AGE DISCRIMINATION MODELS OF PROOF AFTER *HAZEN PAPER CO. V. BIGGINS*

James C. Bailey

Under the Age Discrimination in Employment Act (ADEA), employers are prohibited from discriminating against employees or potential employees on the basis of age. The Supreme Court, in the 1993 case of Hazen Paper Co. v. Biggins*, held that employers who make a decision based wholly on factors other than age do not violate the ADEA. This decision appeared to severely limit the ability of plaintiffs to use age proxy evidence when bringing an ADEA suit. In his article, Mr. Bailey discusses what models of proof still exist for bringing a case under the ADEA in the wake of* Hazen Paper*. The article examines age proxy proof models under both disparate impact and disparate treatment theories and argues that courts are no less willing to consider age proxy factors as proof of discrimination so long as the plaintiff provides direct evidence that an employer's decision was based on a factor that correlates directly with age. Mr. Bailey also considers how age proxies that do not directly correlate with age can still be used to strengthen an ADEA claim and concludes that age proxy evidence still plays an important role in post-*Hazen Paper *suits.*

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I. Introduction

The Age Discrimination in Employment Act (the ADEA or the Act) forbids discrimination based on age by protecting individuals over the age of forty from "arbitrary" age discrimination.[1] Before 1993, courts held that certain employment considerations (such as seniority, retirement eligibility, and pension status) are so closely related to age that they may be considered evidence that age actually motivated the employer's decision.[2] For example, courts ruled that firing an older worker to prevent the vesting of pension benefits[3] or to save salary costs resulting from seniority[4] violated the ADEA on the theory that pension eligibility and high salary correlate with age such that they are "proxies" for age. By contrast, other courts held that seniority and age discrimination were unrelated[5] and emphasized that an employee's seniority or years of service are distinct factors that do not necessarily correlate with age.[6]

In *Hazen Paper Co. v. Biggins* (*Hazen Paper*),[7] the Supreme Court of the United States resolved a split in the circuit courts of appeals and held that an employer does not violate the Act when the employer makes a decision wholly motivated by factors other than age.[8] In *Hazen Paper*, the employer terminated an employee to prevent the employee from vesting in his pension.[9] Under the employer's plan, the pension vested based upon the employee's years of service and was not directly related to age.[10] The plaintiff argued, in essence, that his years of service were empirically correlated with his age and were thus a proxy for his age[11] and that, by relying on the proxy for his age, the employer essentially engaged in age discrimination.[12]

1. 29 U.S.C. § 621(b) (1990) (explaining that Congress passed the Age Discrimination in Employment Act to "promote employment of older persons based on their ability rather than age" and to prohibit "arbitrary age discrimination in employment"); *see also id.* § 631 (defining "older person" as over forty).
2. *See, e.g.*, White v. Westinghouse Elec. Co., 862 F.2d 56, 62 (3d Cir. 1988).
3. *Id.*
4. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1211 (7th Cir. 1987).
5. Williams v. GMC, 656 F.2d 120, 130 n.17 (5th Cir. 1981).
6. EEOC v. Clay Printing Co., 955 F.2d 936, 942 (4th Cir. 1992).
7. 507 U.S. 604 (1993).
8. "When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." *Id.* at 611.
9. *Id.*
10. *Id.* at 611–12.
11. *Id.* at 606–13.
12. *Id.*

The Supreme Court rejected the plaintiff's argument, holding that "age and years of service are analytically distinct"[13] and that it is "incorrect to say that a decision based on years of service is necessarily 'age-based.'"[14] The Supreme Court concluded that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."[15]

In the wake of the *Hazen Paper* decision, some commentators have expressed concern that, in eliminating the application of age proxies in the ADEA context, the Court made it more difficult for ADEA plaintiffs to prove their cases.[16] One writer, who sought a broader application of the age proxy doctrine, lamented that "the Court provided little guidance as to what remains of the age proxy doctrine" after *Hazen Paper*.[17]

It is far from clear, however, that *Hazen Paper* has altogether killed the age proxy doctrine. Rather, *Hazen Paper* has led to a clarification in judicial interpretation of age proxies. In *Hazen Paper*, the Supreme Court made it clear that "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."[18] The Supreme Court did not, however, foreclose the use of age proxy evidence to corroborate other evidence of an employer's age discrimination. This paper will look at the ADEA through the analytical frameworks used by the courts post-*Hazen Paper*, to demonstrate the clarified nature and current status of the age proxy doctrine.

The first section briefly describes the statutes that are the source of the judicial interpretations of the ADEA. The second section briefly describes *Hazen Paper* and defines the resulting ADEA analytical framework. The third section is an analysis of some of the more important cases that followed *Hazen Paper*, with careful attention given to the varying analytical frameworks used by the courts in both disparate impact and disparate treatment age proxy cases.

13. *Id.* at 611.
14. *Id.*
15. *Id.* at 609.
16. *See, e.g.*, Toni J. Querry, *A Rose by Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After* Hazen Paper Co. v. Biggins, 81 CORNELL L. REV. 530, 561 (1996) [hereinafter *A Rose by Any Other Name*]; *see also* Judith J. Johnson, *Semantic Cover for Age Discrimination: Twilight of the ADEA*, 42 WAYNE L. REV. 1 (1995) [hereinafter *Semantic Cover*].
17. *A Rose by Any Other Name*, *supra* note 16, at 531.
18. *Hazen Paper*, 507 U.S. at 610.

Where the plaintiff presents direct evidence that the basis of an employer's decision was a factor that correlates with age, regardless of the employer's intent, the courts are no more reluctant to find age discrimination than they were pre-*Hazen Paper*.[19] This is particularly evident in cases that involve employee benefit plans.[20] Further, in some cases where such a factor does not directly correlate with age, courts have still held that proxy evidence may be an additional piece of supporting evidence that the employer's decision was truly based on age.[21]

II. The Age Discrimination in Employment Act

A. Scope of Coverage

The ADEA applies to all persons over the age of forty.[22] Section 623(a) of the Act 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.[23]

Section 623(f)(1) of the Act provides that it is lawful for an employer to "take any action . . . where the differentiation is based on reasonable factors other than age."[24]

The ADEA seeks to "broadly prohibit[] arbitrary discrimination in the workplace based on age."[25] The "essence" of age discrimination, according to the Supreme Court, is "for an older employee to be

19. *See, e.g.*, *infra* notes 224–41 and accompanying text (discussing EEOC v. Hickman Mills Consol. Sch. Dist. No. 1, 99 F. Supp. 2d 1070 (W.D. Mo. 2000)).

20. *See id.*

21. *See id.*

22. "The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age." 29 U.S.C. § 631(a) (1974). Some states, such as New Jersey, allow for persons under [the] age of forty to sue under state age discrimination provisions. *See* Bergen Commercial Bank v. Sisler, 704 A.2d 1017, 1022 (N.J. 1998) (holding that the New Jersey Law Against Discrimination was not limited to persons over forty); *see also* Maine Human Rights Comm. v. Kennebec Water Co., 468 A.2d 307, 309 (Me. 1983) (holding that Maine's anti-age discrimination statute was not intended to protect only persons over the age of forty).

23. 29 U.S.C. § 623(a) (1974).

24. *Id.* § 623(f)(1).

25. TWA v. Thurston, 469 U.S. 111, 120 (1985) (quoting Lorillard v. Pons, 434 U.S. 575, 577 (1978)).

fired because the employer believes that productivity and competence decline with age. Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."[26]

B. Using the Title VII Framework in ADEA Cases

Courts have adopted the method of proving discrimination developed in Title VII cases for suits under the ADEA.[27] There are two theories of proof in discrimination cases, including those based on age: (1) disparate treatment discrimination and (2) disparate impact discrimination.[28] Disparate treatment has been described as "the most easily understood type of discrimination."[29] The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics].[30] "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . ."[31]

The circuit courts do not agree about whether the disparate impact theory of discrimination may be used in the ADEA context.[32] Disparate impact discrimination is a very difficult to prove.[33] Disparate impact "involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.

26. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).
27. *See, e.g.,* Adams v. Florida Power Corp., 255 F.3d 1322 (11th Cir. 2001).
28. *Hazen Paper*, 507 U.S. at 609.
29. *Id.* (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977) (citation omitted)).
30. *Id.*
31. *Id.*
32. The Second, Eighth, and Ninth Circuits hold that "because the language of the ADEA parallels Title VII, disparate impact claims also should be allowed under the ADEA." *Adams*, 255 F.3d at 1322 (citing Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980)); Smith v. City of Des Moines, Iowa, 99 F.3d 1466, 1469–70 (8th Cir. 1996); EEOC v. Borden's, Inc., 724 F.2d 1390, 1394–95 (9th Cir. 1984). But courts in the First, Third, Sixth, Seventh, Tenth, and Eleventh Circuits have questioned the validity of disparate impact claims under the ADEA post-*Hazen*. *Adams*, 255 F.3d at 1325 (citing Mullin v. Raytheon Co., 164 F.3d 696, 700–01 (1st Cir.), *cert. denied*, 528 U.S. 811 (1999)); Adams v. Florida Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076–77 (7th Cir. 1994); Ellis v. United Airlines, Inc., 73 F.3d 999, 1006–07 (10th Cir. 1996); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995); Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 139 n.5 (6th Cir. 1995).
33. *Adams*, 255 F.3d at 1327 (Barkett, J., concurring).

Proof of discriminatory motive . . . is not required under a disparate-impact theory."[34] Disparate impact frequently consists of a statistical analysis of the impact that an employer's policy has on the protected class of those over the age of forty.

There are three proof models for discrimination under the ADEA when age proxy is allegedly present. First, where the employer's proffered reason for its employment action directly correlates with the age of an individual over age forty, a court may find the proxy to constitute direct evidence of discrimination.[35] Second, where the employer's proffered reason for its employment action does not directly correlate with age, but has a significant correlation with the age of an individual over age forty, a court may find that employer's proffered legitimate nondiscriminatory reason is pretextual and that age discrimination was the actual reason for its action. Finally, where the employment policy correlates with age in a manner that has an impact on those over age forty, the plaintiff may seek to use the age proxy to demonstrate that the employer's facially neutral policy has a disparate impact on individuals over the age of forty.[36] Under any of these theories, the courts give great weight to the employer's justification for its actions, and in disparate treatment cases, the courts must still carefully scrutinize whether the employer's decision was actually motivated by unlawful age discrimination.[37]

III. The *Hazen Paper* Decision

In *Hazen Paper*, Walter F. Biggins, the plaintiff, claimed that his employer deliberately terminated his employment when he was sixty-two years old to prevent him from vesting in his pension.[38] Mr. Biggins then sued the Hazen Paper Company for violations of the ADEA, claiming that his age had been a "determinate" factor in the company's decision to terminate his employment.[39] Hazen Paper responded that it had terminated Mr. Biggins because he was doing business with its competitors.[40] A jury found that Hazen Paper violated Section 510 of the Employee Retirement Income Security Act

34. *Id.*
35. EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343, 367 (E.D. Pa. 1985).
36. *See Adams*, 255 F.3d at 1330.
37. *See id.*
38. Hazen Paper Co. v. Biggins, 507 U.S. 604, 606–07 (1993).
39. *Id.*
40. *Id.*

(ERISA) and "willfully" violated the ADEA.[41] The First Circuit Court of Appeals affirmed the jury verdict and reversed the judgment notwithstanding the verdict as to "willfulness."[42]

The Supreme Court addressed whether "an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age."[43] The Court held "that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."[44] The Court explained that in a disparate treatment case, an "employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees" or an employer "may have been motivated by the protected trait on an ad hoc, informal basis."[45] Either way, "liability depends on whether the protected trait (under the ADEA, age) *actually motivated* the employer's decision."[46]

According to the Court, disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA."[47] In fact, "[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with age."[48] Therefore, if an employer's "decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears."[49]

The Court concluded that Hazen Paper only intended to prevent Mr. Biggins from vesting in the retirement plan, and while this factor was correlated with age, the employer's decision had nothing to do with the employee's age.[50] Consequently, Mr. Biggins could not demonstrate disparate treatment.[51] Finding that an employee's age is analytically distinct from his years of service, the Court held that, "an employer can take account of one while ignoring the other."[52]

41. "Under § 7(b) of the ADEA, 29 U.S.C. § 626(b), a 'willful' violation gives rise to liquidated damages." *Id.*
42. *Id.* at 607.
43. *Id.* at 608.
44. *Id.* at 609.
45. *Id.* at 610.
46. *Id.* (emphasis added).
47. *Id.*
48. *Id.*
49. *Id.* at 611.
50. *Id.* at 612.
51. *Id.*
52. *Id.* at 611.

The Court explained, "a decision by the company to fire an older employee solely because he has nine-plus years of service and therefore is 'close to vesting' would not constitute discriminatory treatment based on age."[53] The Court concluded that to prevail, Mr. Biggins would have to prove that Hazen Paper had the additional intent to discriminate against Mr. Biggins because of his age.[54]

The Court specifically refrained from addressing whether an employee can bring a claim under the disparate impact theory of liability.[55] Following Title VII case law, many courts have allowed for recovery under disparate impact theory when an employer's actions fall more harshly on the protected group than on others.[56] Prior to *Hazen Paper* some courts treated cases which involved facially neutral policies under the disparate impact analysis because such policies were *generally* aimed at older employees.[57] After *Hazen Paper*, some courts still analyze facially neutral policies under the disparate impact analysis. However, even though some weight is given to the impact that such policies have on older employees, courts generally give much greater weight to the employer's justifications for its actions.[58]

53. *Id*. at 612.
54. *Id*. at 612–13.
55. *Id*. at 610.
56. *See* Smith v. City of Des Moines, Iowa, 99 F.3d 1466, 1469 (8th Cir. 1996) (discussing disparate impact theory available under the ADEA); EEOC v. Borden's Inc., 724 F.2d 1390, 1394 (9th Cir. 1984) (holding that the similar language, structure, and purpose of Title VII and the ADEA compels the adoption of disparate impact analysis in cases seeking relief under the ADEA); Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 690 (8th Cir. 1983) (explaining how to establish a prima facie case under the ADEA using a disparate impact theory); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980) (explaining that because the substantive prohibitions of the ADEA were adopted *in haec verba* from Title VII, the substantive rule permitting proof of disparate impact to establish a claim must also be adopted under the ADEA); EEOC v. Westinghouse Elec. Corp., 632 F. Supp. 343, 370 (E.D. Pa. 1986) (following the Second, Eight and Ninth Circuits); Arnold v. United States Postal Serv., 649 F. Supp. 676, 681 (D.D.C. 1986) (holding disparate impact analysis under Title VII is applicable to the ADEA); EEOC v. Governor Mifflin Sch. Dist., 623 F. Supp. 734, 740 (E.D. Pa. 1985) (finding disparate impact analysis of Title VII appropriate under the ADEA).
57. *See* Metz v. Transit Mix, Inc., 828 F.2d 1202, 1205 (7th Cir. 1987) (holding that employer's scheme to terminate older employees to reduce salary costs violated the ADEA); *Westinghouse Elec. Corp.*, 632 F. Supp. at 367 (holding that "[a]ge and retirement [status] are, in fact, so closely linked that a criterion based on one is a criterion based on the other."); EEOC v. Curtiss-Wright Corp., No. 81-2376, 1982 WL 602, at *2 (D.N.J. Apr. 12, 1982) (recognizing age is a determinative factor where severance pay is based upon retirement status).
58. *See* Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135 (6th Cir. 1995).

IV. The Case Law Post-*Hazen Paper*

A. Age Proxy Doctrine in Disparate Treatment Cases

Disparate treatment age discrimination may be proven through direct evidence of discrimination or indirect (circumstantial) evidence of discrimination.[59] "[W]hen a policy facially discriminates on the basis of the protected trait, in certain circumstances it may constitute per se or explicit [age] discrimination."[60] Motive is not important to proving a case of explicit or facial discrimination.[61] Thus, "'[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.'"[62] Age discrimination is not difficult to prove where a facially discriminatory policy is in effect. It follows that, where a proxy for an employee's age directly correlates with an employee's age and is facially discriminatory, proving a violation of the ADEA should not be difficult.

In the absence of direct evidence, or of a direct correlation between an age proxy and age, the courts have developed a framework for analyzing circumstantial evidence of discrimination.[63] This framework was developed in Title VII cases because courts recognized that there was seldom "eyewitness" testimony regarding the employer's mental processes or motives.[64]

Under this formula, an ADEA plaintiff must first establish a prima facie case of age discrimination by demonstrating that he or she is a member of the protected class (i.e., over forty); that he or she was eligible for the benefit offered by the employer (e.g., hiring, promotion, increase in compensation, or continued employment); that despite such eligibility or qualification, he or she was denied such employment benefit; and that after such rejection or denial of benefit, the employment benefit was given to another person.[65] If a plaintiff is

59. *See, e.g.*, DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995) (direct evidence); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983) (indirect evidence).

60. *DiBiase*, 48 F.3d at 726 (quoting EEOC v. Elgin Teachers Ass'n, 780 F. Supp. 1195, 1197 (N.D. Ill. 1991)).

61. *See* Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991).

62. *DiBiase*, 48 F.3d at 726 (citation omitted).

63. *Aikens*, 460 U.S. at 714–16.

64. *Id.* at 716.

65. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Supreme Court determined that a plaintiff does not have to establish that the employment benefit was given to a person outside of the protected class. *Id.*; *see also*

able to allege the four factors of a prima facie case of discrimination, the burden shifts to the employer to present a legitimate nondiscriminatory basis for the action.[66] The burden "is one of production, not persuasion" and does not involve a credibility assessment.[67]

If the employer articulates a legitimate nondiscriminatory reason for the action, this burden shifts back to the employee to demonstrate that the purported reason for the action was a pretext for discrimination.[68] No matter where the burden of production lies, the burden of persuasion—that of proving discrimination in violation of the Act—remains at all times with the plaintiff.[69]

1. *HICKS* AND *REEVES*

The amount of proof necessary to prove discrimination under this burden-shifting scheme has been the subject of disagreement.[70] Some courts have held that it is sufficient for an employee to successfully articulate a prima facie case of discrimination and to present sufficient evidence for a reasonable fact finder to reject the employer's proffered "legitimate" nondiscriminatory reason for its decision.[71] That is, when the employee demonstrates that the employer's explanation is pretextual, then the framework essentially drops out of the picture, and the plaintiff must then prove her or his case on the merits.[72] Other courts have held that the plaintiff must not only demonstrate that the employer's proffered reason is pretextual, but also provide additional evidence of discrimination.[73]

O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) (holding that in termination case, "[t]he fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because* of his age. . . . [T]here can be no greater inference of age discrimination . . . when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.").

66. *McDonnell Douglas*, 411 U.S. at 802.

67. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993).

68. *See id.*

69. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

70. *See id.*

71. *See, e.g.*, Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (holding plaintiff's discrediting of employer's explanation is entitled to considerable weight, such that plaintiff should not be routinely required to submit evidence over and above proof of pretext).

72. *See id.* at 1306.

73. *See, e.g.*, Fisher v. Vassar Coll., 114 F.3d 1332 (2d Cir. 1997) (en banc) (holding that plaintiff must introduce sufficient evidence for jury to find both that employer's reason was false and that the real reason was discrimination).

The source of much of this confusion was the U.S. Supreme Court's decision in *St. Mary's Honor Center v. Hicks* (*Hicks*).[74] In *Hicks*, the plaintiff was a correctional officer for St. Mary's Honor Center, a halfway house.[75] The plaintiff had a satisfactory employment record until he got a new supervisor.[76] Shortly after his new supervisor started, the plaintiff was subjected to a series of disciplinary actions for failing properly to supervise his staff, among other things.[77] The employer eventually demoted the employee and ultimately discharged him.[78]

The plaintiff alleged that he was discharged because of his race and proved a prima facie case of discrimination.[79] His former employer averred that it discharged the plaintiff because of his poor disciplinary record and not for discriminatory reasons.[80] At trial, the district court "found that the reasons petitioners gave were not the real reasons for respondent's demotion and discharge."[81] In fact, the district court

> found that the respondent was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations committed by respondent's coworkers were either disregarded or treated more leniently; and that [plaintiff's supervisor] manufactured the final verbal confrontation in order to provoke respondent into threatening him.[82]

Although the evidence revealed that the employer's proffered legitimate nondiscriminatory reason was pretextual, the court found that the "respondent had failed to carry his ultimate burden of proving that *his race* was the determining factor in [the employer's] decision first to demote and then to dismiss him."[83] The district court concluded that the employer's true reason for discharging plaintiff was personal and that the employer discharged the plaintiff, in essence, because his supervisor did not like him.[84]

74. 509 U.S. 502 (1993).
75. *Id.* at 502.
76. *Id.* at 505.
77. *Id.*
78. *Id.*
79. *Id.* at 506.
80. *Id.* at 507.
81. *Id.* at 508.
82. *Id.*
83. *Id.*
84. *Id.*

The court of appeals set the district court's finding aside.[85] It reasoned that, when a plaintiff proves that an employer's proffered legitimate nondiscriminatory reason is pretextual, then the plaintiff is "entitled to judgment as a matter of law."[86] Because "all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions."[87]

The Supreme Court disagreed and held that it is not enough for a plaintiff to simply prove that the employer's proffered legitimate nondiscriminatory reason for its action was pretextual.[88] Instead, a plaintiff must demonstrate both that the proffered reason was false and that discrimination was the *real* reason.[89] Thus, "Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race."[90]

Several legal commentators opined that the *Hicks* decision made "proving disparate treatment discrimination more difficult for plaintiffs."[91] In fact, *Hicks* did no more than express the rule that, notwithstanding the burden-shifting framework, a discrimination plaintiff must always prove that the employment decision was made on an unlawful basis. Plaintiffs in discrimination cases should not be allowed to use the evidentiary burden-shifting framework to avoid the duty to produce convincing evidence. Accordingly, a plaintiff cannot necessarily defeat summary judgment simply by proving that the employer's proffered legitimate nondiscriminatory reason for its action is a pretext.[92]

In *Reeves v. Sanderson Plumbing Prods., Inc.* (*Reeves*),[93] the Supreme Court held that a prima facie case of discrimination, along with

85. *Id.*
86. *Id.* (citation omitted).
87. *Id.* at 509.
88. *Id.* at 524.
89. *Id.* at 519.
90. *Id.* at 523–24. This same theory applies to age discrimination. "Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here [to an age discrimination lawsuit]." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000).
91. *A Rose by Any Other Name*, *supra* note 16, at 561; *see also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2232 (1995).
92. *A Rose by Any Other Name*, *supra* note 16, at 561.
93. 530 U.S. at 140.

sufficient evidence of pretext, is all that is required to allow a jury to infer the existence of intentional employment discrimination.[94] The decision resolved a split among the federal courts of appeals regarding whether evidence of pretext alone is sufficient to withstand a motion for judgment as a matter of law ("pretext only") or whether plaintiffs must also present evidence that the real reason for the employer's decision was discrimination ("pretext plus").[95]

In *Reeves*, the plaintiff was a fifty-seven-year-old supervisory employee of a toilet seat manufacturer.[96] The plaintiff was responsible for recording the attendance and hours of employees in the "Hinge Room."[97] After the plaintiff's supervisor reported to the company's director of manufacturing that production was down in the Hinge Room because of excessive absence and tardiness, and that the attendance records that the plaintiff completed did not indicate a problem, the director ordered an audit of several months of records.[98] The audit found "'numerous timekeeping errors and misrepresentations on the part of the [plaintiff and two other employees].'"[99] As a result of the audit, the company terminated both the plaintiff and his supervisor.[100]

The plaintiff sued alleging that he was terminated because of his age in violation of the ADEA.[101] The company argued that it termi-

94. *Id.* at 153.

95. The Third Circuit in *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996), the Sixth Circuit in *Kline v. Tennessee Valley Auth.*, 128 F.3d 337 (6th Cir. 1997), the Seventh Circuit in *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994), the Eighth Circuit in *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104 (8th Cir. 1994), the Ninth Circuit in *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993), and the Eleventh Circuit in *Combe v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), have held that a prima facie case combined with sufficient evidence to discredit the employer's explanation *always* creates a jury issue of whether the employer intentionally discriminated. The D.C. Circuit held that a plaintiff's discrediting of an employer's explanation is entitled to considerable weight, such that the plaintiff does not necessarily have to submit additional evidence above proof of pretext. *See, e.g.*, Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (en banc). The First Circuit in *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994), the Second Circuit in *Fisher v. Vassar Coll.*, 114 F.3d 1332 (2d Cir. 1997), the Fourth Circuit in *Theard v. Glaxo, Inc.*, 47 F.3d 676 (4th Cir. 1995), and the Fifth Circuit in *Rhodes v. Guilberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), held that a plaintiff must introduce sufficient evidence for a jury to find both that the employer's proffered explanation was false and that the real reason was discrimination.

96. 530 U.S. at 137.

97. *Id.*

98. *Id.* at 138.

99. *Id.*

100. *Id.*

101. *Id.*

nated the plaintiff because of his failure to maintain accurate attendance records.[102] The plaintiff responded that his former employer's explanation was a pretext for discrimination by introducing evidence that the records were, in fact, accurate, and that the director of manufacturing had previously shown age-based animus toward him.[103] The trial court allowed the case to go to the jury, which returned a verdict for the plaintiff.[104]

The Fifth Circuit reversed the verdict, holding that the plaintiff "had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination."[105] The court reasoned that, although the plaintiff "'very well may' have offered sufficient evidence for 'a reasonable jury [to] have found [the employer's] explanation . . . was pretextual'. . . . [T]his was, however, 'not dispositive' of the ultimate issue—namely, 'whether Reeves presented sufficient evidence that his age motivated [the employer's] employment decision.'"[106] Thus, the Fifth Circuit held that the company was entitled to judgment.[107]

The Supreme Court reversed the Fifth Circuit and held that a prima facie case of discrimination and sufficient evidence which allows the jury to reject the employer's explanation for the adverse employment action may permit a finding of liability.[108] "Proof that the defendant's explanation is unworthy of credence is simply one form of prima facie evidence."[109] In other words, once the prima facie case has been established, the plaintiff may avoid summary judgment by presenting enough credible evidence of pretext to allow a jury to infer that intentional discrimination occurred. The Court explained that in some cases, it is not necessary for the plaintiff to present evidence that discrimination was the real reason for the employer's alleged discrimination but only that the reason given by the employer is false.[110]

2. *HICKS* AND *REEVES* IN COUNTERBALANCE

From the above analysis it can be seen how *Hicks* and *Reeves* serve as countervailing forces in the ADEA analytical burden-shifting

102. *Id.*
103. *Id.*
104. *Id.* at 139.
105. *Id.*
106. *Id.*
107. *Id.* at 140.
108. *Id.* at 147.
109. *Id.*
110. *Id.*

framework established under *McDonnell Douglas*. *Hicks* establishes that demonstrating that the employer's explanation is a pretext is not always enough for the plaintiff to defeat summary judgment (because the burden always remains with the plaintiff to prove that the reason for the adverse employment action was because of discrimination);[111] whereas *Reeves* illustrates that an employer does not win simply because the plaintiff proves only that the employer's proffered explanation for the employment action in question was pretextual.[112] The rule established by these two cases is reasonable, because it takes into account that in some circumstances the pretextual nature of the employer's explanation is sufficient, while in other circumstances it merely serves as evidence.

The *Hazen Paper* holding is consistent with *Reeves*. In *Hazen Paper*, the Supreme Court logically concluded that a plaintiff cannot prove age discrimination simply by demonstrating an empirical correlation between an age proxy and his protected status.[113] Rather, where there is a direct correlation between the proffered proxy and protected status, it will suffice as direct evidence of discrimination (regardless of intent), it will be more than sufficient to defeat an employer's attempt at summary judgment, and it may even provide conclusive evidence of discrimination.[114] However, where there is only a general correlation between the proxy and protected status, and the employer proffers a legitimate nondiscriminatory explanation for its action, the plaintiff must offer more than the proxy evidence, just as a plaintiff in a Title VII action must, in certain cases, go beyond pretext and prove actual discrimination.[115]

In his article, *There Is Life in That Old (I Mean, More "Senior") Dog Yet: The Age Proxy Theory After* Hazen Paper Co. v. Biggins,[116] Robert J. Gregory argues that proxy evidence, after *Hazen Paper*, may be "viewed as sufficiently probative to support a direct finding that age played a role in the [employment] decision, thus shifting the burden

111. *See generally* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (discussing that the ultimate burden of persuading the trier of fact of defendant's intentional discrimination always lies with the plaintiff).
112. *See Reeves*, 530 U.S. 133.
113. Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993).
114. *Id.*
115. *Id.*
116. Robert J. Gregory, *There Is Life in That Old (I Mean More "Senior") Dog Yet: The Age-Proxy Theory After* Hazen Paper Co. v. Biggins, 11 HOFSTRA LAB. & EMP. L.J. 391 (1994).

to the employer."[117] In terms of the *McDonnell Douglas* framework, proxy evidence "could be viewed as sufficient to raise an inference of age discrimination either as independent circumstantial evidence or as part of the *McDonnell Douglas* standard."[118] Under either approach, "evidence that an employer relied upon a vague or subjective age proxy can provide the factual basis for a finding of intentional age discrimination."[119]

3. THE ADEA'S DISPARATE TREATMENT ANALYSIS

Plaintiffs in ADEA cases have had some difficulty in proving age discrimination based on proxy evidence after *Hazen Paper*,[120] especially if the proxy for age discrimination is higher salary.[121] For example, in *Anderson v. Baxter Healthcare Corp.*,[122] a fifty-one-year-old unit manager, the highest paid maintenance worker at his facility, was discharged.[123] The employer argued that the discharge was properly based on the plaintiff's inadequate job performance.[124] The plaintiff argued that improper age discrimination was the reason for his discharge, because the company fired him simply to reduce its salary costs.[125] The plaintiff cited *Metz v. Transit Mix, Inc.*, in support of his argument.[126] The court noted that *Metz* had been overruled by *Hazen Paper* and "vindicated" the dissent in *Metz*, which contended that "[w]age discrimination is age discrimination only when wage depends directly on age, so that the use for one is a pretext for the other; high covariance is not sufficient."[127]

In *Anderson* the court also explained that "compensation is typically correlated with age, just as pension benefits are. The correlation, however, is not perfect. A younger worker who has spent his entire career with the same employer may earn a higher salary than an older worker who has recently been hired by the same employer."[128] Based

117. *Id.* at 422.
118. *Id.*
119. *Id.*
120. *See, e.g.*, Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994).
121. *Id.* at 1125.
122. *Id.*
123. *Id.* at 1121.
124. *Id.*
125. *Id.* at 1125.
126. *Id.*
127. *Id.* at 1125–26 (citing Metz v. Transit Mix, Inc., 828 F.2d 1202, 1212 (Easterbrook, J., dissenting)).
128. *Id.* at 1126.

on the above, the court held that the plaintiff could not prove "age discrimination even if he was fired simply because [the company] desired to reduce its salary costs by discharging him."[129] Therefore, the court ruled that the plaintiff failed to show that the company's proffered reasons for discharge were pretextual and did not meet his ultimate burden of proving intentional age discrimination.[130]

High salary often correlates with length of service, but a termination based on considerations that include length of service does not necessarily give rise to a finding of discriminatory motive.[131] In *Testerman v. EDS Technical Products Corp.*,[132] for example, the court rejected the plaintiff's argument that his length of service correlated with age sufficiently to demonstrate that his termination violated the ADEA.[133]

In *Testerman*, part of the evaluation sheet for determining whether the plaintiff would be terminated included a length of service blank.[134] The plaintiff argued this was a proxy for age and therefore was an impermissible discriminatory factor.[135] The court stated:

> [W]e would hesitate before announcing a rule that would dissuade managers contemplating staff reductions from taking length of service into account. At the same time, particularly in a case involving an employee with 37 years of experience, it would be disingenuous to deny that length of service will often correlate with age. [The plaintiff's] failure lies not in any lack of connection between age and length of service but in his inability to connect, even indirectly, length of service with discriminatory motive.[136]

Testerman demonstrates that even a factor that closely correlates with age—such as length of service—will not, in some courts, suffice for a finding of discrimination. Importantly, in *Testerman*, the employer had demonstrated a legitimate nondiscriminatory reason for the employment decision—that the workers with longer service were trained on old equipment, which the company rarely used.[137]

129. *Id.*
130. *Id.*
131. Testerman v. EDS Technical Prods. Corp., 98 F.3d 297, 302 (7th Cir. 1996).
132. *Id.*
133. *See id.* at 304.
134. *See id.* at 302.
135. *Id.*
136. *Id.*
137. *Id.* The defendant in *Testerman* argued that people with lengthy service were trained on older equipment, much of which the company no longer used. *Id.* The court agreed that the company considered length of service and the employee skill sets for their own sake, not as proxies for age. *Id.*

In *Johnson v. New York*,[138] the Second Circuit found that an employer's application of a mandatory retirement age for National Guardsmen to the terms and conditions of a civilian security guard violated the ADEA.[139] The New York State National Guard had civilian positions that were filled by part-time National Guardsmen.[140] Under New York law, members of the National Guard must retire at age sixty.[141] The individuals who filled the civilian positions were allowed to continue working in those positions if they retired from the National Guard before the age of sixty, but were forced to retire at age sixty.[142] When the plaintiff reached age sixty, the Guard terminated his employment.[143] The plaintiff sued, alleging that the state's linkage of the National Guard retirement date to his civilian employment constituted unlawful age discrimination.[144] Because the Second Circuit determined that the direct linkage between the National Guard's civil and military retirement dates constituted "direct" evidence of discrimination, the court reasoned that the *McDonnell Douglas* standard did not apply.[145]

The court then turned its attention to whether the State's termination of the plaintiff's employment violated the ADEA.[146] Citing *Hazen Paper*, the State argued that its termination of the plaintiff was not motivated by age, but by the "legitimate reasons underlying the dual status requirement [adopting the National Guard's policy]."[147] The Court rejected the state's argument and distinguished *Hazen Paper*. "The State's reliance on *Hazen Paper* is unavailing. The flaw in the State's argument is that the decision to require dual status, with consequent mandatory retirement at 60 . . . is not merely *correlated* with age . . . [here, it actually] *implements* an age based criterion."[148] Thus, *Johnson* effectively demonstrates the extreme example of a proxy that has a link to age.

138. 49 F.3d 75 (2d Cir. 1995).
139. *Id.* at 78.
140. *Id.* at 76.
141. *Id.* at 77.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 78–79.
146. *Id.* at 79.
147. *Id.*
148. *Id.* at 79–80 (emphasis omitted).

Courts have been reluctant to find discrimination where an employer seeks employees with a certain level of experience. For example, in *Koslow v. Epstein Becker & Green, P. C.*,[149] the District Court for the District of Columbia held that an ADEA defendant can legitimately take into account a job applicant's experience while ignoring his age.[150] The plaintiff, a fifty-three-year-old attorney, responded to the employer's classified advertisement for an associate "between 2 and 6 years out of law school."[151] The employer did not grant the plaintiff an interview, and the employer filled the position with a twenty-nine-year-old lawyer.[152] Subsequently, the plaintiff sued under the ADEA, alleging that the employer violated the ADEA by intentionally discouraging older applicants from applying for the job, because the employer specified a desire for candidates who had been out of law school for between two and six years.[153]

The court in *Koslow* dismissed the plaintiff's claim, explaining that, under the ADEA, a job applicant's years of experience are analytically different from his years of age.[154] The court accepted the employer's argument that its hiring decision was motivated by the candidates' experiences, and not their ages.[155] Again, as in *Testerman*, when an employer proffers a reasonable explanation for its policy, an employee may not prevail by simply alleging and/or proving that there is a correlation between an employment policy and an employee's age.[156] The plaintiff must prove that the employer's decision was based on his age.[157]

This point is illustrated in *Hanebrink v. Brown Shoe Co*.[158] There, the plaintiff lost his job as a result of a reorganization.[159] The plaintiff alleged that his discharge violated the ADEA because the combination of "higher salary, potentially higher retirement benefits, and potentially more expensive health benefits, raises an inference of age dis-

149. No. 97-2335, 1998 WL 241642 (D.D.C. Mar. 10, 1998).
150. *Id*. at *2.
151. *Id*. at *1.
152. *Id*.
153. *Id*. at *2.
154. *Id*.
155. *Id*.
156. *See* Testerman v. EDS Technical Prods. Corp., 98 F.3d 297, 303 (7th Cir. 1996).
157. *See id*.
158. 110 F.3d 644 (8th Cir. 1997).
159. *Id*. at 645.

crimination."[160] Citing *Hazen Paper*, the court rejected the plaintiff's argument.[161] The court found that the plaintiff produced no evidence "tending to demonstrate that his salary, retirement benefits, or health benefits were used as proxies for age, and he has testified that nobody at [the company] said anything that suggested that these characteristics played a role in his discharge."[162] The court also noted that two other employees were retained at higher salaries than the plaintiff and that two other employees who were older than the plaintiff and were retained—with presumably more expensive health benefits.[163] Based on these factors, the court held that the plaintiff failed to establish a prima facie case of age discrimination.[164]

The preceding cases demonstrate the significance of the employer's proffered explanation. If an employer provides a legitimate, nondiscriminatory reason for the age proxy, and the proxy is not sufficiently correlated with age to constitute direct discrimination, then the plaintiff has a high burden to overcome to demonstrate the employment decision was based on unlawful discrimination.[165]

B. Age Proxy Evidence in Disparate Impact Cases

1. UNDERSTANDING THE DISPARATE IMPACT APPROACH

The model of proof for disparate impact (also called "adverse impact") discrimination relies upon statistics to demonstrate that an employer's practice has a statistically significant impact on members of a protected class.[166] The Supreme Court set forth this model of proving discrimination in *Griggs v. Duke Power Co.*[167] In *Griggs*, the employer required its employees to have a high school diploma and pass two general intelligence tests.[168] The plaintiffs demonstrated that the job requirements operated to "render ineligible a markedly disproportionate number of [African-Americans]."[169] Based on the evi-

160. *Id.* at 646–47.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 647.
165. *See generally id.* at 644–47.
166. *See* Marcel C. Garand, *Legal Standards and Statistical Proof in Title VII Litigation: In Search of a Coherent Disparate Impact Model*, 139 U. PA. L. REV. 455, 456 (1990).
167. 401 U.S. 424 (1991).
168. *Id.* at 427–28.
169. *Id.* at 429.

dence of disparate impact, the Court held that "[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[170]

2. DISPARATE IMPACT APPLIED IN THE ADEA CONTEXT

Disparate impact applied in the ADEA context is exemplified by *Metz v. Transit Mix, Inc.*,[171] which was decided prior to *Hazen Paper*. In *Metz*, the "leading case involving salary-based employment decisions,"[172] the Seventh Circuit held that terminating the employment of an older, higher-paid worker constituted an impermissible proxy for age in violation of the ADEA.[173] The plaintiff, fifty-four, was the company's second most senior employee and was one of the company's highest paid employees.[174] The district court had granted judgment for the employer, reasoning that while "the relatively higher cost of employing older workers as a group is generally rejected as an RFOA [reasonable factor other than age]. The cost of employing an older worker when considered on an individual basis" may be considered an RFOA, and therefore constituted a legitimate nondiscriminatory reason for the employee's discharge.[175]

The Seventh Circuit rejected the district court's analysis noting that "neither the policies behind the ADEA nor the relevant case law supports making this distinction and we find it to be an inappropriate distinction as applied to Metz's claim."[176] "[B]ecause of the high correlation between age and salary, it would undermine the goals of the ADEA to recognize cost-cutting as a nondiscriminatory justification for an employment decision."[177]

The Court discussed situations in which cost cutting may serve as an RFOA, citing *EEOC v. Chrysler Corp.*[178] In *Chrysler Corp.*, the Court provided two tests that the employer must meet in order to establish a defense based on the economic needs of a failing company.[179]

170. *Id.* at 431.
171. Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987).
172. *A Rose by Any Other Name*, *supra* note 16, at 544.
173. *See Metz*, 828 F.2d at 1206.
174. *Id.* at 1203.
175. *Id.* at 1206 (citing BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 506 (2d ed. 1983)).
176. *Id.*
177. *Id.* at 1207.
178. 733 F.2d 1183, 1186 (6th Cir. 1984).
179. *Id.*

"First, the necessity for drastic cost reduction obviously must be real . . . . Second, the forced early retirements must be the least-detrimental-alternative means available to reduce costs."[180] The *Metz* court determined that the employer did not even meet this standard, because the employer failed to demonstrate severe financial need, nor did the employer attempt to use the least detrimental means (e.g., asking the plaintiff to take a pay cut).[181]

In other cases, however, the employer may institute a policy that correlates in some fashion with age, which disparately impacts individuals over the age of forty.[182] For example, in *Geller v. Markham*,[183] the Second Circuit stated that a school board violated the ADEA when it instituted a policy that limited teacher hiring "to persons with less than five years' experience."[184] The court held that the plaintiff could recover on both disparate treatment and impact theories because the plaintiff was replaced by a younger employee and was a member of a group that was unfairly affected by the school board's policy.[185]

In *Bramble v. American Postal Workers Union*,[186] however, the First Circuit ruled that no basis existed for a disparate impact analysis of an ADEA claim where the questioned employment practice impacted only one person.[187] The plaintiff served for nineteen years as the elected president of a local postal workers union.[188] In 1992, he took early retirement from the Postal Service but continued as president of the union.[189] In 1993, the union members voted to change the president's base salary to his salary from the Postal Service plus $3000.[190] Because the plaintiff was no longer a Postal Service employee, the effect of the change was to reduce his annual salary to $3000.[191] The plaintiff resigned, and his successor received $51,000 under the new pay structure.[192] The plaintiff sued under the ADEA, alleging that the

180. *Id.*
181. *See Metz*, 828 F.2d at 1208.
182. *See, e.g.*, Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980).
183. *Id.*
184. *Id.* at 1033.
185. *Id.* at 1034.
186. 135 F.3d 21 (1st Cir. 1998).
187. *Id.*
188. *Id.* at 23.
189. *Id.*
190. *Id.*
191. *Id.*
192. *See* Bramble v. Am. Postal Workers Union, 963 F. Supp. 90, 93 (D.R.I. 1997).

union's new salary structure discriminated against individuals within the protected age group.[193]

The First Circuit held the plaintiff could not maintain an ADEA claim under a disparate impact theory because "the questioned employment practice has not fallen on a group at all, but on one person."[194] The court concluded that when an employer targets a single employee and implements a policy, which affects only that employee, there is simply no foundation for a disparate impact claim.[195]

Likewise, in *Gantt v. Wilson Sporting Goods Co.*,[196] the Sixth Circuit held that an employee could not establish a disparate impact claim under the ADEA based on the employer's policy of terminating employees who failed to return from leave after one year.[197] The court noted that there is considerable doubt, in light of *Hazen Paper*, whether a claim of age discrimination may exist under a disparate impact theory.[198] However, even assuming that a disparate impact claim were permitted, the court found that a plaintiff would have to support a claim by offering statistical evidence of a kind and degree sufficient to show that the practice in question caused the termination because of his membership in a protected group.[199] Because Gantt failed to present any evidence to support a disparate impact theory, she failed to establish a prima facie case of age discrimination.[200]

Because of the close blending of the disparate treatment and disparate impact theories in the courts, eventually the Supreme Court will have to decide the issue. The analysis of the cases under the age proxy doctrine, however, will not likely change. Courts carefully consider the relationship between the proxy and age to determine whether they are closely linked. Courts will then determine the employer's proffered explanation.

In *Lyon v. Ohio Education Ass'n & Professional Staff Union*,[201] for example, the Sixth Circuit Court of Appeals approved an early retirement incentive plan, contained in a collective bargaining agreement, which imputed additional service for participants retiring before

193. *See Bramble*, 135 F.3d at 23.
194. *Id.* at 26.
195. *Id.*
196. 143 F.3d 1042 (6th Cir. 1998).
197. *Id.* at 1048.
198. *Id.*
199. *Id.*
200. *Id.*
201. 53 F.3d 135 (6th Cir. 1995).

normal retirement age, even though younger participants with the same length of service as older participants ended up receiving higher pensions.[202] The early retirement plan in *Lyon* provided that "upon the earlier of the completion of twenty . . . years of service or the attainment of age sixty . . . after five . . . years of service, a participant may elect to retire."[203]

The Court rejected the claim that the additional service rules had a disparate impact on older workers.[204] Rather it concluded that the disparity simply reflected the actuarial reality that participants who start work early in their career accumulate more years of service by the time they reach the normal retirement age of sixty-two.[205] Thus, the "motivating factor" in the cash balance plan case is the *number of years to normal retirement age, not age itself*.[206]

The Sixth Circuit, in explaining the application of the age proxy doctrine as set forth by the Supreme Court in *Hazen Paper* stated, "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."[207] As such, "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears."[208] The court further explained that "to state a claim under the ADEA, 'plaintiffs must allege that [the defendant] discriminated against them because they were old, not because they were expensive,' or any other reason unrelated to age."[209]

The court in *Lyon* went on to note that the plaintiffs failed to offer any facts that "even hint at an improper motive" in drafting the early retirement plan.[210] Indeed, the court recognized that the very purpose of an early retirement incentive plan is to "buy out" expensive employees.[211] In this case, however, it happened to be that it was more expensive to "buy out" a younger employee, because a younger

202. *Id.* at 140.
203. *Id.* at 136.
204. *Id.* at 140.
205. *Id.*
206. *Id.* at 139.
207. *Id.* at 138 (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 616 (1993)).
208. *Id.* (emphasis omitted).
209. *Id.* at 139 (quoting Allen v. Diebold, 33 F.3d 674, 677 (6th Cir. 1994)).
210. *Id.*
211. *Id.*

employee has longer until retirement (and thus has "more to lose").[212] The Court rejected as circular the plaintiffs' argument that discriminatory animus could be inferred because of the disparate impact the plan would have on older workers.[213] The Court reasoned that this argument would "render meaningless the carefully-wrought distinction between disparate-impact and disparate-treatment theories of discrimination (intent is not even an element of a prima facie case of disparate-impact discrimination)."[214]

By contrast, in *Erie County Retirees Ass'n v. County of Erie*,[215] the Third Circuit held that an employer violated the ADEA by providing Medicare-eligible retirees health benefits that were inferior to the benefits offered to retirees who were not eligible for Medicare, reasoning that Medicare eligibility is a direct proxy for age.[216] The employer argued that the plan was not based on age, but on cost and reasonable factors other than age.[217] Both the Third District and the circuit court concluded that eligibility for Medicare was a proxy for age because Medicare eligibility hinges on age.[218] Both courts distinguished *Hazen Paper*, stating that Medicare eligibility does not merely correlate with age, as does years of service.[219] Rather, Medicare eligibility follows "ineluctably upon attaining age 65."[220] In *Erie*, therefore, the court found that the proxy directly correlated with age.[221]

Similarly, in *Greene v. Safeway Stores, Inc.*,[222] in which an employee alleged an ADEA claim because he was discharged prior to vesting in an age-based benefit plan, the court held that "[w]e agree that evidence of dismissal prior to vesting in an exclusively *age*-based plan, where other independent evidence of age-based animus is present, may be considered by the trier of fact under proper instructions."[223]

212. *Id.*
213. *Id.*
214. *Id.*
215. 220 F.3d 193 (3d Cir. 2000).
216. *Id.* at 211.
217. *Id.*
218. *Id.* This argument, of course, ignores the fact that individuals may be eligible for Medicare in ways other than reaching age sixty-five.
219. *Id.*
220. *Id.*
221. *Id.* at 212.
222. 98 F.3d 554 (10th Cir. 1996).
223. *Id.* at 562.

Plaintiffs also successfully used a disparate impact theory in *EEOC v. Hickman Mills Consolidated School District No. 1*.[224] In *Hickman Mills*, a public school district implemented two different early retirement incentive plans based on formula that included a mix of years of service and age.[225] Both of the plans, which were published by the Board of Education, revealed that "the early retirement incentive plan is designed to . . . provide for a more balanced staff age blend."[226] Employees sued alleging that the plans violated the ADEA.[227] The court held that although it is not unlawful to offer such plans, it is unlawful for an employer to condition early retirement benefits or to reduce early retirement benefits based on the employee's age.[228] The court found that the plans were facially discriminatory and constituted "direct evidence when the terms of the policy classify employees based upon the protected trait, without regard to the employer's motives for using the protected trait in such a manner."[229]

Significantly, the court also found that one of the school district's plans, which did not specifically determine the amount of benefits *based upon the age* of the employees, was unlawful under a disparate impact theory.[230] The court held that disparate impact "claims are cognizable under the ADEA."[231] The plaintiffs' statistical evidence demonstrated that the plans were inherently discriminatory.[232] The court explained that to establish a claim of disparate impact under the ADEA, "the Plaintiff must 'identify and challenge a facially-neutral employment practice, demonstrate a disparate impact upon the group to which he or she belongs, and prove causation.'"[233] The court then considered the fact that the plaintiff presented statistical evidence demonstrating "the discrimination inherent in these plans."[234] The statistical evidence demonstrated that as the "age at retirement went up, the average percent and dollar amount of benefits went down."[235]

224. 99 F. Supp. 2d 1070 (W.D. Mo. 2000).
225. *Id.* at 1073.
226. *Id.*
227. *Id.* at 1075.
228. *Id.*
229. *Id.* at 1076 (citing UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991)).
230. *Id.* at 1077.
231. *Id.* (citing Lewis v. Aerospace Cmty. Credit Union, 114 F.3d 745, 749 (8th Cir. 1997)).
232. *Id.*
233. *Id.* (quoting *Lewis*, 114 F.3d at 749).
234. *Id.*
235. *Id.*

The court rejected the defendant's argument that the plan was designed to save money because as the employees continued to work, they eliminated the savings the school district would obtain by having people retire early.[236] This decision was based on the fact that the school district did not offer any substantial evidence that it would save money through the plan.[237] The court also rejected the defendant's argument that *Hazen Paper* supported its theory as comparing "apples and oranges" by noting that "*Hazen* dealt with vesting rights of an employee's opportunity to participate in a defined benefit plan."[238] But in this case, the "question was not whether an employee's benefits would be reduced or non-existent based upon age but whether he would be eligible to participate in the retirement plan" if the employee's credited years of service failed to meet the vesting requirement.[239] Moreover, "the Supreme Court [in *Hazen*] emphasized that age must motivate the employer's decision for the Plaintiff to state a prima facie case of disparate treatment. Otherwise, if some other factor is the motivation, Plaintiff's claim fails."[240] The plaintiff in *Hickman Mills* did show that "age motivated Hickman Mills' behavior without the Defendant presenting other motivating factors."[241]

V. Conclusion

The Supreme Court's decision in *Hazen Paper* established that an employer's action upon reasonable factors other than age—even if those factors strongly correlate with age, such as years of service, seniority or salary—does not in itself constitute age discrimination.[242] After *Hazen Paper*, courts have consistently rejected plaintiffs' attempts to use a factor that may be correlated with age to prove age discrimination.[243] The cases demonstrate that, assuming no direct evidence of discrimination (a direct link between age and the proxy), an employee must prove that the employer's explanation for its policy is a pretext. Under *Hicks* and *Reeves*, the employee must be able to then present any other evidence of discrimination. Thus, proxy evidence, when it

236. *Id.* at 1078.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).
243. *See* discussion *infra* Part II.B.3.

does not directly correlate with age, may be used as circumstantial evidence of discrimination. After *Hazen Paper* a plaintiff will not defeat summary judgment merely by proving that a factor that empirically correlates with age was the basis for an employer's action. Likewise, a remote correlation will not necessarily mean that the defendant-employer will win summary judgment. The fact that there is little correlation does not mean that age discrimination was not the motivation behind the employer's action.

Just as the Supreme Court construed the use of an employer's explanation as pretext in its decision in *Hicks* and refined its use in *Reeves*, the Supreme Court in *Hazen Paper* reasonably construed the use of proxies for age. Decisions in the wake of *Hazen Paper* have demonstrated simply that where there is a tenuous connection between the proxy and actual age discrimination, and the plaintiff fails to demonstrate that the employer's explanation is unworthy of credence, the employer should prevail (in the absence of other evidence). However, far from being dead and gone, age proxies continue to be relevant and useful tools for plaintiffs alleging discrimination in violation of the ADEA. The post-*Hazen Paper* law, especially when considered in the light of *Reeves* and *Hicks*, simply puts the age proxy doctrine in proper perspective. Time, and perhaps another decision by the Supreme Court, may continue to demonstrate the reasonableness of the decisional framework created by *Hazen Paper*.