SMITH V. CITY OF JACKSON: SETTING AN UNREASONABLE STANDARD

JESSICA STURGEON

INTRODUCTION

Employment discrimination is often understood to entail employment policies that explicitly prejudice specific groups. A less obvious form of discrimination that may be even more insidious, however, occurs when policies that seem innocent have a disparately large effect on specific groups of employees. Specifically, discrimination that is "facially neutral"—that is, not immediately appearing to favor one class over another—is more difficult to prevent or eliminate. Congress and the Supreme Court have taken steps to control facially neutral employment discrimination in some contexts,[1] but the Supreme Court's decision in *Smith v. City of Jackson* demonstrated that the Court does not view all forms of employment discrimination with equal concern.

Title VII of the Civil Rights Act of 1964[2] prohibits employment practices that are facially neutral but have a disparate impact on a protected group of employees.[3] In *Smith v. City of Jackson*,[4] the Supreme Court explicitly recognized disparate impact liability in age discrimination cases.[5] In applying the Age Discrimination in Employment Act (ADEA), however, the Court applied a substantially weaker standard than it has applied under Title VII. Under Title VII, employers could prevail despite engaging in a

---

1. *See, e.g.*, Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2(a) (2000) ("It shall be an unlawful employment practice . . . to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.").
2. 42 U.S.C. § 2000e.
3. 42 U.S.C. § 2000e-2.
4. Smith v. City of Jackson, 544 U.S. 228 (2005).
5. *Id.* at 232.

practice that had a disparate impact on a protected group if that practice passed the business necessity test. Under the ADEA, an employer, according to the Court, does not need to show that a discriminatory practice is a business necessity, but only that it is based on a "reasonable factor other than age."[6] The decision appeared to help employees by recognizing disparate impact claims, but did so by embracing a standard that made pursuing such claims extremely difficult.

This Note argues that although the Court was correct to hold that disparate impact claims were cognizable under the ADEA, the limitations that the Court imposed rendered such claims practically unwinnable. Part I explores the origins of the Age Discrimination in Employment Act. Part II discusses the development of disparate impact liability under Title VII and under the ADEA prior to *Smith*. Part III discusses the Court's decision in *Smith*. Finally, Part IV addresses the impact of the *Smith* decision and argues that the decision effectively foreclosed any disparate impact theory of liability under the ADEA.

I. ORIGINS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

During congressional debates regarding the Civil Rights Act of 1964, Congress requested a report from the secretary of labor on "factors which might result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected."[7] The secretary of labor, W. Willard Wirtz, complied with Congress's request and issued what is commonly known as the Wirtz Report. Congress passed the Age Discrimination in Employment Act of 1967[8] in response to the Wirtz Report's findings.[9] The Wirtz Report addressed four types of employment discrimination against older employees: (1) dislike or intolerant feelings unrelated to ability to do work; (2) setting of age limits beyond which employers will not consider older workers for

6. *Id.* at 242.

7. Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 U. RICH. L. REV. 757, 758 (1997) (quoting U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter WIRTZ REPORT]).

8. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2000).

9. Harper, *supra* note 7, at 757, 762.

positions; (3) consideration of facially neutral factors such as health, adaptability to new technology, and aptitude testing; and (4) "'institutional arrangements' which are 'designed to protect the employment of older workers while they remain in the work force.'"[10] Although the Report found that the first category of discrimination was not prevalent, it concluded that the other three categories of discrimination seemed to have greater prominence in the workplace.[11]

Scholars have dubbed the Report's second form of age discrimination, the arbitrary setting of age limits, as "statistical discrimination."[12] Although statistical discrimination may be economically sound to individual employers, the Report indicated that this type of differentiation between older and younger employees may be damaging to the aggregate economy.[13] Employers assumed that older employees were less productive and increased labor costs. As a result, older employees were considered less desirable and subject to widespread age discrimination.[14] The resulting "forced retirement, unemployment, and underemployment of many potentially productive older Americans, as well as the aggravation of the burden of public support for the elderly," indicated that age discrimination in the employment context was problematic for the economy as a whole.[15]

The Wirtz Report's third category addressed employment practices based on factors other than age. Despite being facially neutral, such practices sometimes had a disproportionate effect on older workers.[16] Factors in employment decisions such as "health, educational attainment, adaptation to new technology, and aptitude testing" were found to disproportionately affect older workers.[17] This type of discrimination, according to the Report, is particularly troubling because of the difficulty involved in discovering it.[18]

---

10. *Id.* at 758–61 (quoting WIRTZ REPORT, *supra* note 7, at 2, 15–17).

11. *Id.*

12. For discussion regarding statistical age discrimination, see, for example, Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659 (1972), and George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 500 (1995).

13. Harper, *supra* note 7, at 760.

14. *Id.* at 759–60.

15. *Id.* at 760.

16. *Id.* at 761.

17. *Id.*

18. *Id.*

The final category addressed in the Wirtz Report concerned programs that aimed, in theory, to protect older members of the workforce but, in practice, sometimes provided an even greater motivation for employers to discriminate against older workers.[19] For example, programs such as health insurance plans can increase costs to the employer as their employees age, thus providing an economic reason for employers consciously to reduce the average age of their employees.[20] Thus, although these programs might appear to benefit older workers, they may actually contribute to age discrimination by employers.

The Wirtz Report did not recommend that Congress prohibit all practices in the third and fourth categories. Rather, it considered factors in the third category to be demonstrative of "a relationship" between age and job performance.[21] But, even though the Report indicated some correlation between job performance and age, it also suggested that the scope of an age discrimination law would need to go beyond prohibiting overt discrimination to alleviate the impact that age discrimination could have on the aggregate economy.[22] Under the ADEA, the facially neutral factors from the Wirtz Report's third category are the focus of debate over the disparate impact theory of liability. Until *Smith v. City of Jackson*, neither Congress nor the Supreme Court had addressed the availability of disparate impact claims under the ADEA.[23] Nevertheless, in light of evolving Title VII jurisprudence, numerous courts had already recognized similar claims under the ADEA, a development explored more thoroughly in the next part of this Note.

19. *Id.* at 761–62.

20. *Id.*

21. *Id.* at 762 (quoting WIRTZ REPORT, *supra* note 7, at 2).

22. *Id.*

23. Smith v. City of Jackson, 544 U.S. 228, 230 (2005). The words "disparate impact" do not appear in the ADEA. *See* 29 U.S.C. §§ 621–634 (2000). In addition, prior to *Smith*, the Supreme Court had not opined on the issue. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA.").

II. DEVELOPMENT OF DISPARATE IMPACT THEORY PRIOR TO *SMITH*

A. Title VII Disparate Impact Theory

In *Griggs v. Duke Power Co.*,[24] the Supreme Court officially recognized a disparate impact theory of liability under Title VII for the first time.[25] Prior to the enactment of Title VII, Duke Power's workforce was segregated, with black employees working in only one of the five operating departments.[26] With the enactment of Title VII, Duke Power altered its policy to require that applicants have completed a high school education and have passed two aptitude tests to qualify for employment in any of the four operating departments previously limited to whites.[27] The Court in *Griggs* found that "[n]either [of the tests] was directed or intended to measure the ability to learn to perform a particular job or category of jobs."[28] The Court of Appeals had upheld the validity of the tests, finding that Duke Power had not had a discriminatory purpose in requiring the tests.[29] The Supreme Court, however, reversed the Fourth Circuit's decision, holding that Title VII prohibited not only employment actions that are motivated by prejudice against protected groups but also employment actions that have an adverse impact on protected groups.[30]

The Court limited the availability of the disparate impact theory of liability, however, by introducing the business necessity test.[31] Not all adverse impacts, the Court held, were actionable—only those that "b[ore] [no] demonstrable relationship to successful performance of the job[]" were prohibited.[32] The *Griggs* Court found that Congress's intent to prohibit employment actions that resulted in a disparate

24. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

25. *Id.* at 432.

26. *Id.* at 426–27.

27. *Id.* at 427.

28. *Id.* at 428.

29. Griggs v. Duke Power Co., 420 F.2d 1225, 1232 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971) ("Although . . . we concluded . . . that the educational and testing requirements adopted by the company continued the effects of . . . prior discrimination, . . . it seems reasonably clear that this requirement did have a genuine business purpose.").

30. *Griggs*, 401 U.S. at 431–32 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

31. *Id.* at 431.

32. *Id.*

impact, in addition to those that constituted disparate treatment, was apparent from the text of Title VII.[33] Because the tests required by Duke Power had a disparate impact on black applicants and did not "bear a demonstrable relationship" to job performance, Title VII prohibited such tests.[34]

In 1989, the Supreme Court again addressed the issue of disparate impact theory under Title VII in *Wards Cove Packing Co. v. Atonio*.[35] A group of nonwhite salmon cannery employees brought suit under Title VII claiming that several of the employer's hiring and promotion procedures, including nepotism, subjective hiring criteria, and a rehire preference, were racially discriminatory.[36] As in *Griggs*, the Court recognized the general validity of disparate impact claims under Title VII.[37]

The Court, however, also significantly changed the standard under which it would consider disparate impact claims.[38] Instead of applying the business necessity test announced in *Griggs*, the Court announced the business justification test.[39] Under the business justification test, employers were not required to show "that the challenged practice [was] 'essential' or 'indispensable' to the employer's business for it to pass muster."[40] Rather, the Court announced that "[t]he ultimate burden of [persuasion] remain[ed] . . . *at all times*" with the disparate impact plaintiff.[41] The defendant only had the burden of production—the employer only had to assert a particular business justification that could justify the disparate impact.[42] Specifically, plaintiffs were still required to prove that they suffered an adverse employment action "because of" the protected classification.[43] Yet, for disparate impact plaintiffs to successfully meet this new burden of persuasion, they also had to

33. *Id.*

34. *Id.*

35. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

36. *Id.* at 648–49.

37. *Id.* at 645–46 ("Under . . . the 'disparate-impact' theory, . . . a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate.").

38. *Id.* at 658–61.

39. *Id.* at 658.

40. *Id.* at 659.

41. *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997 (1988)).

42. *Id.* at 660.

43. *Id.*

prove that "other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate [hiring] interest[s]."[44] Unless the plaintiff could show that the employer could have served their legitimate hiring interest in a way that would not have a disparate impact on older workers, the plaintiff could not prevail.[45] The Court held that the employees in *Wards Cove* had failed to meet the more stringent requirements of the business justification test and reversed the Ninth Circuit's decision.[46]

Displeased with the decision in *Wards Cove*, Congress acted quickly to amend Title VII to match more closely the interpretation of disparate impact claims from *Griggs*.[47] First, Congress reenacted the business necessity test, legislatively overturning the more employer-friendly business justification test.[48] Second, Congress restored the burdens set forth in *Griggs*, requiring that the employer prove any business necessity defense it raised.[49] Finally, the Civil Rights Act of 1991 abolished the requirement, set forth in *Wards Cove*, that a disparate impact plaintiff identify the specific employment practice that caused the disparate impact.[50] Instead, a plaintiff could prevail on a disparate impact claim under Title VII by showing that the decisionmaking process as a whole resulted in a disparate impact on employees in a protected class.[51]

---

44. *Id.* (second and third alterations in original) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

45. *Id.*

46. *Id.* at 661.

47. Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625, 631 (1996).

48. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k)(1)(A) (2000) ("An unlawful employment practice based on disparate impact is established under this subchapter only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of [an unlawful classification] and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.").

49. For the language of the statute, see § 2000e-2(k)(1)(A)(i).

50. *See id.* § 2000e-2(k)(1)(B)(i) ("[T]he complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice."). For the business necessity test, see *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); for the business justification test, see *Wards Cove Packing Co.*, 490 U.S. at 659.

51. 42 U.S.C. § 2000e-2(k)(1)(B)(i).

B. ADEA Disparate Impact Theory

Following the Court's decision in *Griggs*, many courts interpreted that decision to apply to the ADEA, in addition to Title VII, and, accordingly, recognized disparate impact claims under the ADEA.[52] Among the first to do so was the Court of Appeals for the Second Circuit in *Geller v. Markham*.[53] In the *Geller* decision, the Second Circuit cited Supreme Court precedent as justification for applying the disparate impact theory of liability recognized under Title VII to the ADEA.[54] Not all courts, however, were so eager to apply Title VII's disparate impact liability under the ADEA.[55] Furthermore, not all Supreme Court Justices were amenable to such claims. Ten years after *Griggs*, in his dissent to the denial of certiorari in *Geller*, Justice Rehnquist opined that the ADEA, unlike Title VII, did not support disparate impact claims and noted that the Supreme Court had never actually addressed the issue.[56]

The standard used by courts that recognized disparate impact claims under the ADEA continued to evolve as the standard for evaluating such claims under Title VII changed. Indeed, despite the fact that *Griggs* and *Wards Cove* both construed Title VII, rather than the ADEA,[57] some courts continued to rely on these cases when evaluating disparate impact claims.[58] Following the *Griggs* decision, all courts to consider the issue recognized the availability of a

---

52. *See, e.g.*, EEOC v. Borden's Inc., 724 F.2d 1390, 1394–95 (9th Cir. 1984) (holding that a disparate impact claim exists under the ADEA); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983) (describing the elements of a prima facie case for disparate impact age discrimination); Geller v. Markham, 635 F.2d 1027, 1030 (2d Cir. 1980) (applying the principles of *Griggs* to hold employer liable when a fifty-five-year-old teacher was denied employment, in favor of a younger teacher, to avoid a higher pay grade).

53. 635 F.2d at 1027.

54. *Id.* at 1030 (citing Lorillard v. Pons, 434 U.S. 575, 584 (1978)).

55. *See, e.g.*, Adams v. Fla. Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001) ("[W]e find that disparate impact claims may not be brought under the ADEA . . . ."); Massarsky v. General Motors, Corp., 706 F.2d 111, 120 (3d Cir. 1983) ("Although the Second Circuit has expressly recognized the disparate impact doctrine in the ADEA context, this court has never ruled on whether a plaintiff can establish a violation of the Act by showing disparate impact alone." (citation omitted)); *see also* Herbert & Shelton, *supra* note 47, at 630 (citing cases which did not find disparate impact liability under the ADEA).

56. Markham v. Geller, 451 U.S. 945, 947 (1981) (Rehnquist, J., dissenting from the denial of cert.), *denying cert. to* 635 F.2d 1027 (2d Cir. 1980).

57. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645 (1989); Griggs v. Duke Power Co., 401 U.S. 424, 425 (1971).

58. Herbert & Shelton, *supra* note 47, at 631–34.

disparate impact theory of liability under the ADEA.[59] Such a view was justified by the similarities between Title VII and the ADEA.[60] Following the *Wards Cove* decision, many courts continued to recognize a disparate impact theory of liability under the ADEA, but applied the more employer-friendly business justification test to those claims.[61] The amendments to the Civil Rights Act which restored the more employee-friendly business necessity test from *Griggs* had little effect on disparate impact claims under the ADEA because courts declined to address the issue.[62]

In 1993, the Supreme Court addressed the developing ADEA disparate impact case law and asserted in *Hazen Paper Co. v. Biggins*[63] that it had never decided whether disparate impact claims were available under the ADEA.[64] In *Hazen*, an employee brought suit alleging that his employer fired him to keep his pension from vesting, thereby violating the ADEA.[65] The Court held that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."[66]

---

59. *E.g.*, Monroe v. United Airlines, Inc., 736 F.2d 394, 407 (7th Cir. 1984); EEOC v. Borden's, Inc., 724 F.2d 1390, 1394 (9th Cir. 1984); Allison v. W. Union Tel. Co., 680 F.2d 1318, 1323 (11th Cir. 1982).

60. *See, e.g.*, Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980) ("Although the ADEA did not adopt Title VII's procedural rules entirely, the rule permitting a case to be established by a showing of discriminatory impact or treatment cannot reasonably be viewed as merely procedural.").

61. *See, e.g.*, Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 953–54 (8th Cir. 2001) ("A plaintiff in a disparate impact case must first establish a prima facie case of disparate impact by identifying a specific employment practice and then presenting statistical evidence of a kind and degree sufficient to show that the practice in question caused the plaintiff to suffer adverse employment action because of his or her membership in a protected group."); Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1370 (2d Cir. 1989) ("'[T]he plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988))).

62. *See, e.g.*, Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1245 n.4 (7th Cir. 1992) ("[R]eversal is required in this appeal regardless of . . . whether the [Civil Rights Act of 1991] affects the ADEA at all."); Caron v. Scott Paper Co., 834 F. Supp. 33, 39 n.5 (D. Me. 1993) ("[I]t is unnecessary to reach the issue of the effect of the 1991 amendments to Title VII on ADEA claims."); Libront v. Columbus McKinnon Corp., No. 83-CV-858S, 1992 U.S. Dist. LEXIS 19029, at *8 n.2 (W.D.N.Y. Nov. 23, 1992) ("This Court need not presently decide whether the [Civil Rights Act of 1991] changes the burdens of proof in ADEA actions.").

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

64. *Id.* at 610 ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA.").

65. *Id.* at 606–07.

66. *Id.* at 609.

Because the employee alleged that his employer dismissed him to prevent his pension benefits from vesting, not on account of his age, the Court remanded the case for a jury to consider whether age was a motivating factor in the employee's termination.[67]

Following the decision in *Hazen*, a circuit split developed, with some courts not allowing disparate impact claims under the ADEA,[68] some allowing such claims,[69] and still others remaining undecided.[70] Although the Fifth Circuit had not addressed the issue until *Smith v. City of Jackson*,[71] its decision led the Supreme Court to definitively assert the existence of a disparate impact claim under the ADEA.[72]

III. *SMITH V. CITY OF JACKSON*

A. Fifth Circuit and Supreme Court Decisions

In October 1998, the city of Jackson, Mississippi enacted a plan to increase the salaries of all city employees.[73] One of the purposes of the pay raise plan was to make the salaries of city workers competitive with other public employers in the Southeast.[74] By

67. *Id.* at 610–12.

68. *See, e.g.*, Mullin v. Raytheon Co., 164 F.3d 696, 700–01 (1st Cir. 1999), *cert. denied*, 528 U.S. 811 (1999) (declining to recognize a disparate impact theory of liability under the ADEA); Maier v. Lucent Tech., Inc., 120 F.3d 730, 735 (7th Cir. 1997) ("We have held that [a disparate impact] theory of liability is not cognizable under the ADEA."); Ellis v. United Airlines, Inc., 73 F.3d 999, 1004 (10th Cir. 1996), *cert. denied*, 517 U.S. 1245 (1996) (holding that a plaintiff must prove that age was actually the motivating factor behind the adverse employment action).

69. *See, e.g.*, Smith v. Xerox Corp., 196 F.3d 358, 367 (2d Cir. 1999) (evaluating disparate impact claims based on age together with a disparate impact claim based on gender because "[t]his Court generally assesses claims brought under the ADEA identically to those brought pursuant to Title VII, including disparate impact claims"); Arnett v. Cal. Pub. Employees Ret. Sys., 179 F.3d 690, 697 (9th Cir. 1999) (following its own precedent expressly reaffirming disparate impact theory despite *Hazen* opinion); Dist. Council 37, AFSCME v. New York City Dep't of Parks and Recreation, 113 F.3d 347, 351 (2d Cir. 1997) (same); Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996) (same).

70. *See, e.g.*, Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996) ("We assume without deciding that disparate impact analysis applies to age discrimination claims."); Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union, 53 F.3d 135, 139 n.5 (6th Cir. 1995) ("There is considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory."); 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.").

71. Smith v. City of Jackson, 351 F.3d 183, 184 (5th Cir. 2003).

72. Smith v. City of Jackson, 544 U.S. 228, 231 (2005).

73. *Id.* at 231.

74. *Id.*

enacting the plan, the city hoped to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability."[75]

In May 1999, the city revised the plan.[76] Under the revised plan, the city granted police officers who had been with the department for less than five years proportionally higher raises than those who had been city police officers for five years or more.[77] Although 66.2 percent of officers under forty received more than a 10 percent increase in pay, only 45.3 percent of officers over forty received such raises.[78]

Due to the discrepancies between the raises which older officers and younger officers received, a group of Jackson police officers aged forty and above filed a suit under the ADEA, claiming both disparate treatment and disparate impact.[79] Petitioners claimed that the city's plan disproportionately benefited younger workers.[80] The district court found that petitioners had failed to show an unlawful discriminatory motive on the city's part and dismissed the disparate treatment claim.[81] The district court also dismissed the disparate impact claim, holding that the ADEA did not support disparate impact claims.[82] On appeal, the Fifth Circuit vacated the disparate treatment claim, remanding for further discovery on that issue, but affirmed the district court's holding regarding the disparate impact claim.[83] The United States Supreme Court granted the petition for certiorari on the disparate impact issue.[84] In *Smith v. City of Jackson*, the Supreme Court concluded that the ADEA did support a disparate

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 242.

79. Smith v. City of Jackson, Civ. A. No. 3:01-CV-367BN, 2002 U.S. Dist. LEXIS 27284, at *3–4 (S.D. Miss. Sept. 6, 2002), *vacated*, 351 F.3d 183 (5th Cir. 2003), *aff'd on other grounds*, 544 U.S. 228 (2005).

80. *Smith*, 544 U.S. at 231.

81. *Smith*, 2002 U.S. Dist. LEXIS 27284, at *13.

82. *Id.* at *17.

83. Smith v. City of Jackson, 351 F.3d 183, 184–85, 198 (5th Cir. 2003), *aff'd on other grounds*, 544 U.S. 228 (2005).

84. Smith v. City of Jackson, 541 U.S. 958 (2004).

impact claim, but affirmed the lower court's dismissal of the officer's disparate impact claim.[85]

In announcing the opinion of the Court, Justice Stevens's plurality opinion began by addressing the nexus between the ADEA and Title VII.[86] Justice Stevens explained that the ADEA makes it unlawful for an employer

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or] to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.[87]

Comparing relevant text, the use of "age" in the ADEA, rather than "race, color, religion, sex, or national origin,"[88] as in Title VII, is the only difference between § 623(a) of the ADEA and § 2000e-2(a) of Title VII.[89] Furthermore, both statutes contain an exception allowing "otherwise prohibited" employment practices if the guiding factor is a "bona fide occupational qualification" (hereinafter BFOQ).[90] The ADEA, however, has a more limited scope than Title VII.[91] In particular, the ADEA not only contains an exception for BFOQs, but also allows differential treatment based on "reasonable factors other than age" (hereinafter RFOA).[92]

Justice Stevens reasoned that when two statutes contain similar language, serve similar ends, and are enacted in close proximity to one another, Congress must have meant for the two statutes to have

---

85. *Smith*, 544 U.S. at 231–32.

86. *Id.* at 232.

87. *Id.* at 232–33 (citing Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (2000)).

88. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2(a) (2000).

89. *Compare* 29 U.S.C. § 623(a), *with* 42 U.S.C. § 2000e-2(a).

90. 29 U.S.C. § 623(f); 42 U.S.C. § 2000e-2(e). A BFOQ is a characteristic which is essentially required for an employee to do his or her job. For example, hiring a male actor to portray a male role is not prohibited sex discrimination. In contrast, a pilot does not necessarily need to be under a particular age. However, a pilot does need to be able to see. An employment policy requiring that qualification would likely have a disparate impact on older workers, given that such a requirement would be based on a "reasonable factor other than age," and therefore not prohibited by the ADEA.

91. *Compare* 29 U.S.C. § 623(f), *with* 42 U.S.C. § 2000e-2(e).

92. 29 U.S.C. § 623(f)(1) (2000).

the same general meaning.[93] Following from that premise, Justice Stevens relied on *Griggs*, *Hazen*, the Equal Employment Opportunity Commission (EEOC) and Department of Labor's interpretations of Title VII and the ADEA, and the inclusion of the RFOA provision in the ADEA to find that a disparate impact theory of liability is available under the ADEA.[94] For instance, the *Griggs* Court found that "Congress had 'directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation,'" and held that a plaintiff was not required to show discriminatory intent in order to recover under Title VII.[95] Justice Stevens argued that Congress likewise intended that the ADEA address the effects of employment practices.[96]

Beyond finding analogical support for a disparate impact cause of action under the ADEA, Justice Stevens also found independent indications that the ADEA allowed for liability under a disparate impact theory.[97] He noted that the Department of Labor, which originally drafted the ADEA, and the EEOC, which was the agency responsible for implementing the ADEA, had both recognized the availability of a disparate impact theory under the ADEA.[98]

Finally, Justice Stevens reasoned that the inclusion of an RFOA provision in the ADEA did not make sense unless a disparate impact theory of liability was cognizable under the Act.[99] If the ADEA was meant to allow only disparate treatment claims, Justice Stevens reasoned, the RFOA provision would have no effect because only employment policies which explicitly addressed age would be covered.[100] Under § 623(a), employers are prohibited from discriminating against employees on the basis of the employees' age.[101] The inclusion of a reasonable factor *other than age* exception is logical only if disparate impact claims are recognized under the ADEA.[102] Based on the Court's holding in *Griggs*, the EEOC and

93. Smith v. City of Jackson, 544 U.S. 228, 233 (2005).

94. *Id.* at 233–40.

95. *Id.* at 234 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

96. *Id.* at 235.

97. *Id.* at 236–38.

98. *Id.* at 239–40.

99. *Id.* at 238–39.

100. *See id.* at 239 ("Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion.").

101. *Id.* at 233.

102. *Id.* at 238–39.

Department of Labor's interpretations of both Title VII and the ADEA, and the inclusion of the RFOA provision, Justice Stevens reasoned that recovery was available for disparate impact claims under the ADEA.[103]

Although Justice Stevens held that recovery based on a disparate impact is allowable under the ADEA, he also held that disparate impact liability thereunder was much more limited than disparate impact liability under Title VII.[104] The addition of the "reasonable factor other than age" provision in the ADEA and the amendment to Title VII in the Civil Rights Act of 1991 led the Court to find that Congress intended the availability of disparate impact claims under the ADEA to be significantly more narrow.[105]

The Court highlighted the difference between the ADEA and Title VII by reference to the Civil Rights Act of 1991.[106] Following the Court's decision in *Wards Cove*, Congress amended Title VII to expand the scope of disparate impact liability under Title VII to its pre-*Wards Cove* level.[107] Congress, however, did not make these amendments to the ADEA.[108] The Court reasoned that, without the amendment to scale back the *Wards Cove* decision, the holding in *Wards Cove* governs disparate impact liability under the ADEA.[109] Additionally, the Court focused on the inclusion of the RFOA provision in the ADEA and its absence from Title VII.[110] The inclusion of the RFOA provision highlights the difference between the relevance of age as a factor in employment and the relevance of race, sex, religion, or other Title VII-protected classifications in employment practices.[111] Because, Justice Stevens reasoned, some entirely legitimate and necessary employment requirements will have a greater negative impact on older workers than on younger workers, the RFOA provision was necessary to account for the real impact that age can have on an employee.[112]

---

103. *Id.* at 239–40.

104. *Id.* at 240.

105. *Id.* at 240–41.

106. *Id.* at 240.

107. *Id.*; *see supra* note 50 and accompanying text.

108. *Smith*, 544 U.S. at 240.

109. *See id.* ("Hence, *Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA.").

110. *Id.*

111. *Id.*

112. *Id.* at 240–41.

In applying this rule, Justice Stevens found that the actual pay plan in Jackson, Mississippi did not violate the ADEA.[113] The city's plan based raises solely on position and seniority.[114] Though officers with less seniority did receive proportionately higher raises than those with more seniority, the city explained the difference based on their "perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market."[115] Justice Stevens found this justification reasonable, though he conceded that there may have been other reasonable ways to achieve the city's goal, making it clear that the Court was not using the business necessity test.[116] Instead, Justice Stevens was using a more employer-friendly reasonableness standard to determine the validity of disparate impact claims under the ADEA.[117]

Justices Antonin Scalia and Sandra Day O'Connor both concurred, separately, in the judgment. Justice Scalia concurred in the judgment and joined all of Stevens's opinion except the portion using *Griggs*, textual similarities between the ADEA and Title VII, and the existence of the RFOA provision in the ADEA as independent justifications for finding disparate impact liability under the ADEA.[118] Justice Scalia did agree that a disparate impact theory of liability was available under the ADEA, but believed that recognizing such claims was appropriate because the EEOC's construction of the statute deserved judicial deference.[119] The ADEA granted authority to the EEOC to set forth "'such rules and regulations as it may consider necessary or appropriate for carrying out' the ADEA."[120] Pursuant to the ADEA, the EEOC issued a regulation proclaiming that employment practices that had an adverse impact on individuals over the age of forty, but were based on a reasonable factor other than age, were acceptable under the ADEA only if they were justified as a

113. *Id.* at 241–42.

114. *Id.* at 242.

115. *Id.*

116. *Id.* at 243.

117. *Id.* The reasonableness standard the Court used in *Smith* has since been applied as the "business justification test." *See, e.g.*, Meachum v. Knolls Atomic Power Lab., 461 F.3d 134, 141 (2d Cir. 2006) ("The best reading of the text of the ADEA—in light of *City of Jackson* and *Wards Cove*—is that the plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable.").

118. *Smith*, 544 U.S. at 242–45 (Scalia, J., concurring).

119. *Id.*

120. *Id.* at 243 (quoting 29 U.S.C. § 628 (2000)).

business necessity.[121] Justice Scalia argued that "[e]ven under . . . unduly constrained standards of agency deference," the EEOC's interpretation of the ADEA to include a disparate impact claim warranted deference from the Court.[122] Therefore, in Justice Scalia's view, the EEOC's regulations indicating that there was a disparate impact claim under the ADEA ought to be controlling.[123]

Although Justice O'Connor also concurred in the judgment in *Smith*, she, along with Justices Kennedy and Thomas, would have affirmed the Court of Appeals's dismissal of the officers' claim because the ADEA does not allow for recovery based on a disparate impact theory of liability.[124] Justice O'Connor used the "ADEA's text, legislative history, and purposes" to conclude that "Congress did not intend the [ADEA] to authorize [disparate impact] claims."[125] Both § 623(a)(1) and § 623(a)(2), the two provisions in the ADEA that define conduct prohibited under the statute, forbid employment actions that have an adverse effect on an individual "because of such individual's age."[126] Justice O'Connor interpreted the inclusion of this language as Congress's intent to make employers liable for adverse actions against individuals only when those actions were "*motivated by* the individual's age."[127] In Justice O'Connor's view, paragraph (a)(2) did not mean that the ADEA supported a disparate impact claim but rather that any facially neutral policy had to be *intended* to have an adverse effect as a result of the employee's age to violate the ADEA.[128]

Additionally, Justice O'Connor interpreted the inclusion of the RFOA provision as Congress's intent to "'insure[] that employers [are] permitted to use neutral criteria' other than age even if this

121. *Id.* at 243–44.

122. *Id.* at 244–45 (citing United States v. Mead Corp., 533 U.S. 218 (2001)). According to the Court, "*Chevron* recognized that Congress . . . engages in express delegation of specific interpretive authority . . . ." *Mead*, 533 U.S. at 229 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)). "We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Id.* (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991)).

123. *Smith*, 544 U.S. at 244–47 (Scalia, J., concurring).

124. *Id.* at 248 (O'Connor, J., concurring in the judgment).

125. *Id.*

126. *Id.* at 248–49.

127. *Id.* at 249.

128. *Id.*

results in a disparate adverse impact on older workers."[129] The RFOA provision should be viewed, according to Justice O'Connor, as an indication that Congress intended to protect against age discrimination only where there was intentional discrimination.[130] Justice O'Connor also highlighted the legislative history of the ADEA as justification for her argument that the ADEA did not support a disparate impact theory of liability.[131] Because the Wirtz Report was the model for the ADEA, and that report indicated that intentionally disparate treatment of individuals based on age was the true concern, Justice O'Connor understood the ADEA to prohibit intentional age discrimination (or disparate treatment) but not to forbid employment practices that only have a disparate impact on older employees.[132]

B. Analysis of the Various Opinions in Smith

The Court's decision in *Smith* that a disparate impact theory of liability existed under the ADEA is well-supported. The inclusion of the RFOA provision, the similarities between the ADEA and Title VII, and the EEOC and Department of Labor's interpretations of the ADEA all indicate that Congress intended that a disparate impact theory of liability be available under the ADEA.

First, the inclusion of the RFOA provision in the ADEA, despite its exclusion from Title VII, supports a reading of the ADEA to allow for disparate impact claims.[133] As Justice Stevens pointed out in the plurality portion of his opinion, the RFOA provision would not be essential to the ADEA if Congress had not contemplated a disparate impact claim under the statute.[134] The structure of the statute supports Stevens's reasoning.[135]

---

129. *Id.* at 251 (quoting EEOC v. Wyoming, 460 U.S. 226, 232–33 (1983)).

130. *Id.*

131. *Id.* at 253–56.

132. *Id.* at 254–56.

133. *Id.* at 238–40 (majority opinion).

134. *Id.* at 238–39.

135. A disparate treatment claim requires both a classification on the basis of age and discriminatory intent, but disparate impact claims challenge facially neutral actions. *See* Brett Ira Johnson, Note, *Six of One, Half-Dozen of Another:* Mullin v. Raytheon Co. *as a Representative of Federal Circuit Courts Erroneously Distinguishing the ADEA from Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303, 305–06 (2000) (describing the elements of disparate treatment and disparate impact claims). Even when an action is otherwise prohibited, employers are not liable for actions based on a reasonable factor other than age (facially neutral actions). Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1) (2000).

liability in age discrimination cases than Title VII does when employer policies have a disparate impact on the classes it protects. If an employment policy has a disparate impact on women but that policy is based on a reasonable factor other than sex, the employer can only defend that policy under Title VII by showing that it was necessary for his or her business. If an employment policy is based on a reasonable factor other than age and has a disparate impact on older workers, the employer only has to show that the policy is reasonable to prevail under the ADEA. Despite this difference in language between the ADEA and Title VII, the ADEA supports a disparate impact theory of liability. As Justice Stevens pointed out in the plurality opinion, if the ADEA had not been written with the intent to support disparate impact claims, the very inclusion of the RFOA provision probably would not have been necessary.[141]

The other difference between the ADEA and Title VII, the amendment to Title VII enacted by the Civil Rights Act of 1991, also does not justify excluding disparate impact claims under the ADEA. Following *Wards Cove*, Congress acted to restore the business necessity test that had governed disparate impact claims under Title VII prior to the *Wards Cove* decision.[142] The 1991 amendments to Title VII were not accompanied by corresponding changes to the ADEA. However, *Wards Cove* was a Title VII decision, not a decision under the ADEA.[143] Given that, at the time of the Civil Rights Act of 1991, the Supreme Court had never specifically addressed disparate impact claims under the ADEA and that EEOC regulations regarding the ADEA specified that the business necessity test applied to disparate impact claims under the ADEA, Congress understandably amended only Title VII and not the ADEA.

Finally, the EEOC and Department of Labor's interpretations of the ADEA supporting a disparate impact theory of liability warrant significant deference from the Court.[144] Section 628 of the ADEA reads:

---

141. *Smith*, 544 U.S. at 238–39.

142. Sarah Benjes, Comment, Smith v. City of Jackson*: A Pretext of Victory for Employees*, 83 DENV. U. L. REV. 231, 236 (2005).

143. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 648 (1989) ("All . . . claims were advanced under both the disparate-treatment and disparate-impact theories of Title VII liability.").

144. *Smith*, 544 U.S. at 244–45 (Scalia, J., concurring).

> [T]he Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out [the Age Discrimination in Employment] chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.[145]

The Court has consistently granted deference to administrative agencies' reasonable statutory interpretations, particularly in situations in which Congress entrusted the agency to administer the program.[146] Agency implementations of ambiguous statutes generally receive wide latitude from courts unless those implementations are unreasonable.[147] Given that § 628 clearly confers upon the EEOC authority to administer the ADEA,[148] the agency's interpretation should be binding on the Court under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[149] and the EEOC's regulations implementing the ADEA make it clear that a disparate impact claim should be recognized.[150]

IV. THE IMPACT OF *SMITH*

Although the Court's recognition of a disparate impact claim under the ADEA is well-grounded, the restrictions that it placed on disparate impact claims under the ADEA rendered the theory of liability all but useless to employees. Under *Smith*, conduct that is

145. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 628 (2000).

146. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." (internal quotations and citations omitted)).

147. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996). The Court explained, "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.*

148. 29 U.S.C. § 628 (2000).

149. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. at 843–44; *see supra* note 146.

150. *See* Age Discrimination in Employment Act Interpretations, 29 C.F.R. § 1625.7(d) (2004).

otherwise prohibited because it has a disparate impact on older employees is permissible if the practice is based on a "reasonable factor other than age." An employer who invokes a "reasonable factor other than age" need only show a business justification for making decisions based on that "reasonable factor."

Lower courts applying the business justification test and reading the RFOA provision broadly, as required by *Smith*, have generally dismissed employees' complaints during the pleading stage.[151] These cases indicate two things: first, though courts have consistently refused to allow disparate impact claims under the ADEA, their methods of rejecting these claims have varied widely because the Court's reasoning in *Smith* was so vague; second, the Court's interpretation of the RFOA provision has rendered disparate impact claims futile.

The Court's holding in *Smith* has rendered success under the disparate impact theory of liability under the ADEA unlikely for two reasons: first, because the Court only vaguely defined the scope of the RFOA exception, and second, because the Court required extreme specificity in pointing out which employment practice resulted in the alleged disparate impact. The Court has required plaintiffs to identify a "specific employment practice."[152] However, to this point, disparate impact plaintiffs have had difficulty satisfying this stringent standard of specificity.[153] For example, in *Rizzo v. PPL Service Corp.*,[154] the plaintiff alleged that an internal investigation by her employer, which resulted in mostly older employees being terminated, was an employment practice that had a disparate impact on employees over forty.[155] The District Court for the Eastern District of Pennsylvania found, however, that the practice named by the plaintiff was insufficient: "Plaintiffs cannot show that the investigation was a specific employment practice that illegally disparately impacted older

151. Benjes, *supra* note 142, at 253.

152. Smith v. City of Jackson, 544 U.S. 228, 241 (2005).

153. Aida M. Alaka, *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has* Smith v. City of Jackson *Substantially Expanded the Rights of Older Workers under the ADEA?*, 70 ALB. L. REV. 143, 169–70 (2006) ("*Smith* could not salvage plaintiffs' disparate impact claims [because] plaintiffs failed to identify with specificity the policy or practice responsible for the alleged disparate impact . . . .").

154. Rizzo v. PPL Serv. Corp., No. 03-5779, No. 03-5780, No. 03-5781, 2005 U.S. Dist. LEXIS 11457 (E.D. Pa. June 10, 2005).

155. *Id.* at *13–14.

employees."[156] The level of specificity required under *Smith* can be exceedingly difficult for a plaintiff to meet because employees may not know the specific policies behind their employer's actions. Yet without being able to point to specific practices, plaintiffs cannot prevail.

In addition, many plaintiffs have been unsuccessful because courts have found an RFOA for the challenged employment practice. For example, in *Rollins v. Clear Creek Independent School District*,[157] the District Court for the Southern District of Texas held that the plaintiff did not have a viable disparate impact claim because the defendant's practices were based on a reasonable factor other than age: "Defendant based its policy on Plaintiff's retirement status and its desire to give nonretired teachers who were not drawing a retirement salary preference."[158] In *Rollins*, the plaintiff suffered an adverse employment action due to a policy that had a disparate impact on older workers. That policy was justified by the defendant's purely monetary concerns.[159] The court acknowledged that this outcome differed from what it would have been pre-*Smith*: "Under *Smith*, Defendant is not required to show that there are no other ways of remaining in compliance with the requirement, as it would under the Title VII business necessity test; it is simply required to show that 'the [method] selected was not unreasonable.'"[160] This broad interpretation of the RFOA provision severely limits the usefulness of the disparate impact theory of liability to ADEA plaintiffs.

In *Meachum v. Knolls Atomic Power Laboratory*,[161] the Second Circuit ruled against the plaintiff in a disparate impact claim brought under the ADEA.[162] Despite substantial evidence that a workforce reduction resulted in a disparate impact on older workers, the court

---

156. *Id.* at *14.

157. Rollins v. Clear Creek Indep. Sch. Dist., No. G-06-081, 2006 U.S. Dist. LEXIS 82511 (S.D. Tex. Nov. 13, 2006).

158. *Id.* at *17; *see also* Townsend v Weyerhaeuser Co., No. 04-C-563-C, 2005 U.S. Dist. LEXIS 11767, at *39 (W.D. Wis. June 13, 2005) ("[A]ssuming that reductions in force result in disproportionate numbers of over-40 employees being terminated, an employer would not incur liability under the ADEA as a matter of course. . . . Certainly, an employer that decides to terminate an employee to relieve itself of the burden of that employee's high salary or health care costs has based its decision on 'reasonable factors' other than the employee's age.").

159. *See Rollins*, 2006 U.S. Dist. LEXIS 82511, at *17–18 (discussing the validity of the school's choice to prefer those teachers who were not also drawing retirement salaries).

160. *Id.* at *18 (quoting Smith v. City of Jackson, 544 U.S. 228, 243 (2005)).

161. Meachum v. Knolls Atomic Power Lab., 461 F.3d 134 (2d Cir. 2006).

162. *Id.* at 138.

held that the plaintiff had not shown that the employer's actions were unreasonable.[163] In its holding, the Second Circuit acknowledged the high burden that *Smith* placed on ADEA plaintiffs claiming disparate impact discrimination:

> There is some force to this argument [that the business necessity test should be used], but it does not withstand [*Smith*], which emphasized that there are reasonable and permissible employment criteria that correlate with age. . . . It is therefore hard to see how an ADEA plaintiff can expect to prevail on a showing of disparate impact based on a factor that correlates with age without also demonstrating that the factor is unreasonable.[164]

Because of the holding in *Smith*, the RFOA exception must be interpreted broadly, meaning that ADEA plaintiffs essentially cannot succeed on a disparate impact theory of liability. Employers can justify employment practices that have a disparate impact on older workers with reasons that would be unacceptable if the employer tried to use those same reasons to justify employment practices that have a disparate impact on groups protected under Title VII. Although many legitimate employment practices could have a disparate impact on older workers, the Court's relaxation of the standard for judging such practices from necessity to simple reasonableness has created an easy way for employers to avoid liability under the ADEA.

Thus, the Court's decision in *Smith* has created an inconsistency between the Court's interpretations of Title VII and the ADEA. This is especially problematic given that the Court has repeatedly pointed to the textual similarities between the two statutes and used their interpretation of one statute to justify an outcome relating to the other. Under Title VII, employers cannot justify employment practices that have an adverse disparate impact on a protected group with purely financial justifications.[165] Rather, an employer must justify an employment action, if it has a disparate impact on a protected group, as a bona fide occupational qualification.[166] In addition to an

163. *Id.* at 146.

164. *Id.* at 142–43.

165. *See* Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 302 (N.D. Tex. 1981) (explaining that an employer cannot turn a protected status into a BFOQ by choosing to exploit that status for profitability).

166. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e) (2000); *see Wilson*, 517 F. Supp. at 297 (describing the BFOQ exception to Title VII).

The EEOC's interpretation of the RFOA provision in the Code of Federal Regulations reads:

> When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity.[173]

Furthermore, the EEOC explained that it had specifically rewritten the regulation "to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity."[174]

Disparate impact claims under the ADEA should succeed less often than disparate impact claims brought under Title VII. Age is more likely to be strongly correlated with a legitimate job qualification than race, religion or sex. The standards, however, that courts use in evaluating those claims should be the same. Age is more likely to be legitimately related to job performance than the statuses protected under Title VII.[175] But the approach that the *Smith* Court took regarding the RFOA provision has essentially barred nearly all disparate impact claims under the ADEA. The business necessity test used for disparate impact claims under Title VII could, however, allow for the legitimate difference between age and other statuses. For example, a requirement that employees have certain physical abilities could easily have a disparate impact on older employees, but that impact could be justified as a business necessity. In contrast, decisions not to hire employees who are more senior due to their higher salaries, which would also likely have a disparate impact on older employees, would be much harder to justify under 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."[176] Thus, using the business necessity test, those employment qualifications that are crucial to a particular occupation could be protected, even if they did have a disparate impact on older

---

173. 29 C.F.R. § 1625.7(d) (2004).

174. 46 Fed. Reg. 47725 (Sept. 29, 1981) (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971) and Laugesen v. Anaconda Corp., 510 F.2d 307 (6th Cir. 1975)).

175. For example, age is likely to be highly correlated with eyesight or mobility, which could be legitimate job qualifications.

176. *Smith*, 544 U.S. at 243.

workers, while preserving the effectiveness of the disparate impact theory of liability for plaintiffs.

CONCLUSION

The decision in *Smith v. City of Jackson* definitively established that the ADEA supports a disparate impact theory of liability.[177] But, with that decision, the Court also severely limited the availability of disparate impact claims by announcing an employer-friendly standard for evaluating the "reasonable factor other than age" provision. As a result, a decision that was an apparent victory for employees also announced limitations that have made it difficult for a plaintiff to prevail on a disparate impact claim under the ADEA.[178] In announcing those limitations, the Court provided an interpretation of disparate impact claims under the ADEA that is inconsistent with a proper reading of the statute.

177. *Id.* at 240.

178. *See generally* Benjes, *supra* note 142 (arguing that the Court's decision in *Smith* may vitiate plaintiffs' ability to prevail on disparate impact claims).