxter Healthcare Corp.*⁴⁸ In *Anderson*, fifty-one-year-old Arthur Anderson was discharged from his job as unit manager.⁴⁹ He claimed that the employer’s motivation was to simply reduce its salary costs.⁵⁰ The court stated that the rationale of *Hazen Paper* carried over to decisions based on salary.⁵¹ It noted that “[c]ompensation is typically correlated with age, just as pension benefits are. The correlation, however, is not perfect.”⁵² It concluded that the plaintiff “could not prove age discrimination even if he was fired simply because [the defendant] desired to reduce its salary costs by discharging him.”⁵³ Although *Anderson* has been criticized on its standard of proof for a prima facie case of age discrimination, its decision that employer costs (in the form of salary) are a reasonable-factor-other-than-age has not.⁵⁴

Two cases in the Eighth Circuit Court of Appeals have addressed the issue of employer costs. In 1995, the Eighth Circuit first addressed the issue in *Bialas v. Greyhound Lines, Inc.*⁵⁵ In *Bialas*, the Eighth Circuit held that the defendant did not engage in age discrimination when it fired several older workers in an effort to cut costs because it used a reasonable-factor-other-than-age (salary) in making its decision.⁵⁶ The defendant was having financial problems and fired several older employees, whom it eventually replaced with younger and cheaper employees.⁵⁷ The court followed *Hazen Paper*, holding that terminating older employees “because their salaries were greater than their replacements’ salaries . . . does not necessarily support an inference of age discrimination.”⁵⁸

46. Spindler, *supra* note 30, at 817.

47. *See id.* at 817–19.

48. 13 F.3d 1120 (7th Cir. 1994).

49. *Id.* at 1121.

50. *Id.* at 1125.

51. *Id.*

52. *Id.* at 1126.

53. *Id.*

54. *See, e.g.,* Waldron v. SL Indus., Inc., 849 F. Supp. 996, 1005–06 (D.N.J. 1994). *See also* Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1167 n.4 (6th Cir. 1996).

55. 59 F.3d 759 (8th Cir. 1995).

56. *See id.* at 764.

57. *Id.* at 761.

58. *Id.* at 763.

In 1997, the Eighth Circuit Court of Appeals once again held that employer costs are a reasonable-factor-other-than-age in *Snow v. Ridgeview Medical Center*.⁵⁹ In *Snow*, the plaintiff argued that she was terminated because she was the most senior employee and she earned the highest salary.⁶⁰ The court, relying again on *Hazen Paper*, held that there was not enough evidence to prove age discrimination.⁶¹ Again, it focused on the idea that age and years of service are analytically distinct, and therefore, decisions based on years of service are not age discrimination because they represent a reasonable-factor-other-than-age.⁶²

In 1997, the California Court of Appeals for the Fourth District in *Marks v. Loral Corp.*⁶³ affirmed a lower court's decision upholding a jury instruction that stated, "An employer is entitled to choose employees with lower salaries, even though this may result in choosing younger employees. If the choice is based on salary, there is no age discrimination."⁶⁴ The court held that as long as salaries, or other factors, are not a pretext for a decision really based on age, there is no violation of the ADEA.⁶⁵ Additionally, even though the court acknowledged that experience and seniority necessarily count for something, it did not want to get in the way of business decisions.⁶⁶ The court concluded:

[W]e are not unmindful that the image of some newly minted whippersnapper MBA who tries to increase corporate profits—and his or her own compensation—by across-the-board layoffs is not a pretty one. . . . Congress . . . [never] intended the age discrimination laws to inhibit the very process by which a free market economy . . . [creates] real jobs and wealth . . .⁶⁷

The decision in *Loral Corp.* noted that an action based on price differentials represents the quintessence of a legitimate business decision.⁶⁸ An action based on costs, such as salaries, falls under the reasonable-factor-other-than-age defense.⁶⁹ The court concluded that the ADEA was not

59. 128 F.3d 1201, 1201 (8th Cir. 1997).

60. *Id.* at 1207–08.

61. *Id.* at 1208.

62. *Id.*

63. 68 Cal. Rptr. 2d 1 (Cal. Ct. App. 1997).

64. *Id.* at 7.

65. *See id.* at 23.

66. *See id.*

67. *Id.* at 23–24.

68. *Id.* at 20. *See also* Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 510 (explaining that cost-based lay-offs often constitute perfectly rational business practices).

69. *See Loral*, 68 Cal. Rptr. 2d at 20.

violated when the defendant fired forty-nine-year-old Michael Marks because of his high salary and the potential increase in the corporation's profits.⁷⁰ This decision sparked such a concern with the California Legislature that in 1999 it amended the Fair Employment and Housing Act, rejecting the *Loral Corp.* holding and prohibiting this type of age discrimination in California.⁷¹

The four post-*Hazen Paper* cases discussed above demonstrate a trend in the courts to view employers' decisions based on salary, pension, or other factors that increase employer costs as not constituting age discrimination. This has concerned some, who note that this increase in preserving employers' ability to cut costs rather than protecting older workers comes at a time when more and more Americans are poised to enter their fifties.⁷² Clearly, the results of these cases are not good for baby boomers hoping to stay secure in their jobs and high salaries.⁷³ In fact, these cases contradict the guidelines of the Equal Employment Opportunity Commission ("EEOC"), which forbid the use of employer costs as a reasonable-factor-other-than-age.⁷⁴

The analysis in *Hazen Paper* has caused many courts to limit employee claims under the ADEA.⁷⁵ *Hazen Paper* left many issues unresolved, however, including the use of disparate impact as a way of proving discrimination under the ADEA.⁷⁶ In fact, this point was so

70. See *id.* at 23–24.

71. CAL. GOV. CODE § 12941 (West Supp. 2003). It states:

The Legislature hereby declares its rejection of the court of appeal opinion in *Marks v. Loral Corp.* The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers.

Id.

72. Higgins, *supra* note 39, at 34.

73. *Id.*

74. See 29 C.F.R. § 1625.7(d)–(f) (1994) (“A differentiation based on the average cost of employing older employees as a group is unlawful . . .”).

75. See George J. Church, *Unmasking Age Bias*, TIME MAG., Sept. 7, 1998, at H3. He noted: [T]he U.S. Supreme Court made it much more difficult to prove age was the cause of a layoff. After the ruling it became easier for an employer to cut payroll by replacing higher-salaried workers with lower-paid ones—even if those let go are all much older than the employees who take their place.

Id.

76. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). The Court noted that “we have never decided whether a disparate impact theory of liability is available under the ADEA . . . and we need not do so here.” *Id.*

important that the concurring members of the decision felt it necessary to note that it was only a disparate treatment case, and the decision in no way analyzed the availability of disparate impact analysis as a way of proving discrimination under the ADEA.⁷⁷

IV. DISPARATE IMPACT UNDER THE ADEA

Although the Supreme Court has yet to determine whether disparate impact is a valid cause of action under the ADEA, the oral arguments in *Adams v. Florida Power Corp.* highlighted several concerns with adding disparate impact as a cause of action under the ADEA. Further, several additional arguments have been made for and against disparate impact under the ADEA. These arguments focus on the statutory language, congressional intent, the 1991 amendments to the ADEA, the *Hazen Paper* decision, and the policy adopted by the EEOC.

A. THE ELEVENTH CIRCUIT CASE ADDRESSING DISPARATE IMPACT

The Supreme Court seemed ready to address the issue of disparate impact as a cause of action under the ADEA when it granted certiorari to *Adams v. Florida Power Corp.*⁷⁸ The case involved an electric utility company that went through a series of reorganizations after Congress deregulated the industry.⁷⁹ The plaintiffs were a class represented by Wanda Adams and several older employees who had been terminated during reductions in force.⁸⁰ The defendant claimed that the terminations “were necessary to maintain its competitiveness in the newly deregulated market.”⁸¹ The plaintiffs claimed that they had been discriminated against based on their age, in violation of the ADEA, and sought to establish this through a disparate impact analysis.⁸²

77. See *id.* at 618 (Kennedy, J., concurring). Chief Justice Rehnquist and Justice Thomas joined Justice Kennedy’s concurrence. *Id.* at 617.

78. 534 U.S. 1054 (2001). *Florida Power* was the first disparate impact case in which the Supreme Court granted certiorari, after having denied it to other cases involving disparate impact as a cause of action under the ADEA. See also *Mullin v. Raytheon Co.*, 528 U.S. 811, 811 (1999) (denying a writ of certiorari for a First Circuit Case that involved a claim of both disparate treatment and disparate impact); *Ellis v. United Airlines, Inc.*, 517 U.S. 1245, 1245 (1996) (denying a writ of certiorari for a Tenth Circuit case involving a disparate impact claim under the ADEA).

79. See *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1323 (11th Cir. 2001), *cert. granted*, 534 U.S. 1054 (2001).

80. *Id.*

81. *Id.*

82. *Id.*

Unfortunately, the Supreme Court later decided to dismiss the certiorari as being improvidently granted.⁸³ The Court did allow oral arguments to occur before the dismissals, and the transcript provides valuable insight into the Court's direction on the issue. The Court initially questioned whether a reduction-in-force was specific enough a claim to support a disparate impact theory.⁸⁴ The majority of the discussion, however, focused on two main issues: (1) the harm to businesses if disparate impact claims were allowed under the ADEA and (2) the language of the ADEA and Title VII.

The Court seemed very concerned that disparate impact would place a burden on businesses to defend their business practices, including the rationale used in their decisions to fire employees.⁸⁵ In the context of age discrimination, the Court thought that many business decisions intersected with age, and that it would be unwise to have a court second-guessing every business decision that may be correlated with age.⁸⁶ Even with defenses, such as the reasonable-factor-other-than-age exception, the Court did not wish to limit the ability of businesses to operate freely.

The main discussion in the oral arguments revolved around the language of the statute itself. Respondent argued that the wording was distinct enough from Title VII to foreclose disparate impact.⁸⁷ Respondent also argued that the language required a reading of motive (disparate treatment) and could not support a cause of action based on disparate impact.⁸⁸ Respondent noted that the reasonable-factor-other-than-age requirement would be satisfied with any factor other than age, because intentional age discrimination is the only thing that the ADEA protects.⁸⁹

83. *Adams v. Fla. Power Corp.*, 535 U.S. 228, 228 (2002).

84. Transcript of Oral Argument at 15, *Adams v. Fla. Power Corp.*, 534 U.S. 1054 (2001) (01-584), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html. The Court thought a reduction-in-force may be too general a claim to support disparate impact analysis because a reduction-in-force represented a wide variety of claims from different people at different times. *Id.* at 15. Additionally, the Court was interested in any other reduction-in-force cases that supported a claim based on disparate impact. *See id.* at 16.

85. *See id.* at 17.

86. *Id.* The petitioner justified the requirement because the employer could defeat the claim by proving a reasonable-factor-other-than-age. *Id.* at 18. The petitioner argued that the employer "must only show that its action was reasonable," which is not as demanding as showing that the action was necessary. *Id.* at 19. The Court, however, still seemed concerned with the effects of disparate impact on businesses, noting that any showing, even a less demanding showing, was still burdensome to a business because it was incumbent on the business to make the necessary showing. *See id.*

87. *See id.* at 24-30.

88. *See id.* at 32-33. The respondent argued that no matter the reading, the reasonable-factor-other-than-age defense requires a motive-based test. *Id.* at 32.

89. *See id.* at 32-33.

The Court seemed less than certain of that claim. It noted that the ADEA basically copied the language of Title VII.⁹⁰ Additionally, the Court noted that phrases like reasonable-factor-other-than-age suggest that a “reasonable” factor is required, instead of any motivation other than age.⁹¹ Throughout the entire argument, the Court continually questioned both petitioner and respondent on the language of the ADEA to determine if disparate impact should be applied.

While the Supreme Court’s transcripts help shed light on whether disparate impact as a cause of action under the ADEA will be approved or rejected, the circuit cases provide a more exhaustive evaluation of all the issues. For instance, in *Adams v. Florida Power Corp.*, the Eleventh Circuit upheld the district court’s determination that disparate impact could not be the basis for proving age discrimination under the ADEA.⁹²

The court’s holding in *Florida Power* presents several of the classic arguments for prohibiting the use of disparate impact analysis under the ADEA. First, it pointed out that the ADEA has a reasonable-factor-other-than-age provision, which differs from Title VII.⁹³ The language of this provision is similar to other statutes that the Supreme Court has recognized as precluding disparate impact claims.⁹⁴ Second, the court analyzed the legislative history of the ADEA. The court focused on the Secretary’s recommendation that “Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly, but that factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways.”⁹⁵ This differed from the legislative history of Title VII, which the Supreme Court relied on to find a cause of action based on disparate impact theory.⁹⁶

90. *Id.* at 30.

91. *See id.* at 35–36.

92. *See Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1326 (11th Cir. 2001).

93. *Id.* at 1325. *See also supra* Part III (discussing the reasonable-factor-other-than-age provision).

94. *See Fla. Power*, 255 F.3d at 1325. *See also supra* note 18 (discussing the Equal Pay Act).

95. *Fla. Power*, 255 F.3d at 1325 (citing *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (10th Cir. 1996)).

96. *Id.* at 1325–26 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)) (discussing the history and amendments to the bill, noting that for Title VII, Congress specifically “placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question”).

B. ARGUMENTS FOR AND AGAINST THE USE OF DISPARATE IMPACT ANALYSIS UNDER THE ADEA

Additional arguments have been made for and against the use of disparate impact analysis as a way of proving age discrimination. They can be broken down into five general categories: (1) the statutory language; (2) congressional intent; (3) the 1991 amendments; (4) the Supreme Court's decision in *Hazen Paper*; and (5) the policy adopted by the EEOC.

1. The Statutory Language

Many of the disputes over the availability of disparate impact under the ADEA focus on the wording of the statute. Critics of disparate impact argue that the wording "to fail or refuse to hire or to discharge any individual or otherwise discriminate . . . *because of* such individual's age,"⁹⁷ suggests that the statute requires discriminatory motive and intentional discrimination.⁹⁸

In *Ellis v. United Airlines, Inc.*, the court stated, "Section 623(a)(1), which contains the ADEA's explicit prohibition of discriminatory refusals to hire, specifically proscribes only decisions not to hire *because of* someone's age."⁹⁹ The court viewed the most obvious reading of the clause "*because of* such individual's age" to prohibit an employer from intentionally treating someone differently based on his or her age.¹⁰⁰ The court concluded, "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*."¹⁰¹

In addition, the Supreme Court reiterated the point that age discrimination is something that protects individuals, not groups, in *O'Connor v. Consolidated Coin Caterers Corp.*¹⁰² The issue in *O'Connor* was whether a fifty-year-old man could show a prima facie case of age discrimination even though someone who was also over forty-years-old replaced him.¹⁰³ The Court held that age discrimination is the act of

97. 29 U.S.C. § 623(a)(1) (1994) (emphasis added).

98. See *Ellis v. United Airlines*, 73 F.3d 994, 1007 (10th Cir. 1996). See also *Mullin v. Raytheon Co.*, 164 F.3d 696, 700 (1st Cir. 1999) (approving the reading of the court in *Ellis*).

99. *Ellis*, 73 F.3d at 1007.

100. *Id.*

101. *Id.*

102. *O'Connor v. Conso. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

103. *Id.*

holding an individual's age against the individual, and that "the ADEA prohibits discrimination on the basis of age and not class membership."¹⁰⁴ This indicates a belief that the ADEA protects only against intentional discrimination and not discriminatory impact. In other words, an employer violates the ADEA when the employer holds an individual's age against the individual, whereas acting in a way that has a disproportionate effect on older workers as a group does not. Also, the California Court of Appeal stated in *Loral Corp.*, "The theme of this language is the protection of individuals from discrimination *because* of their age, not the protection of 'older workers' by virtue of their status as older workers. The surrounding context of the phrase . . . deals with the impact of the 'adverse' decision on 'any individual.'"¹⁰⁵ Since discriminatory impact does not require a showing of discriminatory motive, some critics think that it conflicts with the ADEA's central purpose of eliminating inaccurate stereotypes in employment decision-making.¹⁰⁶ Additionally, critics argue that the reasonable-factor-other-than-age defense¹⁰⁷ and its similarity to the Equal Pay Act¹⁰⁸ should foreclose the use of disparate impact under the ADEA.

Proponents of using disparate impact under the ADEA analogize the text to that of Title VII.¹⁰⁹ They conclude that nothing in the text of the ADEA precludes using disparate impact.¹¹⁰ Also, the Supreme Court identified identical language under Title VII to allow for disparate impact.¹¹¹ Title VII provides, "It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees . . . in any way . . . *because of* such individual's race, color, religion, sex, or national origin,"¹¹² whereas the ADEA provides, "It shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way . . . *because of* such individual's age."¹¹³ The language of both statutes uses the same "because of" language, and Title VII allows for

104. *Id.* at 313.

105. *Marks v. Loral Corp.*, 68 Cal. Rptr. 2d 1, 12 (Cal. Ct. App. 1997).

106. *See EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1077 (7th Cir. 1994).

107. *See supra* Part III (discussing the reasonable-factor-other-than-age defense in *Loral Corp.*). *But see generally* 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) (arguing that the reasonable-factor-other-than-age requirement should provide only an affirmative defense to disparate treatment claims under the ADEA rather than foreclose the use of disparate impact under the ADEA).

108. *See supra* note 18 (discussing the Equal Pay Act).

109. *See supra* Part II (detailing the similarities and differences between the ADEA and Title VII).

110. *See Camacho v. Sears, Roebuck de Puerto Rico*, 939 F. Supp. 113, 120 (D.P.R. 1996).

111. *See id.*

112. 42 U.S.C. § 2000e-2(a) (2000) (emphasis added).

113. 29 U.S.C. § 623(a)(2) (1994) (emphasis added).

disparate impact. Proponents also note that the language of the ADEA is not identical to other statutes that apply the reasonable factor analysis.¹¹⁴

2. Congressional Intent

Both sides of the issue also disagree on the intent of Congress when the ADEA was passed. Opponents of the use of disparate impact analysis argue that the legislative intent of the ADEA focused on allowing disparate treatment as a way of proving discrimination.¹¹⁵ They note that the ADEA was created after the Secretary of Labor detailed a report on older workers in the workplace.¹¹⁶ This report “distinguished between ‘arbitrary discrimination’ based on age (disparate treatment) and other institutional arrangements that have a disproportionate effect on older workers (disparate impact).”¹¹⁷ Critics argue the legislative history of the ADEA, which focuses on banning arbitrary discrimination such as disparate treatment based on stereotypical perceptions of the elderly, differs from Title VII, which allows for disparate impact.¹¹⁸ Additionally, they point out other parts of the report that indicate that intent is required for age discrimination under the ADEA.¹¹⁹

Proponents argue that nothing in the legislative history indicated that disparate impact was to be excluded as a cause of action under the ADEA.¹²⁰ They argue that relying on the Secretary’s report is unpersuasive because it came out before the Supreme Court even recognized disparate impact in *Griggs*.¹²¹ One scholar noted that the

114. See *supra* note 18 (discussing the Equal Pay Act). As the Eleventh Circuit stated: [T]he ADEA requires that the “other factor” be a reasonable one, while the Equal Pay Act finds “any other factor” acceptable. It could be argued that this difference distinguishes the ADEA from the Equal Pay Act, and supports the inference that the reasonableness requirement refers to the business necessity justification that, in Title VII cases, can be used to defend an employment qualification that has a disparate impact on employees in the protected class.

Adams v. Fla. Power Corp., 255 F.3d 1322, 1325 n.6 (11th Cir. 2001) (citation omitted). See also *Johnson*, *supra* note 107, at 325 (arguing that the reasonable-factor-other-than-age defense, one of the main distinctions between Title VII and ADEA, should only apply as an affirmative defense to disparate treatment cases and should have no effect on the use of disparate impact).

115. See *supra* notes 95–96 and accompanying text (discussing the *Florida Power* case).

116. *Mullin v. Raytheon Co.*, 164 F.3d 696, 702–03 (1st Cir. 1999).

117. *Id.* at 703 (citing the report created by the Secretary of Labor at Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964)).

118. See *Fla. Power*, 255 F.3d at 1325–26.

119. See *Marks v. Loral Corp.*, 68 Cal. Rptr. 2d 1, 15–17 (Cal. Ct. App. 1997) (arguing that the Secretary indicated a lack of parallel concerns embodied in other kinds of discrimination, and that the report subdivides factors that tend to result in discrimination).

120. *Camacho v. Sears, Roebuck de Puerto Rico*, 939 F. Supp. 113, 120 (D.P.R. 1996).

121. See *id.* at 120–21.

report's "focus on arbitrary age discrimination does not reveal a clear intent to insulate neutral practices from disparate impact scrutiny."¹²² As Steven Kaminshine observed, the Secretary's concern about arbitrary age discrimination "may have embraced not just the unjustified use of overt age limits but also the unjustified use of facially neutral standards that predictably target older employees."¹²³

Additionally, the legislative history and Secretary's report do not directly adopt or reject disparate impact analysis, and some commentators argue that congressional intent favors extending disparate impact to the ADEA.¹²⁴ In *Griggs*, the Supreme Court held that the stated goal of Congress to eliminate "artificial, arbitrary, and unnecessary barriers to employment"¹²⁵ also supported a disparate impact analysis.¹²⁶ Thus, the same concerns over arbitrary discrimination that the Supreme Court relied on for Title VII disparate impact analysis in *Griggs*¹²⁷ also support disparate impact under the ADEA.¹²⁸ Also, while there was a "strong indication that the primary purpose behind the ADEA was to eliminate arbitrary age discrimination, this does not necessarily foreclose a disparate impact analysis."¹²⁹

3. The 1991 Amendments to Title VII

In 1991, Congress amended the Civil Rights Act to codify disparate impact as a cause of action under Title VII.¹³⁰ There was no similar codifying of disparate impact under the ADEA even though it was amended in other ways.¹³¹ Critics have pointed to this as another reason why disparate impact analysis should not extend to the ADEA. Congress had the opportunity to amend the ADEA as it did with Title VII, and its failure to do so means Congress did not intend for disparate impact analysis to apply to the ADEA.

122. Kaminshine, *supra* note 27, at 291.

123. *Id.* at 292.

124. See 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, 606 (1996).

125. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

126. See Saunders, *supra* note 124, at 606.

127. 401 U.S. 424 (1971).

128. See Kaminshine, *supra* note 27, at 290–92 (arguing that the "arbitrary" language used in *Griggs* demonstrates the Court's concern with the absence of correlations between employment practices and the demands of the job).

129. Saunders, *supra* note 124, at 606.

130. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (1991) (codified as amended at 42 U.S.C. § 2000e-2(k)).

131. See *supra* notes 19–24 and accompanying text (discussing the 1991 amendment to Title VII).

Proponents counter with two main arguments. First, the 1991 amendments responded to several Supreme Court opinions that arguably hurt Title VII plaintiffs.¹³² “There was no comparable judicial assault on the ADEA, as no court had ever found disparate impact analysis unavailable to ADEA plaintiffs.”¹³³ It “seems unpersuasive, however, to read so much into congressional inaction.”¹³⁴ Second, although Congress amended the ADEA, it did not expressly prohibit a disparate impact theory of liability.¹³⁵ It can be argued that the absence of discussion on disparate impact when the ADEA was amended in 1984 meant that Congress did not consider the application of the disparate impact to the ADEA troublesome.¹³⁶ Additionally, Congress had knowledge of the courts’ application of disparate impact to the ADEA before the 1984 amendments.¹³⁷ Therefore, if the application of disparate impact to ADEA claims was cause for alarm, Congress could have acted to reverse any improper interpretations of the ADEA.¹³⁸

4. The Ramification of the Supreme Court’s Decision in *Hazen Paper*

Many courts have been inclined to read the Supreme Court’s decision in *Hazen Paper* to foreclose disparate impact under the ADEA. They note that “while the *Hazen* Court left open the question of whether a disparate impact claim can be brought under the ADEA, language in the opinion suggests that it cannot.”¹³⁹ In *Hazen Paper*, the Court found that Congress passed the ADEA due to “its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.”¹⁴⁰ This has led some courts to conclude that disparate impact does not address the evils identified by the Court because of its focus on employment practices grounded in factors other than age, rather than on inaccurate stereotypes.¹⁴¹ The Court in *Hazen Paper* also noted, “Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and

132. Camacho v. Sears, Roebuck de Puerto Rico, 939 F. Supp. 113, 120 (D.P.R. 1996).

133. *Id.*

134. Sloan, *supra* note 68, at 518.

135. See Saunders, *supra* note 124, at 609.

136. *Id.* at 609–10.

137. See Markham v. Geller, 451 U.S. 945, 945 (1981) (denying certiorari where the lower court allowed disparate impact as a cause of action under the ADEA).

138. Saunders, *supra* note 124, at 610.

139. Adams v. Fla. Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001).

140. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

141. See Mullin v. Raytheon Co., 164 F.3d 696, 700–01 (1st Cir. 1999).

competence decline with old age.”¹⁴² This statement has led critics to conclude that if disparate treatment “captures the essence” of what Congress sought to prohibit in the ADEA, disparate impact, which permits liability without proving the employers’ intentions, must not.¹⁴³

Supporters of disparate impact under the ADEA also rely on the Court’s language in *Hazen Paper*. They point out that the Court specifically noted that it did not decide the availability of disparate impact under the ADEA.¹⁴⁴ Some courts have observed that disallowing disparate impact based on what the Supreme Court specifically chose not to address is “not the stuff on which a trial court may base its interpretation of the law.”¹⁴⁵ In *Hazen Paper*, the Court clearly chose to avoid deciding disparate impact under the ADEA, and to claim that some of its language foreclosed the possibility of disparate impact under the ADEA goes beyond what the Court stated. Relying on the Court’s language, scholars have criticized some courts’ decisions regarding disparate impact as overstepping the decision of the Court in *Hazen Paper*.¹⁴⁶

5. The EEOC Guidelines

Those who believe that disparate impact analysis should be allowed point to the guidelines of the EEOC that interpret the reasonable-factor-other-than-age exception as expressly providing for disparate impact claims.¹⁴⁷ The ADEA requires that the employer demonstrate the reasonableness of the challenged practice, which is a “burden essentially identical to that required to defeat a claim of disparate impact under Title VII.”¹⁴⁸ Consequently, the EEOC regulations interpret the reasonable factor exception as expressly providing for disparate impact analysis. Some courts consider EEOC guidelines as authoritative within the scope of

142. *Hazen Paper*, 507 U.S. at 610.

143. See *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008–09 (10th Cir. 1996). The Tenth Circuit said that it could not read *Hazen Paper* “without receiving the strong impression that the Supreme Court is suggesting that the ADEA does not encompass a disparate impact claim.” *Id.* at 1009. See also *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076–77 (7th Cir. 1994) (arguing that inaccurate stereotyping was central to the Court’s decision in *Hazen Paper*, and that the ADEA only provides a cause of action when an older worker is denied the opportunity based on a *belief* that older employees are less effective).

144. See *supra* text accompanying note 77.

145. *Camacho v. Sears, Roebuck de Puerto Rico*, 939 F. Supp. 113, 121 (D.P.R. 1996).

146. See *Johnson*, *supra* note 107, at 342 (arguing that “[t]he negative inference is that six Justices refused to state that disparate impact is not available under the ADEA, indicating the *Mullin* court overstated the message of the *Hazen Court*”).

147. *Camacho*, 939 F. Supp. at 122.

148. *Id.*

employment discrimination. The EEOC interpretative guidelines, “which are entitled to judicial deference, suggest that the ‘reasonable factors’ defense in the ADEA works in tandem with the business necessity defense in the disparate impact analysis.”¹⁴⁹

Other courts disagree on the authoritative value of EEOC guidelines, stating that “no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.”¹⁵⁰ Additionally, “courts are in general agreement that interpretative rules simply state what the administrative agency thinks the statute means, and only ‘remind’ affected parties of existing duties.”¹⁵¹

V. THE PROBLEMS WITH ALLOWING EMPLOYER COSTS TO BE CONSIDERED IN ADEA CASES AND ALTERNATIVE SOLUTIONS

Allowing employers to factor in their cost concerns when deciding age discrimination cases is problematic, even though from a practical standpoint it is logical. Employers must have flexibility to make legitimate and rational decisions about how their businesses are organized and operated. Controlling costs is a way to maintain a profitable and competitive enterprise. Since “wages correspond precisely to the costs of doing business, and hence to profitability,”¹⁵² courts are now more inclined to grant employers wide discretion in cost-related terminations.¹⁵³ As one scholar noted, “[c]ost-based lay-offs often constitute perfectly rational business practices, grounded in employers’ concern for economic viability.”¹⁵⁴ Another federal court decision echoed this view, stating, “[i]n a for-profit enterprise, the essence of employment decisions is whether an employee’s salary is justified by that employee’s productivity.”¹⁵⁵

On the other hand, some critics of cost-based dismissals are concerned that cost-justifications will leave older employees with little in the way of protection from age discrimination. One scholar noted, “The majority in *Metz* worried that allowing discrimination based on wages left employers

149. *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1328 (11th Cir. 2001) (Barkett, J., concurring).

150. *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989).

151. *Jerri’s Ceramic Arts, Inc. v. Consumer Prod. Safety Comm’n*, 874 F.2d 205, 207 (4th Cir. 1989).

152. *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1219 (7th Cir. 1987) (Easterbrook, J., dissenting).

153. For further discussion of the recent trend allowing employer costs to be factored into termination decisions regarding age discrimination, see *supra* Part III.

154. Sloan, *supra* note 68, at 510.

155. *EEOC v. Newport Mesa Unif. Sch. Dist.*, 893 F. Supp. 927, 932 (C.D. Cal. 1995).

holding all the cards. What would stop unscrupulous employers from simply paying older employees a bit more than other workers, then firing them on economic grounds?"¹⁵⁶ Another scholar noted, "Employers are now given the tool to terminate older employees without having to worry about any adverse consequences on the side of the fired employees."¹⁵⁷ He further points out, "[A]lthough modern corporations have reason to cheer about the courts' decisions to protect the free economic system . . . most employees do not share the optimistic vision of the courts."¹⁵⁸ Critics note that employment laws do, in other contexts, force companies to act contrary to their best financial interests.¹⁵⁹

This presents a real dilemma when trying to balance employer and employee interests. Where should the balance be struck? Favoring employers limits judicial scrutiny of their actions. Employers will hold all of the cards and be able to decide whether to hire or fire older workers without incurring liability. Employees would be left with little recourse, and older workers, who are less able to find new employment than younger workers, suffer the most.¹⁶⁰ If the balance favors employee rights, however, every employer decision may be subject to court review. This would undermine the capitalistic marketplace and place large burdens on employers for what may be legitimate business decisions. Employers need discretion, but older employees are entitled to some protection.

Solutions have been proposed to better protect the employees. One typical alternative is to ask workers to take a pay cut before terminating them.¹⁶¹ This way, the employee has the choice of taking a pay cut and keeping his or her job, or accepting the consequences of the refusal to compromise.¹⁶² Another similar idea is a right of first refusal, by which employees are given the choice of accepting a lower salary.¹⁶³ This

156. Higgins, *supra* note 39, at 35.

157. Spindler, *supra* note 30, at 822.

158. *Id.*

159. See Higgins, *supra* note 39, at 35. For example, "even if a company thought its customers would prefer to deal with a younger sales staff, it could not refuse to hire salespeople over age 40." *Id.*

160. See Church, *supra* note 75, at H3. He noted, "most older workers, including those bounced out of good jobs that were later filled by younger people working for less money, eventually find some kind of new employment. Trouble is, they have to search long and hard, and then they must often settle for low-paid, low-skilled work." *Id.*

161. Higgins, *supra* note 39, at 35. He points out that the pay cut offer "would tend to show that it was simply cost—and not age—that motivated the employer." *Id.*

162. See Spindler, *supra* note 30, at 824.

163. See Peter H. Harris, Note, *Age Discrimination, Wages, and Economics: What Judicial Standard?*, 13 HARV. J.L. & PUB. POL'Y 715, 756 (1990).

decision is available “so long as their jobs continue to exist and they are qualified to perform them.”¹⁶⁴

There are many who think these two options will not solve employers’ practical concerns over productivity and cost. They argue that several studies show pay cuts and demotions foster resentment and anger in the workforce.¹⁶⁵ Older workers who take a pay cut are less likely to maintain their former levels of productivity. The pay cut option will not solve employers’ productivity concerns to the extent that its use would be justified.

Another option involves requiring employers to transfer older employees to other available positions in the company.¹⁶⁶ Such a requirement would prevent employers from abusing the right to terminate based on higher costs.¹⁶⁷ This has the obvious problem, however, of being applicable only to a select few large employers. It would require employers that have the resources and positions available to transfer older employees. Additionally, problems associated with employee morale may remain, as the employees may resent being transferred to a different job.

Some advocates for older workers think that the laws should force companies to act against their best financial interest and keep older workers employed.¹⁶⁸ This approach would give some protections to older workers; however, it would have only a limited effect on employer costs because it applies only to wages and not to other employment decisions.¹⁶⁹ Although it does place a limit on some employer costs, it significantly undermines their discretion in choosing whom to fire. Employer discretion is a benefit because it provides flexibility to adjust to changes in the marketplace, it limits the burden the law places on employers, and lowers external costs on employers. This external cost affects profitability as much as higher salaries would.

Should the law place a unilateral restraint on the freedom of employers to use their discretion to fire? Is the evidence of age-motivated discrimination clear enough in every situation to warrant a universal restraint? The answer seems to be no. First, the level of age discrimination

164. *Id.*

165. See Karen E. Mishra, Gretchen M. Spreitzer & Aneil K. Mishra, *Preserving Employee Morale During Downsizing*, SLOAN MGMT. REV., Jan. 1, 1998, at 83.

166. See Spindler, *supra* note 30, at 824.

167. *Id.*

168. See Higgins, *supra* note 39, at 35; Spindler, *supra* note 30, at 825.

169. Spindler, *supra* note 30, at 825.

in society is unclear.¹⁷⁰ Second, even where there is a high correlation between age and another factor, the correlation is not perfect. As the court in *Loral Corp.* pointed out, “[A] high correlation is somewhat simplistic . . . [and] Census bureau statistics, for example, show a *decline* in income for older workers who reach a certain age.”¹⁷¹ In *Hazen Paper*, the Court held that although pension status is correlated with age, “[a]n employee who is younger than 40 . . . may have worked for a particular employer his entire career, while an older worker may have been newly hired.”¹⁷² Therefore, a supposedly high correlation between age and another factor may not translate into actual age discrimination because of other facts.¹⁷³

To place an external cost on employers without clear proof of age-based discrimination seems to be unfair. But how is one to separate age discrimination from other legitimate decisions by employers? The answer may lie in allowing employees to state a cause of action based on disparate impact. This represents yet one more reason to favor allowing disparate impact as a claim under the ADEA.

VI. THE CONSEQUENCES OF APPLYING DISPARATE IMPACT ANALYSIS TO THE ADEA

Disparate impact requires the employer to articulate a legitimate justification for its actions, and then allows the employee to offer evidence of an alternative arrangement that would equally promote the same business necessity with less discriminatory impact.¹⁷⁴ Employees can present evidence indicating other ways to run businesses that would protect employers’ interests and not disproportionately harm older workers. This is consistent with the purpose of the ADEA, which is to give statutory protections to older workers and eradicate employment discrimination based on stigmatizing stereotypes of age.¹⁷⁵ This purpose is similar to Title

170. See Church, *supra* note 75, at H3. He argues that real bias is difficult to prove, and is only getting more difficult as employers become increasingly knowledgeable of age bias laws. *Id.* Additionally, he points out that many deny that there is any major age discrimination in employment. *Id.*

171. Marks v. Loral Corp., 68 Cal. Rptr. 2d 1, 8 (Cal. Ct. App. 1997).

172. Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993).

173. See *id.*

174. 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, 285 (1995).

175. See Adams v. Fla. Power Corp., 255 F.3d 1322, 1326–27 (11th Cir. 2001) (Barkett, J., concurring).

VII, and similarly, disparate impact analysis should be available as an avenue to prove that age discrimination occurred in the workplace.¹⁷⁶

Disparate impact would apply to situations where a specific, facially-neutral employment decision is challenged as having a disproportionate impact on a class of workers protected by a particular statute, and where that decision cannot be justified as job-related and consistent with business necessity.¹⁷⁷ The intent of the employer is irrelevant because “[p]roof of discriminatory motive . . . is not required under a disparate impact theory.”¹⁷⁸ Disparate impact maintains a different focus than disparate treatment, as “the former use[s] statistical theory[,] not to infer the motive of the employer but rather to describe the result of the policy.”¹⁷⁹ The use of statistics allows courts to determine any difference in employment levels between members of the protected class and those outside the class.¹⁸⁰

Once a plaintiff has shown that the employer’s decision has a disproportionate impact on a protected class, the burden shifts to the employer to justify its actions.¹⁸¹ The employer can do this by challenging the evidence of disparate impact, or by defending the action as job-related and consistent with business necessity.¹⁸² If the employer can make such a showing, the employee has the opportunity to establish an alternative employment practice that does not have a disparate impact and would also serve the employer’s legitimate interest.¹⁸³

Disparate impact analysis has been criticized because it is difficult to analyze and it relies heavily on statistics.¹⁸⁴ The use of statistics is particularly complex in age discrimination cases because “[m]any neutral factors, such as the normal predominance of younger workers entering the workforce in combination with older ones leaving, tend to skew the statistics, making age based disparate impact cases rarer than those based

176. *Id.* at 1327.

177. *See* Pontz, *supra* note 174, at 276. *See also* *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977) (stating that disparate impact claims “involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity”).

178. *Id.*

179. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 n.5 (1981).

180. *See* Pontz, *supra* note 174, at 277.

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

182. *See* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997–98 (1988); *Int’l Bhd. of Teamsters*, 431 U.S. at 336.

183. *See* Pontz, *supra* note 174, at 285.

184. *Id.* at 278.

on other protected classes.”¹⁸⁵ Additionally, critics fear that allowing disparate impact in ADEA cases will increase the likelihood that plaintiffs will be successful on the merits and the likelihood that cases will survive summary judgment.¹⁸⁶ In turn, such an increase would “raise the stakes dramatically for employers and alter the strategy and risk calculus used by both parties in employment discrimination suits brought under the ADEA.”¹⁸⁷ But would this really be the case?

One benefit of using disparate impact is that it does not require proof of a discriminatory intent, which can be difficult to demonstrate. Motive can be the most difficult factor to prove because of its subjectivity, existing only in the employer’s mind and not readily proven by direct evidence.¹⁸⁸ In the context of age discrimination, there is little in the way of concrete evidence.¹⁸⁹ Therefore, statistics represent the only viable way to prove discrimination absent specific proof of a discriminatory intent. Further, disparate impact analysis will not dramatically increase the costs to employers because of the reasonable-factor-other-than-age defense and the business necessity defense.

The business necessity defense allows employers to defend any action by proving they considered neutral criteria, unrelated to age, which are job-related and consistent with business necessity.¹⁹⁰ In fact, one scholar has suggested that the reasonable factor defense will often overlap with the business necessity defense.¹⁹¹ As the Eleventh Circuit stated:

Disparate impact is not an easy theory to plead and prove [I]t is probably a more difficult claim to make under the ADEA than in a race or gender context because the impact of neutral policies which fall disproportionately on class members protected by the ADEA can be

185. *Id.* at 279.

186. *Id.* at 286.

187. *Id.*

188. *Id.* at 284.

189. See Church, *supra* note 75, at H3. “Though often disguised, age bias obviously persists even in a supposedly desperately labor-short economy. There is too much anecdotal evidence to permit real doubt. But it is hard to determine its extent or whether it is increasing or decreasing, since anecdotal evidence is about all there is.” *Id.*

190. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

191. See Brendan Sweeney, Comment, “Downsizing” the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability, 41 VILL. L. REV. 1527, 1548 n.81 (1996) (citing *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.”).

proven to be related to legitimate business reasons in more instances than those which might impact other protected groups.¹⁹²

Furthermore, the reasonableness of certain employment actions may appear self-evident. For example, bankrupt employers will almost always win motions for summary judgment on reasonableness and business necessity grounds.¹⁹³ That is likely what would occur in many cases. For instance, in *Bialas*, the employer needed to terminate employees because of financial difficulties.¹⁹⁴ It terminated employees with higher salaries, which the plaintiff claimed had a disproportionate impact on older workers.¹⁹⁵ Clearly, the survival of the corporation would constitute a business necessity defense. The case was even stronger in *Florida Power*, where the employer was facing a changing marketplace after the utility industry was deregulated, and the employer needed to restructure its business.¹⁹⁶ The employer argued that while employment decisions based on salary may have a disparate impact on older workers, they can be necessary to restructuring in a deregulated industry.¹⁹⁷ The case might be strongest in *Raytheon*, where the employer was faced with a drastic reduction in the volume of work to which it would have access once the Cold War ended.¹⁹⁸ It was forced to close plants and terminate employees.¹⁹⁹ The plaintiff claimed that the employer violated the ADEA by demoting or firing employees based on high salary.²⁰⁰ This drastic downturn represents a strong business necessity defense. This kind of economic peril constitutes a greater justification for actions that cause a disparate impact, rather than simply a desire to increase corporate profits. Although increased profits lead to increased corporate growth and value, a clear distinction can be drawn between decisions that affect the employer's survival and those that slightly alter its bottom line.

Thus, although disparate impact would expand the ADEA, its expansion would be tempered by the business necessity and reasonable-factor-other-than-age defense. Further, limiting the business necessity defense to those decisions that are necessary for the corporation's survival

192. *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1327 (11th Cir. 2001) (Barkett, J., concurring) (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610–11 (1993)).

193. *Camacho v. Sears, Roebuck de Puerto Rico*, 939 F. Supp. 113, 122 (D.P.R. 1996).

194. *Bialas v. Greyhound Lines, Inc.*, 59 F.3d 759, 760 (8th Cir. 1995).

195. *Id.* at 763.

196. *See Fla. Power*, 255 F.3d at 1323.

197. *See id.*

198. *Mullin v. Raytheon Co.*, 164 F.3d 696, 697–98 (1st Cir. 1999).

199. *Id.* at 698.

200. *Id.*

will allow employers to make reasonable cost-based decisions without lessening the protection of the ADEA.

CONCLUSION

The purpose of the ADEA is to provide protection to workers over age forty. It was created because Congress and society identified a change in the way workers were treated. Older workers were being seen as more expensive and their skill and expertise were less valuable in a disposable workplace.

Discrimination in general, and particularly age discrimination, is difficult to prove absent a disparate impact analysis. With courts increasingly treating employer costs as distinct from age, the minor protections offered by the ADEA are eroding. Currently, employers hold all the cards and can fire older workers because of the higher costs associated with them. These older workers are likely the same ones who helped their employers become successful and profitable.

Allowing disparate impact claims under the ADEA will help protect older employees and create a greater balance in the employment relationship. It will challenge employers to eliminate discrimination based on age in much the same way Title VII challenged them to eliminate discrimination based on race or sex.

Furthermore, permitting the plaintiffs to present evidence of disparate impact will facilitate the plaintiffs' ability to establish a prima facie case of unlawful discrimination.²⁰¹ However, "Congress, through the ADEA, has assigned the task of assessing the reasonableness of [employer] conduct to the courts—a responsibility that should not be shirked lightly."²⁰² If courts are really mindful of the "newly-minted whippersnapper MBA who tries to increase corporate profits—and his or her own compensation—by across-the-board layoffs,"²⁰³ then they should allow disparate impact analysis as a way of proving discrimination based on age.

201. *Camacho v. Sears, Roebuck de Puerto Rico*, 939 F. Supp. 113, 122 (D.P.R. 1996).

202. *Id.*

203. *Marks v. Loral Corp.*, 68 Cal. Rptr. 2d 1, 24 (Cal. Ct. App. 1997).