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Smith v. City of Jackson: A Pretext of Victory for Employees

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SMITH V. CITY OF JACKSON: A PRETEXT OF VICTORY FOR EMPLOYEES

INTRODUCTION

Age discrimination plagues many older workers in America today.[1] Recent studies reveal that while companies purport to value older employees, they often discriminate against older workers in their hiring, training, and employment practices.[2] In 2004, workers submitted 17,837 age discrimination charges to the Equal Employment Opportunity Commission (EEOC), which represented a 26% increase from 1999.[3] Furthermore, in a 2005 survey of working Americans, 20% reported overhearing age-biased comments in their workplace.[4]

Age discrimination causes unnecessary loss in productivity and depletion of social insurance, unemployment, and welfare programs.[5] As Lyndon B. Johnson so eloquently stated in urging Congress to adopt legislation to prohibit age discrimination, "in economic terms, [arbitrary age discrimination] is a serious – and senseless loss to a nation on the move. But the greater loss is the cruel sacrifice of happiness and well-being, which joblessness imposes on these citizens and their families."[6]

Striving to protect older workers from age discrimination in the workplace, Congress passed the Age Discrimination in Employment Act

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1. Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where it's Been, Where it is Today, Where it's Going*, 31 U. RICH. L. REV. 579, 670–72 (1997).

2. *Id.*

3. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) CHARGES: FY 1992-FY 2004 (2005), http://www.eeoc.gov/stats/adea.html (does not reflect settlements, withdrawals, or other administrative closures); *cf.* Eglit, *supra* note 1, at 669 n.230 (recognizing that the significant numbers of age discrimination charges filed with the EEOC may or may not indicate prevalence of age bias in employment today. The EEOC dismisses a large number of these claims. However, many dismissed claims might have merit but the EEOC chooses not to pursue them due to lack of resources). *See generally* Gary Minda, *Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment*, 48 HASTINGS L.J. 511, 513–14 (1997) (arguing that current popular employment practice of downsizing vulnerable late-career employees who cannot easily transfer skills to other potential employers should be considered illegal age discrimination).

4. Hubert B. Herring, *There's No Shortage of Intolerance in the Workplace*, N.Y. TIMES, July 24, 2005, § 3 (Business), at 2 (citing 2005 phone survey conducted by Novations/J. Howard & Associates of 623 randomly selected working Americans).

5. *See* BARBARA T. LINDEMANN & DAVID D. KADUE, AGE DISCRIMINATION IN EMPLOYMENT LAW 4, 34 (2003); *see also* Michael Evan Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 BERKELEY J. EMP. & LAB. L. 1, 8 (2004) (citing U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 18 (1965) [hereinafter WIRTZ REPORT] (report of the Secretary of Labor to Congress under section 715 of the Civil Rights Act of 1964)).

6. LINDEMANN & KADUE, *supra* note 5, at 7 (quoting Lyndon B. Johnson, *in* PUB. PAPERS OF THE PRESIDENTS, Book I, 32, 37 (1968)). *See generally* Eglit, *supra* note 1, at 670–72 (age stereotypes may affect managerial decisions and result in negative consequences for older employees such as lowered motivation, career stagnation, and eventual career obsolescence).

(ADEA).[7] For decades, courts interpreted the ADEA equivalently to Title VII of the Civil Rights Act of 1964 (Title VII) which prohibits discrimination based on race, sex, religion, color, and national origin.[8] Courts reasoned that because Congress enacted both statutes to combat discrimination, and used the same prohibitory language in both statutes, the statutes should be similarly construed.[9]

Therefore, like Title VII plaintiffs, older workers were initially able to utilize two different avenues to combat age discrimination under the ADEA: disparate treatment and disparate impact.[10] However, after the Supreme Court's decision in *Hazen Paper Co. v. Biggins*,[11] some circuits began to reject disparate impact claims under the ADEA.[12] Finally, in *Smith v. City of Jackson*,[13] the Court resolved the circuits' split and held that disparate impact claims are cognizable under the ADEA.[14]

Part I of this Comment presents a background of the applicable legislation and case law preceding *Smith*. Part II summarizes the *Smith* decision. Part III provides a critical analysis of *Smith*, including the unfortunate but likely ramifications of this case. This Comment will argue that the Court's affirmation of a disparate impact theory of recovery under the ADEA is only an ostensible victory for older workers. In actuality, the Court's narrow construction of employer liability, by its interpretation of employer defenses and its redistribution of burdens of proof, threatens the viability of disparate impact claims altogether. In addition, the Court's restrictive interpretation of disparate impact claims under the ADEA jeopardizes the main purpose of the ADEA: to protect older workers from arbitrary age discrimination.

I. BACKGROUND

A. Age Discrimination in Employment Act

The ADEA arose out of a 1965 report (Wirtz Report), requested by Congress and compiled by the Secretary of Labor regarding age discrimination.[15] The Wirtz Report discussed different types of age-based discrimination and the extent of each type.[16] The Secretary of Labor

7. Judith J. Johnson, *Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other than Age" Defense and the Disparate Impact Theory*, 55 HASTINGS L.J. 1399, 1400 (2004).

8. *See* Smith v. City of Jackson, 125 S. Ct. 1536, 1542–43 (2005).

9. J. Johnson, *supra* note 7, at 1402.

10. *See* Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625, 632–33 (1996). *See generally* discussion *infra* Part IB (providing explanation of disparate impact and disparate treatment claims).

11. 507 U.S. 604 (1993).

12. *Smith*, 125 S. Ct. at 1543.

13. 125 S. Ct. 1536 (2005).

14. *Id.* at 1537.

15. *Id.* at 1540.

16. Gold, *supra* note 5, at 6–8.

found that discrimination based on dislike or intolerance of older individuals was not a significant problem.[17] Conversely, arbitrary age discrimination based on mistaken assumptions about the effect of age on ability was a serious issue.[18] Finally, the Wirtz Report explained that age discrimination sometimes stems from institutional arrangements which needlessly restrict the employment of older workers.[19] For example, a hiring policy requiring a high school diploma might unnecessarily eliminate an older applicant with years of work experience that would be considered equivalent to a high school education.[20]

The Secretary of Labor also reported on the deleterious economic effects of age discrimination.[21] The Secretary stressed that denying older workers employment opportunities wastes valuable human resources.[22] Specifically, rough calculations showed that, at that time, the Nation's economy was losing billions of dollars per year due to lost productivity from individuals forced to retire involuntarily.[23] Additionally, the Wirtz Report noted that the high unemployment rate of older workers and the resulting drain on unemployment insurance programs were serious economic problems.[24]

Congress responded to the Wirtz Report findings by passing the ADEA in 1967.[25] The ADEA applies to persons over the age of forty and makes it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.[26]

However, the ADEA provides four exceptions to employers' liability:

> (1) where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business (BFOQ); or (2) where the differentiation is based on reasonable factors other than age (RFOA); (3) to observe the terms of a bona fide seniority system not intended to evade the purposes of this chapter . . . or . . .

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17. *Id.* at 6–7 (citing WIRTZ REPORT, *supra* note 5).
18. *Id.* at 6–8.
19. Smith v. City of Jackson, 125 S. Ct. 1536, 1540 (2005) (citing WIRTZ REPORT, *supra* note 5, at 15).
20. *Id.* at 1541 n.5 (citing WIRTZ REPORT, *supra* note 5, at 21).
21. *See* Gold, *supra* note 5, at 8 (citing WIRTZ REPORT, *supra* note 5, at 18).
22. *Id.*
23. *Id.* at 8.
24. *Id.*
25. *Smith*, 125 S. Ct. at 1540.
26. 29 U.S.C. § 623(a)(1)-(2) (2004).

employee benefit plan; (4) to discharge or otherwise discipline an individual for good cause.[27]

B. Disparate Treatment and Disparate Impact Claims

Two distinct theories of recovery exist in discrimination law.[28] The first, disparate treatment, refers to an employer's action against an individual because of the individual's protected characteristic and requires discriminatory intent.[29] The second, disparate impact, refers to an employer's practice or policy which is facially neutral and involves no discriminatory intent, but disproportionately affects a protected class of employees.[30] Disparate treatment claims are cognizable under both Title VII and the ADEA,[31] and the Court interpreted Title VII to cover disparate impact claims.[32] But, until the recent decision of *Smith*, the Court had not addressed whether a disparate impact theory is available under the ADEA.[33]

C. Disparate Impact Claims Under Title VII

Generally, courts follow judicial interpretation of Title VII to interpret ADEA disparate impact claims.[34] Therefore, to provide a background of ADEA disparate impact claims, this Section summarizes the progression of the disparate impact theory of recovery under Title VII. The Supreme Court initially articulated the disparate impact theory in a Title VII case, *Griggs v. Duke Power Co.*,[35] and then refined the theory in another Title VII case, *Wards Cove Packing v. Atonio*.[36] Finally, in response to the Court's decision in *Wards Cove*, Congress enacted the Civil Rights Act of 1991, codifying disparate impact claims under Title VII.[37]

1. *Griggs v. Duke Power Co.*

Griggs, decided four years after the enactment of the ADEA, was the first case in which the Court expressly recognized disparate impact claims under Title VII.[38] In *Griggs*, an employer allegedly discriminated

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27. § 623(f)(1)-(3).

28. Brett Ira Johnson, *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, 304–06 (2000).

29. *Id.* at 305.

30. *Id.* at 306.

31. *Id.* at 305.

32. *Smith*, 125 S. Ct. at 1541.

33. *Id.* at 1539.

34. *See* James C. Bailey, *Age Discrimination Models of Proof After* Hazen Paper Co. v. Biggins, 9 ELDER L.J. 175, 179 (2001).

35. 401 U.S. 424 (1971).

36. 490 U.S. 642 (1989).

37. *See Smith*, 125 S. Ct. at 1544–45.

38. Jennifer J. Clemons & Richard A. Bales, *ADEA Disparate Impact in the Sixth Circuit*, 27 OHIO N.U. L. REV. 1, 8 (2000).

against African American employees by requiring a high school diploma and a passing grade on a standardized test as a condition of hire or transfer.[39] Although the Court accepted that the employer had no intent to discriminate, the Court held that because the requirements were not correlated with job performance, disqualified African Americans at a higher rate than whites, and perpetuated the employer's historical preferential hiring of whites, the employer was nevertheless liable.[40] The Court explained that good faith (or lack of intent to discriminate) "does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[41]

Furthermore, the *Griggs* Court introduced the concept of "business necessity" as the touchstone and limiting principle of the disparate impact doctrine.[42] The Court stated that if an employer cannot show that its challenged employment practice is related to job performance (or a business necessity), then it is prohibited under Title VII.[43]

2. *Wards Cove Packing Co. v. Atonio*

After the monumental decision in *Griggs*, a significant amount of case law followed which struggled with the disparate impact doctrine, the business necessity defense, and the burdens of proof for plaintiffs and defendants in disparate impact cases.[44] The Supreme Court endeavored to resolve these issues in its *Wards Cove* decision.[45]

In *Wards Cove*, salmon cannery workers brought suit against their former employer under Title VII alleging that its hiring and promotion policies adversely affected non-white employees and constituted racial discrimination.[46] The Court held that the plaintiff must identify specific employment practices responsible for creating the alleged disparate impact.[47] Then, the employer may produce evidence of a business justification (rather than business *necessity*) for the employment practices.[48] But, the plaintiff may still prevail by showing that the employer could have used an alternative practice with less discriminatory effects.[49]

The Court held that the burden of persuasion remains at all times with the plaintiff.[50] This holding conflicted with the Court's own (and

39. *Griggs*, 401 U.S. at 426–28.
40. *Id.* at 430–33.
41. *Id.* at 432.
42. *Id.* at 431.
43. *Id.*
44. *See* Herbert & Shelton, *supra* note 10, at 630.
45. *See id.*
46. *Wards Cove*, 490 U.S. at 647–48.
47. *Id.* at 659.
48. *See id.*
49. *See id.* at 660–61.
50. *Id.* at 659.

other federal courts') procedural treatment of the business necessity defense as an affirmative defense with the burden of persuasion on the defendant.[51] Furthermore, the Court noted that an employer need not produce evidence that the challenged practice is "essential" or "indispensable" to the employer's business for it to qualify as a business justification (as opposed to business *necessity*).[52] Finally, the Court implied that, in order for the plaintiff to prevail upon showing of an alternative practice with less discriminatory impact, employers needed to have been aware of the alternative practice and rejected it.[53]

3. Civil Rights Act of 1991

The Court's narrow construction of employer liability in *Wards Cove* sparked considerable criticism from Congress and led to the amendment of Title VII in the Civil Rights Act of 1991 (1991 amendments).[54] The 1991 amendments codified and clarified disparate impact claims under Title VII,[55] and restored the plaintiff and defendant burdens articulated in *Griggs*.[56] First, the 1991 amendments allowed a plaintiff to allege that an employer's decision-making process (as a whole) causes a disparate impact if the plaintiffs could not isolate specific employment practices.[57] Second, the 1991 amendments incorporated the business necessity defense from *Griggs* rather than the more lenient business justification test from *Wards Cove*.[58] Third, the 1991 amendments stated that the employer retained the burden of proof and persuasion to establish the business necessity defense.[59] Notably, the 1991 amendments to Title VII did not include any amendment to the ADEA nor mention age discrimination,[60] which is a frequently cited fact in the debate about the scope of ADEA disparate impact claims.[61]

D. Disparate Impact Claims Under the ADEA

After the Court announced the disparate impact theory as a method for proving discrimination under Title VII in *Griggs*, courts consistently recognized disparate impact claims under the ADEA.[62] Similarly, courts

51. *See Wards Cove*, 490 U.S. at 668–69 (Stevens, J., dissenting).
52. *Id.* at 659 (majority opinion).
53. *See* Herbert & Shelton, *supra* note 10, at 631.
54. *See id.*
55. *See Smith*, 125 S. Ct. at 1545.
56. *See* Robert A. Robertson, *The Civil Rights Act of 1991: Congress Provides Guidelines for Title VII Disparate Impact Cases*, 3 GEO. MASON U. CIV. RTS. L.J. 1, 47–48 (1992) (citing 137 CONG. REC. S15273 (daily ed. Oct. 25, 1991)).
57. *See* 42 U.S.C. § 2000e–2(k)(1)(B)(i) (2005).
58. *See* § 2000e–2(k)(1)(A)(i); Herbert & Shelton, *supra* note 10, at 631 (citing Civil Rights Act of 1991, Pub. L. No. 102–166 § 3 (codified in 42 U.S.C.A. § 1981)).
59. 42 U.S.C. § 2000e–2(k) (2005).
60. *See Smith*, 125 S. Ct. at 1545.
61. *See id.* at 1544–45. *See also infra* Section IVB (discussing the effect of *Wards Cove* on ADEA disparate impact claims).
62. *See Smith*, 125 S. Ct. at 1543.

applied the 1991 amendments of Title VII to the ADEA, including the business necessity defense and the shifting burdens of proof.[63] However, after the Supreme Court's decision in *Hazen Paper Co. v. Biggins*,[64] the circuits split over whether the ADEA covered disparate impact claims.[65]

1. *Hazen Paper Co. v. Biggins*

In *Hazen Paper*, the plaintiff, age 62, alleged he was fired to prevent his pension from vesting and brought suit for age discrimination under the ADEA.[66] The Court held that because the employer's motivation for termination was the employee's years of service, not his age, the employee failed to state a claim of disparate treatment under the ADEA.[67] The Court explained that 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 competence decline with old age."[68] The Court reasoned that when an employer's decision is based on factors other than age, the problem of inaccurate stereotypes disappears.[69]

In dicta, the Court expressly stated it was not deciding whether disparate impact claims are recognized under the ADEA.[70] However, a concurring opinion by Justice Kennedy mentioned the ADEA may not cover disparate impact claims.[71]

2. Turmoil Created by *Hazen Paper*

Despite the Court's unambiguous statement in *Hazen Paper* that its decision did not address disparate impact claims under the ADEA, many circuits interpreted *Hazen Paper* as precluding disparate impact claims under the ADEA.[72] Yet, other circuits continued to recognize disparate impact claims under the ADEA[73] and some circuits remained undecided on the issue.[74]

Circuits which continued to recognize disparate impact claims stressed the similarities between the ADEA and Title VII and pointed to the express language in *Hazen Paper*, stating that the Court was not de-

63. *See* LINDEMANN & KADUE, *supra* note 5, at 427–28.
64. 507 U.S. 604 (1993).
65. *See* B. Johnson, *supra* note 28, at 316.
66. *Hazen Paper*, 507 U.S. at 606–07.
67. *Id.* at 610–12.
68. *Id.* at 610.
69. *Id.* at 611.
70. *Id.* at 610.
71. *Id.* at 618 (Kennedy, J., concurring).
72. *See, e.g.*, Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996).
73. *See, e.g.*, Smith v. Xerox Corp., 196 F.3d 358, 367 (2d Cir. 1999).
74. *See, e.g.*, Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1048 (6th Cir. 1998) (stating in dicta that this court is unsure as to whether disparate impact theory is cognizable under the ADEA after *Hazen Paper*).

ciding on the issue of disparate impact claims.[75] For example, in *Smith v. Xerox Corp.*,[76] the Second Circuit, citing *Griggs*, held that disparate impact claims targeting employment practices which are "fair in form, but discriminatory in operation" are recognized under the ADEA.[77] *Xerox* involved fifteen former employees who alleged disparate impact and disparate treatment discrimination claims under the ADEA after being laid off during a reduction in force (RIF).[78] Although the employees did not provide sufficient evidence that the RIF process adversely affected older employees, as compared to other employees,[79] the court clearly stated that the Second Circuit recognized disparate impact claims despite the *Hazen Paper* holding and other circuits' decisions to reject such claims.[80]

In contrast, circuits rejecting such claims argued that the holding in *Hazen Paper*, allowing employers to rely on factors correlated with age, precluded disparate impact claims.[81] Furthermore those circuits concluded that the statutory language, the legislative history, and Congress's 1991 amendments to Title VII all pointed to the differences between the ADEA and Title VII and Congress's intention to prohibit disparate impact claims under the ADEA.[82]

For example, the Tenth Circuit held that disparate impact claims are not cognizable under the ADEA in *Ellis v. United Airlines, Inc.*[83] In *Ellis*, two flight attendants alleged that the airline's height and weight requirements adversely affected older workers and, therefore, constituted age discrimination under a disparate impact theory.[84] The court recognized that *Hazen Paper* left the question of disparate impact under the ADEA open.[85] However, the court's own interpretation of the text, legislative history, and congressional intent of the ADEA combined with the Court's language in *Hazen Paper*, supported its decision not to recognize disparate impact claims.[86] Thus, because the circuits were split over the recognition of ADEA disparate impact claims, the issue was ripe for resolution by the Supreme Court. In *Smith*, the Court granted certiorari to decide this issue.[87]

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75. *See* Smith v. Xerox Corp., 196 F.3d 358, 367 (1999).
76. 196 F.3d 358, 358 (1999).
77. *Smith*, 196 F.3d at 364.
78. *Id.* at 363.
79. *Id.* at 368–69.
80. *Id.* at 367 n.6.
81. *See* Herbert & Shelton, *supra* note 10, at 636.
82. *See id.* at 636–49.
83. 73 F.3d 999, 1009–10 (10th Cir. 1996).
84. *See id.* at 1005–06.
85. *Id.* at 1007.
86. *See id.* at 1006–09.
87. *Smith*, 125 S. Ct. at 1540.

II. *SMITH V. CITY OF JACKSON*[88]

A. Facts

On October 1, 1998, the City of Jackson, Mississippi (City) updated its wage structure to institute pay increases for all employees.[89] The City implemented the new wage structure to ensure that entry-level salaries of police department employees were competitive with the average market wage for similar positions in the region.[90] Specifically, the plan revision identified five distinct positions and a wage range for each position based on a survey of analogous positions in similar Southeastern communities.[91] The City divided each wage range into a series of steps and assigned each employee to a step which was the lowest step to give the individual at least a two percent raise.[92]

While most officers occupied the three lowest positions which contained both officers under and over forty, the few officers in the two highest positions were all over forty.[93] The officers in the highest positions received raises which, while larger in dollar amount, were proportionately smaller compared with the raises granted to the younger officers.[94] Statistical evidence showed 66.2% of officers under forty received raises of more than 10%, compared to only 45.3% of those over forty.[95] Also, the average percentage increase for officers with less than five years of experience was higher than for those with more experience.[96]

B. Procedural History

A group of police officers filed suit against the City under the ADEA in the U.S. District Court for the Southern District of Mississippi alleging: (1) the City deliberately discriminated against them because of their age (disparate treatment); and (2) the older officers were adversely affected by the wage plan (disparate impact).[97] The District Court granted summary judgment to the City on both claims, and the officers appealed.[98] The Fifth Circuit Court of Appeals reversed the ruling on the disparate treatment claim, allowing petitioners to proceed with discovery regarding intent.[99] However, the majority affirmed the dismissal of the disparate impact claim, holding that disparate impact claims are not cog-

88. 125 S. Ct. 1536 (2005).
89. *Smith*, 125 S. Ct. at 1539.
90. *Id.*
91. *Id.* at 1545.
92. *Id.*
93. *Id.*
94. *Id.* at 1545–46.
95. *Id.* at 1546.
96. *Id.*
97. *Id.* at 1539.
98. *See id.*
99. *Id.*

nizable under the ADEA.[100] The majority noted, though, that the alleged facts would have entitled the petitioners to relief under a disparate impact theory if such a theory had been available.[101] The Supreme Court granted certiorari to determine whether the ADEA authorizes disparate impact claims.[102]

C. Majority / Plurality

In a plurality opinion authored by Justice Stevens and joined in concurrence by Justice Scalia, the Court concluded that disparate impact claims are cognizable under the ADEA.[103] However, the Court held that the petitioners failed to present sufficient facts to support their disparate impact claim.[104]

The plurality considered the text and legislative history of the ADEA to support the conclusion that the ADEA authorizes disparate impact claims.[105] The plurality also utilized the *Hazen Paper Co. v. Biggins*[106] decision, the reasonable factor other than age (RFOA) provision, and the agency interpretation of the ADEA in its reasoning.[107] In addition to finding that the ADEA authorizes disparate impact claims, the plurality clarified the scope of employer liability in ADEA disparate impact cases, and identified the proper test for the RFOA defense.[108]

In examining the text of the ADEA, the plurality highlighted § 623(a)(2) of the ADEA, which prohibits employers' actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's . . . age."[109] The plurality noted that the language of § 623(a)(2) is identical to that of § 703(a)(2) of Title VII with the exception of the word "age" rather than "race, color, religion, sex, or national origin."[110] The plurality relied on the presumption that because these two provisions are equivalent, Congress intended the language to have the same meaning in both statutes;[111] and the Court's interpretation of the same language to permit disparate impact claims under Title VII suggests that the Court should likewise recognize disparate impact claims under the ADEA.[112] Additionally, the

100. *Id.* at 1539–40.
101. *See id.* at 1540.
102. *Id.*
103. *Id.* at 1546. Justice Scalia joined the four justice plurality in all but one part of the opinion. Where Justice Scalia joined the plurality, I will refer to the "Court." However, in the part of the opinion in which Justice Scalia differed from the plurality, I will refer to the "plurality."
104. *Id.* at 1540.
105. *Id.* at 1540–44.
106. 507 U.S. 604 (1993).
107. *Smith*, 125 S. Ct. at 1543–44.
108. *See id.* at 1543–46.
109. *Id.* at 1542 (alteration in original) (quoting 29 U.S.C. § 623(a)(2) (2000)).
110. *See id.*
111. *Id.* at 1541.
112. *Id.* at 1542.

plurality explained that the text of § 623(a)(2) highlights the effects of the action, rather than the employer's intent underlying the action, which also supports recognition of disparate impact claims.[113]

The plurality also traced the legislative history and congressional purpose behind the ADEA to support its recognition of disparate impact claims. The plurality stressed the Wirtz Report findings that age discrimination arises predominantly from arbitrary discrimination, rather than animus;[114] and that certain institutional practices may adversely affect older workers.[115] In addition, the plurality acknowledged that, like the *Griggs v. Duke Power Co.*[116] opinion, the Wirtz Report recognized that formal employment standards not related to job performance may adversely impact racial minorities and older workers.[117]

The plurality distinguished *Hazen Paper v. Biggins*, reiterating that the Court in that case expressly stated it was not deciding whether disparate impact claims were available under the ADEA.[118] Furthermore, the plurality addressed the confusion in the lower courts surrounding the reasonable factor other than age (RFOA) provision of the ADEA.[119] The Court explained that for the RFOA clause to have any effect, disparate impact claims must be recognized.[120] Otherwise, the RFOA provision would be superfluous when used in tandem with § 623(a)(1) (disparate treatment claims).[121] Because, according to *Hazen Paper*, an employer acting on any factor other than age would not be liable.[122] However, the plurality explained, the RFOA provision serves to protect employers who would otherwise be liable under § 623(a)(2) if the employer based the challenged practice on a reasonable non-age factor.[123]

The plurality also referred to regulations of the Department of Labor (DOL) and Equal Employment Opportunity Commission (EEOC) to support its holding that disparate impact claims are cognizable under the ADEA.[124] Both the Department of Labor, which drafted the initial ADEA legislation, and the Equal Employment Opportunity Commission (EEOC), the agency designated by Congress to oversee the implementation of the ADEA, interpret the ADEA to allow a disparate impact theory of recovery.[125]

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113. *Id.*
114. *Id.* at 1540 (citing WIRTZ REPORT, *supra* note 5, at 22).
115. *Id.* (citing WIRTZ REPORT, *supra* note 5, at 15).
116. 401 U.S. 424 (1971).
117. *Smith*, 125 S. Ct. at 1541 n.5.
118. *Id.* at 1543.
119. *Id.*
120. *Id.* at 1544.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

Next, the Court[126] discussed the more narrow scope of disparate impact liability for employers under the ADEA compared to under Title VII, focusing on the RFOA provision and Congress's 1991 Amendments to Title VII.[127] The Court noted that the RFOA clause, not found in Title VII, served to limit the coverage of the ADEA by permitting "otherwise prohibited [employer] actions" which are "based on reasonable factors other than age."[128]

Additionally, the Court noted that while Congress amended Title VII to revise the *Wards Cove Packing v. Atonio*[129] decision, Congress did not similarly amend the ADEA.[130] So, the Court reasoned that the *Wards Cove* analysis, which allocates additional procedural burdens on the plaintiff, remains applicable to the ADEA.[131] According to the Court, the combination of the RFOA provision and the application of the *Wards Cove* interpretation serves to narrow the scope of employer liability under the ADEA in comparison to Title VII.[132]

The Court reasoned that the more narrow scope of employer liability under the ADEA follows from historical differences between age discrimination and discrimination of protected classes under Title VII.[133] The Court discussed the fact that age is often relevant to an individual's capacity to perform his or her job.[134] Additionally, the Court explained that certain common employment criteria may be reasonable despite their adverse impact on older workers.[135] Finally, the Court noted that intentional age discrimination "has not occurred at the same levels as discrimination against those protected by Title VII."[136]

The Court demonstrated how to apply the RFOA provision by distinguishing it from the business necessity test.[137] The Court focused solely on determining whether an employer's decision to adopt the challenged employment practice was based on a reasonable factor other than

126. The plurality joined by Justice Scalia.
127. *Smith*, 125 S. Ct. at 1544–45.
128. *Id.* at 1540–41.
129. 490 U.S. 642 (1989).
130. *Smith*, 125 S. Ct. at 1545.
131. *Id.* According to *Wards Cove*, plaintiffs in disparate impact cases must first "isolat[e] and identify[] the specific employment practice . . . allegedly responsible" for creating the adverse impact on the protected class. *Wards Cove*, 490 U.S. at 656 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Additionally, plaintiff must bear the burden of persuasion at all times even regarding an employer's defense of the challenged practice. *See Wards Cove*, 490 U.S. at 659. Placing these additional burdens on plaintiffs results in decreasing employers' potential for liability in disparate impact cases. The *Smith* Court refers to this effect as narrowing the scope of employer liability. *See Smith*, 125 S. Ct. at 1544-45. For a complete discussion of the effect of applying the *Wards Cove* plaintiff burdens in the ADEA context *see infra* Part IIIB.
132. *Smith*, 125 S. Ct. at 1545; *see also supra* note 131 and accompanying text.
133. *Smith*, 125 S. Ct. at 1545.
134. *Id.*
135. *Id.*
136. *Id.*
137. *See id.* at 1546.

age.[138] If so, the Court stated, the employer is not liable under the ADEA.[139] The Court stressed that this reasonableness test, unlike the business necessity test, does not require inquiry into whether the employer could achieve its goals in another manner with less adverse impact on older employees.[140]

In the instant case, the Court held that although the officers presented evidence of a wage plan which was less generous to older workers, they did not identify specific employment practices responsible for statistical disparities, as required by *Wards Cove*.[141] Additionally, the disparate impact caused by the City's plan was based on what the Court considered to be reasonable factors other than age: seniority and position.[142] The Court explained that seniority and position are reasonable given the City's need to raise employees' salaries to match those in surrounding communities to meet its retention goal.[143] While the City may have met its stated goal in another way with less impact on older officers, the plurality found the City's chosen method was reasonable.[144] The Court noted that the RFOA test does not require further inquiry into less discriminatory alternatives that the City might have pursued to achieve its goal of retaining employees.[145]

D. Concurrence of Justice Scalia

The plurality held that disparate impact claims are cognizable under the ADEA by focusing on the text and legislative history of the ADEA.[146] Justice Scalia agreed that the ADEA covers disparate impact claims, but differed from the plurality in his reasoning.[147] Justice Scalia also joined in the plurality's interpretation of the RFOA provision and agreed with the plurality's judgment in favor of the City.[148]

Justice Scalia reasoned that ADEA disparate impact claims are cognizable under the ADEA because of agency deference principles.[149] Indeed, Justice Scalia exclaimed that this case is an "absolutely classic case for deference to agency interpretation."[150] Justice Scalia explained that the Court should defer to the reasonable views of the EEOC, the agency

138. *See id.*
139. *See id.*
140. *See id.*
141. *Id.*
142. *Id.* at 1546.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 1540–44.
147. *See id.* at 1546–47 (Scalia, J., concurring).
148. *Id.* at 1546–49.
149. *See id.*
150. *Id.* at 1546 (citing Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

charged with rule making authority under the ADEA.[151] Therefore, Justice Scalia argued, because the EEOC reasonably interprets the ADEA to cover disparate impact claims, the Court must recognize disparate impact claims under the ADEA.[152]

To support his claim that the EEOC interprets the ADEA to cover disparate impact claims, Justice Scalia cited EEOC regulation 29 C.F.R. § 1625.7(d) (2004).[153] Section 1625.7(d) states that when an employment practice has an adverse impact on individuals within the protected age group, and is claimed by the employer to be based on "a factor other than age," it can only be justified as a business necessity.[154] According to Justice Scalia, that regulation combined with the EEOC's subsequent interpretation of that regulation, and its numerous court appearances, all confirm the EEOC's position that the ADEA encompasses disparate impact claims.[155] Furthermore, Justice Scalia argued that this EEOC interpretation is "eminently reasonable" based on the reasoning in the plurality opinion.[156] Thus, Justice Scalia concluded, the reasonable interpretation of the EEOC itself is enough to support the finding that disparate impact claims are cognizable under the ADEA.[157]

E. Concurrence of Justice O'Connor, with Justices Kennedy and Thomas

Like Justice Scalia, Justice O'Connor, joined by Justice Kennedy and Justice Thomas, concurred in the judgment for the City.[158] However, unlike Justice Scalia and the plurality, Justice O'Connor, along with Justices Kennedy and Thomas, argued that disparate impact claims are not cognizable under ADEA.[159] First, Justice O'Connor focused on the text of § 623(a)(2), specifically the phrase "because of . . . age" and interpreted it to mean that an employer is only liable for its adverse action which is motivated by an individual's age (i.e. disparate treatment).[160] In addition, Justice O'Connor took exception to the plurality's opinion that the RFOA provision confirms disparate impact claims and instead considered it to offer employers "an independent safe harbor from liability."[161]

Justice O'Connor noted that the legislative history of the ADEA, which highlights the qualitative differences between age discrimination and other types of discrimination, actually supports her interpretation that

151. *Id.*
152. *Smith*, 125 S. Ct. at 1547 (Scalia, J., concurring).
153. *Id.* at 1546–47.
154. *Id.*
155. *Id.* at 1547.
156. *Id.* at 1549.
157. *Id.*
158. *Id.* at 1560 (O'Connor, J., concurring).
159. *Id.* at 1549.
160. *Id.* at 1550.
161. *Id.* at 1551.

disparate impact claims are not cognizable under the ADEA.[162] In addition, Justice O'Connor interpreted the language "arbitrary discrimination" in the Wirtz Report as intentional discrimination (implicating only disparate treatment claims).[163] Further, Justice O'Connor argued that Congress intended the non-coercive measures prescribed by the ADEA, such as programs to increase available positions and continuing education, to be the sole means to address disparate impact age discrimination.[164]

Justice O'Connor rejected the plurality's presumption that the language in the ADEA, mirroring the language in Title VII, should be interpreted similarly.[165] Justice O'Connor noted that because the *Griggs* decision preceded the ADEA's creation, Congress could not have intended a disparate impact interpretation in using language from Title VII in the ADEA.[166] Furthermore, Justice O'Connor stated that when two statutes have similar language, they should be interpreted consistently only in the absence of contrary congressional intent; and between Title VII and the ADEA, such contrary congressional intent does exist.[167] Finally, Justice O'Connor argued that the EEOC interpretation cited by the plurality and Justice Scalia was an interpretation of the RFOA clause, not the prohibitory section of the ADEA and, thus, irrelevant to the issue before the Court.[168]

Despite Justices O'Connor, Kennedy, and Thomas' objections, the remaining five justices in *Smith* decided to recognize disparate impact claims under the ADEA.[169] Additionally, the Court applied a new and more expansive interpretation of the RFOA defense to such claims under the ADEA.[170] Finally, the Court held that its *Wards Cove* analysis applies to the ADEA and serves to further narrow employer liability under the ADEA.[171]

III. ANALYSIS

The Supreme Court's decision in *Smith v. City of Jackson*[172] to recognize disparate impact claims under the ADEA was long overdue to resolve the confusion pervading the lower courts in the wake of *Hazen Paper Co. v. Biggins*.[173] However, while the Court in *Smith* claimed to merely narrow employer liability under ADEA disparate impact claims

162. *Id.* at 1552.
163. *Id.* at 1552–55.
164. *Id.* at 1554–55.
165. *Id.* at 1556–57.
166. *Id.* at 1556.
167. *Id.* at 1556–57.
168. *Id.* at 1557–60.
169. *Id.* at 1540 (majority opinion).
170. *Id.* at 1543–44, 1546.
171. *Id.* at 1545.
172. 125 S. Ct. 1536 (2005).
173. 507 U.S. 604 (1993).

compared to Title VII disparate impact claims,[174] in reality a disparate impact theory of recovery could all but disappear under the ADEA as a result of the *Smith* decision. The lengthy rhetoric of the plurality and Justice O'Connor in *Smith* seeking to rationalize their opposing arguments about disparate impact claims was a moot exercise because the end result of this case, and virtually all future cases of disparate impact claims under ADEA will be the same: the employee will be unable to establish a prima facie case of disparate impact. In the unlikely event an employee does establish a prima facie case, the employer will have a justification under the broad reasonable factor other than age (RFOA) exception. In addition, reverting to the plaintiff burdens set forth in *Wards Cove Packing v. Atonio*[175] will further ensure the eradication of the employee's disparate impact claim. Thus, older employees will be left without adequate protection from the inherently discriminatory practices that purportedly motivated the Court's decision in *Smith* and Congress's enactment of the ADEA.

This section will present a critical analysis of the *Smith* holding, focusing on the Court's over-expansive interpretation of the RFOA provision and its unfortunate decision to follow the *Wards Cove* analysis in ADEA disparate impact cases. Additionally, this section will review a few lower court cases applying the *Smith* decision to demonstrate the detrimental effects of the RFOA provision and the *Wards Cove* burdens on ADEA disparate impact cases. Finally, this section will examine the Supreme Court's unpersuasive reasoning for providing less protection for ADEA disparate impact plaintiffs compared to Title VII disparate impact plaintiffs.

A. The Unreasonableness of the Reasonable Factor Other than Age Exception

As Justice O'Connor so aptly perceived, any disparate impact claims "are strictly circumscribed by the RFOA exception" due to the *Smith* Court's broad interpretation of the RFOA.[176] Indeed, courts and commentators opposing the disparate impact theory of recovery under the ADEA prior to *Smith* argued that the RFOA exception is inconsistent with the recognition of disparate impact claims because the motivation behind employment policies targeted by disparate impact claims: factors other than age, are just what the RFOA exception permits.[177] Likewise, commentators who argued against the recognition of disparate impact

174. *Smith*, 125 S. Ct. at 1544–45.
175. 490 U.S. 642 (1989).
176. *See Smith*, 125 S. Ct. at 1560 (O'Connor, J., concurring).
177. Herbert & Shelton, *supra* note 10, at 639; Clemons & Bales, *supra* note 38, at 21; B. Johnson, *supra* note 28, at 321.

claims under the ADEA prior to the *Smith* decision noted that the RFOA exception is logically inconsistent with the disparate impact theory.[178]

The Court in *Smith* disagreed with this interpretation of the RFOA clause, stressing that the word "reasonable" gives meaning to the clause and supports recognition of disparate impact claims.[179] For in such claims, the RFOA plays its "principal role by precluding liability if the adverse impact was attributable to a non-age factor that was 'reasonable.'"[180] However, the Court's over-expansive interpretation of the RFOA exception in *Smith* ignores other courts' reasonable interpretations of the clause, violates statutory interpretation principles, and will allow employers to escape liability in the majority of disparate impact claims. Furthermore, the *Smith* interpretation of the RFOA defense conflicts with Congress's goal of eliminating arbitrary age discrimination in the workplace.

First, the Court adopted a novel and significantly broader interpretation of the RFOA clause rejecting the circuits' long-standing interpretation of the clause. Prior to *Smith*, lower courts consistently applied the business necessity test as a possible defense to employer liability under the ADEA.[181] Some courts and commentators interpreted the RFOA exception as a codified business necessity defense.[182] Others, as well as the Equal Employment Opportunity Commission (EEOC) and Department of Labor (DOL), argued that business necessity or job relatedness were underlying requirements for reasonableness.[183]

The business necessity test is the defense to disparate impact claims under Title VII introduced by the *Griggs v. Duke Power Co.*[184] Court as the "touchstone" to disparate impact claims.[185] The business necessity test allows an employer to justify its use of the challenged employment practice by showing it is job related or a business necessity.[186] The test

178. Herbert & Shelton, *supra* note 10, at 639 (citing Metz v. Transit Mix, 828 F.2d 1202, 1216–20 (7th Cir. 1987) (Easterbrook, J., dissenting)).

179. *See Smith*, 125 S. Ct. at 1544.

180. *Id.*

181. *See* Herbert & Shelton, *supra* note 10, at 630; *see* LINDEMANN & KADUE, *supra* note 6, at 428.

182. B. Johnson, *supra* note 28, at 323, 326.

183. *See id.*; 29 C.F.R. § 1625.7(d) (2005) (EEOC regulation stating that when an employment practice which has a disparate impact on older employees is claimed to be based on a 'factor other than age,' it can only be justified as a business necessity); *see also,* Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 302–03 (1990) (Department of Labor stated that to constitute an RFOA, criterion must be "reasonably necessary for the specific work to be performed" or "shown to have a valid relationship to job requirements."). Incidentally, the *Smith* Court claimed deference to the DOL and EEOC in support of its decision to recognize disparate-impact claims, but glossed over the fact that the DOL and EEOC recommend a specific interpretation of the RFOA clause which conflicts with the Court's interpretation of the same clause in *Smith*. *See Smith*, 125 S. Ct. at 1544, 1560.

184. 401 U.S. 424 (1971).

185. *Griggs*, 401 U.S. at 431.

186. *Id.*

then permits the employee to present alternative practices which would achieve the same legitimate business objective but with less discriminatory impact.[187] However, the Court in *Smith* chose to defenestrate the business necessity test, its self-proclaimed "touchstone" to disparate impact recovery, and to replace it perfunctorily with the "reasonableness" test.[188] The *Smith* Court explained that the RFOA exception does not require the employer to justify its discriminatory practice as being job-related or a business necessity, it need only be "reasonable."[189] Moreover, according to the Court, the RFOA test, unlike the business necessity test, does not involve inquiry into whether the employer could achieve its goals without discriminating against older employees.[190]

Second, the *Smith* Court's broad interpretation of the RFOA clause violates a basic rule of statutory interpretation by rendering another clause of the ADEA superfluous. Giving effect to all language in a statute is an elementary rule of statutory interpretation.[191] Given the Court's RFOA definition, another ADEA exception, § 623(f)(2), would not be necessary to the statute. Section § 623(f)(2) states that an employer is not liable under the ADEA if the employers' challenged action or practice is observing the terms of a bona fide seniority system or employee benefit plan.[192] Certainly, a seniority system and employee benefit plan are reasonable factors other than age according to the Court's reasonableness test. If Congress intended such a broad definition of the RFOA as the *Smith* Court adopted, then it would not have needed to include § 623(f)(2) in the ADEA.

Third, the Court failed to acknowledge that its overly broad interpretation of the RFOA clause will provide employers a defense in the vast majority of disparate impact claims.[193] The Court contended that while the RFOA defense narrows the scope of employer liability, it does not preclude disparate impact claims altogether.[194] However, the Court's new reasonableness test allows an employer to escape liability from disparate impact claims without requiring the employer to demonstrate business necessity or job relatedness.[195] Additionally, the reasonableness test prevents a plaintiff from presenting evidence that the em-

187. *Id.* at 658 (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)); Clemons & Bales, *supra* note 38, at 8.

188. *See Smith*, 125 S. Ct. at 1546.

189. *Id.*

190. *Id.*

191. *See* 73 AM. JUR. 2D *Statutes* § 134 (2004).

192. *See* 29 U.S.C. § 623(f)(2) (2005).

193. *See infra* Part IIIC discussing how lower courts are applying the RFOA defense to dismiss ADEA disparate impact claims.

194. *See Smith*, 125 S. Ct. at 1543–44, 1544 n.11 ("[I]f Congress intended to prohibit all disparate-impact claims, it certainly could have done so. For instance, in the Equal Pay Act of 1963, Congress barred recovery if a pay differential was based 'on any other factor' – reasonable or unreasonable – 'other than sex.'")

195. *See id.* at 1546.

ployer could achieve its business goals by adopting a less discriminatory alternative practice.[196] Moreover, the Court did not propose any limitations to this RFOA test, nor did it offer any factors to judge reasonableness or any examples of what would constitute an unreasonable non-age factor.

Indeed, the *Smith* case demonstrates the potential breadth of the new RFOA exception. The Court in *Smith* found it reasonable for an employer, like the City of Jackson, to rely on seniority and rank to calculate market wage adjustments for lower level employees in order to attract and retain such employees even if such wage adjustments result in a higher percentage increase for younger employees.[197] However, while the Court admitted the City probably had other less discriminatory alternatives, the Court stated that no investigation into such alternatives was necessary.[198]

Thus, any "reasonable" justification will suffice to allow an employer to escape liability for its discriminatory practices.[199] There seems to be no employer explanation which would not be considered reasonable under the *Smith* Court's broad definition of the RFOA clause. Hiring only less experienced workers for certain positions, company restructure, and reductions in workforce are all likely to be considered "reasonable" in light of an employer's need to cut costs, maintain efficiency and compete in its industry. But, perhaps employment practices which are based on clearly egregious factors would fail the reasonableness test.[200]

For example, the RFOA might not protect an employer who had a physical fitness requirement for its applicants for accountant positions, as that would have a disparate impact on older employees and would be an outrageous employment test given the nature of an accounting position.[201] However, if an employer adopts a test or policy and has a reasonable explanation for it, a court would immediately reject the older employee's disparate impact claim, even if the employer could have achieved its business goals in another less discriminatory manner.[202] For example, the RFOA exception would likely protect an employer who laid off its highest paid employees due to budgetary concerns, without looking at whether the employer could have adhered to its budget by reducing expenses other than wages, such as operating or marketing costs and, thus, lessen the discriminatory impact on older employees.[203]

196. *See id.*
197. *Id.* at 1546–47.
198. *Id.* at 1546.
199. *See id.*
200. *See, e.g.*, B. Johnson, *supra* note 28, at 309–10.
201. *See id.*
202. *See, e.g.*, *Smith*, 125 S. Ct. at 1546.
203. *See* J. Johnson, *supra* note 7, at 1406.

Arguably, the majority of employers today are savvy enough not to engage in outrageous employment practices such as the physical fitness requirement for accountant positions. Indeed, commentators suggest that employers are becoming increasingly sophisticated in dodging ADEA liability.[204] Additionally, courts and commentators argue that employers should not be allowed to adopt policies or practices that adversely impact older employees without being required to justify the practice (for example, by showing a business necessity or job relatedness, or the inability to adopt a less discriminatory alternative).[205]

However, the Court's broad new interpretation of the RFOA defense will hinder a plaintiff's ability to challenge subtle discriminatory practices (such as layoffs to cut costs) which adversely impact older workers. An employer may escape liability by justifying its practice with any reasonable explanation (no business necessity or job relatedness are required).[206] Furthermore, the plaintiff does not have the opportunity to show that the employer could have achieved its goal in a less discriminatory manner.[207] By severely limiting the disparate impact cause of action under the ADEA, the Court will effectively frustrate Congress's attempts to protect older workers from arbitrary age discrimination in the workplace.[208]

B. Regressing Back to Wards Cove

In addition to its expansive interpretation of the RFOA defense, the *Smith* Court held that the burdens of proof and persuasion as defined in *Wards Cove*, and long since rejected by Congress as unfair limitations of Title VII, are now to be applied in ADEA disparate impact cases.[209] Thus, in order to establish a prima facie case under the ADEA, the plaintiff must identify the specific employment practice responsible for creating the alleged disparate impact and then introduce statistical evidence

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204. Minda, *supra* note 3, at 538–39 (citing RICHARD A. POSNER, AGING AND OLD AGE 335 (1995) ("By now . . . employers have largely succeeded in purging such slogans as 'you can't teach an old dog new tricks' from the vocabulary of their supervisory and personnel staffs.")).

205. *See* J. Johnson, *supra* note 7, at 1406–08 (arguing that the ADEA must provide protection for older employees who are downsized by employers attempting to cut costs, and that employers should be required to justify decisions to impose cost-savings on older workers). *See, e.g.*, Geller v. Markham, 635 F.2d 1027, 1033–34 (2d Cir. 1980) (holding that defendant was unable to adequately justify its policy of hiring inexperienced applicants which disproportionately disadvantaged older applicants and, therefore, was liable under the ADEA).

206. *See Smith*, 125 S. Ct. at 1546.

207. *See id.*

208. *See supra* note 205 and accompanying text. *See also* Minda, *supra* note 3, at 512–15 (asserting that opportunistic downsizing of older workers should be eliminated by age and pension discrimination legislation to avoid rendering legislation, including the ADEA, meaningless. Additionally, if opportunistic downsizing is left unchecked, it could contribute to the impending Social Security crisis and the downfall of the American work ethic).

209. *See Smith*, 125 S. Ct. at 1544–45.

that the practice adversely impacts older employees.[210] Then, the employer may either refute the plaintiff's statistical evidence or produce evidence that its challenged practice is based on a reasonable non-age factor.[211] However, the burden of persuasion remains with the plaintiff at all times.[212] So, the plaintiff has the burden to persuade the factfinder that the employer's justification is unreasonable.[213]

Ironically, Justice Stevens, author of the plurality opinion in *Smith*, wrote a scathing dissent of the majority opinion in *Wards Cove* for the decision to impose this burden on the plaintiff.[214] Justice Stevens wrote, "[t]he changes the majority makes today, tipping the scales in favor of employers, are not faithful to those [ordinary] principles [of fairness]."[215] Justice Stevens' own arguments against the Court's adjustment of burdens of proof in his dissent in *Wards Cove* are applicable to refute his opinion in *Smith*.

In his *Wards Cove* dissent, Justice Stevens attacked the majority's redefinition of the employees' burden of proof to establish a prima facie disparate impact case, calling it unfair and unwarranted.[216] Justice Stevens predicted that the majority's requirement that employees isolate specific employment practices responsible for the statistical disparities would present serious difficulties for employees.[217] Justice Stevens recognized that employers often consider multiple factors in making their decisions and it would be nearly impossible to separate and challenge each factor rather than the decision-making process as a whole.[218]

Justice Stevens also asserted in *Wards Cove* that the employer should have the burden of proof and persuasion for the defense of business necessity in disparate impact cases.[219] Following basic common law pleading procedure, Justice Stevens stressed that the plaintiff has the burden to persuade the factfinder that the defendant has harmed her, and the defendant may refute any evidence the plaintiff presents.[220] In addition, the defendant has the option of persuading the factfinder that her act was justifiable.[221] Depending on which party is asserting a proposition, the burdens of persuasion shift between the plaintiff and defendant.[222]

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210. *See Wards Cove*, 490 U.S. at 656–57 (discussing the prima facie requirements under Title VII); *see also Smith*, 125 S. Ct. at 1560 (O'Connor, J., concurring) (applying these same requirements to the ADEA).
211. *Smith*, 125 S. Ct. at 1560 (O'Connor, J., concurring).
212. *Id.*
213. *See id.*
214. *See Wards Cove*, 490 U.S. at 662–78 (Stevens, J., dissenting).
215. *Id.* at 673.
216. *Id.* at 672–73.
217. *See id.* at 673 n.19–20.
218. *Id.* at 672–73 n.19.
219. *Id.* at 668–70.
220. *Id.*
221. *Id.*
222. *Id.*

Thus, Justice Stevens concluded, the business necessity defense in disparate impact cases is a "classic example of an affirmative defense."[223]

Indeed, courts interpreted the RFOA defense as an affirmative defense in ADEA disparate impact cases following *Griggs*.[224] Furthermore, prior to *Smith*, commentators arguing for the recognition of disparate impact claims under the ADEA interpreted the RFOA exception as an affirmative defense, based on the construction of the statute.[225] Additionally, commentators recognize that because the employer has greater access to proof regarding its own policies and practices, the burden of persuasion for employer defenses to disparate impact claims should be allocated to the employer.[226]

However, contrary to basic rules of civil procedure and statutory construction, the Court in *Smith* decided to revert back to its obsolete 1989 *Wards Cove* decision and place what should be the employer's "weighty" burden,[227] squarely on the shoulders of the employee.[228] Thus, rather than requiring the employer to persuade the factfinder that its practice is based on a reasonable non-age factor, the employee is expected to persuade the factfinder of the unreasonableness of the non-age factor.

So, in addition to receiving the benefit of the broad RFOA defense under the ADEA, employers do not even have to persuade the factfinder of that defense.[229] Moreover, in order to establish a prima facie case, ADEA disparate impact plaintiffs are now responsible for isolating specific employment practices and presenting statistical evidence that each practice adversely affects older workers.[230] Charging older employees with both of these procedural burdens adds to the likelihood that employees' ADEA disparate impact claims will fail.[231]

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223. *Id.* at 670 (citing FED. R. CIV. P. 8(c)).

224. *See* Palochko v. Manville Corp., 21 F.3d 981, 981 (10th Cir. 1994); *see Geller*, 635 F.2d at 1032, 1034; *see also* LINDEMANN & KADUE, *supra* note 5, at 428 (stating that the defendant has the burden of production and persuasion regarding the business necessity test (the predecessor to the RFOA test)).

225. J. Johnson, *supra* note 7, at 1402, 1447; *see also* Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819, 832–36 (1997) (arguing that the ADEA's language pertaining to the RFOA exception indicates that procedurally, the RFOA exception is a defense, and thus the burden must be upon the employer to establish that it acted upon a reasonable non-age factor).

226. *See* Jesse A. Whitten, *Disparate Impact Doctrine Revisited: Wards Cove Packing Co. v. Antonio*, 13 HARV. J.L. & PUB. POL'Y 383, 396 (1990) (arguing that employers should bear the burden of persuasion on the business necessity defense to Title VII disparate impact claims because they have greater access to information about their business practices).

227. *Wards Cove*, 490 U.S. at 671 (Stevens, J., dissenting).

228. *See id.* at 659 (majority opinion).

229. *See Smith*, 125 S. Ct. at 1544–45 (adopting *Wards Cove* analysis in ADEA cases).

230. *See id.*

231. *See* Niall A. Paul, Wards Cove Packing Co. v. Antonio*: The Supreme Court's Disparate Treatment of the Disparate Impact Doctrine*, 8 HOFSTRA LAB. & EMP. L.J. 127, 162–63 (arguing that the *Wards Cove* decision including the statistical evidence requirement, business justification test, and shifting the burden of persuasion of the business necessity issue to plaintiffs threatens the

C. *ADEA Disparate Impact Plaintiffs Losing in the Lower Courts*

Lower courts applying the *Smith* decision have utilized the *Wards Cove* plaintiff burdens, and the over-expansive interpretation of the RFOA provision to eliminate ADEA plaintiffs' disparate impact claims.[232] These courts have consistently dismissed ADEA disparate impact claims in the initial pleading stages either because the plaintiff failed to meet the statistical evidence requirement, or because the defendant pleaded a 'reasonable factor other than age' (RFOA) defense, or both.[233] Indeed, since the *Smith* decision, only one ADEA disparate impact plaintiff has survived summary judgment;[234] and no ADEA plaintiff has prevailed under a disparate impact theory of recovery.[235]

In *Slattery v. Peerless Importers*,[236] the court found the plaintiff's ADEA disparate impact claim was without merit because the employer based its challenged policy on a reasonable non-age factor.[237] In *Slattery*, the plaintiff, a salesperson employed by the defendant wholesale wine distributor, alleged that the defendant's policy to hire new salespersons in its new division, rather than allowing existing salespeople to transfer to that division, adversely impacted older employees.[238] The new division had exclusive distribution rights for a lucrative brand of

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viability of Title VII plaintiffs' disparate impact claims); *see also* Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 WAYNE L. REV. 1093, 1190 (1993) (criticizing the *Wards Cove* decision for its "revisionist treatment of the burden of proof" and its requirement that plaintiffs identify specific employment practices).

232. *See infra* note 233 and accompanying text.

233. Plaintiff failed to isolate a specific facially neutral employment practice and present evidence showing a statistically significant disparate impact on older employees: *See* Mihalik v. Expressjet Airlines, No. 3:04CV258 RV/EMT, 2005 WL 1787350, at *3 (N.D. Fla. July 27, 2005); Aylward v. Hyatt Corp., No. 03 C 6097, 2005 WL 1910904, at *14–15 (N.D. Ill. Aug. 5, 2005); Schaller v. Donelson Air Conditioning Co., No. 3:04–0545, 2005 WL 1868769, at *8 (M.D. Tenn. Aug. 4, 2005); Chavarria v. Despachos Del Notre, Inc., No. CIV.A. L–03–96, 2005 WL 1515472, at *6 n.11 (S.D. Tex. June 22, 2005); Ackerman v. Home Depot, Inc., No. CIV.A. 304CV0058N, 2005 WL 1313429, at *5 (N.D. Tex. May 31, 2005). Employer based its decision on what the court considered to be a reasonable factor other than age: *See* Slattery v. Peerless Imp., Inc., No. 04 CV 0275(JG), 2005 WL 1527681, at *7–8 (E.D.N.Y. June 29, 2005); Duggan v. Orthopaedic Institute of Ohio, Inc., 365 F. Supp. 2d 853, 862 (N.D. Ohio 2005); Wilson v. MVM, Inc., No. CIV.A.03–4514, 2005 WL 1231968, at *18 (E.D. Pa. May 24, 2005). Plaintiff failed to isolate specific practice and employer's motivation constituted a RFOA: *See* Durante v. Qualcomm, Inc., No. 03–56255, 2005 WL 1799416, at *3, *4 (9th Cir. Aug. 1, 2005) (not selected for pulication); Rizzo v. PPL Serv. Corp., No. Civ.A. 03–5779, Civ.A. 03–5780, Civ.A. 03–5781, 2005 WL 1397217, at *3 (E.D. Pa. June 10, 2005); Townsend v. Weyerhaeuser Co., No.04–C–563–C, 2005 WL 1389197, at *13–14 (W.D. Wis. June 13, 2005).

234. As of Aug. 26, 2005, *Williams v. Sprint/United Mgmt. Co.*, No. 03–2200–JWL, 2005 WL 1801605, at *1 (D. Kan. July 29, 2005), is the only ADEA disparate impact case in which the court denied a defendant's motion for summary judgment. However, the *Williams* court misapplied the *Wards Cove* standard and stated that the employer had the burden to plead and prove the RFOA defense and refused to consider the employers proffered factors other than age under this motion for summary judgment. *Id.* at *3.

235. *See supra* notes 233–34 and accompanying text. These are all the reported decisions through Aug. 26, 2005 which cited *Smith* and involved ADEA disparate impact claims.

236. No. 04 CV 0275(JG), 2005 WL 1527681 (E.D.N.Y. June 29, 2005).

237. *Slattery*, 2005 WL 1527681, at *8.

238. *Id.* at *1, *2, *7.

wine which previously accounted for 30% of the plaintiff's commission income.[239] The court found that the employer's allegation that it prohibited its salespersons from transferring to reassure its other suppliers that an experienced sales staff would continue to support them constituted a RFOA; and, thus, precluded the plaintiff's disparate impact claim.[240]

The *Slattery* court noted that the *Smith* decision narrowed the scope of employer liability under the ADEA from what previously existed in the Second Circuit.[241] The court further explained that the Supreme Court's interpretation of the RFOA requires only an employer's showing that its disputed decision was reasonable.[242] This reasonableness test, the *Slattery* court pointed out, is much easier for an employer to satisfy compared to the business necessity test which was the law of the Second Circuit prior to *Smith*.[243]

Additionally, in *Townsend v. Weyerhaeuser Co.*,[244] the court granted summary judgment in favor of the defendant on a disparate impact claim with the assistance of both the *Wards Cove* plaintiff burden and the RFOA provision.[245] In *Townsend*, the plaintiff was an administrative assistant employed at the defendant paper mill company who lost her job as a result of the defendant's reorganization.[246] A total of eight employees were laid off as a result of the defendant's reorganization; and seven of the eight employees were over forty years of age.[247] The court held that the plaintiff did not isolate a specific practice which was responsible for the observed statistical disparity.[248]

However, even if the plaintiff showed that the defendant's reduction in force (RIF) had a significant adverse effect on employees over forty, the court could still grant summary judgment in favor of the defendant based on the RFOA provision.[249] The employer decided to terminate older employees to relieve itself of the burden of those employees' high salary or health care costs.[250] The court found that saving salary and healthcare costs constitute reasonable factors other than age and, thus, the employer would not be liable under the ADEA.[251]

In addition to the dismal results of plaintiffs' attempts to plead disparate impact cases since *Smith*, litigators' commentaries highlight the

239. *Id.* at *1–*2.
240. *Id.* at *8.
241. *Id.* at *7.
242. *Id.* at *8.
243. *See id.* at *7.
244. No. 04–C–563–C, 2005 WL 1389197 (W.D. Wis. June 13, 2005).
245. *See Townsend*, 2005 WL 1389197, at *1.
246. *Id.* at *1, *6.
247. *Id.* at *6.
248. *Id.* at *14.
249. *Id.*
250. *Id.*
251. *Id.*

difficulties they expect plaintiffs will face in ADEA disparate impact cases.[252] Litigators lament that "the existence of the [RFOA] defense curtails disparate impact liability."[253] Additionally, litigators observe that as a result of *Smith*, an employer may now adopt a policy to hire less experienced (usually younger) employees and justify it as a cost-saving mechanism to take advantage of the RFOA defense.[254] Whereas under the business necessity test prior to *Smith*, an employer's assertion of cost-saving alone would not allow it to escape liability under ADEA disparate impact claims.[255]

In short, no plaintiff has been successful in a disparate impact case under the ADEA since *Smith*. Courts and litigators alike have commented on how the Supreme Court's interpretation of the ADEA in *Smith*, particularly the RFOA provision, has made it extremely difficult for an ADEA plaintiff to succeed under a disparate impact theory.[256] Further, a review of the initial lower court cases applying *Smith* indicates that the *Smith* decision has made it nearly impossible for plaintiffs to prevail on a disparate impact theory of recovery under the ADEA.

D. Discriminating Against ADEA Plaintiffs

According to the Court, the ADEA seeks to "*broadly* prohibit[] arbitrary discrimination in the workplace based on age."[257] In addition, the nearly identical language of the ADEA and Title VII supports a presumption that Congress intended to provide similar protection for employees against the types of discrimination included in both statutes.[258] Commentators argue that due to the language and format similarities of Title VII and ADEA, the ideal solution would be "to allow for co-extensive causes of action and protection for covered plaintiffs under [both] the respective acts."[259] Unfortunately, the Court's decision in *Smith* does not further Congress's goal of *broadly* prohibiting age discrimination, nor does it provide protection for older employees similar to the Title VII protections. Instead, the *Smith* Court highlighted the textual differences rather than the similarities between the two statutes, and arbitrarily adopted an interpretation which will result in significantly less protection for employees subjected to age discrimination.

The Court's main reasons for affording employees less protection under the ADEA than under Title VII included: (1) the existence of the

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252. *See Slattery*, 2005 WL 1527681, at *7; LOUIS A. JACOBS & ANDREW J. RUZICHO, LITIGATING AGE DISCRIMINATION CASES § 2:8 (2005), *available at* LITADCS § 2:8 (Westlaw).

253. *See* JACOBS & RUZICHO, *supra* note 252, § 2:8.

254. *Id.*

255. *Id.*

256. *See id.*; *Slattery*, 2005 WL 1527681, at *7.

257. TWA v. Thurston, 469 U.S. 111, 120 (1985) (emphasis added); Lorillard v. Pons, 434 U.S. 575, 577 (1978) (emphasis added).

258. *Smith*, 125 S. Ct. 1536 , 1541 (2005).

259. B. Johnson, *supra* note 28, at 343.

RFOA clause in the ADEA but not Title VII; (2) Congress not mentioning the ADEA in its 1991 amendments; and (3) age discrimination's inherent difference from the other types of discrimination.[260] These reasons are unpersuasive.

First, the mere existence of the RFOA clause in the ADEA but not in Title VII does not support the Court's broad interpretation of the RFOA clause (and narrowing of employer liability). Courts prior to *Smith* were able to apply the RFOA defense without significantly narrowing employers' liability under the ADEA.[261] These courts utilized the more stringent business necessity test and allowed plaintiffs to present less discriminatory alternatives.[262] Furthermore, this argument is tautological given that the Court first selected a broad interpretation of the RFOA defense and then used it as reasoning to conclude that employer liability should be more narrow under the ADEA.

Second, many commentators have opined and drawn a range of different conclusions about the meaning of Congress's failure to mention the ADEA in its 1991 amendments.[263] Some argue that Congress may not have addressed the ADEA for the simple reason that *Wards Cove* was a Title VII case, not an ADEA case.[264] Others argue that Congress actually intended for courts to follow the 1991 amendments for similar statutes such as the ADEA.[265] Still other commentators question whether Congress even considered how the 1991 amendments could apply in the context of the ADEA.[266]

Third, just because age discrimination is inherently different from racial discrimination, for example, does not mean older employees should not be shielded from needless discrimination too. In *Smith*, the Court noted that "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment."[267] While this is unquestionably true, it does not support a ruling leaving older workers vulnerable to age discrimination which has nothing to do with their ability to perform their job. If an older employee cannot perform the job, then the employer may either refuse to hire her according to the BFOQ exception, or terminate her according to the good cause exception without incurring ADEA li-

260. *Smith*, 125 S. Ct. at 1544–45.
261. *See supra* notes 181-183 and accompanying text.
262. *See supra* notes 181-183 and accompanying text.
263. *See* LINDEMANN & KADUE, *supra* note 5, at 420–21.
264. *See* Eglit, *supra* note 231, at 1174–75.
265. *See* LINDEMANN & KADUE, *supra* note 5, at 421 (A House Judiciary Committee report stated that the laws modeled after Title VII should be interpreted consistently with the 1991 amendments. However others contend that the House Committee's interpretation should not be followed because it was not part of the Senate Bill which was adopted.).
266. *See* Eglit, *supra* note 231, at 1168–70.
267. *Smith*, 125 S. Ct. at 1545.

ability.[268] Finally, while older workers have not been exposed to a lifetime of discrimination like racial minorities, they still deserve freedom from workplace discrimination.

CONCLUSION

A cursory review of the Court's decision in *Smith v. City of Jackson*,[269] leads to the assumption of a victory for older employees. However, closer scrutiny reveals that although the Court held that disparate impact claims are cognizable under the ADEA, its expansive interpretation of the RFOA exception, and its use of the plaintiff burdens in *Wards Cove Packing v. Atonio*[270] will in effect preclude the majority of disparate impact claims. Indeed, not one plaintiff has prevailed in an ADEA disparate impact case since *Smith*.[271] Perhaps Congress will intervene yet again to express its discontent at leaving workers exposed to arbitrary discrimination. However, if Congress does not act accordingly, the Court's ruling in *Smith* will eviscerate the main purpose of the ADEA and leave elder workers without recourse against insidious age discrimination in the workplace.

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268. *See* 28 U.S.C. § 623(f)(1), (4) (2004).
269. 125 S. Ct. 1536, 1536 (2005).
270. 490 U.S. 642, 657 (1989).
271. See *supra* notes 233–34 and accompanying text.

* J.D. Candidate, 2007.