Comments

HAZEN PAPER CO. v. BIGGINS REVISITED: THE SUPREME COURT’S DISMISSAL OF ADAMS v. FLORIDA POWER CORPS.

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I. INTRODUCTION

In April of 2002, the Supreme Court dismissed Adams v. Florida Power Corp., once again leaving unanswered the question of whether the Age Discrimination in Employment Act (ADEA) permits disparate impact claims. The Court previously left this issue unresolved in 1993 by remanding Hazen Paper Co. v. Biggins without deciding the issue of whether disparate impact theory liability is available under the ADEA. Consequently, there is a circuit court split regarding the applicability of disparate impact claims to the ADEA.

Walter Biggins, a sixty-two year old employee of the Hazen Paper Company, sued after being fired just weeks shy of the date on which his pension would vest. He filed suit under the ADEA alleging that his age was a determinative factor in Hazen’s decision to terminate him. Hazen claimed that Biggins was discharged for engaging in business with Hazen’s competitors. The district court found for the plaintiff on the ADEA claim and the holding was affirmed by the court of appeals. The Supreme Court granted certiorari to decide whether an employer’s interference with an

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4. Id. at 606.
5. Id.
6. Id.
7. Id. at 607.
employee's pension benefits vesting is violative of the ADEA.

On the surface, the interference with pension benefits may not appear to be an age discrimination issue. In fact, courts have been in disagreement over seniority being a proxy for age.\(^8\) However, since pension eligibility is determined by the number of years an employee has worked for a particular employer, pension is "empirically correlated with age."\(^9\) Termination purely based on age is a blatant violation of the ADEA and accordingly, the Supreme Court remanded the case, allowing the district court to properly determine Hazen's motivation for firing Biggins.\(^10\)

Interestingly, Biggins did not assert a disparate impact claim under the ADEA. Biggins' allegation was a pure disparate treatment claim.\(^11\) Despite the asserted claim being under a disparate treatment theory, this case contributed to the circuit court split and the academic debate over the availability of disparate impact claims under the ADEA. The Court proclaimed, "we have never decided whether a disparate impact theory of liability is available under the ADEA ... and we need not do so here."\(^12\)

The facts of Adams are divergent from those of Hazen in that in the former, the plaintiff class was alleging disparate impact theory liability under the ADEA.\(^13\) The plaintiffs claimed that the Florida Power Corporation's reorganization scheme disproportionately and adversely affected older employees.\(^14\) While the district court first certified the plaintiff class, it later decertified the class, maintaining that the individual claims were too dissimilar to proceed as a class.\(^15\) It then allowed individual plaintiffs to file claims, but found that the ADEA precludes

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8. Id. at 608-09. The Court noted this in its discussion of precedent in Hazen:

Compare *White v. Westinghouse Electric Co.*, 862 F.2d 56, 62 (CA3 1988) (firing of older employee to prevent vesting of pension benefits violates ADEA); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (CA7 1987) (firing of older employee to save salary costs resulting from seniority violates ADEA), with *Williams v. General Motors Corp.*, 656 F.2d 120, 130, n.17 (CA5 1981) ("[S]eniority and age discrimination are unrelated .... We state without equivocation that the seniority a given plaintiff has accumulated entitles him to no better or worse treatment in an age discrimination suit"), cert. denied, 455 U.S. 943 (1982); *EEOC v. Clay Printing Co.*, 955 F.2d 936, 942 (CA4 1992) (emphasizing distinction between employee's age and years of service).


10. Id. at 614.

11. For a discussion of the difference between disparate impact and disparate treatment see infra pt. II.


14. Id.

15. Id.
disparate impact claims. This finding was affirmed by the court of appeals.\textsuperscript{16} Although the court of appeals acknowledged that the Supreme Court had not decided the issue, it found against the plaintiff class because of a perceived symmetry between the ADEA and the Equal Pay Act (EPA),\textsuperscript{17} the Supreme Court has held that disparate impact claims are not viable under the EPA.\textsuperscript{18} The Supreme Court granted certiorari and subsequently dismissed the claim.\textsuperscript{19} The opinion simply reads, "[t]he writ of certiorari is dismissed as improvidently granted. It is so ordered."\textsuperscript{20}

Even though the facts of these two cases differ and the complaints alleged different theories of discrimination, the cases are strikingly similar in that the Supreme Court made it clear that it did not want to decide the issue of disparate impact theory liability under the ADEA. Consequently, employees' ability to succeed on a claim under the ADEA is, at least in part, dependent on the circuit in which they reside.

\section{II. History of Disparate Impact}

The terms "disparate treatment" and "disparate impact" should not be conflated, since they denote different legal theories. An understanding of this difference is fundamental for comprehending the issue of disparate impact, particularly in its relation to age discrimination. Disparate treatment focuses on a discriminatory intent.\textsuperscript{21}

'\textit{Disparate treatment} ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . .'\textsuperscript{22}

Conversely, disparate impact rests not on motive but rather on the consequence of a particular practice.\textsuperscript{23} "Claims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on

\begin{itemize}
\item \textsuperscript{16} Id.
\item \textsuperscript{17} 29 U.S.C. § 206(d) (1994).
\item \textsuperscript{18} See County of Washington v. Gunther, 452 U.S. 161, 170-71 (1981) (differentiating the EPA from Title VII, which does permit disparate impact liability theory).
\item \textsuperscript{19} Adams v. Florida Power Corp., 535 U.S. 228 (2002).
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Hazen, 507 U.S. at 609 (quoting Teamsters v. United States, 431 U.S. 324, 335-36, n.15 (1977)).
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\end{itemize}
one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required . . . "24

In 1971, disparate impact first became an issue before the Supreme Court in Griggs v. Duke Power Company.25 The discrimination in this case was racial in nature and the claim was brought under Title VII.26 Black employees of a generating plant alleged that the employer’s requirement of a high school diploma or the passing of an intelligence test, as a prerequisite of being hired or transferred within the plant, had a disparate racial impact.27

It must be noted that the practices and requirements set by the generating plant were first implemented prior to the passage of Title VII.28 Therefore, the district court held for the employer, stating that Title VII relief is not retroactive and that the employer was no longer practicing discriminatory conduct.29 The court of appeals affirmed the holding for the employer.30 Its rationale was that the employer did not have a discriminatory intent when it implemented the prerequisites, so there was no violation of Title VII.31 However, the court of appeals disagreed with the district court’s finding that Title VII precluded claims of residual discrimination.32

The Supreme Court granted certiorari in order to determine the correct interpretation of Title VII.33 By reviewing the facts of this particular case, and analyzing the statute, the Court reversed the holdings of the lower courts.34 It determined that Title VII does not require a finding of discriminatory intent: “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.”35 In this case, the Court found that the requirement of a high school diploma or passing an intelligence test could not be sustained under Title VII because there was no correlation between the requirements and an employee’s job performance.36 Title VII does not ban the use of testing mechanisms to determine eligibility for employment and transfers so long as the testing, or

24. Id.
28. Id. at 426-27.
29. Id. at 428.
30. Id.
31. Id. at 429.
32. Id.
33. Id.
34. Id.
35. Id. at 432.
36. Id. at 433 ("The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability.").
other requirements, bears a connection to job performance.\textsuperscript{37}

The appeal to plaintiffs of disparate impact liability is obvious; motive and intent is something that can be difficult to prove and effects can be more readily apparent. To prove a prima facie case for disparate impact, a plaintiff must prove: (1) that the defendant's actions adversely affected the plaintiff; (2) that the defendant's facially neutral practice disproportionately impacts persons of a particular group; and (3) that there is a causal connection between the disparate impact and the defendant's practices.\textsuperscript{38}

Even after the plaintiff has proven a prima facie case, the defendant still has a chance to rebut by showing a legitimate and justifiable reason for its practice (a business necessity). Once the defendant meets its rebuttal burden, the plaintiff must then establish either that the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is no more than a pretext for discrimination.\textsuperscript{39}

Since \textit{Griggs}, successful disparate impact claims have been asserted for gender based discrimination as well. \textit{Dothard v. Rawlinson}\textsuperscript{40} was the first such Supreme Court case. In \textit{Dothard}, a female contested Alabama's statutory weight and height requirements\textsuperscript{41} for employment as a prison

\begin{itemize}
    \item \textsuperscript{37} Id. at 436 n.12. The Court clearly limited its rejection of the employer's test in \textit{Griggs}:

    \textit{Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.}

    \textit{Id.} at 436.

    \item \textsuperscript{38} \textit{Id.} at 431-32 (applying this test to the facts of this case).

    \item \textsuperscript{39} Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (defining this final stage of the burden shifting process).

    \item \textsuperscript{40} 433 U.S. 321 (1977).

    \item \textsuperscript{41} The Court in \textit{Dothard} relied on Alabama Code, Title 55, § 373 (109) (Supp. 1973), which stated that:

    \textit{(d) Physical qualifications. - The applicant shall be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law-enforcement officer. The commission may for good cause shown permit variances from the physical qualifications prescribed in this subdivision.}

\end{itemize}
guard. Though facially neutral, she claimed that this requirement disproportionately and adversely affected women by decreasing the probability that they would be employed as guards.\textsuperscript{42} The Court held that the district court did not err in ruling that Title VII was applicable to Alabama’s statutory requirements.\textsuperscript{43} It also held that the plaintiff established a prima facie case which the defendant was unable to rebut.\textsuperscript{44}

It has been judicially determined that Title VII does in fact allow for disparate impact liability. Congress passed Title VII for “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”\textsuperscript{45} These impermissible classifications include and are limited to “race, color, religion, sex, or national origin.”\textsuperscript{46} Notably missing from the protected categories listed in Title VII is age.

III. THE ADEA

The ADEA undoubtedly prohibits age discrimination under a disparate treatment theory. Passed in 1967, the ADEA was an amendment to the Fair Labor Standards Act.\textsuperscript{47} Its stated purpose is to ensure that older workers are not treated unfairly and arbitrarily with respect to employment.\textsuperscript{48} Persons over forty years of age,\textsuperscript{49} whether employees or applicants, comprise the class protected by the ADEA. An employer must have at least twenty employees for its employees to be covered under the ADEA.\textsuperscript{50} The ADEA is not only applicable to employers, it also applies to

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Dothard, 433 U.S. at 324 n.2.
42. Dothard, 433 U.S. at 321, 324.
43. Id. at 328.
44. Dothard, 433 U.S. at 331. The Court stated that:

The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement’s grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made.

Id.
45. Griggs, 401 U.S. at 431.
48. 29 U.S.C. § 621(b) (1994) (“It is therefore the purpose of this [chapter] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.”).
50. The Statute reads:
labor organizations, employment agencies, and the government.

Under the ADEA, "[i]t shall be 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." It is also illegal for a labor organization to "exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age." An employment agency is prohibited from "refus[ing] to refer for employment, or otherwise to discriminate against, any individual because of such individual’s age, or to classify or refer for employment any individual on the basis of such individual’s age." The "because of" clauses are indicative of the availability of disparate treatment theory liability. Courts, including the Supreme Court, universally have allowed plaintiffs to assert disparate treatment claims under the ADEA.

The term ‘employer’ means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

The term ‘employment agency’ means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States”.

The term “labor organization” means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

See Greene v. Safeway Stores, Inc., 98 F.3d 554, 558 (10th Cir. 1996) (“[T]o set forth a prima facie case of age discrimination, a plaintiff must ordinarily prove that (1) the affected employee was within the protected age group; (2) he was doing satisfactory work;
IV. CIRCUIT SPLIT

There is currently no national consensus on whether disparate impact liability theory is a cognizable claim under the ADEA. Most circuits have aligned themselves on either side of the issue with only the Fourth, Fifth, and D.C. Circuits still in flux. A majority of circuits preclude disparate impact theory liability claims under the ADEA; the First, Third, Sixth, Seventh, Tenth, and Eleventh Circuits have situated themselves on this side of the split. Only the Second, Eighth, and Ninth Circuits permit disparate impact liability under the ADEA.

In Mullin v. Raytheon Co., an employee claimed his demotion was a result of disparate impact. He sued under the ADEA and the Massachusetts Anti-Discrimination Act. Mullin had been an employee of the Raytheon Company for twenty-nine years and had become a manager of manufacturing operations. This position had a ranking of fifteen on Raytheon’s four to eighteen pay scale. Raytheon then diminished Mullin’s responsibility and subsequently reduced his position ranking to a twelve, which resulted in a ten percent decrease in his salary. The district court granted Raytheon’s motion for summary judgment and it was affirmed by the Court of Appeals for the First Circuit.

The Court of Appeals for the Third Circuit took its stance on the issue of the availability of disparate impact liability under the ADEA in DiBiase

(3) [he] was discharged despite the adequacy of this work; and (4) a younger person replaced [him].” (second and third alterations in original) (citations omitted); Johnson v. New York, 49 F.3d 75, 78-79 (2d Cir. 1995) (stating that age must have motivated the defendant in its decision to fire the plaintiff for plaintiff to succeed on a disparate treatment claim); Bartek v. Urban Redevelopment Auth., 882 F.2d 739, 745 (3d Cir. 1989) (“Where an employer makes a decision such as termination of an employee because of age, the employer will or should have known that the conduct violated the [ADEA].”) (second alteration in original) (quoting Dreyer v. Arco Chem. Co., 801 F.2d 651, 658 (3d Cir. 1986)); Cuddy v. Carmen, 694 F.2d 853, 856-57 (D.C. Cir. 1982) (“To make out a prima facie case of age discrimination against either government or private employers, a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination was ‘a determining factor’ in the employment decision.”) (citation omitted); Real v. Cont’l Group, Inc., 627 F. Supp. 434, 439-40 (N.D. Cal. 1986) (“To meet his burden in an age discrimination case, the plaintiff must prove that age was a determining factor in the employer’s challenged conduct in the sense that ‘but for’ the discrimination the allegedly unlawful conduct would not have occurred.”) (citation omitted).

57. 164 F.3d 696 (1st Cir. 1999).
58. Id. at 697.
59. Id.
60. Id. at 698.
61. Id. at 704 (holding that “the ADEA does not impose liability under a theory of disparate impact”).
v. SmithKline Beecham Corporation. In this case, an employee, DiBiase, was laid off after SmithKline consolidated four data centers. SmithKline employees who were laid off as a result of the consolidation were given three months of continued health and dental benefits, as well as one year’s salary. However, if employees were willing to sign a release waiving their right to file suit against SmithKline, the quid pro quo was fifteen months salary and six months of health and dental benefits. DiBiase refused to sign the release and sued SmithKline, alleging that he was terminated because of his age. It is important to note that DiBiase’s claim is actually one of disparate treatment. The district court granted DiBiase summary judgment on his ADEA claim. Even though DiBase did not allege a disparate impact claim, the National Employment Lawyers Association (NELA) submitted an amicus brief urging the Court of Appeals for the Third Circuit to consider DiBiase’s claim under an alternative theory, disparate impact. The court reversed the district court on the disparate treatment claim and speculated that the Supreme Court would not allow a disparate impact claim to proceed under the ADEA.

Lyon v. Ohio Education Association, is a representative case from the Sixth Circuit. As in DiBiase, the plaintiffs in this case did not allege a disparate impact claim. Lyon, later joined by sixteen coworkers, sued both his employer and his union claiming that an early retirement clause in the collective bargaining agreement was violative of the ADEA. Although the plaintiffs were not alleging a disparate impact claim, this

62. 48 F.3d 719 (3d Cir. 1995).
63. Id. at 722.
64. Id.
65. Id.
66. Id. at 722-23. DiBiase’s complaint actually alleged two counts but only one is pertinent to this discussion. Id. at 723.
67. Id. at 723.
68. Id. at 730.
69. Id. at 732 ("[I]n the wake of Hazen, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA.").
70. 53 F.3d 135 (6th Cir. 1995).
71. Id. at 137.
72. The Collective Bargaining Agreement read:

Upon the earlier of the completion of twenty (20) years of service or the attainment of age sixty (60) after five (5) years of service, a participant may elect to retire. Early retirement under this Option B may be elected by the participant at any time after the participant meets the eligibility requirement . . . . Early retirement benefits under this Option B shall be at least equal to the same percent of salary that the participant would have received if the participant had retired on the normal retirement date.

Id. at 136 (emphasis and alteration added by the court).
court, like its sister in the Third Circuit, read the Supreme Court's decision in Hazen as a strong indication that disparate impact liability claims are not cognizable under the ADEA.\footnote{73. The court in DiBiase provided an instructive discussion of the relationship between Hazen and the possibility of finding age discrimination under a disparate-impact theory:}

In \textit{EEOC v. Francis W. Parker School},\footnote{74. 41 F.3d 1073 (7th Cir. 1994).} the Court of Appeals for the Seventh Circuit weighed in on the debate. This is a case in which the EEOC sued a school claiming that the school's process for hiring a drama teacher had a disparate impact on older applicants.\footnote{75. \textit{Id.} at 1075.} When the school was looking to replace a drama teacher who left the school, it was limited in the salary that it could offer.\footnote{76. \textit{Id.}} Since the school could only offer a small salary for the position, it could only hire a teacher who was relatively inexperienced.\footnote{77. \textit{Id.}} Harold Johnson, a sixty-three year old with thirty years of experience, applied for the opening but the school informed him that he could not be hired because his experience qualified him for a higher salary.\footnote{78. \textit{Id.}} The EEOC filed suit on behalf of Johnson alleging both disparate treatment and disparate impact under the ADEA.\footnote{79. \textit{Id.} at 1076-78 (7th Cir. 1994).} In 1992, the Francis W. Parker School moved for summary judgment and it was denied, but after the Supreme Court decided \textit{Hazen}, the Parker school asked the district court to reconsider the motion in light of Hazen.\footnote{80. \textit{Id.}} Parker's motion for summary judgment was granted and the EEOC appealed on the disparate impact claim.\footnote{81. \textit{Id.}} The court of appeals held that disparate impact was not a

\textit{Hazen Paper. See 113 S. Ct. at 1706 ("we have never decided whether a disparate impact theory of liability is available under the ADEA ... and we need not do so here"); see also id. at 1710 (Kennedy, J., concurring) ("[T]here are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."); EEOC v. Francis W. Parker School, 41 F.3d 1073, 1076-78 (7th Cir. 1994). The Court's focus in \textit{Hazen Paper} on Congress's intent to prevent discrimination based on inaccurate and damaging stereotypes suggests that incidental discriminatory effects arising from facially age-neutral policies are not redressable. However, this circuit has stated that a disparate-impact theory of age discrimination may be possible. See \textit{Abbott v. Federal Forge}, 912 F.2d 867 (6th Cir. 1990).}

\textit{Id.} at 139-40 n.5.
\textit{Id.} at 1073 (7th Cir. 1994).
\textit{Id.} at 1075.
\textit{Id.}
\textit{Id.}
\textit{Id.}
\textit{Id.} The school also informed Johnson that he would not be hired because his resumé was received after the search process was over.
cognizable claim under the ADEA and therefore is not available in the Seventh Circuit.\(^{82}\)

The disparate impact on age of weight standards was at issue in *Ellis v. United Airlines, Inc.*\(^{83}\) Plaintiffs applied for jobs as flight attendants at United Airlines after their previous employer was bankrupted.\(^{84}\) They claimed that United's refusal to hire them because they were overweight,\(^{85}\) had a disparate impact on older applicants.\(^{86}\) The district court granted United's motion for summary judgment.\(^{87}\) The Court of Appeals for the Tenth Circuit reviewed the appeal and held that disparate impact is not a liability theory that is available under the ADEA.\(^{88}\)

The Eleventh Circuit joined circuits that preclude disparate impact claims under the ADEA, as evidenced by the its holding in *Adams.*\(^{89}\) In all of these circuit court cases, the courts found for the defendant either after analyzing the ADEA and finding that it is more analogous to the EPA than to Title VII, or just by relying on the Supreme Court's holding in *Hazen.*

Conversely, the Second, Eighth, and Ninth Circuits allow disparate impact claims under the ADEA because they find symmetry between the structure and language of the ADEA and Title VII. They also view *Hazen* differently from the circuits that preclude disparate impact claims. Instead of interpreting the sentence "we have never decided whether a disparate impact theory of liability is available under the ADEA . . . and we need not do so here"\(^{90}\) to mean that claims are not cognizable, they read it literally and say that since the Supreme Court has not definitively made a ruling on the issue, disparate impact liability is available to plaintiffs under the ADEA.

In *Criley v. Delta Air Lines, Inc.*,\(^{91}\) plaintiffs were former pilots of Pan Am who claimed Delta's method of hiring Pan Am pilots after it took over Pan Am World Airways' shuttle had a disparate impact on older employees.\(^{92}\) Although the Court of Appeals for the Second Circuit upheld

\(^{82}\) *Id.* at 1077 ("[T]he ADEA prevents employers from using age as a criterion for employment decisions. On the other hand, decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited.").

\(^{83}\) 73 F.3d 999 (10th Cir. 1996).

\(^{84}\) *Id.* at 1000.

\(^{85}\) The weight standard was based on a weight by height chart. *Id.* at 1001.

\(^{86}\) *Id.* at 1000.

\(^{87}\) *Id.* at 1001.

\(^{88}\) *Id.* at 1009 ("[P]laintiffs cannot bring a disparate impact claim under the ADEA.").

\(^{89}\) Adams, 255 F.3d at 1325 ("[T]he history of the ADEA differs from the legislative history of Title VII, which the Supreme Court in *Griggs* relied on to find a cause of action for disparate impact.").

\(^{90}\) *Hazen,* 507 U.S. at 610.

\(^{91}\) 119 F.3d 102 (2d Cir. 1997).

\(^{92}\) *Id.* at 103.
the district court's grant of summary judgment for the defendant, it was not based on a finding that the ADEA precludes disparate impact claims. In fact, the court conceded that disparate impact liability is cognizable, but ruled for the defendant because the plaintiffs did not meet their burden.

Similarly, in *Smith v. City of Des Moines*, the court of appeals affirmed a district court holding for the defendant, but made it clear that disparate impact liability was available in the Eighth Circuit. *Smith* involved a fire captain who was terminated after thirty-three years of employment for failing to meet the fire department's physical fitness standard. He contended that this physical fitness standard had a disparate impact on older firefighters. In disparate impact analysis, even if a plaintiff meets its initial burden of proving a prima facie case, the defendant can rebut if it proves a business necessity. In this case, the City of Des Moines did just that.

The Ninth Circuit completes the trio of circuits that allow disparate impact liability claims under the ADEA. *Frank v. United Airlines* is another case involving United's weight requirements for flight attendants. Plaintiffs were flight attendants alleging that these standards

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93. *Id.* at 105.
94. *Id.*
95. *Id.* ("Although the Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA . . . in our circuit, we have recognized such an action."); see also District Council 37 v. New York City Dep't of Parks & Recreation, 113 F.3d 347, 352 (2d Cir. 1997) ("[E]mployees can make a prima facie case of disparate impact by showing that a step in an employment practice had significant disparate impact on a protected class of which the employee was a member, regardless of whether the bottom line was discriminatory.").
96. *Criley*, 119 F.3d at 105 ("[A]n employer's concern about the economic consequences of employment decisions does not constitute age discrimination under the ADEA, even though there may be a correlation with age.").
97. 99 F.3d 1466 (8th Cir. 1996).
98. *Id.* at 1469-70 ("We consider first the city's argument, which the District Court rejected, that a claim of disparate impact is not cognizable under the ADEA . . . We have on several occasions applied disparate impact analysis to age discrimination claims . . . [D]isparate impact claims under the ADEA are cognizable.").
99. *Id.* at 1468.
100. *Id.*
101. *Id.* at 1471.
102. *Id.* ("We conclude that the city met its burden on the business necessity defense by supporting its motion with evidence that would entitle it to a directed verdict if not controverted by evidence sufficient to create a jury issue. On the job-relatedness issue, the city presented undisputed evidence that a captain is frequently involved in fire suppression activities when a company arrives at a fire scene and that the captain wears a SCBA under those circumstances.").
103. 216 F.3d 845 (9th Cir. 2000).
104. *Id.* at 847.
had a disparate impact on gender,\textsuperscript{105} under Title VII, and on age, under the ADEA.\textsuperscript{106} The district court held for United on both claims, declaring that disparate impact claims are unrecognized under the ADEA,\textsuperscript{107} the Ninth Circuit reversed the judgment.\textsuperscript{108}

V. EPA OR TITLE VII?

The major battleground in the debate over the applicability of disparate impact liability to the ADEA is whether the ADEA is more analogous to the EPA or to Title VII. Structurally, the ADEA mirrors Title VII. Not only are they structurally indistinguishable, but the wording of the two statutes is almost identical as well. Both the ADEA and Title VII begin with virtually the same phrase, "[e]mployer practices. It shall be an unlawful employment practice for an employer . . . ."\textsuperscript{109} Both statutes then enumerate the types of discrimination that are prohibited. In both, section (a) addresses unlawful practices by employers; section (b) pertains to employment agencies; and section (c) applies to labor organizations.\textsuperscript{110} In fact, one of the only major textual differences between the statutes is that the ADEA is targeted at age discrimination and Title VII prohibits discrimination based on "race, color, religion, sex, or national origin."\textsuperscript{111} By contrast, the EPA is not structurally or textually similar to the ADEA. The text of the EPA is as follows:

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and

\textsuperscript{105} Id. at 848 ("Between 1980 and 1994, United required female flight attendants to weigh between 14 and 25 pounds less than their male colleagues of the same height and age. For example, the maximum weight for a 5'7", 30-year-old woman was 142 pounds, while a man of the same height and age could weigh up to 161 pounds. A 5'11", 50-year-old woman could weigh up to 162 pounds, while the limit for a man of the same height and age was 185 pounds.").

\textsuperscript{106} Id. at 849.

\textsuperscript{107} Id.

\textsuperscript{108} Id. at 856 ("[A] disparate impact claim is cognizable under the ADEA . . . We therefore conclude that plaintiffs should be allowed to proceed with their disparate impact class claim.").


\textsuperscript{110} Id.

\textsuperscript{111} Id.
responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection. 112

Examining the plain language and structures of the statutes is not the only approach taken by commentators on both sides of the issue; both proponents and opponents of the extension of disparate impact liability to the ADEA analyze legislative history and intent of the statutes, and the amendments to Title VII.

As previously stated, those who advocate applying disparate impact theory to ADEA cases tend to focus on the language of the ADEA. 113 Specifically, they point to the similarity between the ADEA and Title VII since the latter allows disparate impact claims. The Supreme Court has also noted the similarities. According to the Court, the two statutes "share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'” 114 A similar argument is that the two statutes are analogous because the ADEA was derived from Title VII, and since disparate impact is available under Title VII, it must be available under the ADEA. 115 “In Lorillard v. Pons the Court noted the important similarities between the ADEA and Title VII in both their aims and substantive prohibitions: '[t]he prohibitions of the ADEA were derived in haec verba from Title VII.” 116

Naturally, opponents of ADEA disparate impact claims assert that the two statutes are merely facially analogous and determining whether disparate impact claims should be available in ADEA cases, necessitates a deeper analysis.

Those who argue in favor of extending disparate impact theory to the ADEA are forced to place a heavy emphasis on the general similarities between the statutory language of the ADEA and the language of Title VII. Admittedly, at first glance this is an appealing argument. Because the ADEA was modeled after Title VII of the Civil Rights Act of 1964, both statutes’ provisions are largely identical in wording and purpose.\textsuperscript{117}

While conceding facial similarity, opponents are quick to note fundamental differences between the acts. These differences, they maintain, militate against a finding that disparate impact liability should be available under the ADEA.\textsuperscript{118} The structural similarity of the statutes might render them “statutory relatives, . . . [but] does not make them twins. There indeed are important distinctions between the two statutes which have precluded the development of completely parallel bodies of case law.”\textsuperscript{119}

One of the differences is that the ADEA contains an exemption where Title VII does not.

Most of those who argue against applying the disparate impact theory to the ADEA rely on section 4(f)(1) of the ADEA. That section creates an exemption making it lawful for an employer to “take any action . . . where the differentiation is based on reasonable factors other than age.” Title VII does not contain any comparable exemption.\textsuperscript{120}

Even though Title VII does not have a comparable clause, the EPA does have such a clause. Since the Supreme Court has precluded disparate


\textsuperscript{119} Id.

impact claims under the EPA,121 opponents of ADEA disparate impact claims apply the Supreme Court's analysis to the ADEA. "[T]he Court concluded that the defense was inconsistent with disparate impact cases and reflected a congressional intent to limit Equal Pay Act claims to disparate treatment."122

Another argument, based on statutory language, against the availability of disparate impact claims under the ADEA is that the ADEA prohibits employers, agencies, and unions from making employment decisions "because of" a person's age; the "because of" language, it is argued, is indicative of the availability of disparate treatment claims.123

The most obvious reading of the clause, "because of such individual's age," is that it prohibits an employer from intentionally treating someone differently based on his or her age. 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.124

However, proponents of ADEA disparate impact claims counter with the language of Title VII, which also includes the "because of" phrase. Since the Supreme Court has held that disparate impact claims are available under Title VII, the proponents maintain that the "because of" language must not preclude disparate impact.125 Additionally, some commentators suggest that the ADEA specifically provides for the availability of disparate impact claims.126 They support their assertion with the text of the ADEA, which makes it illegal "to limit, segregate, or classify... 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."127

122. Herbert & Shelton, supra note 120, at 640.
123. Ellis, 73 F.3d at 1007.
124. Id.
126. See, e.g., Marla Ziegler, Disparate Impact Analysis and the Age Discrimination in Employment Act, 68 MINN. L. REV. 1038, 1051-52 (1984) ("The phrase 'adversely affect' implies that an employment practice can constitute illegal discrimination even if not intended or directed specifically at age. Thus the phrase not only prohibits intentional age discrimination but also forbids any policy having a more harmful effect on older people than on their co-workers.").
VII contains parallel language. For the proponents, “adversely affect” is synonymous with disparate impact.

The opposing argument, as advanced by Pamela Krop, is that this reading of the “adversely affect” clause is grammatically incorrect. According to Krop, the “because of” phrase modifies the phrase “limit, segregate, or classify,” and not the “adverse affect” phrase. Krop concludes that the statute only outlaws behavior that “limit[s], segregate[s], or classify[ies]” because of an employee’s age. This reading is consistent with the availability of only disparate treatment liability under the ADEA.

The next points of contention are the legislative history and intent of the statutes. In order to determine legislative intent, Professor Alfred Blumrosen closely examined Secretary of Labor Wirtz’s Report. When Congress enacted Title VII, it mandated the Report to evaluate the factors that contribute to age discrimination. Blumrosen argues that in the Report, the Secretary distinguishes between arbitrary discrimination and discrimination resulting from “factors which might tend to result in discrimination.” This dichotomy of discrimination, according to Blumrosen, is equivalent to disparate treatment and disparate impact; the Report suggested that only the arbitrary age discrimination should be outlawed.

128. See 42 U.S.C. § 2000e-2(a)(2) (making it unlawful “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”) (emphasis added).

129. Herbert & Shelton, supra note 120, at 638 (quoting Pamela S. Krop, Age Discrimination and the Disparate Impact Doctrine, 34 Stan. L. Rev. 837, 842-48 (1982)).

130. Id.

131. Id.

132. Id. at 643-44.

133. Id. at 643.

134. Id. at 643-44 (quoting Alfred W. Blumrosen, Interpreting the ADEA: Intent or Impact, in Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners 68, 74 (Monte B. Lake ed., 1982)).

135. Id. at 645 (citing Alfred W. Blumrosen, Interpreting the ADEA: Intent or Impact, in Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners 68, 79 (Monte B. Lake ed., 1982)).
The Report did not suggest that institutional practices which had an "adverse effect" on older workers should be declared illegal. On the contrary, it recommended that institutional pressures, such as those arising from pension systems, be eased by special programs which would not discourage hiring of older workers. The only practice which the report proposed to declare illegal was the setting of a specific age limit for hiring or termination in disregard of individual capacity. Such a practice would have to be "intentional" by its nature.\textsuperscript{136}

Blumrosen also notes that as opposed to the legislative history of the Title VII, the legislative history of the ADEA "is replete with statements that the new Act would outlaw only those employment actions that were 'solely' based on age. From this, he draws further support for his conclusion that the ADEA does not incorporate the disparate impact doctrine."\textsuperscript{137}

Naturally, advocates of the availability of disparate impact claims under the ADEA respond by asserting that the legislative history of the ADEA militates in favor of a finding that the statute does not preclude disparate impact liability. They maintain that the similarity in language and structure of Title VII and the ADEA is a manifestation of Congress' intent to offer the same protections against age discrimination that are available for discrimination based on "race, color, religion, sex, or national origin."\textsuperscript{138}

During the Senate floor debate on the ADEA, Senator Jacob Javits described America as a "land where a premium is put on ability— not rank, not privilege, and, if the system worked to perfection, not nationality, not religion, not sex, not race, and not age." In making these statements, Senator Javits, a leading figure in the adoption of the ADEA, admitted that there were shortcomings in America's treatment of minorities. These shortcomings, he added, were addressed by the Civil Rights Act of 1964, which specifically prohibited discrimination on the ground of race, sex, religion, or national origin. Senator Javits, noted, however, that "[a]t the time, we all recognized that the act left untouched another major problem, age discrimination." Congress's purpose in enacting the ADEA was "to promote


\textsuperscript{137} Id. at 645-46 (describing Blumrosen's observation).

\textsuperscript{138} Boris, \textit{supra} note 116, at 879-80.
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.”

A second historical argument against the availability of disparate impact claims under the ADEA has been averred; if Congress intended for age discrimination in employment to be treated in the same manner as employment discrimination based on “race, color, religion, sex, or national origin,” it would have included age in Title VII. In fact, according to this argument, Congress contemplated including age in Title VII and elected instead to mandate the Report.

With the passage of the Civil Rights Act of 1991, Title VII was amended to specifically provide for disparate impact liability; Congress failed to amend the ADEA in this way. The Title VII amendment that expressly allows disparate impact claims is viewed by both proponents and opponents of ADEA disparate impact claims as favorable to their viewpoint.

Those who believe that the ADEA precludes disparate impact claims assert that Congress’ failure to amend the ADEA to include the availability of such claims shows that Congress intends for the ADEA only to allow disparate treatment claims. The fact that Congress has amended the ADEA in other ways is further evidence, “signaling its intent not to provide for a disparate impact cause of action under the ADEA.”

The counterargument is that Congress’ inaction should not be indicative of its intent to preclude disparate impact claims under the ADEA.

139. Id. at 879-80 (citing 113 CONG. REC. 31,254 (1967)) (alterations in original) (citations omitted).
140. See Herbert & Shelton, supra note 115, at 645 (describing the legislative history of the ADEA).
141. Id. at 643.
143. “Specifically, Congress explicitly added a disparate impact cause of action to Title VII in the 1991 Civil Rights Act... However, Congress added no such parallel provision to the ADEA, despite its amendment of other portions of the ADEA...” Ellis, 73 F.3d at 1008 (internal citations omitted).
144. Id.
Congress can only create laws by enacting a statute within the parameters of Article I, Section 7 of the United States Constitution. Thus, congressional silence cannot be understood to be an affirmative statement and congressional failure to amend the ADEA to specifically allow for a disparate impact cause of action has very little, if any, probative value.\textsuperscript{145}

A corollary argument is as follows: congressional inaction might, in fact, be indicative of the availability of disparate impact liability under the ADEA.\textsuperscript{146} Congress may have thought that there was no need to amend the ADEA with respect to disparate impact claims because courts have recognized the availability of disparate impact claims under the ADEA.\textsuperscript{147} “This silence, if any consideration is given to such, could be seen as acquiescence to the judicial recognition of a disparate impact cause of action under the ADEA.”\textsuperscript{148}

VI. SHOULD DISPARATE IMPACT LIABILITY BE AVAILABLE UNDER THE ADEA?

It is ostensibly quite odd that the Supreme Court not only refused to decide the issue of availability of disparate impact liability in \textit{Adams}, but that it granted certiorari and dismissed the case. In 1981, the Court also refused to directly resolve this issue in \textit{Markham v. Geller}.\textsuperscript{149} But unlike in \textit{Adams}, the Court simply denied certiorari in \textit{Markham}. Additionally, the opinion in \textit{Adams} does not provide an explanation for the dismissal. This leaves much room for academic conjecture.

Although it is easy to be sympathetic to the plight of older employees, it appears that Congress did not intend for disparate impact liability to be available under the ADEA. It can even be asserted that Congress did not specifically intend for Title VII to include disparate impact claims when Title VII was passed. Disparate impact is not mentioned in Title VII and became an issue only after \textit{Griggs}. “Because the ADEA was passed before \textit{Griggs}, Congress likely only contemplated a disparate treatment cause of action in enacting the ADEA.”\textsuperscript{150}

However, even if Congress did not contemplate the concrete notion of disparate impact, the nature and history of discrimination based on race and


\textsuperscript{146} \textit{Id.} at 333.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} 451 U.S. 945 (1980).

\textsuperscript{150} Johnson, \textit{supra} note 145, at 326.
gender that Congress sought to remedy is consistent with a finding of disparate impact liability under Title VII. Unlike with race and gender, age does not have a history of stigma and *de jure* barriers. Under an equal protection analysis, state classifications based on race and gender are afforded a higher level of scrutiny than classifications based on age.\footnote{151}

Because age is not immutable, while race and sex are, the link between prior discrimination against one in the covered class and the effects of that discrimination trickling down to others in the covered class is tenuous at best. In other words, one can at least see how prior discrimination against blacks may possibly have served to keep blacks as a group from starting at the same point as others in the race for employment. But to say that prior discrimination against a fifty-year-old had some traceable effect upon another in the covered class, who was not in the covered class at the time of the discrimination, does not follow. Thus, no vestige exists to be corrected.\footnote{152}

The ADEA is undoubtedly similar to Title VII in structure and wording, but this does not render the two statutes analogous.

The similarities between the two statutes should not overshadow some significant differences. Unlike Title VII, the ADEA was not amended so as to provide explicitly for disparate impact claims by the Civil Rights Act of 1991. The ADEA also differs from Title VII insofar as the ADEA provides for a defense for employment practices which are based on "reasonable factors other than age (RFOA)."\footnote{153}

\footnote{151. Compare United States v. Virginia, 518 U.S. 515, 555 (1996) ("[A]ll gender-based classifications today' warrant 'heightened scrutiny.'") (quoting J.E.B. v. Alabama, 511 U.S. 127, 136 (1994)), Reed v. Reed, 404 U.S. 71, 76 (1971) ("To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."), Loving v. Virginia, 388 U.S. 1, 12 (1967) ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."), Brown v. Bd. Of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place."), and Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect."), with Kimel v. Florida Bd. of Regents, 528 U.S. 62, 83 (2000) ("Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it.").}

\footnote{152. Kyle C. Barrentine, *Disparate Impact and the ADEA: A Means to an End or Justice?*, 27 CUMB. L. REV. 1245, 1268 (1997).}

These are the most persuasive arguments against the availability of disparate impact liability under the ADEA because they show an unambiguous demarcation between the ADEA and Title VII. The latter argument is particularly persuasive. Even a strict constructionist, for whom legislative history is never part of the analysis, should be persuaded by the "reasonable factors other than age" clause. The clause clearly differentiates the ADEA from Title VII. In addition, the clause makes the ADEA more analogous to the EPA, a statute that the Supreme Court has found precludes disparate impact claims. Proponents of ADEA disparate impact claims are forced to concede that this is "[a] potent argument".\textsuperscript{154} Similarly, now that Title VII has been amended to include disparate impact liability, the arguments favoring disparate impact under the ADEA that rely on the symmetry of the statutes are further weakened.

VII. CONCLUSION

The Supreme Court has declined several opportunities to resolve the issue of the availability of a disparate impact claim under the ADEA and has given no indication as to when or if it will address the matter. While the ADEA is similar to Title VII, there are significant differences and these differences militate in favor of a finding that the ADEA precludes disparate impact liability. Yet the Court's silence and the dialectical stalemate on the issue within the academic community emphasize that only Congress ultimately can resolve this conflict by amending the statute to address the issue and permanently quell the debate.