DISPARATE IMPACT OR NEGATIVE IMPACT?: THE FUTURE OF NON-INTENTIONAL DISCRIMINATION CLAIMS BROUGHT BY THE ELDERLY

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In 2005, the U.S. Supreme Court interpreted the Age Discrimination in Employment Act (ADEA) as permitting plaintiffs to proceed under a disparate impact theory of discrimination. This decision affirms that plaintiffs who are at least forty years old may challenge employment decisions resulting from policies that are neutral on their face but have a disproportionate impact on individuals in the protected class.

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Although this decision was heralded as a new tool to fight age discrimination in employment, Professor Sperino argues that the decision will have serious and detrimental effects on the ability of elderly employees to seek redress for unfavorable employment decisions. Professor Sperino states that the Supreme Court, while finally recognizing that "disparate impact" claims are viable under the ADEA, also placed many obstacles in the way of litigants who want to challenge such policies. These new obstacles, along with decreased incentives for elderly plaintiffs to pursue disparate impact claims, will result in many potential claims being abandoned or being pursued unsuccessfully.

I. Introduction

On March 30, 2005, the Supreme Court issued its decision in *Smith v. City of Jackson, Mississippi*, recognizing the viability of disparate impact claims under the Age Discrimination in Employment Act.[1] In reporting this decision, the popular press announced that the Supreme Court took a "pro-worker interpretation"[2] of the ADEA that "lower[ed] the bar over age discrimination"[3] and made it "easier . . . to sue."[4] Linda Greenhouse, in an article written for the New York Times News Service went so far as to pronounce that the decision was a "boon" for age-bias lawsuits.[5]

In one sense the case did expand the theories available to plaintiffs under the ADEA by definitively holding that plaintiffs may proceed under a disparate impact analysis. Prior to the Supreme Court's decision, five circuit courts held that the ADEA did not permit advancement of a disparate impact claim.[6] However, the *Smith* decision

1. Smith v. City of Jackson, Miss., 125 S. Ct. 1536 (2005).

2. *See, e.g.*, Linda Greenhouse, *A Boon to Age-Bias Suits*, DESERET MORNING NEWS (Salt Lake City, Utah), Mar. 31, 2005, at A01.

3. *U.S. Supreme Court Lowers the Bar over Age Discrimination*, GLOBE & MAIL (Toronto), Apr. 1, 2005, at C2.

4. Charles Lane, *Ruling Eases Way for Age Bias Lawsuits*, ST. LOUIS POST-DISPATCH, Mar. 31, 2005, at A1.

5. *See, e.g.*, Greenhouse, *supra* note 2.

6. *See infra* Part IV.B. This article is concerned with disparate impact claims under the ADEA, as opposed to disparate treatment claims. The Supreme Court has provided the following succinct description of the two types of claims:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . . [C]laims that stress "disparate impact" [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one

also placed severe limitations on the use of the disparate impact theory in the age discrimination context. These restrictions make disparate impact claims based on age an even less attractive claim for plaintiffs than similar claims under Title VII,[7] which are already underutilized by litigants. The Supreme Court's opinion in *Smith* also highlights a growing unease in the courts about the ability of statistics alone to establish age discrimination.

This article argues that the *Smith* decision and other recent rulings in ADEA disparate impact cases severely affect elderly workers' incentives to prosecute and prove disparate impact claims, even more so than younger workers within the ADEA's protected class.[8] The root cause of this disparity is the ADEA's damages provision and other practical realities, which afford elderly plaintiffs (and their attorneys) less opportunity to obtain large judgments in their favor, as compared to younger litigants. Given the decreased availability of damages and the difficulty and expense that already attends the prosecution of any disparate impact claim, elderly plaintiffs have fewer incentives to pursue a disparate impact claim than other liti-

> group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory.

Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (alteration in original) (citation omitted).

7. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2000), prohibits certain employers from using discriminatory employment practices based on a person's race, color, religion, national origin, or gender.

8. When the article refers to the protected class or the protected group, it is referring to all individuals who are at least forty years of age and protected by the ADEA. 29 U.S.C. § 631(a) (2000). For the purposes of this article, the term "elderly" is defined to include all individuals aged sixty and older. Although the author acknowledges that defining the term "elderly" is problematic, there is ample support for defining the term as including all individuals aged sixty and older. *See, e.g.*, MASS. ANN. LAWS ch. 149, § 52D(a) (LexisNexis 1999) (defining elderly as individuals aged sixty and over); Margaret F. Brinig et al., *The Public Choice of Elder Abuse Law*, 33 J. LEGAL STUD. 517, 532 n.31 (2004) (noting that most of the applicable state statutes defined the term "elderly" to include individuals who had reached the age of sixty); Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem*, 34 MCGEORGE L. REV. 267, 295 nn.146–47 (2003) (citing statutes that protect individuals aged sixty and over). It should be noted that the term can be, and has been, defined differently. *See, e.g.*, 42 U.S.C. § 1471(b)(3) (2000) (federal statute for rural elderly housing assistance defining elderly as sixty-two years old and older); Treas. Reg. § 1.190-2(a)(4) (2002) (defining an "elderly individual" as a person who is sixty-five years old or above); Brinig, *supra*, at 532 n.31 (noting that one state statue defines the term as over age fifty-five and others age sixty-five and over); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1287 (2004) (defining the term "elderly" to mean over age sixty-five).

gants. Any factor that makes it more difficult for elderly litigants to prove an ADEA disparate impact claim shifts the calculus even further in the direction of foregoing such claims.

Not only do elderly workers have fewer incentives to pursue disparate impact claims, but it is also more difficult for these individuals to establish that a policy had a disparate impact on them. As discussed in more detail below, given the limited number of elderly employees within the work force, there are likely to be few elderly individuals at any one workplace. If a particular employment practice has a disparate impact only on elderly workers, it is likely that the number of workers at a given workplace will not be enough to create a statistically significant sample for comparison. This makes it difficult for elderly plaintiffs to assert disparate impact claims against practices that affect only those over the age of sixty. Any change in disparate impact law that heightens the requirements for establishing a disparate impact makes it less likely that elderly workers will be able to prove their statistical case.

Further, there is a growing recognition and acceptance among the courts that employment practices can have a disparate impact on older individuals without necessarily being discriminatory. As recognized in *Smith*, "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."[9] Additionally, the Supreme Court itself has declared that age discrimination is less prone to occur within the workplace than other types of discrimination.[10] This apparent skepticism about disparate impact claims based on age will provide district courts with an enhanced ability to grant summary judgment in favor of defendants, even when a statistical disparity exists. Such skepticism will be especially problematic for elderly litigants, who, more than others within the protected class, are likely to face increased scrutiny about their ability to remain in the work force.

This article begins in Part II by undertaking a historical review of the disparate impact theory of discrimination[11] under both the ADEA

9. Smith v. City of Jackson, Miss., 125 S. Ct. 1536, 1545 (2005).

10. *Id.*

11. Commentators continue to debate, in the ADEA context, whether disparate impact and disparate treatment are separate claims or simply separate evidentiary rules for proving the same cause of action—discrimination. For a good discussion of this issue, see Michael Evan Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 BERKELEY J. EMP. & LAB. L. 1, 12–14 (2004). Any reference in this article regarding disparate impact claims or disparate

and Title VII. Part III discusses the Supreme Court's holding in the *Smith* case. In Part IV, the discussion focuses on the disparate impact landscape prior to *Smith*, with an emphasis on the functional realities that lessen the incentives for, and the ability of, elderly litigants to pursue disparate impact claims. Part V of the article examines the difficulties that elderly plaintiffs will have in proceeding under a disparate impact theory. Finally, Part VI notes the few positive aspects of the *Smith* decision from the plaintiff's perspective.

II. A Historical Review of Significant Disparate Impact Developments

A. Passage of the ADEA

Congress enacted the Civil Rights Act of 1964 to prohibit employment discrimination on the basis of an individual's gender, national origin, sex, race, color, or religion.[12] During the debate leading to the passage of the Act, Congress considered adding provisions to Title VII to also prohibit age discrimination.[13] Instead of amending Title VII, Congress directed Secretary of Labor Willard Wirtz to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected" and to propose remedial legislation.[14]

The report Wirtz delivered to Congress advocated that action be taken to prohibit discrimination in employment based on age; however, the report also indicated that age discrimination was different than the types of discrimination Congress had prohibited in the Civil Rights Act of 1964.[15] Wirtz noted that unlike other forms of discrimination, age discrimination is not typically based on dislike of an indi-

impact evidentiary standards are merely descriptive of disparate impact itself, as there is no intention to make any comment regarding this larger issue, which is outside the scope of this article.

12. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to e-17 (2000)).

13. *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the S. Comm. on Labor of the Comm. on Labor & Public Welfare*, 90th Cong. 29 (1967) (statement of Sen. Smathers); 113 CONG. REC. 23, 31254 (1967) (statement of Sen. Javits).

14. *Smith*, 125 S. Ct. at 1540.

15. Joint Appendix at *36–37, Smith v. City of Jackson, Miss., 125 S. Ct. 1536 (2005) (No. 03-1160), 2004 WL 2289230 (Willard Wirtz, The Older American Worker Age Discrimination in Employment Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act, Letter of Transmittal).

vidual or intolerance for the entire protected group.[16] Instead, Wirtz found that the most problematic type of discrimination facing older workers was "discrimination based on unsupported general assumptions about the effect of age on ability."[17]

While Wirtz recognized that age discrimination did exist, he also noted that older workers might be disparately affected by factors that correlate with age, but that are not discriminatory. Wirtz noted that declining health among older workers may make them less able to perform job functions and may keep them out of the job force.[18] He indicated that either some older workers lack the educational skills required for newer jobs or younger workers have better educational credentials for these positions.[19] The report also emphasized that rapid technological advances may leave older workers with outdated skills in the workplace.[20] Wirtz's recognition that age may sometimes correlate with other reasonable, nondiscriminatory job factors plays an important role in the development of disparate impact analysis under the ADEA.

In 1967, Congress enacted the ADEA.[21] Congress indicated that the purpose of the ADEA was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[22] Congress listed four specific employment practices that it was concerned about, indicating that "older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs," that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice" and that older workers should be promoted based on their ability.[23] Thus, the ADEA made it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of em-

16. *Id.* at *43.
17. *Id.*
18. *Id.* at *58.
19. *Id.*
20. *Id.* at *62.
21. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602; *see also* 29 U.S.C. §§ 621–634 (2000) (current version of ADEA with amendments added after the initial enactment).
22. 29 U.S.C. § 621(b).
23. *Id.* § 621(a)–(b).

ployment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."[24]

As originally enacted, the ADEA only prohibited discrimination against individuals who were at least forty years of age and who were not older than sixty.[25] Congress subsequently increased the protection of the Act to those aged forty to seventy,[26] and in 1986 amended the ADEA to eliminate the upper age limit.[27] In its current iteration, the ADEA protects individuals who have reached the age of forty from unlawful discrimination.[28]

The statutory text of the ADEA provides certain instances in which an action will not be considered to violate the Act. For example, an employer may make an employment decision based on age if age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business,"[29] may "observe the terms of a bona fide seniority system that is not intended to evade the purposes" of the ADEA,[30] and may observe the terms of a bona fide employee benefit plan.[31] The ADEA also expressly provides that an employer may discharge or discipline an employee for good cause.[32] Additionally, the ADEA permits compulsory retirement at the age of sixty-five for certain individuals classified as "bona fide executives" or "high policymakers" under specified circumstances.[33]

Most importantly for the purposes of this article, the ADEA contains specific language allowing an employer to take an action "where the differentiation is based on reasonable factors other than age."[34] As discussed in more detail in Part III.B., below, Title VII does not contain this same exception, which is commonly referred to as the RFOA exception. The presence of the RFOA exception in the ADEA is an im-

24. *Id.* § 623(a)(2).
25. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. at 607.
26. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12, 92 Stat. 189, 189 (1978).
27. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3342 (1986).
28. 29 U.S.C. § 631(a).
29. *Id.* § 623(f)(1).
30. *Id.* § 623(f)(2)(A).
31. *Id.* § 623(f)(2)(B).
32. *Id.* § 623(f)(3).
33. *Id.* § 631(c)(1).
34. *Id.* § 623(f)(1).

portant factor in the *Smith* decision's differentiation between the disparate impact analysis under the ADEA and other causes of action.

B. Development of Disparate Impact Law: *Griggs v. Duke Power Co.*

Because the ADEA, like the originally enacted Title VII, contained no specific wording providing for a disparate impact cause of action, it would remain for the courts to determine whether plaintiffs were required to prove intentional discrimination or could establish discrimination where no discriminatory animus was present. The U.S. Supreme Court examined the disparate impact theory in *Griggs v. Duke Power Co.*, a Title VII case.[35]

The background facts of *Griggs* are important to understanding the theoretical underpinnings of disparate impact claims. The plaintiffs in *Griggs* were a class of African American employees currently employed at, or who were job applicants at, the Dan River Steam Station of the Duke Power Plant, a power generating facility in North Carolina.[36] The district court had found that the company openly discriminated against African American employees in its hiring and placement practices prior to the enactment of the Civil Rights Act of 1964.[37]

The plant discriminated against African American employees by limiting their placement to only one of the plant's five operational units—the Labor Department.[38] The highest paid employees in the Labor Department were paid less than the lowest paid employees in other departments, who were all white.[39]

In 1955, the company implemented a policy requiring job applicants for every department—other than the Labor Department—to possess a high school diploma.[40] The policy also required employees wanting to move from the Coal Handling Department to one of the other three non–Labor Departments to possess a high school di-

35. 401 U.S. 424 (1971).
36. *Id.* at 426; Griggs v. Duke Power Co., 420 F.2d 1225, 1227 (4th Cir. 1970).
37. *Griggs*, 401 U.S. at 427.
38. *Id.*
39. *Id.*
40. *Id.*

ploma.[41] Employees who wanted to change positions between other departments were not required to have a high school education.[42]

The company subsequently abandoned its policy of limiting employment opportunities for African Americans to the Labor Department.[43] However, when it did so, it implemented a new policy requiring that anyone who wanted to transfer from the Labor Department to any other department possess a high school diploma.[44] White employees hired by the company prior to 1955 who wanted to transfer from any operating division (other than the Coal Handling Department) were not required to possess a high school diploma.[45]

On July 2, 1965, the day on which Title VII became effective, the plant implemented a new policy requiring individuals who wanted to be placed in any unit, other than the Labor Department, to possess both a high school diploma and to pass two standardized aptitude tests.[46] Incumbent employees, who had been employed by the company prior to the implementation of this new policy, were allowed to transfer departments if they possessed a high school diploma or if they passed two standardized tests.[47]

The district court found that the company's intentional discrimination ceased as of the date that Title VII became effective.[48] Finding no current intentional discrimination, the district court determined that the plaintiffs' class could not prevail on its discrimination claims.[49] The Fourth Circuit Court of Appeals affirmed this portion of the district court's order, holding that if an employer had a valid business purpose in adopting educational and testing requirements and did so without an intent to discriminate, future applicants for the positions must comply with the requirements and could not prevail under Title VII.[50]

41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 427–28.
47. *Id.* at 428.
48. *Id.*
49. *Id.*
50. Griggs v. Duke Power Co., 420 F.2d 1225, 1232 (4th Cir. 1970). The court of appeals found that the high school education requirement for individuals to be promoted out of the Labor Department was discriminatory for those employees who already worked at the plant at the time the policy was implemented because white employees in other departments were not required to have a high school education.

In reversing the lower courts' decisions, the Supreme Court indicated that it was not questioning the lower courts' findings that the defendant had ceased to intentionally discriminate against employees after Title VII became effective.[51] Rather, the Court held that any practice that excludes members of a protected class and that cannot be shown to be job related is prohibited by Title VII.[52] In its oft-quoted passage, the Court indicated: "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[53] The *Griggs* Court thus recognized the disparate impact theory of employment discrimination under Title VII.

C. Further Refinement of Disparate Impact: *Wards Cove*

After *Griggs* established that disparate impact was a viable theory under Title VII, the lower courts struggled with the burdens of persuasion and production each party would bear in a disparate impact case. To answer this question, the Court accepted the case of *Wards Cove Packing Co. v. Atonio*.[54]

The plaintiffs in *Wards Cove* were individuals who worked in Alaskan salmon canneries.[55] Each summer during the salmon run, the canneries opened to process the fresh salmon. The canneries classified available jobs into two general categories: cannery jobs and noncannery jobs. The cannery jobs were unskilled positions in which workers canned salmon on the cannery line. The noncannery jobs consisted of a variety of jobs, including machinists, engineers, quality control personnel, cooks, carpenters, store-keepers, bookkeepers, and other support personnel.[56]

Individuals employed in the cannery jobs were predominantly Filipinos and Alaskan natives, while the individuals in the noncannery jobs were mostly white.[57] The cannery workers alleged that several of the canneries' hiring and promotion practices, such as nepotism, a rehire preference, a lack of objective hiring criteria, separate

51. *Griggs*, 401 U.S. at 432.
52. *Id.*
53. *Id.*
54. 490 U.S. 642 (1989).
55. *Id.* at 646–48.
56. *Id.*
57. *Id.*

hiring channels, and a practice of not promoting from within, created a racially imbalanced work force.[58]

In ruling on the disparate impact claims, the Court laid out a three-part framework for courts and litigants to use in evaluating disparate impact cases. First, the plaintiff is required to establish a prima facie case of disparate impact by demonstrating that a specific practice of the defendant has a "significantly disparate impact" on a protected group.[59] Once the plaintiff has met this burden, the burden shifts to the defendant to articulate a legitimate business justification for the practice.[60] However, the Court indicated that to meet its burden, the defendant cannot set forth any justification for the practice; rather, the defendant must set forth reasons why the challenged practice "serves, in a significant way, the legitimate employment goals of the employer."[61] The Court emphasized that the burden of persuasion in a disparate impact case always remained with the plaintiff.[62]

After the employer has met its burden of articulation, the *Wards Cove* analysis allows the plaintiff to prevail by proving at least one of the following: First, the employee could convince the court that the employer's justification for its business practice did not serve the legitimate goals of the employer.[63] The employee could also prevail by persuading the fact finder that "other tests or selection devices, without a similarly undesirable . . . effect, would also serve the employer's legitimate . . . interest[s]."[64] The Court reasoned that if other nondiscriminatory selection devices existed, it was reasonable to believe that the employer had chosen the selection device as a pretext for discrimination.[65]

By placing the burden of persuasion on the plaintiff and by requiring the employer only to articulate a legitimate reason for its conduct, the *Wards Cove* analysis for disparate impact claims "tipp[ed] the scales in favor of employers."[66]

58. *Id.*
59. *Id.* at 658.
60. *Id.* at 659.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 660–61.
65. *Id*. In 1998, the Supreme Court further held that disparate impact claims could be brought to challenge not only objective tests like the one presented in *Griggs*, but also subjective employment practices. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989 (1998).
66. *Wards Cove*, 490 U.S. at 673.

D. Congress Reacts: Post–*Wards Cove* Developments

The evidentiary framework set forth by the Supreme Court in *Wards Cove* would prove to be short lived in the context of Title VII. In the Civil Rights Act of 1991, Congress amended Title VII to expressly recognize disparate impact claims and to alter the burdens of production and persuasion outlined in *Wards Cove*.[67] To accomplish this objective, Congress added the following language to Title VII:

> An unlawful employment practice based on disparate impact is established under this title only if—
>
> > (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
> >
> > (ii) the complaining party [suggests an] alternative employment practice and the respondent refuses to adopt such alternative employment practice.[68]

Not only did Congress codify disparate impact as a separate claim under Title VII and legislate the burdens of production and persuasion for such claims, it also limited the employer's ability to respond to disparate impact claims through quotas or other methods. Congress prohibited employers from "adjust[ing] the scores of, us[ing] different cutoff scores for, or otherwise alter[ing] the results of, employment[-]related tests on the basis of race, color, religion, sex, or national origin."[69]

The 1991 amendments to Title VII also bifurcated the damages provisions, depending on whether a plaintiff prevailed on a disparate impact claim or a disparate treatment claim. In addition to the other types of damages available under Title VII, plaintiffs who proved intentional discrimination could obtain punitive and compensatory damages; in contrast, plaintiffs who prevailed on a disparate impact theory of liability could not obtain punitive or compensatory damages.[70]

Despite these significant changes to Title VII, Congress did not make similar amendments to the ADEA, and the ADEA continues to

67. Civil Rights Act of 1991, Pub. L. No. 102-66, § 106, 105 Stat. 1071, 1075 (1991).
68. *Id.*
69. 42 U.S.C. § 2000e-2(l) (2000).
70. *Id.* § 1981a.

lack the explicit disparate impact language found in Title VII. As discussed in Part V.B., the *Wards Cove* analysis continues to have force in the ADEA context.

After these amendments to Title VII, courts began analyzing disparate impact claims under that statute using a three-part framework.[71] First, the plaintiff must prove that a particular employment practice has a significant disparate impact on a protected class.[72] Once the employee establishes this prima facie case, both the burdens of persuasion and production switch to the employer.[73] The employer must then establish that the challenged business practice is related to the job in question and consistent with business necessity.[74] If the employer meets its burden, the employee can still prevail by demonstrating that nondiscriminatory alternative employment practices exist and the employer refused to adopt the alternate employment practice.[75]

E. Development of Disparate Impact Under the ADEA: *Hazen Paper*

Prior to 1993, all of the circuits that considered the question of whether a disparate impact claim existed under the ADEA determined that such a claim existed or at least assumed, without deciding, that such a claim was viable.[76]

In 1993, the Supreme Court issued a decision in *Hazen Paper Co. v. Biggins*,[77] an ADEA disparate treatment case that resulted in significant changes in ADEA disparate impact jurisprudence. In this case, an employee claimed that he was terminated at the age of sixty-two, apparently a few weeks short of the years of service he needed for his pension to vest, so that the employer could avoid making pension

71. *See, e.g.*, Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 265 (4th Cir. 2005) (discussing disparate impact framework under Title VII); Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 160–61 (2d Cir. 2001) (same); Firefighter's Inst. for Racial Equality *ex rel.* Anderson v. City of St. Louis, 220 F.3d 898, 903–04 (8th Cir. 2000) (same).

72. *Anderson*, 406 F.3d at 265.

73. *Id.*

74. *See id.*

75. *Robinson*, 267 F.3d at 161.

76. *See infra* Part IV.B.; *see also* Smith v. City of Jackson, Miss., 125 S. Ct. 1536, 1543 (2005) (noting that prior to *Hazen Paper*, the courts had uniformly recognized a disparate impact claim under the ADEA).

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

payments.[78] After a trial, the jury returned a verdict in favor of the employee, finding that he had been intentionally discriminated against in violation of the ADEA.[79] The employer moved for judgment notwithstanding the verdict, which the district court denied as to plaintiff's federal claims.[80] The First Circuit Court of Appeals affirmed the judgment in favor of plaintiff Biggins, and the company appealed the decision.

In ruling on Hazen Paper's appeal, the Supreme Court considered whether a plaintiff could establish a violation of the ADEA based solely on evidence that the company may have terminated an employee based on his years of service with the company. In other words, the Court was deciding whether consideration of an employee's years of service (which is sometimes correlated with an individual's age) necessarily resulted in age discrimination. The Court rejected Biggins' argument, holding: "We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."[81] The Court further explained: "Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'"[82] The Court remanded the decision to the First Circuit Court of Appeals for a determination of whether the jury had sufficient evidence to find that Biggins was terminated based on his age.[83]

Hazen Paper was a disparate treatment case, which the Court emphasized when it explicitly stated: "We have never decided

78. *Id.* at 606–07.
79. *Id.* at 606.
80. *Id.* at 607.
81. *Id.* at 609.
82. *Id.* at 611. The Court explained that although terminating an employee to prevent his pension rights from vesting does not violate the ADEA, it would violate the Employee Retirement Income Security Act of 1974 (ERISA). *Id.* at 612.
83. The *Hazen Paper* case continued to have a long history. After remand from the Supreme Court, the original First Circuit panel that considered the original appeal determined that sufficient evidence of age discrimination existed to affirm the jury's original verdict. Hazen Paper appealed this decision to the First Circuit en banc, which reversed the panel decision and remanded the case to the trial court for determination of whether a jury trial was appropriate. After denying summary judgment on behalf of both parties, the trial court set the case for trial on the ADEA count. The jury returned a verdict on behalf of the former employer Hazen Paper, which was appealed to the First Circuit Court of Appeals. The First Circuit Court of Appeals then affirmed the jury verdict. Biggins v. Hazen Paper Co., 111 F.3d 205, 207–08 (1st Cir. 1997).

whether a disparate impact theory of liability is available under the ADEA, and we need not do so here."[84] Nonetheless, the *Hazen Paper* case came to have repercussions on ADEA disparate impact cases based on the concurrence written by Justice Kennedy and joined by Chief Justice Rehnquist[85] and Justice Thomas. In the brief concurring opinion, Justice Kennedy emphasized that the *Hazen Paper* decision related only to disparate treatment claims and not to disparate impact claims.[86] He further reiterated that

> nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII of the Civil Rights Act of 1964. As the Court acknowledges, we have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.[87]

As discussed in more detail in Part IV.B., after *Hazen Paper*, disparate impact case law under the ADEA developed erratically. After *Hazen Paper*, the Second,[88] Eighth,[89] and Ninth Circuit Courts of Appeals[90] issued opinions upholding the use of the disparate impact theory under the ADEA.[91] In 2001, the Supreme Court granted certiorari in the case of *Adams v. Florida Power Corp.*,[92] which raised the issue of whether disparate impact claims were viable under the ADEA. After hearing oral argument from the parties, the Court dismissed the writ of certiorari as improvidently granted.[93] By 2004, the First, Fifth, Seventh, Tenth, and Eleventh Circuit Courts of Appeals had all issued

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

85. In 1981, Justice Rehnquist dissented from the Court's denial of certiorari in the case of *Markham v. Geller*, 451 U.S. 945 (1981), which raised the issue of whether disparate impact claims existed under the ADEA.

86. *Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring).

87. *Id.*

88. Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999) (dismissing disparate impact claim because of statistical errors, but not precluding availability of cause of action).

89. Smith v. City of Des Moines, 99 F.3d 1466, 1466 (8th Cir. 1996) (recognizing that disparate impact claims are cognizable under ADEA); Pulla v. Amoco Oil Co., 72 F.3d 648, 658 (8th Cir. 1995) (refusing to allow plaintiff to amend pleadings to add claim of disparate impact with no discussion about the viability of the cause of action); Houghton v. Sipco, Inc., 38 F.3d 953, 958–59 (8th Cir. 1994) (analyzing an ADEA claim brought under a disparate impact theory of liability).

90. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1271 (9th Cir. 2000) (ruling that plaintiffs could not raise disparate impact because the claim was not made in the complaint, but not contesting the availability of the cause of action).

91. Mangold v. Cal. Pub. Utils. Comm'n, 67 F.3d 1470, 1474 (9th Cir. 1995).

92. Adams v. Fla. Power Corp., 534 U.S. 1054 (2001).

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

opinions interpreting the ADEA to prohibit disparate impact claims, developing a circuit split that would require resolution by the Supreme Court.[94]

III. The Supreme Court's Resolution: *Smith v. City of Jackson, Mississippi*

On March 29, 2004, the Supreme Court granted certiorari in the case of *Smith v. City of Jackson, Mississippi*[95] solely on the question of whether a plaintiff could proceed on a disparate impact claim under the ADEA.[96] On March 30, 2005, the Supreme Court issued its decision in the case, recognizing that disparate impact is a viable claim under the ADEA.[97] Although the holding appeared to be a victory for plaintiffs, the Court affirmed the dismissal of the petitioners' claims, finding that they had not produced enough evidence to prevail on a disparate impact claim.[98]

A. Factual Background

In *Smith*, the petitioners were a group of police officers and police dispatchers who worked for the City of Jackson, Mississippi.[99] The petitioners were challenging a new pay plan adopted by the city, which granted raises to all city employees. One of the purposes of the new pay plan was to increase the starting salaries of police officers to bring them up to the regional average. To accomplish this goal, the pay plan gave different levels of raises to employees depending on their years of service with the city. Individuals who had less than five years of tenure received proportionately greater raises than those with more seniority.[100]

Some of the officers with less than five years of service were over the age of forty. However, because most of the officers with more

94. *See* Smith v. City of Jackson, Miss., 351 F.3d 183, 187 (5th Cir. 2003); Adams v. Fla. Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001); Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999); Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076–79 (7th Cir. 1994).
95. 125 S. Ct. 1536 (2005).
96. 541 U.S. 958 (2004).
97. *Smith*, 125 S. Ct. at 1536.
98. *See id.* at 1546.
99. *Id.* at 1539.
100. *Id.*

than five years of service were over the age of forty, the officers were able to put forth statistics showing that older officers were disparately impacted by the new pay plan. The officers filed suit under the ADEA under two different theories—disparate treatment and disparate impact.

The district court granted summary judgment to the city on both claims, holding that the plaintiffs had not established the intent necessary to proceed on a disparate treatment claim and that a disparate impact claim was not cognizable under the ADEA.[101] The Fifth Circuit Court of Appeals reversed the trial court's decision on the disparate treatment claim, finding that the plaintiffs were entitled to additional discovery on the issue of intent and that summary judgment was premature.[102] In a split decision, the court of appeals affirmed the trial court's decision relating to the cognizability of disparate impact claims under the ADEA.[103] The police officers appealed this decision to the Supreme Court.

B. The Majority Opinion

The Supreme Court reversed the appellate court's decision in part in an opinion that both recognized that a disparate treatment claim may proceed under the ADEA and dismissed the petitioners' claims.[104] The entire opinion, drafted by Justice Stevens, was joined by Justices Souter, Ginsburg, and Breyer.[105] Justice Scalia joined Parts I, II, and IV of the opinion, and submitted a concurring opinion.[106] Justices O'Connor, Kennedy, and Thomas submitted an opinion concurring in the judgment, but reasoned that the ADEA did not permit a disparate impact claim.[107] Chief Justice Rehnquist did not participate in the decision.[108]

In reaching this decision the majority opinion utilized a textual analysis of the ADEA's key provisions and compared these provisions with similar language in Title VII. The Court held that "[e]xcept for substitution of the word 'age' for the words 'race, color, religion, sex,

101. Smith v. City of Jackson, Miss., 351 F.3d 183, 185 (5th Cir. 2003).
102. *See generally id.*
103. *See generally id.*
104. *Smith*, 125 S. Ct. at 1536.
105. *Id.* at 1538.
106. *Id.*
107. *Id.* at 1549.
108. *Id.* at 1538.

or national origin,' the language of [the operative] provision in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII)."[109]

However, the Court noted two significant differences between the two statutes. First, the ADEA permits an employer to take any otherwise prohibited action "where the differentiation is based on reasonable factors other than age."[110] The Court referred to this provision as the "RFOA provision." The majority opinion found that the RFOA provision did not preclude plaintiffs from proceeding under a disparate impact theory;[111] rather, the Court indicated that the RFOA provision precludes liability in a disparate impact case if an "adverse impact was attributable to a nonage factor that was 'reasonable.'"[112]

The second major difference between Title VII and the ADEA is the language contained in the Civil Rights Act of 1991, which significantly amended Title VII.[113] As discussed in Part II.D., this language was added to Title VII in response to the Supreme Court's decision *Wards Cove Packing Co. v. Atonio.*[114] Even though Congress statutorily altered Title VII's burdens of persuasion and production through this amendment, it did not make similar amendments to the ADEA.[115]

To bolster its textual argument, the Court noted that if Congress intended to bar all disparate impact claims under the ADEA, it could have done so by using language identical to that found under the Equal Pay Act. Under the Equal Pay Act, if a pay differential is based "on *any* factor other than sex," the employer is not liable.[116] The majority reasoned that because the ADEA requires that the factor used be "reasonable," disparate impact liability is not precluded.[117] The Court also reasoned that the Wirtz Report demonstrated Congress' intent to remedy discrimination resulting from policies with a disparate impact, and noted that the EEOC has consistently interpreted the ADEA as recognizing such claims.[118]

109. *Id.* at 1540.
110. 29 U.S.C. § 623(f)(1) (2000); *Smith*, 125 S. Ct. at 1541.
111. *Smith*, 125 S. Ct. at 1544.
112. *Id.* at 1543.
113. *See supra* Part II.D. (discussing Title VII amendments).
114. 490 U.S. 642 (1989).
115. *See supra* Part II.D.
116. 29 U.S.C. § 206(d)(1) (2000) (emphasis added).
117. *Smith*, 125 S. Ct. at 1544.
118. *Id.* at 1544 & n.5.

Finding that the dissimilarities between Title VII and the ADEA do not affect whether a disparate impact cause of action exists under the latter statute, the Court reasoned that such claims should be allowed under the ADEA.[119] However, the majority then held that the petitioners could not prevail under a disparate impact theory for two reasons.

First, the Court found that the litigants had failed to identify a specific test, practice, or requirement that caused the alleged discrimination.[120] Second, the Court held that the city based its decision on "reasonable factors other than age."[121] In so holding, the Court stated, "[r]eliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities."[122]

Finally, the majority opinion clarified the standard for determining when a defendant's actions will be considered a "reasonable factor other than age." As discussed earlier, in the context of a Title VII disparate impact claim, the plaintiff may prevail if he or she can establish that the defendant could have adopted other methods to achieve its goal that did not create a disparate impact on a protected group.[123] The Supreme Court clearly indicated that plaintiffs would not be entitled to this option under the ADEA. Thus, the Court noted,

> While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.[124]

While the majority opinion provided plaintiffs with a victory by recognizing disparate impact claims, it also identified significant hurdles that litigants would have to overcome in prevailing on such a claim.

119. *Id.* at 1544.
120. *Id.* at 1545.
121. *Id.*
122. *Id.* at 1546.
123. *See, e.g.*, Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 161 (2d Cir. 2001); 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2000).
124. *Smith*, 125 S. Ct. at 1546.

C. Concurring in the Judgment

Three Justices concurred in the judgment affirming the dismissal of the ADEA disparate impact claim; however, these Justices would have found that the ADEA does not recognize disparate impact claims.[125] The concurrence did more than set forth a disagreement over whether a disparate impact claim should exist under the ADEA. Indeed, Justice O'Connor essentially set forth a roadmap for future defendants to use in defending against disparate impact claims.

Relying on the Wirtz Report, the concurring opinion found that "there often *is* a correlation between an individual's age and her ability to perform a job."[126] This finding is in stark contrast to Title VII disparate impact cases where it is generally assumed that there are few cases when an individual's gender, race, national origin, or religion would correlate with the person's ability to perform a job.[127]

The concurrence continued by describing four separate areas in which age may correlate with the person's ability to perform a job. First, the Justices noted that not only "physical ability generally declines with age,"[128] but that mental capacity may also decline as well.[129] The Justices further stated that "advances in technology and increasing access to formal education often leave older workers at a competitive disadvantage vis-à-vis younger workers."[130] Finally, the Justices noted that "employment benefits, such as salary, vacation time, and so forth, increase as an employee gains experience and seniority."[131]

The concurrence also reiterated that if litigants were to be allowed to proceed on disparate impact claims under the ADEA, they should be proceeding under the analysis set forth in the Court's decision in *Wards Cove Packing Co. v. Atonio*.[132] As discussed in Part II.D., Congress amended Title VII to make clear that the *Wards Cove* analysis

125. *Id.* at 1549 (O'Connor, J., concurring).
126. *Id.* at 1555.
127. Brief for the California Employment Law Council as Amicus Curiae Supporting Respondents, at *12–13, Smith v. City of Jackson, Miss., 125 S. Ct. 1536 (2005) (No. 03-1160), 2004 WL 1905737.
128. *Smith*, 125 S. Ct. at 1555 (O'Connor, J., concurring).
129. *Id.*; Gregory v. Ashcroft, 501 U.S. 452, 472 (1991).
130. *Smith*, 125 S. Ct. at 1555 (O'Connor, J., concurring).
131. *Id.*
132. *Smith*, 125 S. Ct. at 1560 (O'Connor, J., concurring); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

does not apply to disparate impact claims raised under that statute; however, Congress did not make similar amendments to the ADEA.

The concurrence emphasized the different burdens that using a *Wards Cove* analysis would place on plaintiffs in disparate impact cases under the ADEA.[133] Under the *Wards Cove* framework, the plaintiff will first be required to establish that the application of a particular employment practice created a disparate impact.[134] Second, the employer will be required to produce evidence that "its action was based on a reasonable nonage factor."[135] Finally, the plaintiff would bear the burden of disproving the company's assertion.[136]

The opinion thus dealt two important blows to future litigants bringing disparate impact claims under the ADEA. First, it signaled to lower courts that the defendant-friendly *Wards Cove* analysis applies to such claims. Second, the concurrence emphasized that differences exist between age discrimination and other types of claims that justify closer scrutiny of disparate impact claims under the ADEA.

IV. Disparate Impact and Its Disfavored Status

As noted above, when the *Smith* decision was rendered, some journalists and other commentators claimed that the case was a "boon" for age discrimination claims. Such proclamations are, at best, overstated. While *Smith* does provide litigants with a different avenue to pursue age discrimination claims, the disparate impact theory itself has not proven to be an attractive avenue for combating discrimination. Even prior to the Supreme Court's decision in *Smith*, litigants seeking to bring claims under a disparate impact theory faced many challenges. These difficulties have resulted in a legal reality in which disparate impact claims appear to be disfavored, and where litigants prefer to combat discrimination through other frameworks.

The *Smith* case does not remove any of these obstacles in the age context, and is unlikely to result in significant change regarding plaintiffs' fundamental aversion to disparate impact claims. This aversion is even more likely to affect elderly workers, who have fewer economic incentives to pursue disparate impact claims under the ADEA.

133. *See Smith*, 125 S. Ct. at 1560 (O'Connor, J., concurring).
134. *Id.*
135. *Id.*
136. *Id.*

Additionally, more than half of the circuits had already recognized the existence of such a claim prior to *Smith*.

A. Even Pre-*Smith*, Disparate Impact Was Not a Favored Theory

Even though the *Smith* decision definitively recognizes the viability of disparate impact claims under the ADEA, it does not change the fact that plaintiffs have been wary of bringing disparate impact claims in general. Whether proceeding under the ADEA, Title VII, or the ADA, plaintiffs attempting to assert disparate impact claims face many challenges that are not present in a typical intentional discrimination claim.

From a practical perspective, litigants and attorneys arguing a disparate impact case face significant initial costs that are either absent or are less significant in a disparate treatment case. These costs are a direct result of the evidence that a plaintiff is required to establish in a disparate impact case. To establish a prima facie case, a plaintiff must establish that a particular employment practice created a disparate impact on a protected group.[137] The primary method of establishing a disparate impact claim is by the use of statistical evidence, which presents cost problems for plaintiffs.[138]

First, the reliance on statistical evidence requires plaintiffs to obtain large amounts of data from the defendant and other sources.[139] In an intentional discrimination case, the plaintiff is likely to possess at least some information about the alleged discrimination and can provide evidence on his or her own behalf to support the claim. Additionally, the plaintiff may be able to obtain evidence from friendly coworkers and other sources without seeking it from the defendant. In contrast, the statistical evidence needed to establish a disparate impact case is largely in the hands of the defendant and must be sought

137. Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 277 (4th Cir. 2005) (describing plaintiff's burden in establishing a prima facie case); *Smith*, 125 S. Ct. at 1551 (O'Connor, J., concurring) (same).

138. *See, e.g.*, Lewis v. State of Del. Dep't of Pub. Instruction, 948 F. Supp. 352, 363 (D. Del. 1996) (dismissing disparate impact claim because plaintiff did not provide a refined statistical analysis and an expert opinion to rebut statistics presented by the defendant); Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1101 (M.D. Ala. 1990) (refusing to consider class claims of disparate impact because plaintiff failed to provide statistical experts and did not provide a detailed statistical analysis).

139. *See, e.g.*, Hill v. Miss. State Employment Serv., 918 F.2d 1233, 1238 (5th Cir. 1990).

through the discovery process.[140] Defendants, of course, are often reluctant to produce this information voluntarily, causing costly discovery disputes for both parties.[141] One court has described the process of collecting and analyzing statistical evidence to support a disparate impact claim as "both complex and arduous."[142]

Second, plaintiff's counsel are often required to retain statistical experts to assist them in developing the statistical evidence and to opine on the significance of the evidence.[143] In addition, the parties may require the assistance of other experts, such as vocational experts, to provide comparative statistics for a particular geographic area.[144] The services of these experts are expensive,[145] resulting in a significant up-front cost for plaintiffs and their attorneys.[146]

This additional investment in time and resources is not necessary in an intentional discrimination case where the plaintiff is not required to put forth any statistical evidence. Although plaintiffs sometimes use statistics to bolster other evidence in intentional discrimination cases, courts tend to be less stringent in examining

140. *See, e.g.*, Vitug v. Multistate Tax Comm'n, 883 F. Supp. 215, 222 (N.D. Ill. 1995) (noting that discovery is necessary to obtain statistical information to support disparate impact claim); *see also* Donna Meredith Matthews, Note, *Employment Law After* Gilmer*: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 384 (1997) (noting that disparate impact claims often require extensive discovery between the parties).

141. *See, e.g.*, Gums v. Oakland Unified Sch. Dist., No. C 01-02972, 2003 WL 716240, at *8 (N.D. Cal. Feb. 24, 2003) (plaintiff arguing that defendant had thwarted his efforts to obtain statistical information); Khan v. Sanofi-Synthelabo, Inc., No. 01 Civ. 11423JSMDF, 2002 WL 31720528, at *4 (S.D.N.Y. Dec. 3, 2002) (discussing discovery disputes arising in the context of disparate impact claims).

142. *Hill*, 918 F.2d at 1238 (quoting Wikins v. Univ. of Houston, 654 F.2d 388, 390 (5th Cir. 1981)).

143. *See id.*; *see also* Note, *Building on* McNamara v. Korean Airlines*: Extending Title VII and Disparate Impact Liability to Foreign Employers Operating Under Treatises of Friendship, Commerce and Navigation*, 24 VAND. J. TRANSNAT'L L. 757, 783–84 (1991).

144. Reginald G. Govan, *Honorable Compromises and the Moral High Ground: The Conflicts Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 41 (1993) (noting that industrial experts are often required in disparate impact cases).

145. *See, e.g.*, Denny v. Westfield State College, Civ. A. Nos. 78-2235-F, 78-3068-F, 1989 WL 112823, at *7 (D. Mass. May 12, 1989) (noting that plaintiff's counsel had paid statistical expert more than $11,000 for services rendered).

146. *See id.*; *see also, e.g.*, Shari Engels, *Problems of Proof in Employment Discrimination: The Need for a Clearer Definition of Standards in the United States and United Kingdom*, 15 COMP. LAB. L.J. 340, 363 (1994) (noting that hiring statisticians can be expensive); Eileen R. Kaufman, *Choosing the Insidious Path:* West Virginia University Hospitals, Inc. v. Casey *and the Importance of Experts in Civil Rights Litigation*, 19 N.Y.U. REV. L. & SOC. CHANGE 57, 69 n.113 (1992).

such evidence and often do not require expert analysis in such cases.[147]

Once the evidence is obtained and compiled, it is fairly common for the court to carefully scrutinize statistical evidence for sampling and other errors. As one court noted: "[W]e must be acutely aware that spotting mistaken understandings or mischaracterizations of numerical data either to suggest or to camouflage discrimination calls for a finely tuned quantitative and qualitative eye."[148] If a plaintiff's counsel or the expert witness has made mistakes in developing the statistical basis, the court will dismiss the disparate impact claims.[149] Developing the appropriate statistical evidence without errors is difficult, and dismissal for statistical error is common in disparate impact cases.[150]

The high costs of presenting statistical evidence and the likelihood that the court will scrutinize such evidence for errors provides plaintiffs and their attorneys with a reduced incentive to pursue such claims. In addition, plaintiffs have less of an economic incentive to pursue disparate impact claims because the types of damages that can be awarded in such cases are drastically different from the types of remedies available in an intentional discrimination case.

In the Title VII context, the damages available to plaintiffs who prevail on a disparate impact claim are statutorily limited. If a plaintiff prevails on an intentional discrimination claim under Title VII, the plaintiff may obtain, among other types of relief, both compensatory and punitive damages.[151] In contrast, compensatory and punitive damages are not available to a prevailing plaintiff in a disparate im-

147. *See, e.g.*, Stratton v. Dep't for the Aging for City of New York, 132 F.3d 869, 877 (2d Cir. 1997) (holding that expert analysis is not required for simple statistics offered in disparate treatment cases); Bruno v. W.B. Saunders Co., 882 F.2d 760, 767 (3d Cir. 1989) (noting that "in individual disparate treatment cases such as this, statistical evidence, which 'may be helpful, though ordinarily not dispositive,' need not be so finely tuned").

148. Hill v. Miss. State Employment Serv., 918 F.2d 1233, 1238 (5th Cir. 1990).

149. *See, e.g.*, Diehl v. Xerox Corp., 933 F. Supp. 1157, 1167 (W.D.N.Y. 1996) (dismissing disparate impact case because plaintiff's expert witness failed to analyze portions of available data); *see also* Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 597 (2004) (noting common errors made by plaintiffs' attorneys in presenting statistical evidence).

150. *See Diehl*, 933 F. Supp. at 1167; *see also* Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999) (dismissing the disparate impact claim because statistics were flawed).

151. 42 U.S.C. § 2000e-5(g) (2000).

pact case.[152] This compensation structure provides little incentive for private attorneys to pursue disparate impact claims, compared to the types of damages available under a disparate treatment cause of action.

Although the ADEA does not contain a similar restriction on the damages available in disparate impact cases, the damages available in ADEA cases are already more substantially limited than those available in Title VII cases. In ADEA cases, prevailing plaintiffs may obtain reinstatement or front pay, back pay, payment of wages owed, injunctive relief, declaratory judgment, attorney's fees and costs.[153] Unlike Title VII, an ADEA plaintiff may not obtain punitive damages or compensatory damages for emotional distress or for pain and suffering.[154] Instead of punitive damages, the ADEA allows prevailing plaintiffs to obtain liquidated damages if the violation is willful.[155] However, the liquidated damage amount is limited to an amount equal to the back pay owed to the plaintiff.[156]

In theory, these same types of damages are available to plaintiffs who prevail on a disparate impact claim. However, commentators have noted that plaintiffs may have difficulty establishing willfulness (and therefore entitlement to liquidated damages) in a disparate impact case, where a violation can be proven without establishing any intent to discriminate.[157] Even though litigants bringing disparate impact claims under the ADEA have more comprehensive remedies than similar Title VII litigants, these remedies are rather limited, especially considering the financial and logistic difficulties associated with mounting such a claim.

152. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 534–35 (1999) (discussing damages available in Title VII disparate impact cases).

153. 29 U.S.C. § 216(b) (2000); Villescas v. Abraham, 311 F.3d 1253, 1257 (10th Cir. 2002).

154. *See, e.g.*, Comm'r v. Schleier, 515 U.S. 323, 326 (1995); Franzoni v. Hartmarx Corp., 300 F.3d 767, 773 (7th Cir. 2002).

155. 29 U.S.C. § 216(b); *Villescas*, 311 F.3d at 1257.

156. 29 U.S.C. § 216(b).

157. For a good discussion about the difficulty of obtaining liquidated damages in a disparate impact case, see Jan W. Henkel, *The Age Discrimination in Employment Act: Disparate Impact Analysis and the Availability of Liquidated Damages After* Hazen Paper Co. v. Biggins, 47 SYRACUSE L. REV. 1183 (1997).

As a result of these difficulties,[158] some commentators believe that disparate impact claims make up a small percentage of employment discrimination claims, amounting to just one employment discrimination claim in fifty.[159] In the Title VII context, commentators have noted that "[a]s a practical matter, disparate impact litigation now plays a much smaller role than it once did in increasing employment opportunities for large numbers of nonwhite workers."[160] Others have noted that disparate impact claims are a "relatively less vital tool, compared with theories of intentional discrimination."[161]

B. Recognition of Disparate Impact Under the ADEA Alone May Not Result in Radical Change

The recognition of a disparate impact cause of action alone does not greatly enhance plaintiffs' ability to bring such claims. By the time the Supreme Court decided the *Smith* case, the Second,[162] Sixth,[163] Eighth,[164] and Ninth Circuit Courts of Appeals explicitly held that

158. For a discussion of other reasons the disparate impact theory may be underutilized, see Shoben, *supra* note 149, at 607, and Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, WILLIAM & MARY L. REV., *available at* http://ssrn.com/abstract=751884 (last visited Sept. 26, 2005).

159. John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998 n.57 (1989). The lack of disparate impact cases also may increase the difficulty for attorneys trying to bring these claims. Because courts have dealt with fewer disparate impact cases than disparate treatment cases, there are more areas of the law that remain unexplored. This makes it more difficult and more expensive to proceed on such a claim. As one commentator noted: "Disparate impact analysis is not a heavily litigated theory of discrimination, and thus many questions remain relatively unsettled regarding the nature of the plaintiff's proof . . . ." Shoben, *supra* note 149, at 607.

160. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 499 (2003).

161. Shoben, *supra* note 149, at 597.

162. Smith v. Xerox Corp., 196 F.3d 358, 370 (2d Cir. 1999) (dismissing disparate impact claim because of statistical errors, but not precluding availability of cause of action).

163. Wooden v. Bd. of Educ., 931 F.2d 376, 379 (6th Cir. 1991) (discussing elements of disparate impact claim under the ADEA); Smith v. Tenn. Valley Auth., No. 90-5396, 1991 WL 11271, at *2 (6th Cir. Feb. 4, 1991) (finding that "claims under the ADEA may be brought under either a disparate treatment or disparate impact theory").

164. Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996) (recognizing that disparate impact claims are cognizable under the ADEA); Pulla v. Amoco Oil Co., 72 F.3d 648, 658 (8th Cir. 1995) (refusing to allow plaintiff to amend pleadings to add a claim of disparate impact with no discussion about the viability of the cause of action); Houghton v. Sipco, Inc., 38 F.3d 953, 958–59 (8th Cir. 1994) (analyzing an ADEA claim brought under a disparate impact theory of liability).

disparate impact claims were allowed under the ADEA.[165] The Third, Fourth, and District of Columbia Circuits had not explicitly ruled on the issue, but had issued opinions that at least were ambiguous as to the ADEA's provision for disparate impact.[166] Further, the strong circuit split on this issue developed only recently, meaning that litigants in most circuits have only been foreclosed from raising such claims for a relatively short amount of time.[167]

Importantly, the first indication at the circuit court level that disparate impact claims might be in jeopardy was not published until 1994. That year, the Seventh Circuit Court of Appeals considered the issue of whether the ADEA provided for disparate impact claims.[168] In its opinion, the court indicated that the Supreme Court's holding in *Hazen Paper v. Biggins Co.*[169] suggested that the ADEA did not allow litigants to proceed under a disparate impact claim.[170] While it is not clear from the opinion whether the Seventh Circuit actually held that disparate impact claims were no longer viable under the ADEA, other courts regarded the Seventh Circuit's opinion as so holding.[171]

Prior to 1994, eleven of the circuit courts either allowed litigants to proceed on a disparate impact theory of discrimination or at least assumed for the sake of argument that the ADEA allowed such

165. Mangold v. Cal. Pub. Utils. Comm'n, 67 F.3d 1470, 1474 (9th Cir. 1995).

166. Koger v. Reno, 98 F.3d 631, 639–40 (D.C. Cir. 1996) (assuming disparate impact applied under ADEA); MacNamara v. Korean Air Lines, 863 F.2d 1135, 1141, 1148 (3d Cir. 1988) (mentioning disparate impact claim under the ADEA); Massarsky v. Gen. Motors Corp., 706 F.2d 111, 120 (3d Cir. 1983) (assuming, without deciding, that a disparate impact claim exists); *see also* Keplinger v. Blue Cross & Blue Shield of Va., No. 90-2434, 1991 WL 45484, at *1 (4th Cir. Apr. 5, 1991) (noting that plaintiffs had not put forth evidence to support a disparate impact claim); Arnold v. U.S. Postal Serv., 863 F.2d 994, 996, 998 (D.C. Cir. 1988) (declining to consider whether the ADEA recognizes disparate impact, but finding that the challenged policy did not have such an impact).

167. The five circuit courts that held that disparate impact was not allowed under the ADEA were the First, Fifth, Seventh, Tenth, and Eleventh Courts of Appeals. Smith v. City of Jackson, Miss., 351 F.3d 183, 187 (5th Cir. 2003); Adams v. Fla. Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001); Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999); Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076–78, 1079 (7th Cir. 1994).

168. *Francis W. Parker Sch.*, 41 F.3d at 1077.

169. 522 U.S. 952 (1997).

170. *Francis W. Parker Sch.*, 41 F.3d at 1077; *see also* Hiatt v. Union Pac. R. Co., 65 F.3d 838, 842 & n.2 (10th Cir. 1995) (discussing the Seventh Circuit's decision).

171. *Hiatt*, 65 F.3d at 838, 842 & n.2 (discussing the Seventh Circuit's decision). In 2001, the Seventh Circuit definitively held that disparate impact claims were not viable under the ADEA. Rummery v. Ill. Bell Tel. Co., 250 F.3d 553 (7th Cir. 2001) (holding disparate impact theory unavailable).

claims.[172] Even some of the circuit courts that later refused to recognize a disparate impact claim under the ADEA continued to allow such claims to proceed throughout most of the 1990s. For example, in a 1993 case, the Tenth Circuit Court of Appeals held: "[W]e believe the prudent course is to merely assume the applicability of the disparate impact analysis without deciding whether it is a viable theory of recovery under the ADEA."[173] In a 1995 case, the Tenth Circuit declined to consider the question of whether a disparate impact claim was viable under the ADEA.[174] In 1994, the Third Circuit Court of Appeals refused to consider whether such claims were viable under the ADEA.[175]

Likewise, as late as 1995, both the First and Sixth Circuit Courts of Appeals still assumed, without deciding, that a disparate impact claim existed under the ADEA.[176] During that same year, the Third Circuit expressed doubts about whether the disparate impact theory

172. *See* EEOC v. Gen. Dynamics Corp., 999 F.2d 113, 114 (5th Cir. 1993) (noting that the EEOC had alleged both disparate impact and disparate treatment claims under the ADEA); Fisher v. Transco Servs.-Milwaukee, Inc., 979 F.2d 1239, 1244 n.3 (7th Cir. 1992); Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992); Wooden v. Bd. of Educ., 931 F.2d 376, 379 (6th Cir. 1991) (discussing elements of disparate impact claim under the ADEA); Keplinger v. Blue Cross & Blue Shield of Va., No. 90-2434, 1991 WL 45484, at *1 (4th Cir. Apr. 5, 1991) (noting that plaintiffs had not put forth evidence to support a disparate impact claim); Smith v. Tenn. Valley Auth., No. 90-5396, 1991 WL 11271, at *2 (6th Cir. Feb. 4, 1991) (finding "[c]laims under the ADEA may be brought under either a disparate treatment or disparate impact theory"); Abbott v. Fed. Forge, 912 F.2d 867, 871–72 (6th Cir. 1990); Rose v. Wells Fargo & Co., 902 F.2d 1417, 1423–25 (9th Cir. 1990); MacNamara v. Korean Air Lines, 863 F.2d 1135, 1141 (3d Cir. 1988) (mentioning disparate impact claim under ADEA); Arnold v. U.S. Postal Serv., 863 F.2d 994, 998 (D.C. Cir. 1988) (declining to consider whether ADEA recognized disparate impact, but finding that challenged policy did not have such an impact); Iervolino v. Delta Air Lines, Inc., 796 F.2d 1408, 1419 (11th Cir. 1986) (noting that plaintiff had not alleged a disparate impact claim in the complaint); Massarsky v. Gen. Motors Corp., 706 F.2d 111, 120 (3d Cir. 1983) (assuming, without deciding, that a disparate impact claim exists); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980).

173. Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1428 (10th Cir. 1993). However, the Court subsequently issued an opinion holding that disparate impact claims could not be brought under the ADEA. Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996) (finding disparate impact claims "not cognizable" under ADEA).

174. *Hiatt*, 65 F.3d at 842.

175. Armbruster v. Unisys Corp., 32 F.3d 768, 772 n.4 (3d Cir. 1994).

176. Graffam v. Scott Paper Co., No. 95-1046, 1995 WL 414831, at *3 (1st Cir. July 14, 1995) (assuming, arguendo, that a disparate impact claim could be asserted under the ADEA); Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 140 (6th Cir. 1995) (expressing doubt about whether a cause of action exists, but indicating that the circuit in the past recognized the viability of such claims).

was viable, but declined to reach the issue.[177] In 1998, the First Circuit also suggested that disparate impact claims could not be raised under the ADEA, but still assumed for the purposes of an opinion that such a claim remained viable.[178]

Finally, even some of the circuit courts that ultimately decided no disparate claim existed under the ADEA did not make that decision until fairly recently. For example, the First Circuit Court of Appeals did not decide the issue until 1999,[179] with the Eleventh Circuit Court of Appeals reaching it in 2001.[180] The Fifth Circuit Court of Appeals' decision denying a disparate impact cause of action under the ADEA was not handed down until 2003.[181] Therefore, litigants have only been precluded from bringing federal disparate impact claims in fewer than half of the circuits for a relatively short period of time.

Even though the First, Fifth, Seventh, Tenth, and Eleventh Circuit Courts of Appeals had eschewed the use of disparate impact analysis, some states within those circuits continued to allow plaintiffs to bring disparate impact claims based on age under state statutes.[182] Also important is the fact that even though plaintiffs may have been limited in bringing disparate impact claims per se, courts within those same circuits continued to allow litigants to raise evidence of disparate impact to support their disparate treatment claims.[183] Thus, employers still had incentives to limit the disparate impact their policies had on workers over the age of forty.

The impact of the *Smith* decision's validation of the existence of disparate impact claims under the ADEA is lessened by the fact that less than half of the circuits had refused to allow disparate impact

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

178. Bramble v. Am. Postal Workers Union, AFL-CIO, Providence Local, 135 F.3d 21, 26 (1st Cir. 1998).

179. Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999).

180. Adams v. Fla. Power Corp., 255 F.3d 1322 (11th Cir. 2001) (relying on plain meaning of statute to finding disparate impact theory of liability unavailable to ADEA plaintiffs).

181. Smith v. City of Jackson, Miss., 351 F.3d 183, 187 (5th Cir. 2003).

182. *See, e.g.*, Sullivan v. Liberty Mut. Ins. Co., 825 N.E.2d 522, 529 n.10 (Mass. 2005) (recognizing disparate impact claim for age discrimination under state statute).

183. *See, e.g.*, Currier v. United Technologies Corp., 393 F.3d 246, 251 (1st Cir. 2004); Rathbun v. Autozone, Inc., 361 F.3d 62, 79 (1st Cir. 2004); Smith v. City of Jackson, Miss., 351 F.3d 183, 193 n.12 (5th Cir. 2003).

claims under the ADEA and that the circuit split existed for a relatively short time period.

C. Elderly Employees as Potential Age Discrimination Plaintiffs

When looking at the group of potential plaintiffs who are at least sixty years old, practical realities also may decrease both the ability to, and the incentives for, filing age discrimination suits under either a disparate impact theory or a disparate treatment theory. As discussed below, elderly individuals make up a small percentage of the total work force, leaving fewer individuals in this age group to prosecute claims on their own behalf and to advocate for changes in disparate impact law that may make it friendlier toward elderly litigants. In reduction-in-force cases, elderly workers are likely to be eligible for early retirement or other severance incentives, which require them to waive their ability to later raise age discrimination claims. Finally, elderly plaintiffs may have less of an economic incentive than younger workers to prosecute an age discrimination claim.

1. FEWER ELDERLY INDIVIDUALS PARTICIPATE IN THE WORK FORCE

The recognition of a disparate impact cause of action may have less of an impact on the elderly simply because there are fewer elderly workers participating in the labor force than their counterparts aged forty to fifty-nine. As noted by the U.S. Census Bureau in its report *We the People: Aging in the United States*, the "percentage of older men and older women in the labor force decreased steadily with age."[184] Work force statistics from 2004 provide a snapshot of the elderly's role within the civilian work force.

In 2004, 147,401,000 individuals at least sixteen years old participated in the United States' civilian work force. Out of this work force, 75,758,000 individuals fell within the group of individuals protected by the ADEA.[185] In other words, more than half of the individuals in the civilian work force were within the ADEA's protected class.[186] During this same time period, the civilian work force consisted of

184. YVONNE J. GIST & LISA I. HETZEL, U.S. CENSUS BUREAU, WE THE PEOPLE: AGING IN THE UNITED STATES 7 (2004).

185. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, http://www.bls.gov/data/home.htm (searched on July 5, 2005) (results on file with author).

186. *Id.*

11,408,000 individuals who were sixty years old and older,[187] which comprised about 7.7% of the total civilian working population.

As shown in Chart 1, in 2004, approximately half (49.2%) of the civilian work force that fell within the ADEA's protected age classification was between the ages of forty and forty-nine years old. The number of individuals within the protected class between the ages of fifty and fifty-nine accounted for 35.7% of protected individuals. Of the total number of individuals who fell within the ADEA's protected class, only slightly more than 15% were aged sixty and older. Examining the group of elderly workers more specifically shows a rapid decline in participation in the work force with age. While individuals in their sixties account for 12% of protected individuals within the work force,[188] less than 3% of workers within the protected class were over the age of seventy.

Chart 1
Protected Individuals in Civilian Work Force by Age Group for the Year 2004[189]

Age Range	Number in civilian work force	Percentage of workers in ADEA protected class
40 to 49 years old	**37,299,000**	**49.23%**
50 to 59 years old	**27,051,000**	**35.71%**
At least 60 years old	**11,408,000**	**15.06%**
TOTAL	75,758,000	

One can draw three important observations from these statistics. First, as would be expected, the elderly population comprises only a

187. *Id.*
188. *Id.*
189. All figures in Chart 1 were obtained from Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, http://www.bls.gov/data/home.htm (searched on July 5, 2005) (results on file with author).

small portion of the total civilian work force. In the year discussed above, the elderly comprised only 7.7% of the total civilian work force. Second, even within the ADEA protected group itself, elderly workers make up only a small percentage of the total number of protected workers. Finally, the bulk of the elderly workers in the civilian work force are in their sixties, with workers' participation in the civilian work force dropping precipitously with increasing age.

2. ELDERLY WORKERS HAVE EARLY RETIREMENT OPTIONS

The availability of a disparate impact cause of action also may affect elderly workers less than younger workers because elderly workers are likely to be able to take advantage of early retirement and other severance incentives that may not be available to their younger counterparts. Workers who take severance and other incentives are often required to sign agreements in which they waive their ability to bring claims under the ADEA.[190]

A survey of a decade's worth of disparate impact cases demonstrates why early retirement incentives have special importance in disparate impact cases. A review of the federal reported and unreported decisions from 1995 to 2004 provides an interesting snapshot of the types of cases pursued by individuals using the disparate impact theory.[191] This research revealed 176 cases in which one or more plaintiffs tried to assert age discrimination claims using a disparate impact analysis.[192]

190. The ADEA specifically recognizes that employees may waive their rights to bring age discrimination lawsuits and provides specific requirements for such a waiver to be effectuated. 29 U.S.C. § 626(f)(1) (2000); Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426 (1998) (describing the Older Workers Benefits Protection Act (OWBPA)). If an employer does not comply with the requirements of the OWBPA, the plaintiff can still file suit under the ADEA, even if the employee has signed an agreement waiving such rights. *Oubre*, 522 U.S. at 426–28.

191. These cases were the result of a search on Westlaw for any case that contained the terms "Age Discrimination in Employment Act" or "ADEA" within the same paragraph as the term "disparate impact." This search resulted in 558 cases. The author then read each of the cases to determine whether the court described the case as raising a disparate impact claim under the ADEA. Cases in which the court merely described disparate impact analysis or made reference to the ADEA's analysis, even though the plaintiff was not asserting a disparate impact claim under the ADEA, were not counted for analysis in this article.

192. The survey of the disparate impact case law is not designed to provide a census of all of the disparate impact cases being considered by the federal courts during this time period, as an exact count of all disparate impact cases is nearly impossible. The author recognizes that some district court rulings are not reported or available through electronic sources and that some cases are settled prior to any

Of the 176 total cases, 74 (approximately 42%) of the cases involved employees challenging termination and rehiring decisions relating to reductions-in-force. Given the breadth of employment decisions that can be challenged under a disparate impact analysis, the fact that almost half of all such cases relate to reductions-in-force creates an interesting dynamic for understanding this type of claim.

The first phase of many reductions-in-force is the offering of early retirement incentives to certain groups of employees.[193] Voluntary retirement is often offered to workers with a certain number of years of service or those who have reached a certain age at the time of a particular decision.[194] Thus, older workers are often eligible to take advantage of voluntary severance and retirement plans for which their younger counterparts are not eligible.[195] In exchange for these early retirement incentives, companies usually require employees to release all potential age discrimination claims they may have against the company.[196]

written disposition. Additionally, this number naturally excludes cases that plaintiffs chose to voluntarily forego, based on their circuit's holding that disparate impact claims were no longer viable. Rather, this data is designed to illustrate the types of disparate impact cases being pursued.

193. *See, e.g.*, Cerutti v. BASF Corp., 349 F.3d 1055, 1059 (7th Cir. 2003) (company offered early retirement to all individuals who worked for the company for at least ten years and who were aged fifty-three and older); Michael J. Collins, *It's Common, But Is It Right? The Common Law of Trusts in ERISA Fiduciary Litigation*, 16 LAB. LAW. 391, 400 (2001) (discussing use of early retirement incentives in reductions-in-force); Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination? The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 814 (1997) (noting the use of early retirement programs by companies to decrease the expense of employees). It should be noted that some employees have brought lawsuits claiming that a company used early retirement incentives as a way to get rid of older workers and that these workers felt compelled to take the early retirement or to risk subsequent termination without the retirement incentive. *See, e.g.*, Cirillo v. Arco Chem. Co., 862 F.2d 448, 450–51 (3d Cir. 1988) (plaintiff claiming that his placement in early retirement program was discriminatory).

194. Stephen F. Befort, *The Labor and Employment Law Decisions of the Supreme Court's 2003–2004 Term*, 20 LAB. LAW. 177, 183 (2004) (noting that early retirement incentives often are offered to individuals over the age of fifty-five or sixty).

195. *See* Stone v. Travelers Corp., 58 F.3d 434, 437 (9th Cir. 1995) (denying plaintiff's age discrimination claim that he was denied ability to participate in severance plan because he was fifty-five years old, and thus too young to participate in the plan); Karlen v. City Colls. of Chi., 837 F.2d 314, 314 (7th Cir. 1988) (holding that employer may create incentive plan that favors older employees); State Police for Automatic Ret. Ass'n v. Difava, 164 F. Supp. 2d 141, 152 (D. Mass. 2001) (explaining that retirement incentives that favor older workers over younger workers are not prohibited by the ADEA).

196. Befort, *supra* note 194 (noting that employees are typically required to waive their right to later file suit).

While some litigants have challenged the use of early retirement plans as a way for companies to terminate older workers,[197] these programs have usually met with success. Separations from employment resulting from early retirement incentives are less likely to result in litigation compared to involuntary terminations, and employees accept early retirement incentives as a normal part of a reduction-in-force.[198]

Because many workers over the age of sixty are offered and accept early retirement benefits in exchange for waiving their rights to file suit against their former employers, fewer of these employees are within the available plaintiff pool for a disparate impact claim based on a reduction-in-force.

3. ELDERLY WORKERS HAVE LESS POTENTIAL DAMAGES

In addition to early retirement options, workers over the age of sixty also may have less economic incentive to sue. In age discrimination cases, both back pay and front pay are determined by reference to the "working life" of the individual.[199] In other words, if an individual was sixty years old at the time of the alleged discrimination, and the individual anticipated retiring at the age of sixty-two, that individual's front pay and back pay awards would be limited to a two-year time window. The limited time period for which damages may be obtained diminishes the economic incentive for both the plaintiff and any potential plaintiff's attorney to bring such claims.

Further, in age discrimination cases, liquidated damages are tied to the amount of back pay awarded to the plaintiff.[200] Even though the illegal termination of an older worker may draw the ire of the judge or jury (as compared to the termination of a younger individual within the protected class), the jury and the court's ability to compensate the older victim is limited.

197. *See, e.g.*, *Cirillo*, 862 F.2d at 450–51 (plaintiff claiming that his placement in early retirement program was discriminatory).

198. *See, e.g.*, Pamela Perun, *Phased Retirement Programs for the Twenty-First Century Workplace*, 35 J. MARSHALL L. REV. 633, 645 (2002) (discussing early retirement incentives).

199. Kulling v. Grinders for Indus., Inc., 185 F. Supp. 2d 800, 813 (E.D. Mich. 2002) (discussing front pay award with an upper limit as the date the plaintiff anticipated no longer working); Vogl v. Arrow Pattern & Foundry Co., No. 93 C 3846, 1994 WL 162807, at *2 (N.D. Ill. Apr. 25, 1994).

200. 29 U.S.C. § 626(b) (2000); McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 357–58 (1995) (discussing ADEA's liquidated damages provision).

Consider a scenario where a sixty-four-year-old employee is terminated on the basis of her age. If the individual planned on retiring at the age of sixty-five, she would only be eligible for one year of back pay and to have that award doubled, if liquidated damages are appropriate. In contrast, a younger employee would be able to obtain back pay from the date of termination until the date of the verdict.[201] As the average employment case takes between eighteen months and three years to reach trial,[202] younger workers in the protected class may obtain far more significant back pay and liquidated damages awards than their counterparts nearing retirement.

Additionally, an employer may argue that an employee's declining health should limit damage awards.[203] In other words, the employer would argue that the employee is not entitled to back pay or front pay because the employee's health would have limited his or her ability to work. This argument may be more effective against older workers protected by the ADEA because older Americans are more likely to report that illness or disability affects their day-to-day activities. Census data indicates that "the disability rate of the population 65 and over was at least three times the rate of the total.[204] The population 65 and over reported mental disabilities at twice the rate of the total population."[205] More specifically, thirteen percent of individuals aged sixty-five to seventy-four reported that they had a disability that caused them difficulties going outside their home, with this number increasing to forty-seven percent for people over the age of eighty-five.[206]

Given the limited amount of available damages, individuals over the age of sixty (and, importantly, plaintiff's attorneys) are less likely to view an age discrimination lawsuit as economically efficient and may have less incentive to raise age discrimination claims in gen-

201. Drase v. United States, 866 F. Supp. 1077, 1080 (N.D. Ill. 1994) (noting appropriate time period for awarding back pay).

202. *See, e.g.*, Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights*, DISPUTE RES. J., Nov. 2003–Jan. 2004, at 56–57; Cecilia H. Morgan, *Employment Dispute Resolution Process*, 11 TEX. WESLEYAN L. REV. 31, 32 (2004).

203. *See, e.g.*, Dix v. Thompson Newspapers GA, Inc., 1:90-CV-351-RHH, 1991 WL 33205, at *4 (N.D. Ga. Jan. 11, 1991) (awarding only two months of back pay because plaintiff became disabled shortly after termination of employment).

204. GIST & HETZEL, *supra* note 184, at 11.

205. *Id.* at 11 fig.14.

206. *Id.* at 11.

eral.[207] Given the added expense required to hire statistical experts and gather data in a disparate impact case, the economic calculus may be even less appealing for individuals over the age of sixty.

V. *Smith* Raises New Challenges for All Disparate Impact Plaintiffs, Especially Elderly Plaintiffs

As discussed in Part IV, elderly workers may be less likely to bring suit under the ADEA for systemic reasons. However, even those individuals aged sixty and over who do file lawsuits will find that the *Smith* decision, while ostensibly favoring plaintiffs, creates new hurdles for plaintiffs in proving their claims. Although many of these obstacles will impact all litigants bringing disparate impact claims, the following discussion focuses on the ways in which these obstacles will affect elderly litigants.

A. After *Smith*, Defendants Will Be More Likely to Aggressively Challenge the First Prong of the Disparate Impact Test

To establish a disparate impact claim, a plaintiff is first required to prove that a specific employment practice caused a disparate impact on individuals within the protected class.[208] Thus, within the prima facie case, the plaintiff must demonstrate two separate elements: (1) a specific practice (2) created a disparate impact on a particular group of people. Language in the *Smith* decision may encourage defendants and courts to be more aggressive in requiring plaintiffs to meet heightened standards of proof in each of these areas.

1. MORE DEFENDANTS WILL CHALLENGE WHETHER A SPECIFIC PRACTICE IS IDENTIFIED

In *Smith*, the plaintiffs contested the legality of a pay plan that gave workers with less seniority a greater percentage wage increase than those with more seniority.[209] The pay plan at issue would have allowed officers to progress through a series of five steps with increas-

207. Additionally, an elderly individual's eligibility for Social Security, Medicare, or other retirement benefits may even further reduce the employee's economic incentive to pursue litigation.

208. *See, e.g.*, Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 953 (8th Cir. 2001) (describing prima facie case).

209. Smith v. City of Jackson, Miss., 125 S. Ct. 1536, 1545 (2005).

ing salary based on their performance reviews.[210] When the plan was initially implemented, officers were placed in the salary rung that would provide them with at least a two percent increase over their salary before the plan's implementation.[211] However, the rungs in which the less senior officers were placed gave them more than a two percent pay increase.[212]

Despite the fact that the plaintiffs were challenging the implementation phase of a fairly simple pay plan, the Court held that the plaintiffs could not prevail because they had "not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers."[213] The majority continued that "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. 'Rather, the employee is responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.'"[214]

Given the simplicity of the implementation phase of the pay plan, it is difficult to comprehend how the plaintiffs could have been more specific regarding their allegations. The implementation of the pay plan simply required the police department to place officers in the correct salary grade, depending on their current salary. It was clear that this was the policy that the plaintiffs were challenging. Indeed, the court of appeals assumed that the plaintiffs could establish a prima facie case if disparate impact was a viable cause of action under the ADEA.[215]

Although the plaintiffs were required to identify a particular practice or policy prior to *Smith*, the Supreme Court's denial of relief in *Smith* based on plaintiffs' failure to identify a particular employment practice signals to defense attorneys and lower courts that this prong of the test should be carefully scrutinized, perhaps more so than in the past. Added scrutiny to the first part of the prima facie case will make it more difficult for plaintiffs to proceed on disparate impact claims for several reasons.

210. Joint Appendix at *15, *21, Smith v. City of Jackson, Miss., 125 S. Ct. 1536 (2005) (No. 03-1160), 2004 WL 2289230.
211. *Id.* at *20.
212. *Smith*, 125 S. Ct. at 1545.
213. *Id.*
214. *Id.* (quoting Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989)).
215. *Id.* at 1540.

First, it will make it more difficult for plaintiffs' counsel to determine the likelihood of success on a given claim. Potential plaintiffs seeking legal advice often do not possess detailed information about the specific workings of company policies. Instead, plaintiffs seek advice with more generalized information, i.e., "I was terminated during a reduction-in-force and other people in my protected class were also terminated." It is not until the discovery phase that plaintiffs' counsel will have access to the data and employer policies that will allow the attorney to determine whether specific portions of a policy caused a disparate impact. The more detailed the courts require plaintiffs to be in identifying the particular practice at issue, the more work that will be required of plaintiffs' counsel to learn the practices of the employer defendant and to gather the appropriate statistical information, and the less information that plaintiffs and lawyers will have in making a decision about whether a claim is viable.

Second, an increased focus on specific policies and practices will require extra diligence on behalf of plaintiffs' counsel in compiling and gathering statistical data. As discussed above, mistakes by either plaintiffs' counsel or a statistical expert are common reasons for dismissal of disparate impact claims.[216] If plaintiffs gather data on a more generalized practice of the employer, rather than focusing on a specific practice or policy, this would be an additional reason to dismiss the claim. Although this same problem was present prior to *Smith*, the Supreme Court's focus on the first prong of the test makes challenges on these grounds more likely now than in the past.

While all potential plaintiffs are impacted by any analysis that makes disparate impact claims harder to bring, elderly plaintiffs are more greatly affected by such a change because of the systemic realities that already discourage the bringing of such suits. Thus, plaintiffs' lawyers deciding whether to bring a case will have one additional difficulty to consider. In a case where the existence of or amount of damages is already limited by the plaintiff's age and where the costs of gathering statistical information are high, plaintiffs' counsel may think twice about launching a disparate impact claim on behalf of an elderly client.

Further, focus on a more narrowly defined practice may make it more difficult for elderly plaintiffs to establish that a company's policy

216. *See supra* Part IV.A.

has a disparate impact on elderly workers alone. This is because the more narrow a practice being challenged, the fewer people who are likely to fall within the group challenged by the practice. For elderly workers, who already make up only a small portion of the employed population, it will be more difficult to establish a statistically significant disparity if the number of individuals affected by the practice is even smaller.[217]

To clarify this idea, consider the following hypothetical. A company decides that it needs to reduce its work force and directs company managers to lay off employees based on the following criteria: (1) the needs within the individual working unit for the position in question; (2) the prior performance evaluations of the employees; and (3) the potential the employee has to learn new skills that would be transferable within the company. As a result of the reduction-in-force, nearly all of the elderly individuals within the company are laid off. However, consistent with national statistics, the company did not have very many elderly employees prior to the reduction-in-force.

In this hypothetical, even if the employees could argue that the reduction-in-force itself was the discriminatory practice, they would have a difficult time proving that their population size was large enough to create a proper statistical disparity. However, if the workers are required to show that one of the three selection criteria created a disparate impact, they will have an even more difficult time establishing a large enough statistical group, especially if the reasons for the employees' layoffs were fairly evenly distributed between the three criteria.

Any additional focus on the first prong of the prima facie case will discourage elderly plaintiffs and their attorneys from bringing disparate claims and will also decrease their likelihood of prevailing on these claims.

217. It is unclear whether the plaintiffs prosecuting disparate impact claims under the ADEA will be able to assert that an entire process results in a disparate impact if individual portions of a process are not able to be analyzed separately. Title VII specifically provides that if "the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B) (2000). The Court did not address whether this option was available under the ADEA.

2. COURTS MAY BE MORE RECEPTIVE TO THE ARGUMENT THAT NON-AGE FACTORS MAY CREATE A DISPARATE IMPACT

As discussed above, the primary evidence in a disparate impact case is statistical evidence showing that a particular policy creates a significant disparity for members of a protected group.[218] In *Smith*, the Court emphasized that the plaintiff's burden is not merely to demonstrate that a statistical disparity exists, but to demonstrate that it was the employer's specific policy or practice that led to the discrepancy. This was the law prior to *Smith*,[219] and *Smith* does not change this portion of the plaintiff's proof. However, what *Smith* did do is place disparate impact claims based on age in a separate, and arguably lesser, category from other such claims.

In its opinion, the Court indicated that two factors separate ADEA disparate impact claims from those brought under Title VII. First, when the protected trait is gender, religion, national origin, or race, there should be little correlation between the protected trait and a person's qualifications for a position.[220] In other words, if a certain employment practice has a disparate impact on any of these groups, one of the likely explanations for this statistical disparity is discrimination. As the California Employment Law Council argued in its amicus brief in support of the City of Jackson: "The burden this sort of [disparate impact] analysis imposes on employers is ameliorated by the very rarity with which racial or gender disparities ought to occur."[221]

However, the Court made it clear that it considered age to be different than other protected traits. As discussed during the oral arguments in the *Smith* case, age is different than the traits protected by Title VII because it is "inherently correlated with myriad selection practices."[222] Both the majority opinion and the concurrence in *Smith*

218. *See supra* Part IV.A.

219. *See, e.g.*, Pottenger v. Potlatch Corp., 329 F.3d 740, 749 (9th Cir. 2003) (explaining that plaintiff must challenge a specific practice); Fisher v. Transco Servs.-Milwaukee, Inc., 979 F.2d 1239, 1245 (7th Cir. 1992).

220. *Smith*, 125 S. Ct. at 1544.

221. Brief for the California Employment Law Council as Amicus Curiae Supporting Respondents, *supra* note 127, at *12–13.

222. Transcript of Oral Argument at *26, *Smith*, 125 S. Ct. 1536 (No. 03-1160), 2004 WL 2607536 ("In the age context, as Justice Breyer pointed out in the Florida Power argument, as he's pointed out again today, age is inherently correlated with myriad selection practices. It's painful to say, particularly to a Court that's a little bit older than I am, but our mental and physical capacities are not constant over our lifetimes. They're different for each one of us, but statistically they change over time and they deteriorate over time, and progress doesn't treat the skills and

agreed with this contention,[223] with the concurring opinion even listing four areas—physical ability, mental ability, technological knowledge, and employment benefits—in which employers may reasonably make decisions that correlate with age.[224] Phrased differently by the Seventh Circuit Court of Appeals: "Everyone knows that younger people are on average more comfortable with computers than older people are, just as older people are on average more comfortable with manual-shift cars than younger people are."[225]

This reasoning provides a stark contrast to Title VII cases, where the Court has routinely decried the application of stereotypes and has instead focused on the abilities or characteristics of the individuals appearing before the Court. For example, in *City of Los Angeles, Department of Water & Power v. Manhart*, the Court was faced with the question of whether a city could require female workers to make larger contributions to a pension plan based on the fact that women generally outlive men.[226] While the Court agreed that women as a group have a longer lifespan than men, this argument did not prevail. The Court noted:

> It is equally true, however, that all individuals in the respective classes do not share the characteristic that differentiates the average class representatives. Many women do not live as long as the average man and many men outlive the average woman. The question, therefore, is whether the existence or nonexistence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics.[227]

The Court held that the city's practice was discriminatory because it treated women differently than men.[228]

It appears that in the age context more so than in other discrimination cases, the courts will be more likely to question the cause of any statistical disparity and to believe that such disparities are the result of legitimate factors. Thus, courts will not only be looking at whether plaintiffs can establish that a particular practice resulted in a statistical disparity, but also whether the statistical disparity is caused

abilities that we have with—the same way to people who are at different stages in life.").

223. *Smith*, 125 S. Ct. at 1545, 1555.

224. *Id.* at 1555.

225. Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997).

226. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 704 (1978).

227. *Id.* at 708.

228. *Id.* at 711.

by discrimination. In other words, "[u]nlike with Title VII, where racial, religious, or gender disparities are presumed to be both few and inherently suspicious, age-correlated disparities in the workplace are almost certain to be both innocent and commonplace."[229]

An increased acceptance of the fact that a statistical disparity may not necessarily be the result of discrimination is more problematic for elderly plaintiffs than for others within the ADEA's protected class. If courts believe that an employee's physical ability, mental capacity, and ability to adapt to technological change decreases with age, this perception will be even more severe when looking at a class of litigants over the age of sixty, rather than a larger class of individuals over the age of forty.

Further, even the employees bringing the *Smith* case recognized the "relatively innocuous nature of ageism," compared with other types of discrimination, in that age "distinctions are particularly unique because they so often are used thoughtlessly rather than as intentional expressions of invidious malice or even mildly bigoted intent."[230] As commentators cited in the petition for writ of certiorari described:

> Age-related biases . . . may have become so routinized that they may influence social judgments at a level below that at which we consciously ascribe traits to others. Such "automatic" ageism may be hard to eradicate if it has been incorporated into our implicit personality theories or social schemata and is evoked without awareness on our part.[231]

While this argument weighs in favor of recognizing a cause for disparate impact under the ADEA, it may also cause courts to be more skeptical of these types of claims. Even though intent to discriminate is not required to be proved in a disparate impact case, evidence of intentional discrimination can be used to bolster a conclusion that the statistical disparity resulted from the individual's membership in a protected class. If a court is trying to determine whether the reason

229. Brief for the California Employment Law Council as Amicus Curiae Supporting Respondents, *supra* note 127, at *15.

230. Brief for the AARP et al. as Amicus Curiae Supporting Petitioners at *23, *Smith*, 125 S. Ct. 1536 (No. 03-1160), 2004 WL 1356592; *see also* Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense*, 66 BOSTON L. REV. 155, 222 (1986).

231. Brief for the AARP et al. as Amicus Curiae Supporting Petitioners, *supra* note 230, at *24 (quoting Charles W. Perdue & Michael B. Gurtman, *Evidence for the Automaticity of Ageism*, 26 J. OF EXPERIMENTAL SOCIAL PSYCHOLOGY 199, 201 (1990)).

for a statistical disparity is discrimination, it may instinctually (and probably not explicitly) view the absence of any intent to discriminate as bolstering the defendant's viewpoint that no discrimination occurred. This is especially so if the court is already inclined to believe that the statistical disparity was more likely caused by a reasonable factor, and not discrimination.

Given the potential correlation between age and other legitimate factors, the Supreme Court's reemphasis of this fact, and the likelihood that a disparate impact plaintiff will not be able to put forth any evidence of intentional discrimination to bolster an age claim, it is likely that courts will scrutinize disparate impact statistics more in age discrimination than in other contexts because the statistical disparity alone may not be suspect. Thus, courts faced with statistics showing that a particular practice resulted in disparate treatment based on age may be reluctant to find in favor of the plaintiff. As one court explained: "[i]n the age context, courts should be skeptical that statistical disparity alone results in age discrimination."[232]

B. Plaintiffs Will Face a More Onerous Burden of Proof

While the purpose of the *Smith* case was to determine whether disparate impact analysis was appropriate,[233] the National Employment Lawyers Association (NELA), a group of lawyers representing plaintiffs in employment litigation, and the Chamber of Commerce anticipated that once disparate impact was recognized, the real conflict would arise over the questions of "reasonableness" and the appropriate burdens to be allocated to each party.[234]

As discussed in Part II.D., the Civil Rights Act of 1991 amended Title VII to clarify that the plaintiff only has the initial burden of establishing that a statistical disparity exists. The burdens of both production and persuasion then switch to the employer to establish that its actions were taken as a "business necessity." The employer's burden

232. Adams v. Fla. Power Corp., 255 F.3d 1322, 1323 (11th Cir. 2001).

233. Brief of the Petitioners at *2, *Smith*, 125 S. Ct. 1536 (No. 03-1160), 2004 WL 1369172 (indicating that sole question for the court was whether disparate impact claims are ever cognizable).

234. Brief for the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Respondents at *2, *Smith*, 125 S. Ct. 1536 (No. 03-1160), 2004 WL 1905736; Brief for the National Employment Lawyers Ass'n and the Trial Lawyers for Public Justice as Amicus Curiae Supporting Petitioners at *24–25, *Smith*, 125 S. Ct. 1536 (No. 03-1160), 2004 WL 1378336.

on this second prong is quite onerous and requires the employer to establish that the practice is related to the job in question and necessary to the business. Even if the employer prevails on this prong, the employee has the ability to prevail by establishing that an alternate business practice exists that achieves the same result as the discriminatory policy, but does not result in a disparate impact on the protected group.

However, this analysis is completely different than the analysis set forth by the Supreme Court in its *Wards Cove* decision. Recall that Congress amended Title VII to clarify that the *Wards Cove* analysis should not be used in Title VII cases, but did not make similar amendments to the ADEA. The concurring opinion in *Smith* emphasized that the result of this legislative history is that the *Wards Cove* analysis applies in ADEA disparate impact cases.[235]

Thus, under the *Wards Cove* analysis, the burden of persuasion at all times remains with the plaintiff. The only burden that the defendant would have would be to articulate a legitimate basis for its actions.[236] Placing the burden of persuasion on the plaintiff would be a significant difference between disparate impact claims under the ADEA and disparate impact claims under Title VII and is a serious obstacle to all plaintiffs pursuing such age discrimination claims.

Not only will the burden of persuasion remain on the plaintiff, the defendant's burden to produce evidence of a reasonable basis for its procedure or policy will be lighter than it is in the Title VII context. As the majority opinion in *Smith* noted, the employer is only required to provide a reasonable basis for its actions.[237] This is much different than demonstrating the business justification necessary under Title VII cases, where the defendant is required to establish "that the challenged practice is job related for the position in question and consistent with business necessity."[238] Further, unlike in Title VII cases, the plaintiff will not be able to prevail in an ADEA disparate impact case by showing that the employer could have adopted an alternative, nondiscriminatory practice.[239] The absence of this option removes an-

235. *Smith*, 125 S. Ct. at 1560.
236. *Id.*
237. *Id.*
238. Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 277 (4th Cir. 2005) (Gregory, Cir. J., dissenting) (quoting 42 U.S.C. § 2000e-2(k)(1)(a)(i) (2000)).
239. *Smith*, 125 S. Ct. at 1560.

other possible basis for victory from the plaintiff's disparate impact arsenal.

The use of the *Wards Cove* framework, as well as the requirement that an employer's decision only be based on reasonable factors, provides the defendant in an ADEA disparate impact case with a distinct advantage. As discussed above, as elderly plaintiffs already have reduced incentives to pursue disparate impact claims and may have a greater difficulty proving statistically significant disparities, placing a higher burden of proof on plaintiffs only creates an additional incentive not to pursue disparate impact claims.

Additionally, given the Court's recognition that age often correlates with a person's mental capacity, physical ability, employment benefits, and ability to adapt to technological changes, it is likely that policies that create a disparate impact on the elderly will be found to be reasonable as long as they rationally relate to one of these four traits and are not based strictly on an individual's age.[240] *Smith* itself recognizes that policies relating to an employee's years of service or seniority are likely to be held reasonable.[241]

Under the current framework, elderly workers are not likely to pursue disparate impact claims. Even if a plaintiff did not waive his or her claims after receiving early retirement or a severance, it is unlikely that the amount of possible recovery would provide an incentive for an individual or an attorney to file suit. Even if a monetary incentive is present, the plaintiff still faces the onerous task of collecting and analyzing the proper statistics. This task is made even more difficult by the *Smith* Court's emphasis on a specific employment practice. If a practice only affects elderly workers, it is unlikely that enough individuals will be affected by it to create a statistically significant disparity. Even if such a disparity does exist, *Smith* provides courts with a basis to disbelieve that the disparity resulted from discrimination and justifies a finding that the employer's practice was reasonable. After *Smith*, plaintiffs do indeed have the right to proceed on a disparate impact claim, but it is unlikely that many elderly litigants will want to do so.

240. The author is not expressing agreement with this proposition, but is merely noting that courts are likely to hold that policies that create a disparate impact based on age are likely to be upheld as reasonable.

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

VI. The Silver Lining in the Dark Cloud: Some Hope for Elderly Employees

Even with the limits placed on disparate impact liability, the existence of a cause of action for disparate impact alone may help older employees by encouraging companies to highly scrutinize termination and other decisions that may have an adverse effect on older employees. Companies certainly have an incentive to avoid costly litigation, even if they believe that they would ultimately prevail on the merits.[242]

Further, the *Smith* case provides employers who do not want to discriminate against an individual based on age additional inducement to reexamine policies and procedures that may create a disparate impact. For example, the recognition of a disparate impact cause of action may encourage employers to use methods other than termination when trying to cut costs and payroll during a reduction-in-force. Commentators have suggested that employees with more seniority be given an option of taking a cut in salary[243] or be given a right of first refusal for other jobs within the company for which the individual is qualified.[244] These alternative methods of cutting pay "tend to show that it was simply cost—and not age—that motivated the employer."[245] Only time will tell whether employers will adopt these methods in response to *Smith*; however, the existence of a cause of action at least provides employers with a minimal incentive to do so.

As noted by the petitioner's attorney during oral argument in the *Smith* case: "an important part of impact liability is just making

242. Brief for the California Employment Law Council as Amicus Curiae Supporting Respondents, *supra* note 127, at *16 ("And even if it were true that defendants usually would win on the merits, litigation is costly, and class litigation can be ruinously so. The potential damages in a discrimination class action can push defendants to settle even the weakest of claims."); *see also* FED. R. CIV. P. 23(f) advisory committee notes to 1998 amendments (noting that "[a]n order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 163–64 (3d Cir. 2001); Blair v. Equifax Check Servs. Inc., 181 F.3d 832, 834 (7th Cir. 1999) ("[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight.").

243. Michael Higgins, *Success Has Its Price: Courts OK Firing Older, Higher-Paid Workers to Save Money*, A.B.A. J., Feb. 1998, at 34, 35; Kester Spindler, *Shareholder Demands for Higher Corporate Earnings Have Their Price: How Courts Allow Employers to Fire Older Workers for Their Achievement*, 27 PEPP. L. REV. 807, 808 (2000).

244. Spindler, *supra* not 243, at 824.

245. Higgins, *supra* note 243, at 35.

employers think about it . . . . [D]isparate impact . . . acts as a spur or catalyst to cause employers to self-examine and self-evaluate their employment practices to endeavor to eliminate, so far as possible, the last vestiges of discrimination."[246]

VII. Conclusion

At best, the *Smith* decision is a mixed result for older workers. On the positive side, the *Smith* decision recognizes disparate impact as a possible claim under the ADEA and provides companies with an incentive to create policies that do not have a disparate impact on older workers. However, the case also places many obstacles in the way of litigants who want to challenge such policies. Once litigation ensues, ADEA disparate impact plaintiffs bear a greater burden of persuasion and production than their counterparts in the Title VII context. This change alone will lessen the incentives for older workers and their attorneys to pursue disparate impact claims based on age.

Elderly litigants in particular are most affected by the procedural and other hurdles now present in the ADEA disparate impact context. As discussed above, the damages structure of the ADEA already provides workers nearing retirement with less ability to recover economic damages, and thus, less incentive to pursue age discrimination claims in the courts. Additionally, there are fewer elderly employees in the workplace, making it difficult for these workers to establish that a practice has a statistically significant impact on them. Given these practical realities, the *Smith* decision's tilting of the burdens of production and persuasion in favor of defendants makes it even less likely that elderly workers will prevail on a disparate impact claim.

Perhaps even more problematic for elderly litigants is the underlying skepticism in the *Smith* case regarding the relationship between statistical disparities and discrimination. Unlike in Title VII claims, where the courts have found that discrimination is the likely explanation for employment practices that create gross statistical disparities, the *Smith* decision emphasized that this is not the case in age discrimination cases. In fact, the Court went even further by recognizing that in many instances a person's age will permissibly correlate with a myriad of factors.

246. Transcript of Oral Argument, *supra* note 222, at *55.

Even if an elderly worker has enough economic incentive to file suit, can find an attorney who shares the same belief, and is able to produce evidence of a statistical disparity, the district courts will be able to rely on the *Smith* decision to reject the plaintiff's explanation for the statistical disparity and find that the employer's proffered reason for its action was reasonable. While *Smith* recognizes disparate impact as a cause of action, it does little else to help aggrieved workers, especially the elderly.