NOTE

AGE DISCRIMINATION, WAGES, AND ECONOMICS: WHAT JUDICIAL STANDARD?

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I. INTRODUCTION

Charges of age-based wage discrimination are not common. Nevertheless, they do occur, and they pose intriguing questions about how courts should diagnose and treat civil rights violations. The intrigue has been escalated by recent Supreme Court decisions modifying the standard procedures governing civil rights adjudication. Attempting to discover the appropriate standards for analyzing age-based wage discrimination necessarily leads one to examine the Supreme Court's recent actions regarding civil rights and how those actions affect age-discrimination litigation.

The judicial standards used to prevent age discrimination are not yet settled. A vigorous academic debate exists regarding whether prohibition of age discrimination should be considered a "disparate-impact" civil right. The final outcome of that debate will apply to analysis of age as it relates to pay equity. Nevertheless, almost all of the writings on the judicial standards address discharges, promotions, or hiring—but not wages. Uniform standards, or at least a uniform philosophy, is required for both *discharge* and *compensation differentiation* cases; otherwise the law could be circumvented by substituting one type of age discrimination for the other.[1] This Note reviews the existing judicial standards that are or could be applied to age discrimination cases, while keeping an eye on the pay equity concerns of older workers. It concludes that a modification to current judicial standards for analyzing age discrimination is required.

Part II of this Note describes the statutory basis for prohibiting age discrimination, and it contains an overview of how the

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1. For example, an employer could reduce an employee's wage by eighty percent rather than discharging him. The effect would be practically equivalent.

judicial standards for enforcing the statute have been applied. Parts III and IV address the two primary judicial constructs for analyzing discrimination cases: the disparate treatment model and the disparate impact model. These parts review the models to determine whether or to what extent the models are applicable to age-based wage discrimination. Part V discusses a recent case decided in the Court of Appeals for the Seventh Circuit. The case serves as a prod to introduce a modification to existing standards of judicial analysis for reviewing age discrimination cases. The modification is outlined in Part VI.

II. THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 AND THE JUDICIAL STANDARDS OF ENFORCEMENT

Following a decision not to include age as one of the protected[2] classifications under Title VII of the Civil Rights Act of 1964,[3] Congress commissioned the Secretary of Labor to study employment discrimination with regard to older workers.[4] Soon after Secretary Wirtz submitted his report, Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA).[5] The Act protects older persons from discrimination by employers, employment agencies, and labor organizations.[6]

Age was not included as part of Title VII because it is distinct from other characteristics, such as race or gender, that may lead to unjust employment discrimination. Although the timing varies significantly from individual to individual, at some point in almost everyone's life, age affects the ability to work. At the time of its enactment, the ADEA was intended primarily as a protection to persons whose ages were within a range suscepti-

2. Some take offense at the notion that identifiable groups are singled out for *protection*, as if in some condescending way the group is composed of inherently weaker persons. *See* Alan Keyes, Speech delivered at the Ninth Annual Federalist Society Symposium, Stanford, Cal. Mar. 16, 1990 (forthcoming in 14 HARV. J.L. & PUB. POL'Y — (1991)). The term *protected* is used here as a term of art only.

3. The Title VII classifications include race, color, religion, sex, and national origin. *See* Civil Rights Act of 1964, 42 U.S.C. 2000e to 2000e-17, 2000e-2(a)(1) (1982).

4. *See* U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT (1965) (Secretary Wirtz's report); *see also* Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 381 (1976) (arguing that ADEA is an independent statutory scheme, not a simple copy of Title VII) [hereinafter Harvard Note].

5. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987)).

6. *See* 29 U.S.C. § 623(a)-(c) (1982 & Supp. V 1987). "Employer" is used throughout this Note for convenience, but in most of the situations discussed, any of the three organizations could be held to the same standards.

ble to discrimination but whose aging had not significantly affected their ability to work. Persons were protected if they were at least forty years of age but not more than sixty-five. In 1986, the coverage of the Act was expanded for most covered employees to include *all* ages greater than or equal to forty.[7] Because of this expanded coverage, the ADEA continues to prohibit employment discrimination even after age has affected the ability to work for most people. Tension arises when age affects the ability to work and an employer is compelled to take action despite employment protection for the older workers.

The stated purpose of the ADEA is "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."[8] The Act is designed to assure that chronological age alone will not be used as an arbitrary cut-off or classification of ability. The stated purpose implicitly admits that age can have an effect on the ability to work, and it suggests that employers and employees are to work together to resolve the "real" difficulties caused by aging and to dispel the "illusory" difficulties of age.[9] At the time of the ADEA's enactment, education was seen as the foremost and primary method of alleviating age discrimination.[10]

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7. *See* 29 U.S.C. § 631(a). The initial ADEA protected only those persons at least forty and less than sixty-five. In 1978, ADEA was amended to include up to age seventy because reports indicated that many persons were still highly productive up to that age. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978) (codified as amended at 29 U.S.C. § 631(a) (1982 & Supp. V 1987)). In 1986, the final amendment to the age range set no upper age limit for most covered employees. *See* Act of Oct. 31, 1986, Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 3342, 3344 (1986) (codified as amended at 29 U.S.C. § 631(a) (Supp. V 1987)) (some transitional exceptions were allowed for tenured professors, law enforcement officers, and firefighters). For purposes of this Note, "older workers" refers to persons older than forty.

8. 29 U.S.C. § 621(b) (1982).

9. 113 CONG. REC. 31,249 (1967) (quoting S. REP. No. 723, 90th Cong., 1st Sess. 1 (1967)).

10. Following the statement of purpose, ADEA includes a requirement for an "[e]ducation and research program." 29 U.S.C. § 622 (1982).

> While the bill includes enforcement procedures which are adopted from the Fair Labor Standards Act, it is the hope of the sponsors of this legislation [ADEA] that such procedures will not be needed very often. Rather, it is the fact that our national policy as declared by this bill will be to stop invidious distinctions in employment because of age. Everyone who testified at our hearings felt that the greatest need in this area was to educate employers to the facts—facts which show that older workers are at least as productive as younger workers and that on average they stay with their employers for a longer period of time.

The Age Discrimination in Employment Act prohibits age-based wage discrimination. Wage discrimination is mentioned twice in the statute. The first reference is included as part of the primary prohibitions of the Act:

> It shall be unlawful . . . 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 . . . .[11]

The second reference follows shortly after the first:

> It shall be unlawful . . . to reduce the *wage rate* of any employee in order to comply with this chapter.[12]

The first prohibition against discriminatory compensation refers to what one might generally consider "wage discrimination," that is, compensating older workers at a lesser rate than younger workers. Almost all cases of wage discrimination arise under this first reference. The second prohibition is taken *in haec verba* from a provision of the Equal Pay Act.[13] Its purpose as part of the Equal Pay Act is to prevent employers from reducing the wages of higher paid (male) employees to the level of lower paid (female) employees to comply with the mandate of equal compensation. As applied to ADEA cases, an employer cannot lower the salary of unprotected younger employees to match the salaries of the older protected employees.

Part of the discrimination believed to affect older workers is wage "exploitation" that occurs as a result of an older worker's disadvantage, compared with younger workers, in obtaining substitute employment. Such exploitation may be based on eiether of two factors. First, after years of working for the same firm, an older worker may have become very valuable to a company, but his skills are firm-specific; that is, his skills are not easily used by another company. Second, older workers searching for substitute employment may face more difficulties than are faced by younger employment-seekers because of miscon-

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113 CONG. REC. 31,253 (1967) (remarks of Texas Senator Yarborough, one of the principal sponsors of ADEA).

11. 29 U.S.C. § 623(a)(1) (1982) (emphasis added). This part of ADEA is taken verbatim from Title VII except that "age" replaces the categories of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1982).

12. 29 U.S.C. § 623(a)(3) (emphasis added).

13. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (1982) (1963 amendment to the Fair Labor Standards Act of 1938)).

ceptions or stereotypes about age. The profit-maximizing employer, either consciously or unconsciously, may lower the wage of an older worker to a level just above the point at which the employee would seek outside employment—well below his actual value to the company.

Four different mechanisms have been discussed as structures to deter the "exploitation" of older workers: (1) the market, (2) unionism and collective bargaining, (3) direct regulatory intervention, and (4) employee participation.[14] Although the purpose of this Note is not to decide which of these systems best prevents employers from taking advantage of older workers, it is essential to recognize that more than one method may be pursued at the same time. This Note addresses only how courts ought to apply the "direct regulatory intervention" imposed by the ADEA. Fine-tuning the judicial standards may not resolve all (or even most) of the real or perceived difficulties facing older workers, but such fine tuning is necessary under the current statutory regime. The final outcome of this Note implicitly illustrates the inherent weakness of attempting to cure age-based wage discrimination through direct governmental intervention.

It is instructive to note that age classifications have not been considered a suspect class—as race classifications have been—under the Constitution.[15] In *Murgia v. Massachusetts Board of Retirement*,[16] the Supreme Court held that explicit age classifications should be analyzed using criteria different from race classifications under the Equal Protection Clause.[17] The Court listed three factors that distinguished age discrimination: Older persons (1) "have not been subjected to a 'history of purposeful unequal treatment' "; (2) "have not been discriminated

14. *See generally* P. WEILER, THE LAW AT WORK: PAST AND FUTURE OF LABOR AND EMPLOYMENT LAW (forthcoming 1990). For leading discussions of the general labor market theories, see Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984) (defending the market); Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1 (1983) (same); R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? (1984) (defending unionism); Weiler, *Promises to Keep*, 96 HARV. L. REV. 1769 (1983); MacIntosh, *Employment Discrimination: An Economic Perspective*, 10 OTTAWA L. REV. 275 (1987) (discussing direct governmental regulation in the labor market); P. WEILER, *supra* (advocating employee participation).

15. *See* Harvard Note, *supra* note 4, at 384-87 (citing Murgia v. Massachusetts Bd. of Retirement, 427 U.S. 307 (1976) (upholding mandatory retirement of police officers at age fifty)).

16. 427 U.S. 307 (1976).

17. U.S. CONST. amend. XIV ("nor deny to any person . . . the equal protection of the laws").

against 'on the basis of stereotyped characteristics not truly indicative of their abilities,' thus suggesting that age is an inherently more job-related characteristic than race"; and (3) "do not constitute a 'discrete and insular' minority" because "aging is a process which affects everyone in society."[18] The Supreme Court's reasons for declining to grant constitutional protection to older workers as a group illustrate some of the arguable distinctions between the special protections afforded to older members of society under the ADEA when compared with Title VII protections for racial minorities and women.[19]

The prohibitions in the ADEA and Title VII contain almost identical language, and some argue that because the two statutes are so similar, the judicial standards used to enforce them should be nearly identical.[20] The courts have enforced Title VII under two standards: disparate treatment and disparate impact. The disparate treatment standard requires that the plaintiff demonstrate the employer's discriminatory motive or intent. The disparate impact standard allows a plaintiff to use statistics—without a showing of motive or intent—to demonstrate that the employer's action had a disproportionate, adverse effect on a protected group. It follows, according to some authors, that the Title VII disparate impact model should be used for ADEA cases.[21] Although courts have readily applied a disparate treatment standard in ADEA cases, many courts are cautiously analyzing the potential effects of using the disparate impact standard.[22] The Supreme Court has yet to rule on the issue.

Several general legislative histories of the ADEA have been compiled,[23] and some authors have attempted to justify or to

18. Harvard Note, *supra* note 4, at 386 (quoting *Murgia*, 427 U.S. at 313).

19. *See generally id.*

20. *See, e.g.*, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038, 1039 (1984) [hereinafter Minnesota Note]. The majority of written academic opinion, however, argues that the differences between age discrimination and Title VII discrimination are sufficient to require independent judicial interpretations and standards. *See id.* at 1039 n.9 (citing multiple sources); Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982) (arguing that disparate impact should be used only to remedy historically disadvantaged groups) [hereinafter Stanford Note].

21. *See* Minnesota Note, *supra* note 20; Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

22. *See infra* notes 79-81 and accompanying text.

23. *See* Harvard Note, *supra* note 4 (comprehensive review of the legislative history and intent of ADEA); Doppelt & Takefman, *The Retirement-Plan Exemption in the Age Discrimination in Employment Act of 1967: Will the Exception Swallow the Rule?*, 53 CHI.-KENT L.

reject use of the disparate impact theory based on the ADEA's legislative history.[24] The attempt is futile. The Act was passed in 1967—four years before the *Griggs*[25] decision ensconced the "disparate impact" standard in Title VII litigation. The inherent difficulties of projecting legislative intent beyond the words of a particular statute are often insurmountable, even when analyzing whether the drafters meant to adopt a legal standard that *existed* at the time of the act's passage. "Disparate impact" did not exist as a standard when the ADEA was enacted. Using the construct of historical legislative intent to determine whether the framers of the ADEA meant to include the use of the disparate impact standard is therefore much like asking whether Congress was omniscient.[26]

III. The Disparate Treatment Model

The disparate treatment model is a judicially created framework of analysis developed in the context of Title VII litigation. The model is well chronicled in many court opinions and academic writings. Courts have readily accepted it as a standard under the ADEA.

The initial step for the ADEA plaintiff pursuing a disparate

Rev. 597 (1976) (focusing primarily on the exemption from ADEA for employee benefit plans); Note, *Mandatory Retirement and the Age Discrimination in Employment Act of 1967*, 1977 U. Ill. L.F. 927 (focuses primarily on the exemption from ADEA for employee benefit plans); J. Kalet, Age Discrimination in Employment Law 1-5 (1986) (short general overview of legislative history).

Most of the legislative histories rely on a few primary sources, such as, 113 Cong. Rec. 31,248-57 (1967); 1967 U.S. Code Cong. and Adm. News 2213; S. Rep. No. 723, 90th Cong., 1st Sess. (1967); H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967); *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. (1967); *Age Discrimination in Employment: Hearing on Age Discrimination Bills Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90th Cong., 1st Sess. (1967); Pub. Papers of the Presidents of the United States—Lyndon B. Johnson, 1967, Book I, at 32 (1968) ("Special Message to the Congress Proposing Programs for Older Americans" delivered January 23, 1967).

24. *See* Minnesota Note, *supra* note 20, at 1053-56 (arguing that the legislative history supports use of the disparate impact standard); Schneiderman, *The Law of Age Discrimination: Disparate Treatment and Disparate Impact*, in Age Discrimination 181, 208-09 (1982) (arguing that legislative history indicates that disparate impact standard should not be used in ADEA cases).

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

26. Some might argue that congressional comments establish a structure in the legislative record that extends beyond statutory language and that this structure somehow provides answers about how to address new questions of interpretation and enforcement as they arise. Even if this argument were accepted, the structure established by the congressional commentary on ADEA is unclear regarding the disparate impact issue.

treatment claim is to present a prima facie case of discrimination. The plaintiff may establish a prima facie case with direct evidence of discrimination,[27] but such evidence is seldom obtained by plaintiffs—most defendants do not leave trails of evidence that reveal overt age discrimination. The more common route for establishing a prima facie case is to create an inference of discrimination using circumstantial evidence. In Title VII litigation, *McDonnell Douglas Corp. v. Green*[28] outlines how to create a (rebuttable) inference of discrimination, and the basic *McDonnell Douglas* regime has been adopted in ADEA litigation.[29]

The specific *McDonnell Douglas* criteria for establishing a prima facie case have been modified in many ways to meet the circumstances of individual cases. The plaintiff's initial prima facie case in a wage discrimination suit would consist of something akin to the following: (1) the plaintiff was at least forty years old, (2) the plaintiff was adversely affected by the defendant's action with regard to his compensation, and (3) younger employees who were performing a similar quantity and quality of work were not subject to the adverse effect.[30]

Once a plaintiff establishes a prima facie case of wage discrimination, the defendant may rebut the inference by presenting a legitimate explanation for the alleged discriminatory action. In addition to legitimate explanation, the ADEA contains four exceptions, which can be used as defenses and which

27. *See* Wilson v. Popp Yarn Corp., 680 F. Supp. 208, 212 (W.D.N.C. 1988) ("Plaintiff may show that he was treated unfairly because of his age . . . by any direct . . . evidence relevant to and sufficiently probative of the issue . . . ." (citing Lovelace v. Sherwin Williams Co., 681 F.2d 230, 239 (4th Cir. 1982)); *cf.* Slack v. Havens, 7 F.E.P. 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975) (Title VII race discrimination case).

28. 411 U.S. 792, 802 (1973) (prima facie case established by showing that (i) plaintiff is in protected class, (ii) plaintiff applied and was qualified for open position, (iii) plaintiff was rejected despite qualifications, and (iv) position remained open and employer sought other candidates with same qualifications).

29. Under the *McDonnell Douglas* burden-shifting regime, plaintiff demonstrates a prima facie case and establishes an inference of discrimination. Defendant is then required to present (without proving) a legitimate nondiscriminatory reason for the action charged as discrimination. Plaintiff then has the opportunity to respond by showing that the defendant's explanation is only a pretext for discrimination.

30. *Cf. Wilson*, 680 F. Supp. at 213; Hardin v. Champion Int'l Corp., 685 F. Supp. 527, 530 (1987) (to present prima facie case plaintiff must "show that (1) he was in the protected age group; (2) he was demoted; (3) at the time of his demotion he was performing his job at a level that met his employer's legitimate expectations; and (4) following his demotion he was replaced by someone of comparable qualifications outside the protected class" (citing Equal Employment Opportunity Comm'n v. Western Electric Corp., 713 F.2d 1011, 1014 (4th Cir. 1983)).

allow employers to treat older workers in ways that are different from the ways they treat other workers: (1) reasonable factors other than age (RFOAs),[31] (2) bona fide occupational qualifications (BFOQs),[32] (3) seniority or benefit plans,[33] and (4) good cause.[34] In wage discrimination cases, the essence of most "explanations" or justifications given by the defendants are related to economic considerations.[35]

The case law is confused about whether or when economic considerations are RFOAs or legitimate explanations that rebut a prima facie case of disparate treatment. What appears to be the general, albeit unsettled, rule for discharges or other practices excluding persons from employment is that evidence of economic considerations is not sufficient to justify differential treatment of older workers.[36] In *Dace v. ACF Industries*,[37] a plaintiff claimed that he was demoted from his position as a supervi-

31. *See* 29 U.S.C. § 623(f)(1) ("[i]t shall not be unlawful . . . where the differentiation is based on reasonable factors other than age").

32. *See id.* ("It shall not be unlawful . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business"). The BFOQ defense would rarely, if ever, be employed in a wage discrimination claim. If some particular age is a BFOQ, the person attaining that age would be discharged or not hired rather than receiving differential wage treatment.

33. *See id.* § 623(f)(2) ("It shall not be unlawful . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this subchapter . . . ."). The Supreme Court recently decided a case addressing this exemption. *See* Public Employees Retirement System v. Betts, 109 S. Ct. 2854 (1989). The Supreme Court made it clear that the exception to ADEA for bona fide benefit plans is not contingent upon a showing that costs justify the differential treatment of older persons in the plan. The costs of allowing older workers to participate in a plan do justify differential treatment, and other parts of bona fide plans—even if they have no cost justification—are allowed so long as the plan is not a "subterfuge" (in its "traditional" meaning) to evade the purposes of the Act. *See id.* at 2862-65.

34. *See id.* § 623(f)(3) ("It shall not be unlawful . . . to discharge or otherwise discipline an individual for good cause."). This clause resembles language found in many collective bargaining agreements that allow dismissal for "just cause."

35. *See, e.g.*, Green v. Edward J. Bettinger Co., 608 F. Supp. 35, 42 (E.D. Pa. 1984) (holding that an employer was "eminently reasonable" in reducing plaintiff's compensation "to maintain an appropriate relationship between plaintiff's compensation and the results of her efforts, [and] to rationalize the compensation schedule in light of the changed circumstances").

36. *See* Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318 (1987) ("cost containment has not generally been accepted as a 'reasonable factor other than age' . . ."). An often cited example of the general rule is Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978), *aff'd in part, rev'd in part*, 608 F.2d 1369 (2d Cir. 1979) (unpublished opinion). Plaintiff was discharged because of the high salary that "she had attained as a result of raises given to her during her many years of work." *Id.* at 728. The court explained that plaintiff's discharge violated ADEA: "[E]conomic savings and expectation of longer future service are directly related to an employee's age . . . ." *Id.*

37. 722 F.2d 374 (8th Cir. 1983), *aff'd on rehearing*, 728 F.2d 976 (1984).

sor to that of an hourly-paid factory worker because of the money that the employer would save by demoting someone with his seniority, that is, someone with his salary.[38] The trial court dismissed the plaintiff's action (despite the general rule) because in its view the circumstantial evidence could give rise to an inference of profit maximization only, not age discrimination.

> [P]laintiff has sought to introduce circumstantial evidence based upon the *seniority* achieved by plaintiff, that cost was the primary factor leading to the adverse action taken against him. From this, plaintiff would have the jury further infer that age was the true motivation. This would require an inference upon an inference, and one the Court believes does not logically follow of necessity.[39]

The appellate court overturned the lower court's ruling and concluded that "[i]f the existence of such higher salaries can be used to justify discharging older employees, then the purpose of ADEA will be defeated."[40] The appellate court rigidly adhered to the rule that differential treatment of employees based on salary levels is equivalent to differential treatment based on age, which violates the ADEA.

Dace and other similar disparate treatment cases are founded upon a circumstantial inference of discriminatory animus, even though they were not the result of "evil" intent; rather, they resulted from a desire to effectuate cost reductions by discharging highly paid employees. Although an employer's "true" motives may be economic, when courts put circumstantial evidence through the disparate treatment machine, they sometimes infer that discriminatory motives are behind the employer's actions. Some version of this machinery is necessary because of the evidentiary difficulties that plaintiffs face in proving age discrimination.

The question of whether economic considerations should be a legitimate defense against circumstantially established allegations of discriminatory intent has not been uniformly answered.

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38. *See id.* at 375.

39. *Id.* at 378 (quoting the trial court opinion, Dace v. ACF Indus., 553 F. Supp. 545, 546 (E.D. Mo. 1982) (emphasis in original)).

40. *Id.* (quoting Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983)). Interestingly, the court relied upon the reasoning of disparate impact cases to reverse the trial court's dismissal of a disparate treatment claim. Judge Easterbrook, in dissent, later chastises his own court for such "scrambling" of the two theories. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1215 (7th Cir. 1987) (Easterbrook, J., dissenting).

Despite what appears to be a general rule disallowing a cost defense to defeat an inference of intentional discrimination, the courts are not unanimous.[41] In 1985, the Court of Appeals for the Seventh Circuit decided *Tice v. Lampert Yard, Inc.*, a case in which an employer closed a facility because of financial losses.[42] A fifty-seven-year-old plaintiff with extensive seniority argued that the employer had an obligation to "bump" a less senior employee at another facility so that he could continue working.[43] The court held that even if the plaintiff had presented a prima facie case of age discrimination, which he had not, the employer's economic considerations were valid reasons for the plaintiff's termination. "The ADEA mandates that an employer reach employment decisions without regard to age, but it does not place an affirmative duty upon an employer to accord special treatment to members of the protected group."[44]

In *Diamantopulos v. Brookside Corp.*, another example contrary to the general rule, the plaintiff was a job applicant who was denied employment.[45] The sixty-one-year-old plaintiff had indicated as an applicant for a supervisory position that he would accept an annual salary of $54,000. A thirty-nine-year-old applicant agreed to start at $36,000.[46] The employer chose the younger applicant. The plaintiff presented a prima facie case, and the employer responded with the obvious economic con-

41. *See, e.g.*, Wilson v. Popp Yarn Corp., 680 F. Supp. 208 (W.D.N.C. 1988). In *Wilson*, the employer made statements indicating "that plaintiff was too expensive and [that the employer] might hire a less experienced employee to save costs." *Id.* at 212. The court found that the statements did not "raise a genuine issue of fact on the question of discrimination. . . . [T]here is no indication whatsoever that Plaintiff's *age*, rather than the fact that Plaintiff was earning the highest salary of anyone in the company, older or younger, was the reason he was fired." *Id.* (emphasis in original).

The Court of Appeals for the Sixth Circuit identified a two-tier test for determining whether a failing company was justified in imposing retirement upon its oldest workers (in violation of the general rule): (1) Is the necessity for the reductions "drastic" and "real?" (2) Are the actions the least-detrimental alternative available to achieve the necessary cost containment? Equal Employment Opportunity Comm'n v. Chrysler Corp., 733 F.2d 1210 (7th Cir. 1985) (rejecting Chrysler's claim that its forced retirement could be based on economic grounds; other less-detrimental alternatives existed).

42. 761 F.2d 1210 (7th Cir. 1985).

43. *Id.* at 1217.

44. *Id.* (quoting Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982)). The court also declared that "ADEA was not intended to legislate seniority rights where none exist in the contract." *Id.*

45. 683 F. Supp. 322 (D. Conn. 1988).

46. *See id.* at 327.

siderations that led to its actions.[47] The court accepted the economic considerations as a rebuttal to the inference of discrimination, and the plaintiff was not able to show that the cost containment was a "pretext" for discrimination.

> Where economic considerations are not a proxy for age, . . . such factors may constitute legitimate, non-discriminatory reasons justifying an employer's actions. An actionable ADEA claim cannot be premised on the mere fact that higher salaried workers were terminated because a person may not be within the ADEA protected class yet still receive a large salary because of particular qualifications, merit increases, or long tenure.[48]

Nevertheless, the court also commented that "[e]conomic considerations which are simply a result of employing older employees do not constitute legitimate, non-discriminatory reasons for either a failure to hire them or their discharge."[49] The court said that these situations (the general rule) could be distinguished from *Tice* because they were based on the notion that the employer's consideration of economics were *sub rosa* attempts to discriminate. In this case, the defendant was not attempting to cover up discrimination; age was simply not a factor in the decision.[50] The plaintiff presented a prima facie case of disparate treatment that was rebutted with a reasonable factor other than age—the cost of hiring.

Cases of age-based wage discrimination do not occur often in the disparate treatment setting. A logical explanation for this is apparent: Most employees would not want to sue their current employer to improve their wage rate. Some combination of other mechanisms, such as the market, collective bargaining, or employee participation, may provide a more effective recourse for deferring wage discrimination. Nevertheless, the basic *McDonnell Douglas* framework seems to function well procedurally

47. *See id.*

48. *Id.* at 329 (footnote and citation omitted).

49. *Id.* at 328 (citing Equal Employment Opportunity Comm'n v. City of Altoona, 723 F.2d 4, 7 (3d Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) (economic factors cannot be used to justify involuntary retirements); Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 755 (7th Cir. 1982), *cert. denied*, 464 U.S. 992 (1983) (cost factors do not justify mandatory retirement age); Hahn v. City of Buffalo, 596 F. Supp. 939, 953 (W.D.N.Y. 1984), *aff'd*, 770 F.2d 12 (2d Cir. 1985) (hiring based on projected longevity of employment to obtain cost effective work force does not justify age discrimination); Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 716 (1978) (cost-justification defense not available in Title VII action involving employer requiring females to make larger contribution to pension fund)).

50. *See id.* at 329 n.4.

when cases are brought before the courts, and virtually all courts have adopted it. The primary issue that remains unresolved is whether or when economic considerations justify differential treatment of older employees. This issue will arise again in the discussion of the disparate impact standard below, and it will be discussed extensively in Part V of this Note.

IV. The Disparate Impact Model

The disparate impact model, like the disparate treatment model, is a judicially created legal framework designed to enforce Title VII protections against "discrimination on the basis of race, color, religion, sex, or national origin."[51] The primary distinction between the disparate treatment and disparate impact standards is that the treatment standard requires a showing of motive or intent while the impact standard requires a showing of discriminatory *effect* only. The watershed case that first defined the impact standard was *Griggs v. Duke Power Co.*,[52] in which the Supreme Court unanimously declared that the unintentional discriminatory consequences of an employer's actions may violate Title VII.

A plaintiff in a disparate impact case begins by identifying some specific test, device, or practice[53] that has an adverse effect that "falls more harshly" upon a protected group of which the plaintiff is a member.[54] Once the plaintiff establishes a

51. 42 U.S.C. 2000e-2(a) (1982).

52. 401 U.S. 424 (1971). The *Griggs* Court approved the disparate impact model to remedy the disproportionate effects upon black applicants caused by aptitude testing and a requirement of high school diplomas. For a general discussion of the disparate impact theory under Title VII, see Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297 (1987).

53. This requirement of specificity was recently emphasized in the Title VII context by the Supreme Court in Ward's Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2124 (1989) (plaintiff must identify specific practice or practices that caused the discriminatory results). *See also* Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2788 (1988). The Supreme Court in *Atonio* settled some of the questions that had lingered in Title VII litigation since its inception in 1971. *See generally* Recent Development, 13 Harv. J.L. & Pub. Pol'y 383 (1990) (discussing the three primary holdings of *Atonio*: (1) plaintiff must specifically identify the neutral practice with an adverse effect, (2) statistical showing must be based on the relevant labor pool, and (3) employer has burden of producing justification rather than burden of persuasion). The issues ultimately may not have been resolved by the Court. Congress is considering legislation explicitly intended to overturn the *Atonio* ruling. *See* Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess. (1990) (pending legislation).

54. International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977). In *Atonio*, the Court required the plaintiff's statistics to compare the effect of the alleged discriminatory policy with the "relevant qualified labor market." *See Atonio*, 109 S. Ct. at 2122.

prima facie case, the employer may rebut the inference of discrimination by producing[55] a reasonable explanation for the disparate effect. The employer can justify a neutral practice if it is "job related" or a "business necessity."[56] If so justified, the plaintiff may respond to the employer's explanation by showing that a less-detrimental (less-discriminatory) alternative practice would achieve the same business objective as the challenged practice.

Under Title VII, two views developed regarding the meaning of the "business necessity" defense within the disparate impact framework. One line of decisions imposed upon employers the heavy burden of *persuading* the court that the challenged practice was almost "essential."[57] The other line of decisions, which recently received the imprimatur of the Supreme Court, imposed upon employers the lesser burden of *producing* a reasonable explanation that indicates why the challenged practice "serves, in a significant way, the legitimate goals of the employer."[58] The latter line of cases is the more current of the two. Congress, however, is considering a bill which would reinstate the heavier burden on employers.[59]

A. *Academic Commentary on the Disparate Impact Model as Applied to the ADEA*

For the past several years, academicians have debated

55. Before *Atonio*, many courts (perhaps including the Supreme Court itself) had determined that once the plaintiff in a Title VII disparate impact case had established a prima facie case, the defendant was required to persuade the court that the challenged practice was justified by necessity. *See Atonio*, 109 S. Ct. at 2125-26; Recent Development, *supra* note 53, at 394-95 (cases cited therein).

56. The terms "business necessity" and "job relatedness" are sometimes used interchangeably. In *Griggs*, the Court used several terms from which one can infer that the Court envisioned some sort of "business justification" defense. *See* Rutherglen, *supra* note 52, at 1313 (the Court used the phrases "business necessity," "related to job performance," "meaningful study of their relationship to job-performance ability," and "manifest relationship to the employment in question" (quoting *Griggs*, 401 U.S. at 431-32)).

57. *See* Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (height and weight restrictions for prison guards have disparate impact on women); *see also* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (requiring rigid adherence to Equal Employment Opportunity Commission (EEOC) guidelines on validation of pre-employment testing).

58. *Atonio*, 109 S. Ct. at 2126-27; *see also* Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2790 (1988); Washington v. Davis, 426 U.S. 229, 247 (1976) (choosing to examine the "rational basis for the challenged practices" rather than to use Title VII disparate impact theory for cases arising under 42 U.S.C. § 1981); New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979).

59. *See* Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess., § 4 ("Restoring the Burden of Proof in Disparate Impact Cases"); *see also supra* note 53.

whether the disparate impact analysis that was developed under Title VII should be adopted in the age discrimination context.[60] Proponents of adopting the disparate impact framework in age discrimination cases argue that Title VII and the ADEA are virtually identical and therefore that the judicial enforcement of the two statutes should be virtually identical. Opponents of using the disparate impact theory in ADEA cases argue that judicial standards for age discrimination should be at least partially independent from Title VII standards.[61] The arguments regarding the adoption of the disparate impact theory are useful in illustrating that this direct governmental intervention would be an ineffective method to alleviate age-based wage discrimination.

Legislative History.[62] The purpose of the ADEA, based on the congressional record and the statement of purpose at the beginning of the Act, is to prohibit arbitrary age discrimination caused by misconceptions and stereotypes.[63] The disparate impact doctrine is not designed to eliminate practices based on ill-conceived stereotypes of the aged; it is designed to eliminate *neutral* practices that happen to have a statistically adverse effect on the aged.[64] No mention of such broad-based protection is contained in the legislative record.[65] Furthermore, if exact replicas of Title VII standards were the intended standards for judicial enforcement under the ADEA, Congress could have amended Title VII so that it included age as a protected category.[66] It was not thus amended. Congress must have recog-

60. The majority of published academic opinion argues against the adoption of disparate impact theory under ADEA. *See* Blumrosen, *Interpreting the ADEA: Intent or Impact*, in AGE DISCRIMINATION IN EMPLOYMENT ACT: A COMPLIANCE AND LITIGATION MANUAL 68, 68-115 (1981); Schneiderman, *The Law of Age Discrimination: Disparate Treatment and Disparate Impact*, in AGE DISCRIMINATION 181 (1982); Harvard Note, *supra* note 4, at 410-11; Stanford Note, *supra* note 20, at 838; *see also* Minnesota Note, *supra* note 20, at 1039 n.9. *But see* Minnesota Note, *supra* note 20.

61. *See, e.g.*, Minnesota Note, *supra* note 20, at 1039, 1055-56, 1075.

62. The author participates in the exercise of determining "congressional intent" beyond the statutory language for the sake of argument but accepts the task with a healthy dose of skepticism. *See supra* note 26 and accompanying text.

63. *See* 29 U.S.C. § 621(a)-(b) (1982).

64. This view of the doctrine assumes that its purpose is not to overcome potential evidentiary difficulties for proving intent but rather that its purpose is to examine consequences only.

65. *But see* Minnesota Note, *supra* note 20, at 1053-55 (arguing that Title VII standards should be adopted wholesale because (1) statements by the sponsors referred to "equal[] consideration for employment," and Title VII refers to a similar concept of equal opportunity, and (2) the sponsors indicated that the two statutes are complementary).

66. Two bills were offered that would have amended Title VII to include age, but

nized significant distinctions between age on one hand and race, color, religion, sex, and national origin on the other hand.[67]

Statutory Construction. Two statutory construction arguments reveal that the disparate impact theory is inappropriate for ADEA cases.[68] First, the RFOA defense explicitly authorized in the ADEA defeats most (if not all) allegations based on the disparate impact theory. Disparate impact violations are premised on the notion that neutral factors other than age have had a discriminatory effect on protected persons. Neutral practices are almost always *reasonable* practices[69] and are exempted from coverage. "[I]f a differentiation is based on reasonable factors other than age, ADEA cannot be violated, regardless of any disparate impact."[70] Furthermore, basing an action upon an *un*reasonable factor other than age would probably violate the ADEA under the disparate treatment standard: Behaving in an

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they were rejected. *See* Harvard Note, *supra* note 4, at 381 n.7 (discussing two bills that were offered after the enactment of ADEA). An example of the logical leaps involved in arguing from legislative intent is illustrated by the Minnesota Note. The author of the Note argues that Title VII standards of judicial enforcement should be adopted because one of the principal sponsors of ADEA had wanted to amend Title VII at the time of its enactment to include age as one of the protected categories. The senator apparently withheld the amendment out of fear that it would "jeopardize" the passage of the Civil Rights Act. *See* Minnesota Note, *supra* note 20, at 1053.

67. *But cf.* Harvard Note, *supra* note 4, at 381 ("Whether the decision to administer the ADEA and Title VII separately was . . . intended to reflect differences in the degree of protection to be afforded . . . is . . . difficult to discern.").

68. An additional argument that some have discussed proves fruitless for either side of the controversy. Some argue that the inclusion in the ADEA of an allowance for an employer to consider the costs of providing employee benefit plans for older workers, *see* 29 U.S.C. § 623(f)(2), is indicative of the statute's presumption that neutral factors (cost) can be considered by the employer. *See, e.g.*, Metz v. Transit Mix, Inc., 828 F.2d 1202, 1220 (1987) (Easterbrook, J., dissenting). On the other hand, the specific exception in the Act could indicate that the general rule is not to allow employers to consider neutral factors; otherwise an exception to the rule would not be necessary. Either suggestion may be logically based on an examination of this single provision only.

69. The exception to the rule that neutral policies are objectively reasonable would be a practice pursued by an uninformed or irrational actor. The statute does not specify whether the "reasonable" test refers to a subjective or objective test for reasonableness, but the intended meaning must be objective. If the test were subjective, violations of ADEA could occur only when a defendant had viewed its own actions as unreasonable—a situation not likely to occur.

70. Stanford Note, *supra* note 20, at 845. Title VII has no language equivalent to the ADEA's RFOA defense. Nevertheless, the Stanford Note also points out that the EEOC considers the RFOA defense equivalent to "business necessity" under the disparate impact standard. *See id.* at 845 n.32. Given the Supreme Court's recent interpretations of the business necessity defense, both tests do seem to be based on "reasonableness." But a striking difference remains: If a practice is "reasonable" under the RFOA defense, it is exempt from the statute; if a practice is "reasonable" under the business necessity defense only, the defendant is still subject to the "less-detrimental-alternative" response by the plaintiff.

unreasonable way that adversely affected older workers would give rise to a circumstantial inference of intent and possibly grounds for an allegation of pretext. The disparate impact analysis is therefore superfluous in light of the RFOA exemption.[71]

Second, the enforcement provisions of the ADEA were borrowed from the Fair Labor Standards Act.[72] Title VII is not the only model for the judicial enforcement of the ADEA. The RFOA language in the ADEA is similar to the "any factor other than sex" language of the Equal Pay Act (a portion of the Fair Labor Standards Act).[73] On the basis of this language, the Supreme Court determined that disparate impact analysis cannot be used to demonstrate discrimination under the Equal Pay

71. *But see* Minnesota Note, *supra* note 20, at 1050-51 & n.53 (arguing that the RFOA defense is an exception to a general rule prohibiting neutral policies that have an adverse impact and, therefore, that Congress intended to forbid only *un*reasonable policies that have an adverse effect on older workers). The Minnesota Note here weakens and almost defeats its own implicit argument that the disparate impact standard is necessary to protect older workers to the extent mandated by the statute. The Note refers to an example of an *un*reasonable neutral employer policy that has an adverse effect—requiring accountant employees to be able to lift sixty pounds. *See id.* at 1051-52 & n.57. Although such a policy would violate ADEA under a forced disparate impact standard, it also would violate ADEA under the disparate treatment standard. The prima facie case under disparate treatment is easy to establish in such a situation, and it would be difficult for an employer to respond by articulating a legitimate purpose for an *un*reasonable policy. And even if an employer could articulate a legitimate explanation for an unreasonable policy, the employer would almost surely fail the test for pretext under the treatment standard when the plaintiff demonstrates that the policy is unreasonable. The courts have used the disparate impact theory not to forbid *un*reasonable, neutral employer policies but rather to forbid policies despite a reasonable factor other than age—that is, cost. *See* Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). Courts accepting the disparate impact standard seem to ignore the RFOA exception. Perhaps there exists a predisposition against allowing cost as a defense among those courts that are willing to implement the disparate impact standard in ADEA cases.

In Title VII litigation, courts have increasingly allowed cost containment as a legitimate defense. *See* Brodin, *supra* note 36, at 360-62 (1987) (arguing that courts should look to recent ADEA disparate impact cases as a model for averting the recent trend toward allowing cost as a defense in Title VII cases). Interestingly, the Court's decision in *Atonio* may have pushed Title VII in the direction of ADEA—toward a superfluous disparate impact standard—by equating "business necessity" with a reasonableness test. "The touchstone . . . is a reasoned review of the employer's justification . . . . A mere insubstantial justification . . . will not suffice because . . . [it] would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." *Atonio*, 109 S. Ct. at 2126.

72. 29 U.S.C. §§ 201-219; *see* Harvard Note, *supra* note 4, at 381.

73. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982) (1963 amendment to the Fair Labor Standards Act of 1938); *see also* Stanford Note, *supra* note 20, at 845-56. Title VII does not contain any exceptions for defenses based on factors other than the protected categories. *See id.*

Act.[74] The courts should follow the precedent of the Equal Pay Act and deny the use of disparate impact doctrine in ADEA cases.

Age Is Distinct. Several factual characteristics distinguish age from race, color, religion, sex, and national origin. First, age is not an immutable characteristic; by definition, one's age changes over time.[75] *Griggs* is based on the notion that the neutral factors causing the harmful effect are "freezing" historical discrimination.[76] Blacks had less educational opportunities, and requiring minimum educational requirements not related to employment would perpetuate the ills caused by past discrimination even though the practice was facially neutral. Older persons, however, have faced no lifelong bias—all persons who are covered by the Act have lived forty years before reaching the protected age.

Second, the Supreme Court has acknowledged the differences between age and other protected categories in litigation under the Equal Protection Clause.[77] These differences reveal that the ADEA should be treated as an independent statute and is worthy of its own distinct judicial standards to address the unique aspects of age discrimination.

Third, at some point age does affect the capacity to work. Focusing on the aged as a group to be represented at appropriate statistical levels belies any real effect of age on the ability to work. Such treatment of older workers only perpetuates age-based classifications—the very practice that Congress attempted to banish—because arbitrary age groups will define whether an employer has violated the ADEA.[78]

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74. *See* County of Washington v. Gunther, 452 U.S. 161 (1981); Stanford Note, *supra* note 20, at 845-46. *But see* Equal Employment Opportunity Comm'n v. Governor Mifflin School Dist., 623 F. Supp. 734, 740 (E.D. Pa. 1985) (arguing that ADEA is different from Equal Pay Act because it includes the term "reasonable" to describe the allowable factors).

75. Religion is not immutable, but many persons are members of minority religions throughout their lives. No one can be "aged" for his entire life, and all persons have a family history that includes "aging."

76. *See* Stanford Note, *supra* note 20, at 848, 850-51.

77. *See* Murgia v. Massachusetts Bd. of Retirement, 427 U.S. 307 (1976) (holding that age is different from race because the aged do not have history of "purposeful" discrimination and are not a discrete and insular minority); *supra* note 18 and accompanying text.

78. Some of the difficulties of such statistical analyses were recently addressed by the Second Circuit. *See* Lowe v. Commack Union Free School Dist., 886 F.2d 1364 (1989), *cert. denied*, 58 U.S.L.W. 3595 (1990) (statistical evidence indicating that a "subgroup"—ages fifty to seventy—of the protected group was adversely affected compared

B. *Courts and the Disparate Impact Model*

Despite the arguments against using Title VII disparate impact theory in ADEA cases, no courts have flatly rejected use of the theory.[79] Several courts have groped their way forward and used the impact theory,[80] but other courts have hesitated and have gone out of their way to forego ruling on the issue.[81]

Two circuit court cases decided in the early 1980s set the stage for the use of disparate impact theory in ADEA discharge cases. The plaintiffs in both cases alleged that the employers' practices violated the ADEA under the disparate impact theory and that the practices could not be justified by cost considerations, which were the employers' primary defenses. In *Geller v. Markham*,[82] a school district had instituted a "cost-cutting" hiring policy—giving hiring preference to teachers with less than five years of experience.[83] The Court of Appeals for the Second Circuit concluded that "the high correlation" between experience and age rendered the policy "discriminatory as a matter of law . . . ."[84] The court imposed a heavy burden[85] on the employer to rebut the plaintiff's statistical inference of discrimination. Not a word was spoken by the court regarding why the district faced the heavy burden of proving business necessity in the face of the reasonableness (RFOA) defense authorized by

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to employees ages forty to fifty does not establish a prima facie case of disparate impact).

79. Justice Rehnquist, however, has said that he does not favor using the disparate impact theory in ADEA litigation. *See* Geller v. Markham, 451 U.S. 945, 945-49 (1981) (Rehnquist, J., dissenting from denial of certiorari) (asserting that cost should be considered a reasonable defense).

80. *See, e.g.*, Holt v. Gamewell, 797 F.2d 36 (1st Cir. 1986); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

81. *See* Arnold v. U.S. Postal Serv., 863 F.2d 994, 998 (D.C. Cir. 1988) ("We do not decide whether the test is applicable to ADEA cases because we conclude that the [postal service policy] does not have a disparate impact on postal inspectors who are forty years of age and older."); Equal Employment Opportunity Comm'n v. Governor Mifflin School Dist., 623 F. Supp. 734, 743 (E.D. Pa. 1985) ("Whether the disparate impact model can be applied in a compensation case is a difficult, unsettled question."); Allison v. Western Union Telegraph Co., 680 F.2d 1318, 1323 (11th Cir. 1982) (using disparate impact analysis but explicitly reserving judgment on whether the disparate impact standard applies to ADEA cases).

82. 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

83. *See id.* at 1030. Statistical evidence presented at trial indicated that 92.6% of teachers older than 40 had more than 5 years of experience, while only approximately 60% of teachers under 40 had more than 5 years of experience. *See id.* at 1032-33.

84. *Id.* at 1033.

85. *See id.* at 1032. For a discussion of the heavy and light burdens that defendants may face in impact cases, see *supra* notes 57-59 and accompanying text.

the ADEA. Not surprisingly, the court repudiated cost containment as a defense,[86] and it found that the school district had violated the ADEA under *both* the disparate impact and disparate treatment analyses.[87]

In the second major case of the early 1980s, *Leftwich v. Harris-Stowe State College*, the Court of Appeals for the Eighth Circuit declared that the College had violated the ADEA under the disparate impact standard by discharging the plaintiff, a tenured faculty member.[88] The College had used a "cost-saving" criterion to determine who would keep their jobs following a reduction in the number of faculty members from fifty-one to thirty-four. The College specified the number of tenured and non-tenured positions that would remain in each department following the reduction,[89] and the plaintiff's department had been reduced by one tenured position. The plaintiff alleged that his discharge, in light of retaining a younger non-tenured professor in the department, had violated the ADEA. The court agreed, declaring that the "burden of demonstrating business necessity is a heavy one."[90] The court rejected cost containment as a defense.

> [B]ecause of the close relationship between tenure status and age, the plain *intent and effect* of the defendant's practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts. If the existence of such higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated.[91]

Both the *Geller* and *Leftwich* courts showed absolute disregard for the RFOA defense. They both unequivocally rejected economic considerations as a defense. And they both indicated that the offenses would have been equally violative of the ADEA under either the impact or treatment standard. The plaintiffs in these cases were in no better position than they

86. *See id.* at 1034 (citing 29 C.F.R. § 860.103(h) (1979); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978)); *see also supra* note 36 (discussing *Marshall*); *infra* note 164 and accompanying text (discussing 29 C.F.R. § 860.103(h)).

87. *See id.* at 1030, 1034-35.

88. 702 F.2d 686 (8th Cir. 1983).

89. *See id.* at 691.

90. *Id.* at 692; *see also id.* at 691 (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

91. *Id.* at 691 (emphasis added). Although the plaintiff advanced his arguments under the disparate impact theory only, the court's statement suggests that the College's actions would have violated the disparate treatment standard as well.

would have been in if they had pursued their claims under the disparate treatment framework only.[92]

Following this initiation of the disparate impact theory in ADEA litigation during the early 1980s, several other courts followed along, but they did not always share the same view regarding the disallowance of cost as a defense against a disparate effect. In *Holt v. Gamewell*, the plaintiff's managerial position was eliminated because of its high salary, and the plaintiff was discharged.[93] Three subordinate employees—who were younger than the plaintiff and whose salaries were lower than the plaintiff's—continued their employment. The plaintiff argued that one of the younger employees should have been discharged and that the plaintiff should have been offered a demotion to replace the subordinate.[94] Under the disparate impact analysis, the Court of Appeals for the First Circuit asked "whether choosing for discharge those higher paid employees is in itself a *de facto* act of age discrimination."[95] The court concluded that it is not: "Salary may well be directly related to seniority . . . . But seniority as a function of age is dependant upon the age at which the employee began to work for the company."[96] Even though the plaintiff was in the protected group, his high salary was not the result of his age, but rather was the result of his position, promotions, and merit raises. His discharge did not violate the ADEA.

At the time *Geller*, *Leftwich*, and *Holt* were brought, the plaintiffs might have had a provident reason to pursue their cases under the disparate impact theory. The defendant's burden of responding to a prima facie disparate impact claim at that time was much greater than that of responding to a disparate treatment claim—showing business necessity rather than a legitimate explanation. After *Atonio*, it is unclear whether any advantage remains; *Atonio* replaced "business necessity" with a "reasoned review";[97] that is, "whether a challenged practice

92. The courts cast aside the RFOA defense and would not have accepted economic considerations as legitimate or reasonable defenses under the disparate treatment or disparate impact theories.

93. 797 F.2d 36, 37 (1st Cir. 1986).

94. *See id.* at 38.

95. *Id.* Under the disparate treatment standard, the court determined that no legal authority bound the employer to discharge a subordinate-level unprotected employee to accommodate the needs of a management-level protected employee. *See id.*

96. *Id.*

97. Ward's Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).

serves, in a significant way, the legitimate employment goals of the employer."[98] The difference between the disparate treatment doctrine's requirement of a legitimate explanation and the new *Atonio*-disparate-impact requirement remains to be seen.[99]

The required employer rebuttal under *Atonio* straddles a fence somewhere between the "business necessity" and "legitimate explanation" defenses in Title VII litigation. But the distinctions between the *Atonio* requirement and a legitimate explanation would be minor if applied in the ADEA context, and virtually no practical distinctions would exist. Assuming that the employer's obligation to satisfy the RFOA defense is roughly equivalent to the obligation for rebuttal under the *Atonio* "reasoned review,"[100] any employer who meets this *Atonio*-RFOA burden would be statutorily *exempted* from the Act. Under the impact standard, a plaintiff would *never* have the opportunity to rebut the employer's reasonable explanation by presenting a less-detrimental alternative. The only expected value to a plaintiff of pursuing a claim under the impact standard rather than or in addition to the treatment standard would depend on the likelihood of a successful outcome when (1) the defendant could present a legitimate purpose[101] for a neutral practice that was deemed unreasonable under the *Atonio*-RFOA requirement, and (2) the practice could survive the test for pretext under the treatment standard. Such an occurrence is theoretically possible, but not likely to happen in reality. The practical similarity between the two defense burdens under the ADEA means that most plaintiffs will not expend the additional effort necessary to present a full-scale statistical disparate impact case when compared with the relative ease of presenting a prima facie case under the disparate treatment standard. Even before *Atonio* limited the impact model to a more treatment-like

98. *Id.* at 2125-26.

99. It could be argued that *Atonio* requires objective reasonableness and that the disparate treatment standard requires something similar to subjective reasonableness only. *Cf. supra* note 69. The final result will depend upon how the courts interpret *Atonio* and whether Congress acts on the matter. *See supra* notes 57-59 and accompanying text.

100. *Cf.* Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 U. TOL. L. REV. 1261, 1278-80, 1283 (1983) (arguing that the RFOA defense should fall between "business necessity" and "simple legitimacy," and comparing the RFOA defense to the middle-ground defense under the Equal Pay Act of "business rationality").

101. If the employer could not present a legitimate purpose, the employer's practice would fail under both the treatment and impact standards.

model, the *Geller*, *Leftwich*, and *Holt* courts would have yielded the same outcomes under either theory, even though they had different views on allowing the cost defense. If judges imported disparate impact theory into the ADEA, it would yield very little profit for plaintiffs.

C. *Wage Discrimination and the Disparate Impact Model*

Few cases have directly addressed age-based wage discrimination through the lens of disparate impact analysis. If a protected employee's wages were lower than his younger counterparts' wages, it is unlikely that he would sue his current employer. Furthermore, the disparate impact analysis requires a statistical showing of an adverse effect upon older workers as a group, and any disparate impact claim of wage discrimination necessarily involves a broad attack upon a compensation system as a whole.[102] Such an attack would parallel gender discrimination claims against compensation systems under the Equal Pay Act and under Title VII.[103]

Plaintiffs can assert two forms of system-wide wage discrimination. First, the protected employees receive less money than the unprotected employees in the *same* positions. Such discriminatory compensation might be recognized as a violation of the Equal Pay Act, Title VII, or the ADEA.[104] The second form of system-wide wage discrimination is alleged to occur when protected employees receive less money than unprotected employees in *comparable* but different positions. Remedies for the comparable worth form of discrimination have not received the approbation of the judiciary under the Equal Pay Act or Title VII.[105] No cases have challenged comparable worth for older

102. It seems more likely that a group of protected employees (compared to a single employee) would sue an employer who consistently offered lower wages to older workers. Such a group claim could be pursued under either a disparate treatment or a disparate impact model. Even if a single employee sued under the impact model, he would be required to produce proof of a differential effect upon the older workers as a group.

103. For a discussion of gender-based wage discrimination, see Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1985); Freed, Mayer, & Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078 (1984).

104. *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188 (1973) (under the Equal Pay Act).

105. *See, e.g.*, County of Washington v. Gunther, 452 U.S. 160 (1981) (Equal Pay Act does not prohibit inequities across different types of jobs; holding that Title VII is not restricted to Equal Pay Act claims of discrimination); Equal Employment Opportunity Comm'n v. Madison Community Unit School Dist., 818 F.2d 577 (7th Cir. 1987) (Equal Pay Act does not authorize comparable worth claims); American Nurses Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986) (holding that comparable worth claims based on

workers. It is unlikely that a defendant would create particular categories of jobs for (and pay less to) persons at least forty years of age.

Some plaintiffs have alleged the first form of age-based wage discrimination under the disparate impact theory. In *Equal Opportunity Employment Commission v. Governor Mifflin School District*, the EEOC claimed that older teachers were adversely affected under a negotiated compensation schedule because of their ages.[106] Under a former schedule, teachers received set pay increases each year regardless of their current level of compensation, and the highest annual salary was limited only by the length of tenure.[107] The School District and Governor Mifflin Education Association negotiated for a new compensation system that included (1) a maximum annual compensation, (2) an annual percentage salary increase (larger absolute increases for higher salaries), and (3) a fixed annual dollar increase based on seniority only.[108]

The EEOC asserted that the new schedule violated the ADEA because the limit on annual compensation caused the more-senior teachers to receive smaller pay increases during the transition year than less-senior teachers. The EEOC further urged that the "only method of distributing pay increases that comported with its interpretation of the ADEA would be a simple percentage increase made across-the-board."[109] If this EEOC argument were generally accepted, employers could stop worrying about how to apportion their profits, if any profits still existed. It would also thrust compensation cases into a new epoch, a revolutionary epoch of judges determining wages. The court wisely declined to accept this role. Viewing the School District's compensation schedule in its "entirety," the court determined that the system was not discriminatory: The most senior teachers received the highest compensation.[110] The court did accept the disparate impact model for ADEA cases in general, but it also indicated that the impact

assumption that market rates are discriminatory is not actionable under Title VII); American Federation of State, County and Municipal Employees v. Washington, 770 F.2d 1401 (9th Cir. 1985) (same).

106. 623 F. Supp. 734 (E.D. Pa. 1985).

107. *See id.* at 735.

108. *See id.* at 736.

109. *Id.*

110. *Id.* at 743.

standard might not apply in *compensation* cases.[111]

A current case similar to *Governor Mifflin* involves a group of dairy truck drivers, the company for whom they drive, and their union.[112] Before 1969, the drivers hired by the company were paid a commission based on the quantity of dairy products they sold out of their trucks.[113] In 1969, the company shifted to an hourly rate of pay but "grandfathered" the commission drivers.[114] As time progressed, the commission drivers received higher compensation than the drivers who were paid by the hour. In 1989, the company and the union negotiated for a new contract that eliminated completely the commission sales formula within three years.[115] A group of the "grandfathered" commission drivers—all of whom are within the protected age group—have alleged that the wage-reducing actions of the company and the union discriminated against them on the basis of their ages.

In *Governor Mifflin* and the truck drivers case, the older workers had received salary gains purely on the basis of seniority. The correlation between age and seniority is not perfect, but under the disparate impact theory one can use statistical overlays to demonstrate that actions on the basis of seniority lead to differentiations based on age—so long as one disregards statistically "insignificant" exceptions.[116] Especially in the unionized sector, lock-step seniority pay increases are not specifically based on merit or productivity but on longevity and are closely related to age. When seniority gains are modified to reflect productivity or some other limiting characteristic, it may adversely affect the subjective expectations of older workers.

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111. *See id.* at 742-43 ("Whether the disparate impact model can be applied in a compensation case is a difficult, unsettled question.").

112. Adkins v. Safeway Stores, Inc., No. 89-3054 (D.D.C. filed Nov. 7, 1989).

113. Complaint, ¶ 9, Adkins v. Safeway Stores, Inc., No. 89-3054 (D.D.C. filed Nov. 7, 1989).

114. *See id.* The reason for the shift in policy is apparently that the drivers no longer had marketing responsibilities, and the commissions on their sales were not relevant to their effort or ability. *See* Memorandum of Points and Authorities in Support of Defendant Safeway's Motion to Dismiss or, in the Alternative, for Summary Judgment, Adkins v. Safeway Stores, Inc., No. 89-3054 (D.D.C. filed Nov. 7, 1989) [hereinafter Defendant's Memorandum].

115. Complaint, ¶ 10, Adkins v. Safeway Stores, Inc., No. 89-3054 (D.D.C. filed Nov. 7, 1989). The commission drivers eventually became a small minority in the union and lost their bargaining power within the union to maintain their "grandfathered" status.

116. Exceptions could occur in two ways: (1) an older individual begins work with a new employer and receives no more seniority rights than a young individual beginning contemporaneously, and (2) an individual begins work for an employer at a very young age and gains considerable seniority before receiving ADEA protection.

It could be argued that both *Governor Mifflin* and the truck drivers case are easily resolved by resorting to the "entirety" defense, that is, the end result of the compensation system is nondiscriminatory.[117] Relying on the entirety defense is unsettling. Such reliance would mean that even if part of a salary system were discriminatory, the ADEA would not be violated unless the final consequences were discriminatory.[118] In other words, if bottom-line defenses were consistently acceptable, an employer could obfuscate any disparate impact discrimination so long as the appropriate ratios were achieved in the end. Such a system would provide a strong impetus for employers to move toward some form of a quota system for ages.

A better argument for resolving each of these two cases under the disparate impact standard is to require examination of the compensation scheme at one point in time (but not necessarily in its entirety). The comparison of past wages for a group of workers with the same workers' current (or expected) wages should be inapplicable in a disparate impact case. The statistical question is whether the compensation scheme has an objectively different and adverse effect upon the protected persons *compared with unprotected persons*, not compared with the protected group's subjective expectations of future earnings.[119] One could argue that the adverse effect in the cases was the salary adjustment itself, but a decrease (as in the truck drivers case) or an "insufficient" increase (as in *Governor Mifflin*) standing alone cannot be an objective disparate effect.[120] The *wage*

117. *Cf.* General Electric v. Gilbert, 429 U.S. 125 (1976) (holding that an insurance plan that failed to cover maternity benefits did not violate Title VII because pregnancy is not the same as gender and the *overall* benefits were equivalent) (cited in *Governor Mifflin*, 623 F. Supp. at 744). *Gilbert* has been followed in only a handful of other closely related cases.

118. Such rationale has been shunned in Title VII litigation. *See* Connecticut v. Teal, 457 U.S. 440 (1982) (holding that a "bottom-line" defense of racial balance in the workforce is inapposite in defending employee selection criteria when some persons are discriminated against at a particular stage in the process) (cited in *Governor Mifflin*, 623 F. Supp. at 744).

119. It might be that in a disparate treatment case, an employee or group of employees could use the difference between "promised" or expected earnings and actual earnings as circumstantial evidence of discriminatory intent. *But see* Equal Employment Opportunity Comm'n v. Airline Pilots Ass'n, 489 F. Supp. 1003, 1005 (D. Minn. 1980), *aff'd in relevant part, rev'd in part*, 661 F.2d 90 (8th Cir. 1981) (cited in Defendant's Memorandum, *supra* note 114, at p. 14 (disparate treatment case; "[I]t is irrelevant whether older employees receive lesser benefits than in the past; the relevant inquiry rather is whether older employees receive lesser benefits than younger employees, and if so, why.").

120. Although the EEOC argued that ADEA requires specific and precise calibration of salary adjustments, such a notion is fraught with enormous difficulties. If all pay

must be compared with another's *wage*.

If wage increases and decreases were parceled out and the resulting wages on average were lower for older workers, then a disparate impact view of the compensation system would be more applicable than in the cases discussed above. No cases of which the author is aware contain fact patterns that reflect this type of wage discrimination under the disparate impact standard.[121] Even though the disparate impact theory would be more applicable in such a case than one in which older employees received less than their expectations, the general arguments against the use of disparate impact theory under the ADEA would still apply.[122]

Traditional disparate impact analysis would be especially difficult to apply to age-based wage discrimination. Judge Easterbrook, in a dissenting opinion, contrasted the disparate treatment and disparate impact models and discussed the impact model as it would be applied in a wage discrimination context.[123] In his view, the treatment model has an easy-to-establish prima facie requirement and a corresponding easy burden of refutation on the defendant; the impact standard places difficult burdens on both the plaintiff and the defend-

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increases were based on a percentage of existing salaries, greater absolute dollar disparity would occur between senior and less-senior workers' wages (albeit in favor of older workers). In accepting this structure, one would necessarily throw to the wind any ability to factor merit or productivity into salaries. ADEA does require the judiciary to determine whether compensation is distributed in a discriminatory manner, but asking the courts to take over the board rooms and to determine the specific types and amounts of adjustments to salaries is beyond the scope of the statute—and even beyond the appropriate scope of governmental powers.

121. The Court of Appeals for the District of Columbia, however, recently reviewed a relevant situation in *Arnold v. U.S. Postal Serv.*, 863 F.2d 994 (D.C. Cir. 1988). Postal inspectors sued the Postal Service for a policy that mandated (under specified circumstances) the transfer of the most-senior postal inspectors to understaffed offices in major metropolitan areas. The district court ruled that the Postal Service's policy was discriminatory on the basis of age under the disparate impact standard. *See* Arnold v. United States Postal Service, 863 F. Supp. 994 (D.D.C. 1988). The court of appeals reversed the decision of the trial court and held that the policy must be considered in its entirety to determine whether age discrimination occurred. The court distinguished Connecticut v. Teal, 457 U.S. 440 (1982) (rejecting bottom-line defense), because inspectors were *all* required to serve in one of the metropolitan areas at some time and because they were given an opportunity for "voluntary" transfer at earlier times in their careers; the racial minorities in *Teal* had no such opportunities. *See Arnold*, 863 F.2d at 999. The court avoided deciding whether the disparate impact analysis is applicable in age discrimination suits by finding that even if the impact standard applied, no disparate effect had occurred in the case. *See id.* at 998.

122. *See supra* notes 60-78 and accompanying text.

123. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1214-20 (1987) (Easterbrook, J., dissenting).

ant.[124] Assuming temporarily that the disparate impact analysis applies to ADEA cases,[125] Judge Easterbrook pointed out that it would be difficult to identify a specific and neutral device, test, or practice that is the cause of an alleged discriminatory wage differential.[126] Many factors play into the determination of wage rates. Second, the plaintiff must present a "statistical foundation" for its assertion that the protected category is adversely affected as a group.[127] In a case in which a plaintiff is alleging that the adverse effect was based on economic considerations—that is, the higher the salary the worse the effect—it is incumbent upon the plaintiff to show that the higher salaries are held by the older workers. Judge Easterbrook presented a cross-sectional view of hourly wages by age in the United States. On average, wages peak when persons are approximately forty to fifty years of age and steadily decline thereafter.[128] These data refute the automatic assumption that older workers always receive the highest salaries.[129] Furthermore, in Title VII litigation, the Supreme Court recently emphasized that the statistical presentation must focus on the "relevant" labor pool;[130] if the "relevant" pool has decreasing wages, then perhaps decreasing the wages of older workers would not violate the ADEA under the disparate impact theory.

Finally, Judge Easterbrook examined the validation or business necessity defense.[131] He identified two types of action based on wage considerations: across-the-board actions and individualized actions. An across-the-board wage reduction of employees older than a particular age would violate the ADEA; but individualized evaluation of the relationship between a per-

124. *See id.* at 1214-15 (Easterbrook, J., dissenting). Judge Easterbrook's model has been disturbed by the Supreme Court's recent ruling in *Atonio*, which made the disparate impact standard much easier to refute.

125. Judge Easterbrook later argues that the disparate impact doctrine should not apply to ADEA cases on the basis of the statute's legislative history and construction. *See id.* at 1219-20 (Easterbrook, J., dissenting).

126. *See supra* note 53 (discussing the specificity requirement).

127. *Id.* at 1218 (Easterbrook, J., dissenting).

128. *See id.* at 1218 (Easterbrook, J., dissenting) (citing NATIONAL COMMISSION FOR EMPLOYMENT POLICY, NINTH ANNUAL REPORT: OLDER WORKERS: PROSPECTS, PROBLEMS AND POLICIES 16 (1985) (reproduction of 1981 census report)).

129. Interestingly, these data could also support the notion that older employees receive wages below the value of their work to the employer because of the difficulty they may face in obtaining substitute employment. *See supra* pp. 718-19.

130. *See supra* note 54 and accompanying text.

131. *See id.* at 1219 (Easterbrook, J., dissenting).

son's wages and his productivity would not.[132] "It is hard to imagine how the use of wages could not be valid; wages correspond precisely to the costs of doing business, and hence to profitability."[133] An individualized comparison of wages and output is essential to the functioning of business and should not violate the ADEA.

As discussed above with regard to disparate impact cases in general, the RFOA defense should play a pivotal role in wage discrimination cases under the impact standard. If a plaintiff established a prima facie case, the employer would be required to produce a reasonable explanation for the practice. If the employer could not produce a reasonable explanation for the compensation differential (he had only unreasonable explanations or no explanation), the story ends and the plaintiff wins. If the employer produced a reasonable explanation, the story again ends because the statute exempts RFOAs. The plaintiff has no opportunity to present a less discriminatory alternative.[134] In sum, if the disparate impact theory were applied to ADEA wage cases, the protected plaintiff could win only by specifically identifying an objectively unreasonable, non-RFOA, neutral practice that adversely affected the wage rate of protected older employees when statistically compared with the wage rate of unprotected younger employees.

The disparate impact standard in cases of wage differentiation is stringent and difficult to apply. Given the Supreme Court's recent pronouncements and the resulting lack of opportunity for an ADEA plaintiff to present a less-detrimental alternative in impact cases, plaintiffs alleging age-based wage discrimination—perhaps any discrimination under the ADEA—would be well advised to use the less awkward treatment standard in pursuing their claims. Courts have uniformly accepted the treatment standard for ADEA cases (unlike the impact standard); the prima facie requirements under the treatment standard are easier to meet than under the impact standard; and although the burden that shifts to defendants under the treat-

132. *See id.* (Easterbrook, J., dissenting). The district court had made the same distinction. *See Metz*, 646 F. Supp. at 294 (citing B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 506 (2d ed. 1983)).

133. *Id.* (Easterbrook, J., dissenting).

134. The plaintiff could present a less-detrimental alternative only if the employer produced a reasonable explanation that did not identify an RFOA; it is impossible for a *reasonable* explanation of a neutral device, test, or practice not to identify a *reasonable* factor other than age.

ment standard may be slightly lighter than it would be under the impact standard, treatment-standard plaintiffs can compensate by demonstrating pretext with evidence of the unreasonable nature of the neutral practice that is causing the disparate effect. By using the treatment standard, plaintiffs do not forego the opportunity to use statistics to create a circumstantial inference of intent.[135] Indeed, any unreasonable, neutral practice that adversely affected older employees' wage rates as a group (the only type of practice that could jump through the disparate impact hoops) would almost certainly bear sufficient evidence to infer circumstantial intent or pretext. The disparate impact doctrine as it exists in Title VII litigation does not fit within the structure of the ADEA.

Title VII and the ADEA are based on distinct philosophies.[136] One of the eventual goals of Title VII, or at least one of its goals under recent interpretation by the Supreme Court, is to achieve a "color-blind" society. *All* persons are protected from discriminatory classifications on the basis of their race; but persons with less than forty years of age have no protection from discrimination based on age. The Age Discrimination in Employment Act is not meant to foster an "age-blind" society but rather an "age-educated" society. The stated goals of the ADEA are to "promote" or "retain" employment of the aged to the extent of their abilities and to help employers and employees accommodate the actual manifestations of aging, which vary significantly from individual to individual.

V. *METZ V. TRANSIT MIX, INC.*

A question persistently repeats itself throughout the discussion of wage discrimination cases litigated under either the disparate treatment or impact standard: Should economic factors be considered as reasonable explanations to rebut an inference of discrimination? The question and the answer are complex, and they will be addressed in this section of the Note by focusing on a 1987 case from the Court of Appeals for the Seventh Circuit. The decision in *Metz v. Transit Mix, Inc.*[137] is one of the

135. *See* Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977) (case of systemic disparate treatment).

136. For a discussion of other differences between Title VII and ADEA, see *supra* notes 68-74 and accompanying text.

137. 828 F.2d 1202 (7th Cir. 1987), *rev'g* 646 F. Supp. 286 (N.D. Ind. 1986). Two brief academic commentaries discuss the *Metz* case. *See* Kandel, *Discharging the Higher-*

most informative and lengthy court opinions addressing the relationship between compensation and age discrimination.[138]

A. *The Facts*

Transit Mix discharged Wayne Metz after twenty-six years of employment—when he was fifty-four years old.[139] Following a bench trial, the district court entered a judgment for Transit Mix.[140] The Seventh Circuit reversed the trial court's ruling and remanded the decision for a determination on the appropriate relief.[141] Judge Frank Easterbrook submitted an eleven-page dissent in which he argued that virtually any economic considerations are sufficient justification for discharge or wage differentiation.[142]

Transit Mix operated a plant in Knox, Indiana, for producing concrete. Mr. Metz was the manager. Because of a slack in local construction, Transit Mix closed the Knox plant and laid off Mr. Metz.[143] At the time of the plant closing, the president of Transit Mix did not know and did not announce whether the closing would be permanent or temporary.[144] A few months after the closing, Transit Mix re-opened the plant under a new manager, Donald Burzloff, who was younger than Mr. Metz and who had worked for the company eighteen years (eight years fewer than Metz).[145] Mr. Burzloff's salary was approximately half of Mr. Metz's salary, and he was chosen to re-open the Knox plant, according to the company, because the plant would be more profitable with reduced salary expenditures.[146]

The trial court decided that Mr. Metz presented a prima facie case under the *McDonnell Douglas* (disparate treatment) burden-shifting regime,[147] but it found that the employer rebutted the

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Paid Employee: Good Business or ADEA Violation?, 13 EMPLOYEE REL. L.J. 520 (1988); Recent Decisions, 1988 ILL. B.J. 570.

138. Although the holding is based on the disparate treatment standard, both the majority opinion and the dissent discuss the applicability of the disparate impact standard to age-based wage discrimination.

139. *See* 828 F.2d at 1203.

140. *See* Metz v. Transit Mix, Inc., 646 F. Supp. 286 (N.D. Ind. 1986).

141. *See* 828 F.2d at 1211.

142. *See id.* at 1211-22 (Easterbrook, J., dissenting).

143. *See* 646 F. Supp. at 288-89.

144. *See* 828 F.2d at 1203; 646 F. Supp at 289.

145. *See* 828 F.2d at 1203; 646 F. Supp. at 289. Mr. Burzloff was an assistant manager at Transit Mix's principal office, and he requested the opportunity to run the Knox plant.

146. *See* 646 F. Supp. at 289-90; 828 F.2d at 1203-04.

147. The specific criteria that the district court required for a prima facie case were

inference of discrimination with two legitimate nondiscriminatory reasons for its actions: (1) the economic savings from eliminating the relatively high salary expenditures caused by Mr. Metz's seniority,[148] and (2) flexibility.[149] The district court concluded that Transit Mix did not violate the ADEA when it replaced Mr. Metz with a less-senior, less-expensive, and younger manager. The court distinguished several types of cases from the *Metz* situation, such as closing an operation,[150] salary savings linked with direct evidence of discrimination,[151] a pattern of discharging older employees,[152] "statistical evidence,"[153] and discharges coupled with the vesting of pension or retirement benefits.[154] The trial court contrasted the *Metz* disparate

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that Metz "must show (1) that he was a member of the class protected by the statute, . . . (2) that he was qualified for the position, (3) that he was terminated, and (4) that he was replaced in his position by a younger person." 646 F. Supp. at 291. The same test was applied by the appellate court. *See* 828 F.2d at 1204.

148. The district court reported that "Mr. Metz was among the highest-paid Transit Mix employees at the time of his layoff," 646 F. Supp. at 289, and that he was laid off because his "salary was too high to justify in light of the poor performance of the Knox plant." *Id.* Mr. Metz's high level of compensation was the result of periodic salary increases during his long employment relationship with Transit Mix. *See* 828 F.2d at 1203.

149. The trial court indicated that Mr. Burzloff was better suited for managing the Knox plant because he could easily be reassigned to Plymouth, where he had been working as an assistant manager, if the Knox plant continued to fail. *See* 646 F. Supp. at 291. The trial court declared that flexibility was a "determining factor" in the decision. *Id.* at 289-90. Nevertheless, the Seventh Circuit's majority opinion asserted that this reason for favoring Mr. Burzloff was not a sufficient independent ground for the termination and based its entire decision on the economic grounds cited by the trial court: "The district court did *not* find that absent the desire to save the higher cost of Metz's salary, Transit Mix nevertheless would have replaced Metz because of the flexibility motivation." 828 F.2d at 1205 n.5. *But see id.* at 1211, 1215 (Easterbrook, J., dissenting) (arguing that the flexibility reason was accepted by the trial court as a sufficient nondiscriminatory ground for termination). Although the trial court's opinion contained clear language indicating that flexibility was an independent ground for not rehiring Mr. Metz, the majority's dismissal of this view forces the case to hinge on the question of cost considerations.

150. An employer may close a shop for poor economic performance. *See* 646 F. Supp. at 296 (citing Tice v. Lampert Yards, Inc., 761 F.2d 1210 (7th Cir. 1985)). "The Knox plant, however, was not closed; Mr. Burzloff simply replaced Mr. Metz as its manager." *Id.*

151. *See id.* (citing Franci v. Avco Corp., 538 F. Supp. 250 (D. Conn. 1982); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973)).

152. *See id.* (citing McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980), *rehearing denied*, 627 F.2d 239 (although older employees were not *replaced* by younger employees, a pattern of discharging older employees in reduction in force situations is a sufficient prima facie case to reach the jury); Cova v. Coca-Cola Bottling Co., 574 F.2d 958 (8th Cir. 1978); Carpenter v. Continental Trailways, 446 F. Supp. 70 (E.D. Tenn. 1978)).

153. *See id.* (citing Polstorff v. Fletcher, 452 F. Supp. 17 N.D. Ala. 1978); Schulz v. Kickok Mfg. Co., 358 F. Supp. 1208 N.D. Ga. 1973)).

154. *See id.*; *see also supra* note 33.

treatment situation with *Geller v. Markham*[155] and *Leftwich v. Harris-Stowe State College*,[156] the two leading ADEA cases using disparate impact theory.[157] The court reasoned that comparing the cost of employing older workers as a group with the cost of employing younger workers as a group is not a legitimate nondiscriminatory reason for a policy leading to the discharge of a disproportionate number of older workers; but "the higher cost of the employee may be a permissible consideration when approaching a single personnel decision . . . ."[158] The district court decided that the higher cost of a *single* employee's seniority could be considered without violating the ADEA; but considering the higher cost of employing a *group* of older employees would violate the ADEA. Making a group determination would require the employer to generalize about the effects of age on productivity, and such generalizations are prohibited by the ADEA.

B. *The Majority Opinion*

The Seventh Circuit limited the question on appeal to the "sole issue" of "whether the salary savings that can be realized by replacing a single employee in the ADEA age-protected range with a younger, lower-salaried employee constitutes a permissible, nondiscriminatory justification for the replacement."[159] The analysis of the majority in *Metz* started from the proposition that economic considerations cannot justify the termination of older workers. The majority quoted and discussed the guideline promulgated by the EEOC regarding the cost of older workers: "A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the Act."[160] The court also commented that the guideline[161] was comparable to the former

155. 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

156. 702 F.2d 686 (8th Cir. 1983).

157. *See* 626 F. Supp. at 293.

158. 646 F. Supp. at 294 (citing B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 506 (2d ed. 1983) ("The relatively higher cost of employing older workers as a group is generally rejected as an RFOA. The cost of employing an older worker when considered on an individual basis, however, may constitute an RFOA.").

159. 828 F.2d at 1205.

160. *Id.* at 1205 (quoting 29 C.F.R. § 1625.7(f) (1986)).

161. The guideline is current to this date. *See* 29 C.F.R. § 1625.7(f) (1989).

regulation promulgated by the Department of Labor:[162]

> It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act unless one of the other statutory exceptions applies. . . . Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.[163]

The court then asserted that the guideline's prohibition against using economic considerations to justify discharges applies not only to *groups* but also to *individuals*.[164] The court reached its determination that considerations of a single employee's wages violate the ADEA by adopting the rationale of disparate impact cases, even though Mr. Metz had advanced his arguments under the disparate treatment standard:[165]

> [T]he reasoning behind [a disparate impact claim] . . . can apply equally to a discriminatory treatment claim brought by an individual employee where, because of the high correlation between age and salary, it would undermine the goals of the ADEA to recognize cost-cutting as a nondiscriminatory justification for an employment decision.[166]

The majority completed its analysis[167] by pointing out that Transit Mix did not meet the test defined in *Equal Employment Opportunity Commission v. Chrysler* to determine the legitimacy of financial considerations as a defense to an exclusionary prac-

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162. Enforcement for ADEA was transferred from the Department of Labor to the EEOC in 1978. *See* Reorganization Plan No. 1 of 1978, § 2, 43 FED. REG. 19,807, 92 Stat. 3781 (effective Jan. 1, 1979, as provided by § 1-101 of Exec. Order No. 12,106, Dec. 28, 1978, 44 FED. REG. 1053).

163. 29 C.F.R. § 860.103(h) (1979).

164. *See id.* at 1206 (citing 29 U.S.C. § 623(a)(1) (ADEA prohibits practices that "discriminate against any individual . . . ."); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 709 (1978) (Court rejected benefit plan in which women's contributions were greater to account for greater average longevity.)). The appellate court discarded the district court's distinction based on the number of employees whose cost is considered, *see* 828 F.2d at 1206 & n.7, and asserted that ADEA was intended to provide fairness to individuals, not just to groups of individuals. *See* 828 F.2d at 1206.

165. *See id.* at 1207 (referring to Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1168 (8th Cir. 1985) (distinguishing right to abolish a position from the right to replace employee with lower-cost employee); Dace v. ACF Indus., 722 F.2d 374 (8th Cir. 1983), *aff'd on rehearing*, 728 F.2d 976 (1984); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715 (E.D.N.Y. 1978), *aff'd in part, rev'd and remanded in part*, 608 F.2d 1369 (2d Cir. 1979) (unpublished opinion)).

166. *Id.*

167. The court also included a three-page response to the attacks of the dissent by Judge Easterbrook. *See* 828 F.2d at 1208-11.

tice. The test requires that an employer's actions under economic duress be the least detrimental alternative available to the employer.[168] "Transit Mix did not pursue obvious less-detrimental alternatives to replacing Metz, such as offering Metz continued employment at a lower salary . . . ."[169] The majority merges the impact and treatment standards both by declaring that wages are equivalent to age and by requiring a less-detrimental alternative to discharge.[170]

The fundamental distinction between the decisions of the trial court and the appellate court is the difference between their views of what the ADEA requires. The trial court sees the ADEA as a prohibition against basing decisions on ill-founded generalizations or stereotypes; economic decisions based on individual factors do not use mass labelling and do not violate the ADEA. The majority opinion seems to equate wages with ages and could be read as requiring employers to ignore financial constraints in making individual discharge decisions for protected persons. The majority's comment about reducing the employee's wages, however, gives some indication that financial constraints are not to be totally ignored, even under its version of the ADEA.

C. *The Dissent*

Judge Easterbrook attacked the majority's decision from all sides. The main thrust of his dissent is that economic considerations—"comparison of the employees' wages with their product"—are legitimate reasons to fire employees and to hire less costly replacements.[171] He argues that employers will be unable to hire less costly replacements under the majority's decision and that the decision forces employers to close their shops.

> Metz's victory today is Pyrrhic—not for him, but for older employees in general. The court tells employers to keep their plants closed. Throw overpaid employees out of work because their salaries are high . . . but don't you dare hire

168. *See* Equal Employment Opportunity Comm'n v. Chrysler Corp., 733 F.2d 1183, 1186 (6th Cir. 1984); *supra* note 41 and accompanying text.

169. 828 F.2d at 1208.

170. Judge Easterbrook severely criticizes the majority's opinion for mixing the easy-to-establish prima facie case under treatment theory with the employer's difficult burden of refutation under the impact standard. *See id.* at 1215 (Easterbrook, J., dissenting).

171. *Id.* at 1212 (Easterbrook, J., dissenting).

> anyone else at a lower salary to do the work. . . . [J]udges should not go out of their way to injure protected groups.[172]

Judge Easterbrook's prophecy about the calamitous closing of plants overlooks a crucial comment made by the majority: Transit Mix should have offered to reduce Mr. Metz's salary to match his level of productivity.[173] The majority's instruction to lower Mr. Metz's salary implicitly admits that comparing salary and productivity is appropriate. The majority, however, found that terminating a protected employee because of such a comparison and replacing him with a younger employee at a reduced rate violates its notion of what is required under the ADEA.

Judge Easterbrook responded to the majority's mandate to reduce Mr. Metz's salary by professing that compensation and discharge are treated indistinguishably under the ADEA.[174] Reducing an older person's wages on the basis of age would violate the statute as much as discharging. "It would be a shocking violation of the ADEA to reduce by [fifty percent] the wages of all employees [fifty] and up."[175] Judge Easterbrook's "shocking" example would of course violate the ADEA—it would be an arbitrary adverse action based on age. But reducing an employee's salary to match his productivity is qualitatively different from discharging him because his wage exceeds his productivity. It is the difference between tightening one's belt and cutting off the circulation. A discharge reduces salary to zero (well below the level of productivity for most employees). The decision is no longer based on productivity concerns alone, but is based on a desire to employ a different (less expensive and younger) person in the position.[176]

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172. *Id.* at 1212 (Easterbrook, J., dissenting) (citations omitted). For the proposition that firms may lay off employees for prudent economic reasons, Judge Easterbrook cites Tice v. Lampert Yards, Inc., 761 F.2d 1210 (7th Cir. 1986); Dorsch v. L.B. Forster Co., 782 F.2d 1421 (7th Cir. 1986); Sahadi v. Reynolds Chemical, 636 F.2d 1116 (6th Cir. 1980); and Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977). He disregards the "general rule" laid down in Marshall v. Arlene Knitwear, 454 F. Supp. 715 (1978), and followed by several courts. *See supra* note 36. This disregard is justified within the limited realm of the Seventh Circuit: The rule of the Seventh Circuit does not follow the general rule.

173. *See id.* at 1208.

174. *See* 29 U.S.C. § 623(a)(1) ("It shall be unlawful for an employer . . . 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 . . . .").

175. *Id.* at 1213 (Easterbrook, J., dissenting).

176. Many employers routinely discharge rather than reduce wages when faced with

VI. The Contours of an ADEA Judicial Standard

Although it appears that the statute equally prohibits discharge and wage reduction on the basis of age, the stated purpose of the ADEA clearly indicates that discharge is especially abhorrent.

> The Congress . . . finds and declares that . . . older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs. . . . It is therefore the purpose of [the ADEA] to promote employment of older persons based on their ability rather than age; . . . [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[177]

If we accepted Judge Easterbrook's view, the slightest—even momentary and minute—disequilibrium between wage and productivity that favored an older worker would leave that person with absolutely no protection under the ADEA. So long as the employer can hire someone else at a lower wage rate to do the same work, the protection of the ADEA is nonexistent. Under such a view, the ADEA is a farce. An employer who compensates his employees (or even a particular employee) slightly more than market rate would effectively be exempted from liability under the ADEA. Such a view does little to "promote" employment of older persons or to assist in coping with the difficulties of age as they individually arise. A lower paying job is better than no job at all.

Nevertheless, Judge Easterbrook is correct in asserting that *employers* must be allowed to compare costs with productivity—that is their job. Although part of the purpose of the ADEA is to assist older workers in retaining their employment, the statute also is clear in stating that employers are not required to assist older workers *beyond* the level of the older persons' abilities. Courts are inadequate to decide (nor does the statute suggest that they should decide) whether the wages of each individual are appropriate.[178] But when, as in *Metz*, a protected

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economic constraints. *See* Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 Yale L.J. 565, 592 n.126 (1979) ("Reducing salaries may threaten employee loyalty or morale, and in practice it is infrequently initiated by employers." (citing Hershfield, *Reducing Personnel Costs During Recession: Are There Alternatives to the Layoff?*, Conf. Bd. Rec., June 1975, at 21)) [hereinafter Yale Note].

177. 29 U.S.C. § 621(a)(1), (b).

178. Interestingly, Judge Easterbrook's hypothesis that employers can respond to economic considerations any way they see fit still requires courts to second-guess the

employee is terminated and *replaced* by a younger person who is assumed to be equally proficient at a lesser salary, the court can easily observe the cost-productivity comparison made by the employer. In such a case, the offer should have been made to the protected person to work for a reduced wage rate or some comparable less-detrimental alternative.

Only two variables were on the table when Transit Mix had to decide between Messrs. Metz and Burzloff:[179] age and wage. The choice was whether to *replace* Metz with the younger Burzloff at a salary corresponding to profitability or to *retain* Metz on the condition that he work for the same salary that would have been offered to Burzloff. The economic results to the employer would have been equivalent with either choice; the economic considerations were "factored out" of the equation.[180] Salary is not an explanation for why Transit Mix chose to replace rather than to retain. The same type of reasoning explains why salary was not an RFOA in this situation—salary simply was not a factor in the equation. The only variable that remained was age. Because no factors remained other than age,[181] Transit Mix was left without an RFOA, reasonable explanation, or legitimate purpose for its action.

If the choice had been whether to *retain* Metz at a reduced compensation level or to *close* permanently the plant, economic considerations would not have been "factored out" by comparison with a replacement employee.[182] If a discharged employee

economics of businesses: The court must determine whether the wage-productivity comparisons were sufficient and accurate as justifications for terminations.

179. This formulation assumes, as the majority did, that the two candidates were equally proficient. This assumption disregards the dispute over flexibility, but it is a useful assumption to focus the issues. *See supra* note 149 and accompanying text.

180. It could be argued that the choice was not entirely equivalent because employees may tend to lose loyalty and morale after a wage reduction. For this reason, many employers prefer to discharge rather than reduce pay. *See* Yale Note, *supra* note 176, at 592 n.126; *Metz*, 828 F.2d at 1210. In responding to this point, raised by the dissent, the *Metz* majority pointed out that "most older employees . . . would prefer a wage reduction to being fired, . . ." and further that "pay reductions are less a threat to senior employees than terminations would be (in part because employers are less likely to cut pay unless economic circumstances absolutely require it)." *Id.*

181. If explanations other than the alleged salary consideration existed—for example, a significant difference in proficiency—then ADEA would not extend protection beyond the level of the older worker's abilities; capacity is a prerequisite to coverage.

182. It is theoretically possible to "factor out" economic considerations even in this situation: If an open plant under Metz brought in at least as much as a closed plant (presumably zero), then Transit Mix's choice is not based on economics but on whether or not to retain Metz. Courts are not in a position to second-guess businesses on such questions, and the ADEA does not require businesses to remain open to accommodate the needs of protected group members.

is not replaced—for example, the discharge occurred during a reduction in force—then the employer should not be required to offer a reduced wage rate to the older employee.[183] No law in the country mandates that an employer provide employment when it does not want to or when it is uneconomical to do so.[184] If the courts were required to determine whether a reduced wage rate should have been offered when discharged employees are not replaced, the courts would have to determine whether the pursued action was the least detrimental alternative for every discharge or layoff in which plaintiffs presented their easy-to-establish prima facie cases. Once again, the court would be jumping into the epoch of judicial determination of compensation.[185]

The modified disparate treatment standard mapped out in this section is similar to the basic disparate treatment standard under Title VII.[186] The protection is extended further in specific situations because of the unique characteristics of age. A replacement employee provides reliable and objective information about an employer's cost-productivity comparison. When such information is available, an older employee should have had the right to accept a wage reduction rather than to be discharged. The employer, of course, can terminate any employee who lacks sufficient ability to perform the job. But if an older

183. A difficult issue would arise when replacement occurs in a reorganization: Was the plaintiff replaced or was the position eliminated in the reorganization and a new employee hired to perform a different job? Such determinations would have to be made on a case-by-case basis with some test, such as whether the duties after the reorganization are substantially equal to the former duties of the discharged plaintiff. A reasonable guide would be the cases under the Equal Pay Act regarding whether positions are "equal" and deserve the same pay regardless of whether the employee is male or female. *See, e.g.*, Spaulding v. Univ. of Washington, 740 F.2d 686 (9th Cir. 1984) (position need not be identical, but must be substantially equal). If an employer went out of his way to reorganize and to discharge an employee, the plaintiff could present the evidence and show that the reorganization was a pretext for discrimination under the disparate treatment standard.

184. When employment is offered to some persons, however, it must be offered without discrimination against older persons.

185. *Cf. id.* at 1214 (Easterbrook, J., dissenting) (discussing the infeasibility of strictly applying the disparate impact theory in ADEA cases because for every plant closing the "court must determine whether a general wage reduction would have restored the plant's profitability"). *But cf.* Yale Note, *supra* note 176, at 590-95 (arguing that plaintiff should be able to present "reasonable alternatives" to rebut defendant's claim of business necessity). Without an in-hand replacement, determination of the appropriate cost-productivity comparison is beyond the realm of judicial knowledge or power.

186. The Title VII disparate impact standard could also apply to age discrimination with a similar modification, but its small marginal utility—especially in light of the modified disparate treatment standard's requirement of a less-detrimental alternative (wage reduction) in certain cases—make the arguments against its adoption overwhelming.

employee is capable of fulfilling the duties of his job and is replaced because of economic considerations, the older employee should have been given an opportunity to accept a wage reduction and to retain his employment. Under the modified standard, employers would be required to determine, before taking action affecting older workers or at least before hiring replacements, whether the older persons will be replaced.

A potential danger associated with this standard is that by requiring employers to make individual decisions regarding older workers' wages, the opportunity for wage "exploitation" could be enhanced.[187] Two characteristics of this judicial standard allay fears of this danger. First, employers prefer not to reduce wages and usually will do so only as a matter of last resort.[188] Second, the disparate treatment standard remains intact for analyzing differential wage treatment. Employers would be required to present a legitimate explanation for any challenged wage differentiation. It should also be remembered that a judicial standard is not the only, and probably not the most effective, protection against wage exploitation.[189] The modified treatment standard would be beneficial on the whole because it would promote employment, albeit at a (sometimes reduced) wage level that matches the abilities of older workers.

Reviewing one of the cases that was briefly mentioned earlier in this Note will assist in illustrating the functions and limitations of the modified disparate treatment standard. In *Marshall v. Arlene Knitwear, Inc.*,[190] the plaintiff was one of three persons employed in similar positions. The plaintiff was discharged because she had a much higher salary than the other two workers as a result of her seniority raises. The other two workers retained their positions. Under the modified standard, if the plaintiff were replaced by someone at a lower salary, then the plaintiff should have been offered to continue her employment at a reduced wage level that matched her productivity. If the plaintiff were not replaced, the employer's economic considerations should have been a legitimate explanation to rebut the plaintiff's prima facie case. Determining whether one of the

187. *See supra* pp. 718-19.

188. *See* Yale Note, *supra* note 176, at 592 n.126; *Metz*, 828 F.2d at 1210.

189. *See supra* note 15 and accompanying text.

190. 454 F. Supp. 715 (E.D.N.Y. 1978), *aff'd in part, rev'd in part*, 608 F.2d 1369 (2d Cir. 1979) (unpublished opinion); *see also supra* note 36.

other employees substantially replaced the plaintiff is a factual question unanswered by the court's opinion.

Assuming equivalent proficiency among the three employees, it is tempting to believe that the economic considerations based on seniority should be "factored out" by projecting the lower salary of the remaining employees onto the plaintiff regardless of whether one of them replaced the plaintiff. The employer, it seems, should be required to make a decision on some factor other than seniority-based economics. If one of the three employees must be discharged, perhaps the employer should be required to compare them at the same wage level and to choose based on some factor not correlated with age.

In a purely theoretical world, such "factoring out" of seniority without a replacement employee would not be difficult. In practical terms, however, such an analysis would bind the employer beyond the purview of the ADEA. With a replacement employee, a court can examine a wage level that the employer is willing to pay for a specific amount of additional productivity. But how would the employer "factor out" seniority in practical terms without a replacement employee? The plaintiff's wage would be compared to the wages of a group of employees. The court would have to determine whether the additional productivity of another worker would be worth the same wage that the other workers receive on average. Even if seniority could be somehow "factored out" and the employer chose to discharge someone with lower seniority than the plaintiff, what would happen if the savings from the lower salary were not sufficient to meet the need to reduce expenses? Must another employee be discharged? How should the employer determine which employees to discharge with economic blinders on? Should the employer secretly identify cost-productivity comparisons to redefine what each employee's wage should be and then choose who will be discharged? If so, must all of the remaining employees' wages be re-negotiated? Without a replacement employee, the court would be required to engage in a panoply of business decisions. *Such decisions must be left to employers rather than courts*. If an employer is closing or reducing its business or a portion of it, then the courts must allow the employer to base its actions upon economic considerations.

VII. Conclusion

The judicial standards that currently exist for the analysis of Title VII discrimination should not be copied for age discrimination. Age is distinct from other categories of civil rights. The Age Discrimination in Employment Act explicitly exempts employer policies or practices that are based on "reasonable factors other than age." Even if the Title VII disparate impact model were adopted, it would hardly protect anyone not otherwise covered by the Act; it would be virtually precluded from enforcement power because of the RFOA exemption combined with the Supreme Court's recent ruling in *Atonio* that allows for a "reasonable" defense. Furthermore, the plain meaning of the statute indicates that the costs of doing business, including wages, are reasonable factors other than age. Recognition of these characteristics appear to leave the older worker with only a facade of protection covering little more than direct evidence of discriminatory animus. Methods of protecting older workers' wages other than the ADEA's direct governmental intervention should be pursued. Courts have struggled to come to some reasoned and equitable conclusion about how to prohibit age discrimination, especially in the face of economic considerations.

The Age Discrimination in Employment Act was designed to *promote* employment of older persons *to the extent of their abilities*. Judges, however, cannot and should not be determining whether one's wage corresponds exactly with ability. Nevertheless, older workers must be given a "right of first refusal" on their jobs at the level of compensation determined by economic considerations—so long as their jobs continue to exist and they are qualified to perform them. Employers cannot *replace* an older worker without first making an individualized review of the economic considerations and addressing the effects of age. This requirement forces employers to determine whether a discharge is based on current individual ability or on distortions caused by seniority compensation or ill-founded stereotypes and generalizations about older workers. It is reasonable to match wages with productivity or with an employer's ability to pay; it is unreasonable to terminate an older worker because a younger worker will do the same work for less money.