UIC Law Review

Volume 39 | Issue 4 Article 8

Summer 2006

Disparate Impact and the ADEA: So, Who is Going to be in the Comparison Group?, 39 J. Marshall L. Rev. 1475 (2006)

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DISPARATE IMPACT AND THE ADEA: SO, WHO IS GOING TO BE IN THE COMPARISON GROUP?

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I. INTRODUCTION

A decision has been made and the debate has ended. The Supreme Court, in *Smith v. City of Jackson*,[1] has ruled that under the Age Discrimination in Employment Act of 1967 ("ADEA")[2] disparate impact claims are available.[3] This decision came twenty-one years after the Court in *Griggs v. Duke Power Co.*[4] developed the doctrine of disparate impact as a means for establishing liability under Title VII[5] of the Civil Rights Act of 1964 ("Title VII").[6] Now the big question becomes: who can be in the comparison group for the plaintiff to establish a disparate impact claim under the ADEA? This comment is the first to lay the foundation for what standard courts should accept as proper in deciding who a plaintiff can use as a comparison group.

Part II will explore the purpose of the ADEA and introduce the two major employment discrimination doctrines available: disparate treatment and disparate impact. It will also discuss how to establish a prima facie case for both doctrines under Title VII, and for disparate treatment under the ADEA. Part III will explore what types of tests can be used to prove ADEA disparate impact claims and the problems associated with each test. Part IV will propose the use of a case-by-case analysis for deciding what

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* Juris Doctorate Candidate, 2007, The John Marshall Law School. Thank you to the John Marshall Law Review staff for all your hard work. Thank you also to my friends, for always keeping me grounded. Most importantly, thank you to my parents, for their constant support and encouragement.

1. 544 U.S. 228 (2005).

2. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-34 (2000)).

3. *Smith*, 544 U.S. at 238.

4. 401 U.S. 424 (1971).

5. *Id.* at 435-36.

6. Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (1964) (codified at amended at 42 U.S.C. §§ 2000e-1 to 2000e-16 (2000)).

comparison group plaintiffs can use to establish a disparate impact claim.

II. BACKGROUND

A. Employment Discrimination Doctrines

Over the past forty years, Congress has enacted two key employment discrimination doctrines:[7] Title VII, which prohibits discrimination on the basis of race, sex, color, national origin, and religion;[8] and the ADEA, which prohibits discrimination on the basis of age.[9] Under these statues, two methods for establishing employment discrimination have developed within the courts: disparate treatment and disparate impact.[10]

Proof of discriminatory motive is vital under a disparate treatment claim.[11] Proof of discriminatory motive, however, is not vital under a disparate impact claim,[12] because the required proof "involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on

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7. Other imperative discrimination statues Congress has enacted include: Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-213 (2000) (making it illegal to discriminate against individuals with disabilities); Immigration Reform and Control Act of 1986, 8 U.S.C. 1324(b) (1994) (making it illegal to discriminate on the basis of citizenship status).

8. 42 U.S.C. § 2000e-2.

9. 29 U.S.C. § 623 (2000). The purpose of the ADEA is to protect over-forty-year-old workers from age-based discrimination. 29 U.S.C. § 621. The ADEA makes it illegal to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1).

10. Some scholars have broken down employment discrimination into four categories: (1) disparate treatment; (2) employment practices or policies that contain past discrimination; (3) disparate impact (policies or practices having an adverse impact, which are not justified by business necessity); and (4) "failure to make reasonable accommodation to an employee's religious observance or practices or to a qualified employee's disability." *See* Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U.L. REV. 1071, 1074 n.15 (1998); *see also* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 4 (3d ed. 1996) (explaining that all employment discrimination cases can be analyzed under one of the four categories, which help in the basic understanding of the elements of an employment discrimination case). As Frentomiller points out, though, the ADEA "contains no explicit duty of reasonable accommodation. Additionally, the 'present effects of past discrimination' method of proof could be viewed as a subset of both disparate impact and disparate treatment analysis depending upon the facts of the case." Fentonmiller, *supra* note 10, at 1074 n.15.

11. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, at 335 n.15 (1977) (explaining further that disparate treatment is simple to understand because a protected employee, such as an African-American employee, is treated with less favor because of his color).

12. *Id.*

one group than another and cannot be justified by business necessity."[13] Accordingly, an employer can be held liable under the disparate impact theory with no proof of discriminatory intent or motive.[14] The crux of a discrimination claim is the same: whether an employer discriminated against an employee.[15] Moreover, the Supreme Court has held that both theories, disparate impact and disparate treatment, are essentially equivalent,[16] and that both theories may be applied to the same set of facts.[17]

B. Disparate Treatment

Generally, there are four methods of proving disparate treatment in an employment discrimination case.[18] The first method, which is the easiest and most obvious method of proving discrimination, is direct evidence.[19] However, direct evidence is rare; therefore, a majority of plaintiffs establish discrimination through circumstantial evidence, the second method.[20] The

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13. *Id.* While a disparate impact claim brought under Title VII requires employer justification of business necessity, the Supreme Court ruled that a disparate impact claim brought under the ADEA only requires the employer to justify its practice by showing a reasonable factor other than age. *Smith*, 544 U.S. at 239; *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 613 (1993) (holding that if the employer's practices are motivated by reasons other than age there is no disparate treatment under the ADEA).

14. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. at 335 n.15.

15. Fentonmiller, *supra* note 10, at 1075.

16. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) (plurality opinion) (holding that the court was allowed to analyze the employer's discretionary promotional system under a disparate impact claim).

17. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. at 335 n.15.

18. While only four methods of proving disparate treatment are discussed here, unlawful harassment based on an individual's protected characteristic is a viable theory under Title VII. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (finding a claim of "hostile environment" to be valid disparate treatment sex discrimination claim under Title VII). Other courts have extended a hostile work environment theory of discrimination to claims against federal employers. *See generally* Hathaway v. Runyon, 132 F.3d 1214 (8th Cir. 1997) (ruling on sexual harassment claims against the U.S. Postal Service). Finally, some courts have extended the hostile environment claim to the ADEA. *See* Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996) (holding that the hostile environment claim of discrimination extends to the ADEA); *see also* EEOC v. Massey Yardley Chrysler Plymouth, Inc., 117 F.3d 1244, 1249 n.7 (11th Cir. 1997) (presuming, without deciding, that the hostile environment theory applies to the ADEA). *But see* Burns v. AAF-McQuay, Inc., 980 F. Supp. 175, 180 (W.D. Va. 1997) (refusing to extend the hostile environment theory of discrimination to the ADEA).

19. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 124-25 (1985) (holding that an employer's policy, which diminished the right of sixty-year-old and above pilots to take the spot of less senior flight engineers, was unlawful because of age discrimination).

20. Fentonmiller, *supra* note 10, at 1075-76. The Supreme Court has also established a "pattern or practice" method for proving discrimination. Int'l Bhd. of Teamsters v. United States, 431 U.S. at 336. First, there is a trial to

Supreme Court established the framework to prove discrimination through this method.[21] Although this framework was established in the context of Title VII, it has been used and accepted by courts in ADEA claims.[22]

The third method of proving disparate treatment is known as the "mixed-motives" analysis.[23] This analysis was also framed in the context of Title VII,[24] but has been applied to ADEA claims.[25] This type of case falls within the "fuzzy area between facially-discriminatory policies and wholly circumstantial cases of intentional discrimination."[26]

The fourth and final method of proving disparate treatment is by showing a "pattern and practice" of discrimination and is generally used in class action suits.[27] Under this method, a plaintiff must show widespread discrimination through statistical and anecdotal evidence.[28]

C. Disparate Impact

The Supreme Court adopted the disparate impact theory in *Griggs*.[29] This case was a racial discrimination case brought under

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determine if a discriminatory policy exists. Fentonmiller, *supra* note 10, at 1075 n.22. If this policy does exist, the court holds "mini-trials" to determine if the individuals who claim they were disparately impacted, were actually disparately impacted by that policy. *Id.*

21. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973) (illustrating a disparate treatment claim as proved by circumstantial evidence: the plaintiff has the burden of establishing a prima facie case; the burden then shifts to the defendant, when it can explain a non-discriminatory reason for its action. Finally, the plaintiff has a chance to rebut the defendant's proffered reason).

22. *See Hazen*, 507 U.S. at 612 (stating that *McDonnell Douglas* created a "proof framework applicable to [the] ADEA"); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997) (applying the *McDonnell Douglas* framework to an ADEA case); Greene v. Safeway Stores, Inc., 98 F.3d 554, 557-59 (10th Cir. 1996) (same); Cuddy v. Carmen, 694 F.2d 853, 855-57 (D.C. Cir. 1982) (same); Douglas v. Anderson, 656 F.2d 528, 531-32 (9th Cir. 1981) (same).

23. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (plurality opinion) (holding that once the plaintiff establishes a prima facie case for a disparate treatment claim the "defendant may avoid a finding of liability only by proving . . . that it would have made the same decision even if it had not taken the plaintiff's [protected characteristic] into account").

24. *Id.*

25. *See, e.g.*, Nitschke v. McDonnell Douglas Corp., 68 F.3d 249, 253 (8th Cir. 1995) (presuming that the "mixed motive" analysis is available under the ADEA).

26. Fentonmiller, *supra* note 10, at 1077.

27. *Id.*

28. Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976).

29. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

Title VII.[30] The Court held that "good intent or absence of discriminatory intent [will] not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[31] Consequently, the employer's policy requiring employees to have a high school diploma violated Title VII because such a requirement disparately affected minorities, even if this was not the employer's intent.[32]

Prior to *Hazen Paper Co. v Biggins*,[33] the majority of circuit courts allowed disparate impact claims to be brought under the ADEA.[34] However, this all changed once *Hazen* was decided. In *Hazen*, the Court ruled that where an employer's actions are motivated by reasons other than age, there is no liability under the ADEA.[35] Importantly, Justice Kennedy suggested in his concurrence, joined by Chief Justice Rehnquist and Justice Thomas, that he did not believe disparate impact claims were available under the ADEA.[36] Notwithstanding the dicta in *Hazen*, the second, eighth, and ninth circuits continued to rule that disparate impact was available under the ADEA.[37] However, after

30. On the day Title VII took effect, the employer required employees to pass an intelligence test and have a high school diploma to qualify for any type of promotion. *Id.* at. 427. Because of the poor quality education African-Americans received during that time, this new policy hindered a great majority of African-Americans from qualifying for a promotion. *Id.* at 430.

31. *Id.* at 430.

32. *Id.* at 429.

33. 507 U.S. 604.

34. *See* Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1244 (7th Cir. 1992) (ruling that a disparate impact claim was available under the ADEA); Holt v. Gamewell Corp., 797 F.2d 36, 37 (1st Cir. 1986) (recognizing a disparate impact claim brought under the ADEA); Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1372 (2d Cir. 1989) (stating that a disparate impact claim could be brought under the ADEA); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690 (8th Cir. 1983) (recognizing a disparate impact claim brought under the ADEA); MacNamara v. Korean Air Lines, 863 F.2d 1135, 1141 (3rd Cir. 1988) (inferring that a disparate impact claim was available under the ADEA); Iervolino v. Delta Air Lines, Inc., 796 F.2d 1408, 1413-14 (11th Cir. 1986) (same).

35. 507 U.S. at 613.

36. *Id.* at 618 (Kennedy, J., concurring). Specifically, Justice Kennedy stated that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Id.*

37. *See, e.g.*, Dist. Council 37 v. N.Y. City Dep't of Parks & Rec., 113 F.3d 347, 351 (2d Cir. 1997) (holding that disparate impact claims are still available under the ADEA); Smith v. City of Des Moines, Iowa, 99 F.3d 1466, 1469-70 (8th Cir. 1996) (same); Mangold v. California Pub. Utilities Comm'n, 67 F.3d 1470, 1474 (9th Cir. 1995) (stating in dictum that disparate impact claims are still available under the ADEA). However, the Ninth Circuit's District Courts developed a split within themselves. *Compare* EEOC v. Newport Mesa Unif. Sch. Dist., 893 F. Supp. 927, 930 (C.D. Cal. 1995) (holding that a disparate impact is available under the ADEA), *with* Frank v. United

Hazen, the majority of Circuit Courts of Appeals — the First,[38] Third,[39] Fifth,[40] Sixth,[41] Seventh,[42] Tenth,[43] and Eleventh[44] — ruled disparate impact was not available under the ADEA.[45]

The Supreme Court, however, swung the other way in *Smith*, holding that disparate impact claims are available under the ADEA.[46] The Court noted that, other than the use of the word "age" in the ADEA rather than the use of the words "race, color, religion, sex, or national origin" in Title VII, the ADEA contained language identical to what is found in Title VII.[47] Because disparate impact claims are available under Title VII,[48] the Court reasoned they should also be available under the ADEA.[49] This decision did nevertheless come with some restrictions.

Under a Title VII disparate impact claim, once the plaintiff establishes a prima facie case, the burden shifts to the employer to justify its practice or policy by proving that it is "job related" and that there is a "business necessity."[50] If proven, the burden shifts

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Airlines, Inc., No. C-92-0692, 1997 WL 258890 (N.D. Cal. Feb. 26, 1997) (refusing to allow a disparate impact claim under the ADEA).

38. Mullin v. Raytheon Company, 164 F.3d 696, 703-04 (1st Cir. 1999).

39. DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 734 (3d Cir. 1995).

40. Smith, 351 F.3d at 187.

41. Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union, 53 F.3d 135, 140 n.5 (6th Cir. 1995).

42. Blackwell v. Cole Taylor Bank, 152 F.3d 666, 672 (7th Cir. 1998).

43. Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996).

44. Adams v. Florida Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001).

45. *See also* Barry Kozak, *The Cash Balance Plan: An Integral Component of the Defined Benefit Plan Renaissance*, 37 J. MARSHALL L. REV. 753, 766 (2004) (noting that ostensibly the current trend before *Smith* was decided was for courts to find that a disparate impact claim was not available under the ADEA).

46. *Smith*, 544 U.S. at 239.

47. *Id.* at 231.

48. *Id.* at 236.

49. *Id.* Interestingly, while the Court ruled that disparate impact was available under the ADEA, the Court did not find in favor of the parties bringing suit on the disparate impact theory. *Id.* at 242. In that case, the City of Jackson gave raises to all police officers to attract and retain qualified workers. *Id.* at 230. However, those having less than five years experience received a higher percentage raise than those with more than five years. *Id.* Officers over the age of forty brought suit, claiming age disparate impact. *Id.* The Court, however, ruled that the plaintiffs never identified any specific practice adversely affecting older workers and that the city had a reasonable reason for enacting the pay plan. *Id.* at 240. Thus, the plaintiffs did not establish a viable disparate impact claim under the ADEA. *Id.* at 242.

50. *See Griggs*, 401 U.S. at 431 (1971) (explaining that business necessity is the "touchstone" of the inquiry of whether the employer has a legitimate reason for the questioned policy or practice); *see also* LINDEMANN & GROSSMAN, *supra* note 10, at 106 (noting that the terms business necessity and job-related are "intended to reflect the concepts enunciated by the Supreme Court in *Griggs*" (quoting 137 Cong. Rec. S15273, S15276 (daily ed. Oct. 25, 1991)). However, the Supreme Court was not very clear on what

back to the plaintiff to prove that there was an alternative method the employer refused to use, which would have achieved the employer's desired result with a lesser disparate impact.[51]

Under the ADEA, the burden on the employer is less stringent. An employer need only show that the disparate impact on the employee's age was due to any reasonable factor other than age.[52] Further, it is not required that the employer's selected method be the only method for achieving the desired goal.[53] Thus, the scope of liability for disparate impact under the ADEA is narrower than under Title VII.[54]

Notwithstanding an employer's strong affirmative defense under ADEA disparate impact claims, we are still left with a confounding question: what comparison groups will a plaintiff use to help establish his or her disparate impact claim? With that in mind, we will now look at how to establish a prima facie case for disparate impact claims brought under Title VII.

D. Establishing a Prima Facie Case for Disparate Impact Claims Under Title VII

To establish a prima facie case for disparate impact under Title VII, the plaintiff must first identify a facially-neutral

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these terms meant. *Id.* at 107; *see also* Judith J. Johnson, *Semantic Cover for Age Discrimination: Twilight of the ADEA*, 42 WAYNE L. REV. 1, 41-42 (1995) (noting that some courts require that the employer's practice or policy be essential, while other courts merely require a rational relationship between the employment practice and the employer's interest).

Interestingly enough, in 1989, the Supreme Court, in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), took more of an employer-friendly view regarding disparate impact claims under Title VII. The Court held that the plaintiff, in establishing his or her prima facie case, must prove that the challenged employer's practice or policy had a significant disparate impact on employment opportunities for the protected class and the non-protected class. *Id.* at 657. If this is established, the employer must demonstrate that the challenged practice serves, in a significant way, the employer's goals. *Id.* at 659. However, the employer need not show a business necessity; the inquiry is only a "reasoned review of the employer's justification for his use of the challenged practice." *Id.*

This decision led Congress to enact the Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (codified as amended in scattered sections of 42 U.S.C.). This act codified the holding in *Wards Cove* that the plaintiff must demonstrate a specific practice that caused the disparate impact. 42 U.S.C. § 2000e-2(k)(1)(A)(i). However, Congress brought back the requirement that the employer's reason is a business necessity and job-related. *Id.*

51. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

52. *See Hazen*, 507 U.S. at 613 (1993) (holding that the employer will not be liable under the disparate impact theory if its actions are motivated by reasons other than age, even if those reasons are clearly related to the employee's age).

53. *Smith*, 544 U.S. at 242.

54. *Id.* at 239.

employment practice.[55] Second, he or she must present statistical evidence showing that such a practice causes a disparity between the class of employees that were allegedly disparately impacted and other employees not adversely impacted.[56] For instance, a female employee can allege that her employer's hiring policy disparately impacts female employees as compared to male employees by using statistical data to illustrate the disparity.

The Supreme Court has given no definitive guidance on "just what threshold mathematical showing of variance . . . suffices as 'substantial disproportionate impact.'"[57] The lower courts also have not used a uniform rule,[58] nor does the text of Title VII provide one.[59] Thus, there are several tests plaintiffs have used to present statistical evidence showing that an employer's practice causes disparate impact among a particular group of employees.[60]

One such test is the eighty percent rule, or the four-fifths test.[61] Adopted by the Equal Employment Opportunity Commission's ("EEOC") Uniform Guidelines on Employee Selection Procedures,[62] the four-fifths test states that an employer's selection criterion has an adverse impact when members of a protected group (e.g. females) are selected at a rate less than four-fifths of the preferred class.[63] For example, if seventy percent of qualified males are hired, but only forty percent of qualified females are hired, the ratio would be 4/7, or approximately fifty-seven percent. Thus, under the EEOC's four-fifths rule, a disparate impact claim would exist.[64]

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55. *Wards Cove*, 490 U.S. at 645-46 (codified in Title VII at 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

56. *Id.* at 650.

57. Moore v. Southwestern Bell Tel. Co., 593 F.2d 607, 608 (5th Cir. 1979) (per curiam).

58. *See, e.g.*, Moore v. Southwestern Bell Tel. Co., 19 FEP 232, 234 (E.D. Tex. 1978) (stating that the lower courts have not used a uniform standard in determining the existence of "adverse impact"), *aff'd per curiam*, 593 F.2d 607 (5th Cir. 1979).

59. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (stating only that a prima facie case can be established if the adverse party demonstrates that the employer's particular employment practice causes disparate impact based on "race, color, religion, sex, or national origin . . . ," but not what formula can be used to show a substantial disparate impact).

60. For a discussion on the test used for statistical analysis, *see* LINDEMANN & GROSSMAN, *supra* note 10, 1687-1740.

61. *See, e.g.*, United States v. City of Chicago, 663 F.2d 1354, 1358 n.8 (7th Cir. 1981) (finding adverse impact under the four-fifths rule); Bushey v. New York State Civil Serv. Comm'n, 733 F.2d 220, 225-26 (2nd Cir. 1984) (same).

62. 29 C.F.R. §§ 1607.4(D).

63. LINDEMANN & GROSSMAN, *supra* note 10, at 92.

64. *See also*, United States v. City of Chicago, 663 F.2d at 1358 n.8 (finding disparate impact under the four-fifths rule when the selection rate of African-Americans was 18% of that for whites); *Bushey*, 733 F.2d at 225-26 (finding disparate impact under the four-fifths rule when the minority pass rate of test

Perhaps the most commonly used test looks at whether a disparity is sufficiently large enough that it becomes highly unlikely to have randomly occurred.[65] The "significant statistical test" allows the court to find disparate impact when the selection rate of members of the protected group is significantly different from the expected selection rate in the absence of discrimination.[66] The test determines the probability of obtaining the disparity by chance,[67] and many courts accept that a 0.05 probability level is sufficient to rule out chance.[68] A 0.05 probability level means that an observed disparity, or a greater disparity, would occur by chance only one time in twenty cases.[69] Thus, as the probability level drops below 0.05, courts that utilize this test are likely to find a disparate impact.

The two aforementioned tests deal with selection rates. The plaintiff may use other types of statistical proof depending on the situation, such as: pass/fail comparisons, population/workforce comparisons, regression analyses, and other kinds of statistical comparisons.[70] Pass/fail selection tests simply compare the

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was 25% compared with the non-minority pass rate of 50%); Easely v. Anheuser-Bush, Inc., 572 F. Supp. 402, 406-07 (finding disparate impact under the four-fifths rule when out of 1,500 applicants, only 30% of black applicants passed a test, but 50% of white applicants passed; the three-fifths being well below the four-fifths standard).

65. LINDEMANN & GROSSMAN, *supra* note 10, at 90.

66. *Id.*

67. *Id.*

68. *See, e.g.*, Billish v. City of Chicago, 962 F.2d 1269, 1285 (7th Cir. 1992) (holding the 0.05 probability sufficient to rule out chance); Palmer v. Shultz, 815 F.2d 84, 92-96 (D.C. Cir. 1987) (same); Waisome v. Port Auth., 948 F.2d 1370, 1376 (2d Cir. 1991) (same).

Similarly, in *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977), the Supreme Court held that a disparity of two or three standard deviations was sufficient to rule out chance. A two-tailed probability level of 0.05 corresponds with two standard deviations. LINDEMANN & GROSSMAN, *supra* note 10, at 91. An explanation of the two-tailed analysis is as follows:

> A 'two-tailed' analysis examines the probability of a departure in either direction — either favoring or disfavoring the group alleging discrimination — from the results that would have been expected in the absence of discrimination. A 'one-sided' analysis examines the probability of a departure from such expected results in only one direction, such as a departure disfavoring the group alleging discrimination. There is a simple arithmetic relationship between these approaches: A two tailed probability level is always two times the one-tailed probability level. It is thus more difficult to prove statistical significance when using a two-tailed approach.

Id. at 91 n.60.

69. *See Waisome*, 948 F.2d at 1376 (noting that social scientists regard a two standard deviations finding significant, which translates into approximately "one chance in 20 that the explanation for the deviation could be random").

70. LINDEMANN & GROSSMAN, *supra* note 10, at 89. Another kind of statistical analysis includes a "cohort analysis." *Id.* at 1700. This analysis is a

percentage of the protected class that passes or fails a given test with the majority group.[71] Population/workforce comparisons "compare the availability of the protected group in the general population or relevant labor market with the percentage of the protected group in an employer's workforce (or portion thereof.)"[72] Regression analyses estimate "the effect of several independent variables (e.g. education, experience, performance, age, race, sex) on a single dependent variable" (e.g. salary).[73] This test is commonly used when comparing wage rates between a protected group and the majority group, because simply comparing wages fails to take into account other facts such as education and experience.[74] These tests also may be used to determine whether a plaintiff has established a disparate impact claim under Title VII.

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statistical analysis which studies groups of employees that begin employment at the same time and at the same level. *Id.* at 1700 n.66. The "cohort analysis" has been used in pay and promotion discrimination cases. *Id.* at 1700.

Another type of analysis has been termed the "bottom line" concept. *Id.* at 1701. Instead of comparing the selection rate of a group to a particular component part in the hiring process (e.g. employees' pass/fail rate on a particular test), this test compares the selection rate of a group to the overall employment process. *Id.* This test has been used by both plaintiffs and defendants. *Id.* Using this test, the plaintiff would allege the whole employment process had a disparate impact on his or her protected group, even though no particular part of the hiring process was shown to have a disparate impact. *Id.* In contrast, the defendant would show there was no disparate impact from the whole employment process, even though there may have been a disparate impact from a particular part of the employment process. *Id.* The Supreme Court, however, has severely limited the use of this statistical test. *Id.* at 1701-02.

71. For example, 200 Hispanics passed a test out of 1000 Hispanics who took the test; versus 500 whites who passed the test out of 1000 whites who took the test. Accordingly, Hispanics passed the test at a 20% rate compared to whites who passed the test at a 50% rate. Thus, if we were using the four-fifths rule, there would be a disparate impact in this case (20/50 is only 40%—well below the 80% level needed).

72. The Supreme Court in *Int'l Bhd. of Teamsters v. United States* noted that a gross disparity between the protected group in the relevant labor market versus the protected group in an employer's workforce is sufficient to meet the plaintiff's burden of proof of discrimination. 431 U.S. at 337. For example, if there are 10,000 Native-Americans in the relevant labor pool versus 40,000 persons available in the relevant labor pool, this would equate to a twenty five percent Native-American available labor market rate. However, if the particular employer only employed fifty Native-Americans versus 1000 total employees employed by the employer, this would equate to only a five percent Native-American employment rate. Most likely, the disparity between the available labor-market rate and the employment rate in such a case would satisfy the plaintiff's burden of proving discrimination.

73. *Id.* at 1697.

74. *Id.*

III. ANALYSIS

Now that individuals can bring disparate impact claims under the ADEA, the big question becomes: what comparison group can the plaintiff use to help establish a disparate impact claim? Lower courts have struggled to establish a uniform test for determining whether the plaintiff has established a prima facie case of disparate impact under the ADEA.[75] The biggest reason for this struggle arises from the lower courts' attempt to define the disparately impacted group.[76] This is because age is progressive, unlike factors relevant to Title VII discrimination cases (e.g. Hispanics versus non-Hispanics, or women versus men). Thus, the comparison groups in ADEA disparate impact claims are not always as obvious when compared with Title VII claims.[77]

However, there are some clear, and not so clear, comparison groups courts can use to determine if the plaintiff has established a prima facie claim for disparate impact under the ADEA. These groups include: the "bright-line" rule;[78] sub-grouping;[79] and

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75. *See* Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996) (implying that courts have struggled with defining what tests and statistical data will satisfy the plaintiff's prima facie case of disparate impact under the ADEA, and that courts will continue to struggle with this dilemma).

76. *See id.* ("[T]he line defining the class that is disparately impacted by the [employer's] policy is an imprecise one . . . ."); *see also* Mullin v. Raytheon Co., 2 F. Supp. 2d 165, 174 (D. Mass. 1998) (noting the difficulty in defining what age group was disparately impacted).

77. The lack of clarity can lead to statistical manipulation by the plaintiff. *See* RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION 7-24 (1996) (stating that when there are no constraints on the types of groupings available, manipulation of age grouping in order to obtain particular statistical results is possible). However, there are also ways to manipulate data under a Title VII disparate impact claim. This would often occur when two or more protected categories are combined to show discrimination. Joel S. Allen, Melissa M. Hensley & Scott Sherman, *Employment and Labor Law: Split Decisions: The Lack of Consensus on Disparate Impact Claims Under the Age Discrimination in Employment Act*, 29 OKLA. CITY U.L. REV. 63, 85 (2004). For example, there may be no evidence of disparate impact against Hispanics or women, but Hispanic women might be able to show disparate impact.

78. *See* Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1373 (2d Cir. 1989) (ruling that the impact on the protected group as a whole is to be used to establish a prima facie case for disparate impact claims brought under the ADEA); *see also* EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 950-51 (8th Cir. 1999) (implying that age impact cases can only be established by providing evidence that the protected group as a whole was affected, and not some specific group within the protected group).

79. Some courts, however, have refused to allow this test altogether. *See McDonnell Douglas*, 191 F.3d at 950-51 (rejecting the use of sub-grouping within the protected class to show adverse impact from a reduction in workforce). *Cf.* Katz v. Regents of the Univ. of Cal., 229 F.3d 831, 835-36 (9th Cir. 2000) (refusing to rule whether sub-grouping was available under ADEA disparate-impact claims).

statistical tests based on individuals and not groups (e.g. logistic regress analysis and multivariate analysis).[80] While these "groups" all have their own distinct advantages, they also have disadvantages when applied to an ADEA disparate impact claim.

A. The "Bright-Line" Rule

While it is conceivable that the courts can establish multiple bright-line rules[81] for making out a prima facie case of disparate impact, one bright-line rule has been used in the lower courts prior to the *Smith* decision.[82] Under this bright-line rule, a plaintiff establishes a disparate impact claim by presenting evidence of a statistically significant disparity between the impact of an employment policy on employees forty years old and over versus the policy's impact on employees under forty.[83] The Second and Eighth Circuit Courts have employed this bright-line rule.[84]

1. Advantages of the Bright-Line Rule

First, the one obvious advantage to this rule is that it is a bright-line solution. Courts would have no problem employing the test because of its simplicity.[85] Second, plaintiffs would not be able to manipulate age groupings to produce their desired statistical result. For example, a plaintiff would not have a viable disparate impact claim if employees sixty-years old and over were

80. Gregory L. Harper, *Statistics as Evidence of Age Discrimination*, 32 HASTINGS L.J. 1347, 1362-66 (1981).

81. Sub-grouping might also be considered a bright-line rule. For example, courts can use the rule of fives. The rule of fives breaks groups accordingly: forty to forty-four; forty-five to forty-nine; fifty to fifty-four; etc. Under the rule of fives, the fifty to fifty-four-year-old group could bring a disparate impact claim under the ADEA if they show a particular employment policy adversely affected their age group, even if it did not adversely affect any other age group. As discussed *infra* notes 92-102 and accompanying text, this bright-line rule would have advantages, but would also have disadvantages.

82. *See supra* note 78 (identifying case law showing that the Second and Eighth Circuit only allow a disparate impact claim under the ADEA if the forty- year-old and above group as a whole is disparately impacted).

83. Fentonmiller, *supra* note 10, at 1123. For example, if seventy percent of qualified employees thirty-nine years old and under are hired, but only forty percent of qualified employees forty years old and over are hired, the forty-year-old and over group could use the EEOC's four-fifths test to prove disparate impact. Using this rule, the ratio would be 40/70, or approximately fifty-seven percent, which is well short of the eighty percent needed. Thus, under the bright-line rule, through the use of the four-fifths test, a disparate impact claim would exist.

84. *Lowe*, 886 F.2d at 1373; *McDonnell Douglas*, 191 F.3d at 950-51.

85. The word simplicity, used in this context, means that, compared to the other tests courts can and have used, the bright-line test is simple. Yet, even under the bright-line rule, there is a wealth of statistical data that might be required to prove a disparate impact claim. This only serves to complicate a "simple" rule.

disparately impacted, but not the forty-year-old and over group as a whole. Third, this rule would make it easier on the employers to plan against any policies that might have a disparate impact.[86]

2. Disadvantages of the Bright-Line Rule

There are three glaring disadvantages to applying this bright-line rule. First, applying this rule might unfairly prejudice employees who are, for instance, sixty-five and older. For example, having a workforce where the vast majority of employees are between the ages of forty and forty-five is very conceivable. However, at such a company, a particular neutral policy may be restricting employees sixty-five years-old and over, even though they are equally, if not more qualified than the forty to forty-five year-old employees. Under the bright-line rule, the employees sixty-five years old and over would have no recourse under the ADEA for disparate impact. In other words, the sixty-five-year-old and over group was disparately impacted, but the forty and over group was not.[87] Essentially, an employer could realistically adopt a facially-neutral policy that has a significant disparate impact on employees over the age of sixty-four, as long as that policy does not disparately impact the overall group of employees who are forty years old and over.

Second, disparate impact claims are "functionally equivalent" to disparate treatment claims.[88] However, following the bright-line rule would allow disparate treatment claims to be more broad than disparate impact claims under the ADEA.[89] In other words, a

86. This type of planning would be analogous to how employers decide policies when considering Title VII discrimination issues. In other words, employers take into consideration the impact a policy will have on race. This test will make consideration of age impact the same: does it affect employees forty and older?

87. The reverse is also true. A forty-year-old employee may not be disparately impacted by an employment practice, but the forty-year-old and older group as a whole who are disparately impacted by the practice might afford the forty year-old a remedy under this bright-line test.

88. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) (stating that disparate treatment claims and disparate impact claims are "functionally equivalent" and either claim can be applied to a particular fact pattern).

89. In *O'Connor v. Consolidated Coin Caterers, Corp.*, 517 U.S. 308, 312-13 (1996), the Supreme Court stated that a plaintiff bringing a disparate treatment claim under the ADEA need not produce evidence that he was replaced by someone outside the protected class to establish his prima facie case. Instead, the Court held it was sufficient for the plaintiff to establish that his replacement was "substantially younger." *Id.* The Court further noted that whether the person who replaced the terminated plaintiff is "outside the protected class" is not a reliable criterion. *Id.* Therefore, the Supreme Court does not require a bright-line rule for disparate treatment claims under the ADEA. Rather, all that is required is an imprecise determination that the replacement is "substantially younger." *Id.*

sixty-five-year old employee who was intentionally fired because of his age and replaced by a forty-five-year-old employee would have a claim of disparate treatment under the ADEA. However, if a group of sixty-five-year-old employees were fired in favor of a group of forty to forty-five-year-old employees because of an unjustified, albeit neutral, policy, this group would not have a claim of disparate impact under the ADEA.[90] Essentially, plaintiffs would not be afforded equivalent protection under both claims.

Third, and perhaps most importantly, this rule would contradict the ADEA language. As stated in the statute, the ADEA is meant to protect "individuals" and not groups.[91] Implementing this rule would protect the group of employees who fall within the forty and over age bracket. However, it would not protect the individual sixty-five-year-old employee who was disparately impacted by a facially neutral company policy.

B. Sub-Grouping

A sub-grouping rule would allow a plaintiff to "sub-group" his age to prove that an employer's neutral policy disparately impacted his or her group, even though it might not have disparately impacted the whole forty-year-old and over group.[92] Taken from the examples above, if a sixty-five-year-old employee can establish statistically that a specific neutral employment policy disparately impacts employees sixty-five and over, that employee would have a viable disparate impact claim. This is true

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90. Interestingly, the sixty-five-year-old group would have a disparate impact claim under the ADEA if the employment practice discriminates against their group in favor of thirty-nine year olds, but not when it discriminates in favor of forty-year-olds.

91. The ADEA states: "[I]t shall be unlawful for an employer . . . to deprive any *individual* of employment opportunities . . . because of such *individual's* age . . . ." 29 U.S.C. § 623 (a)(2)(emphasis added). The Supreme Court in *O'Connor* explained that the ADEA does not prohibit discrimination only against those employers forty years and older, but prohibits discrimination against employees because of their age, with the limit on the protected class to those forty years and older. 517 U.S. at 312-13. The main focus then becomes whether an individual, not a group, suffered age discrimination vis-à-vis any other person or persons in any other age group.

This exact point was made when the ADEA was passed in 1967. Senator Yarborough in effect stated that if a forty-two-year-old and a fifty-two-year-old applied for the same job, the employer "could not turn either one down on the basis of the age factor." 113 Cong. Rec. 31,255 (1967) (statement of Sen. Yarborough).

92. This is similiar to what the Supreme Court has allowed for disparate treatment claims under the ADEA. *See O'Connor*, 517 U.S. at 312-13 (stating that the person who replaced a terminated employee need not be "outside the protected class").

even if employees forty years old and over as a whole are not disparately impacted by that same specific employment practice.

1. Advantages of Sub-Grouping

While this rule would not necessarily protect individuals, it would focus on smaller groups of employees instead of the forty-year-old and over group as a whole. Thus, individuals would be better protected under this rule than under the bright-line rule previously discussed. As shown from the above example, the sixty-five-year-old employee would be able to bring a disparate impact claim under the ADEA even if the whole forty year-old and over group did not suffer disparate impact.

Further, this rule would essentially eliminate a major negative of the bright-line rule: it would preclude employers from adopting an unjustified, albeit neutral, policy that disparately impacts employees who are fifty-five years old and over, but not the forty year-old and over group as a whole.[93] In other words, sub-grouping would not "permit policies and practices that clearly have an adverse impact on individuals based on their age to escape judicial scrutiny."[94]

2. Disadvantages of Sub-Grouping

There are two major problems associated with this rule. First, there is the problem of deciding what sub-groups to use.[95] Since it is extremely rare for two people to be born at the same time, plaintiffs could divide sub-groups in all different ways.[96]

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93. *See* Graffam v. Scott Paper Co., 848 F. Supp. 1, 4 (D. Me. 1994) (providing a similar hypothetical).

94. *Id.*; *see also* Finch v. Hercules Inc., 865 F. Supp. 1104, 1129 (D. Del. 1994) (stating that prohibiting age discrimination within sub-groups was the type of age discrimination Congress sought to prohibit).

95. Interestingly, the Supreme Court in *Connecticut v. Teal*, 457 U.S. 440, 455 (1982), did not rule out sub-grouping for disparate impact claims under Title VII. The Court stated that determining whether a particular employment policy is fair to the class as a whole does not justify unfairness to an individual class member. *Id.* Consequently, the Court stated: "Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired." *Id.* Thus, a woman, who was excluded from the hiring process, would still have a valid disparate impact claim even if the overall hiring process resulted in women as a group faring as well as the employees. *Id.*

96. For instance, a forty-five-and-a-half-year-old employee files a disparate impact suit under the ADEA. The employee wants to establish a sub-group to establish his prima facie case for disparate impact. The employee first looks to employees between forty-five years old and above. However, if he were to use this sub-group, there would be no disparate impact because there are multiple other employees who just turned forty-five years old. Thus, the employee will attempt to divide the sub-group up to include forty-five-and-a-half-year-olds and older, because this would help establish a disparate impact claim.

This would allow plaintiffs to manipulate the statistical data to provide them with a particular sub-group that has been disparately impacted.[97]

Second, implementing this rule would make the jobs of employers much more difficult.[98] They would have to spend an ample amount of time ensuring that each employment decision on certain policies did not disparately impact an age sub-group. Not only would this be tedious and time consuming, but it would also cost the employer money as well. Further, this would lead employers to account for age when making employment decisions on certain policies, which is precisely what the ADEA prohibits.[99]

There is another problem, albeit a minor one, which concerns reverse discrimination claims.[100] Reverse discrimination claims occur when a sub-group of employees forty years old and over alleges that they were disparately impacted by a specific employment policy as compared to older employees.[101] For

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In *McDonnel Douglas*, the Eighth Circuit strongly condemned the use of sub-grouping as a means for establishing a prima facie case for disparate impact when it stated:

> If disparate impact claims on behalf of subgroups were cognizable under the ADEA, the consequence would be to require an employer engaging in an [sic] RIF to attempt what might well be impossible: to achieve statistical parity among the virtually infinite number of age subgroups in the workforce. Adopting of such a theory, moreover, might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute proscribes. . . . We have held that employment decisions motivated by factors other than age (such as retirement eligibility, salary, or seniority), even when such factors correlate with age, do not constitute age discrimination. We certainly do not think that Congress intended to impose liability on employers who rely on such criteria just because their use had a disparate impact on a subgroup.

191 F.3d at 951 (citations omitted).

97. For instance, a forty-four-and-a-half-year-old employee could bring a disparate impact claim under the ADEA against an employment practice alleging that employees between the ages of forty-four and forty-seven were disparately impacted. She could bring this claim even though employees between the ages of forty and forty-three, employees forty-eight and older, or employees forty and over as a whole are not disparately impacted by the practice.

98. *See* Ellis v. United Airlines, 73 F.3d 999, 1099 (10th Cir. 1996) (stating there are countless facially-neutral selection criteria and other employment practices whose effect on individuals differ depending on their age at the time a business decision is made). For example, reductions in workforce are typically designed to cut salary and benefit costs. Typically, the employees who make the most salary and who have the higher benefits are the older employees. Thus, the employer would have to spend countless resources determining whether a particular sub-group was disparately impacted by the reductions in workforce.

99. *McDonnell Douglas*, 191 F.3d at 951.

100. Allen, Hensley & Sherman, *supra* note 77, at 85.

101. *Id.*

instance, a particular employment practice might have a severe effect on employees between the ages of forty and forty-five, but not on employees forty-five-years-old and over. The employees in the forty to forty-five year old group would then attempt to bring a disparate impact claim based on reverse discrimination. While most courts do not recognize reverse discrimination claims brought under the ADEA, some courts have allowed plaintiffs to bring such claims.[102] Of course, this would also increase difficulties in making employment decisions. Employers would now also have to account for reverse discrimination problems as well.

C. Statistical Tests that Focus on Individuals Rather Than Groups

While the analysis of a disparate impact claim under Title VII focuses on groups being disproportionately impacted,[103] "the best statistical tests for ADEA cases are those that do not employ grouping."[104] One statistical test that a plaintiff could use is called "mean analysis."[105] This test compares what the average age of employees who are adversely affected by an employment practice against the average age of the entire employee population.[106] The probability that the difference between the two mean ages resulted by chance can be calculated using various statistical formulas.[107]

While this analysis focuses more on individuals than groups, it generally fails to reveal which individuals among the group of disparately impacted employees were actually impacted.[108] For instance, a fifty-year-old employee who claims he was disparately impacted by a specific policy might use the mean analysis to show

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102. *See* Cline v. Gen. Dynamics Land Sys., Inc., 296 F.3d 466, 469-71 (6th Cir. 2002) (allowing the type of reverse discrimination case, as given in the example above, but refusing to the label it a reverse discrimination claim).

103. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15 (1977) (stating that claims for disparate impact under Title VII involve employment practices that "fall more harshly on one group than another"). In other words, whether African-Americans or Hispanics as a group were disparately impacted by a particular employment practice would determine whether there is a disparate impact claim under Title VII. *But see supra* note 87 (noting how a person might recover based on disparate impact touching a group as a whole, but not impacting the person as an individual).

104. Harper, *supra* note 80, at 1362.

105. *Id.* at 1362.

106. *Id.* at 1363.

107. Harper discusses the possible use of "mean analysis" in ADEA cases using the "z statistic" which is derived form the central limit theorem. *Id.* at 1362-66. However, as Luce points out, this analysis has a drawback: "it can reveal that the discrepancy in the means is not by chance, but it does not reveal how much, if any, of the discrepancy is explained by some factor other than age." George O. Luce, Comment, *Why Disparate Impact Claims Should Not Be Allowed under the Federal Provisions of the ADEA*, 99 NW. U.L. REV. 437, 489 n.322 (2004).

108. Luce, *supra* note 107, at 489.

that the practice had a significant disparate impact on age, but this would not prove that it disparately impacted the actual fifty-year-old employee. The data may actually reveal that the disparate impact was focused on other ages in the age distribution (i.e. sixty-year-olds), but not fifty-year-olds.

The next two methods, however, can establish that a plaintiff's particular age explains a disparate impact he suffered from a neutral employment policy or practice.[109] First, is the logistic regression analysis.[110] This statistical analysis is used to estimate the probability that an employee of a certain age will be disparately impacted by a specific employment policy or practice, based on the relationship between age and the effect of the policy on each employee in the population.[111]

The second analysis that focuses strictly on the individual's age is the multivariate analysis.[112] This analysis indicates how much the probability of the disparate impact's occurrence is explained by other non-age factors, such as cost, or years of service.[113] However, while both of these tests focus on the plaintiff's age, they are both complex,[114] and costly to administer[115] and validate.

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109. *See id.* (stating that these statistical tests require a number of assumptions and experts to validate the assumptions). Consequently, cost becomes a major downfall for using statistical tests for disparate impact claims under the ADEA.

110. Robert Timothy Reagan, *Federal Judicial Center Statistical Examples Software Prototype: Age Discrimination Examples*, 42 JURIMETRICS J. 281, 293 (2005).

111. *Id.* at 293-95.

112. *Id.*

113. *Id.* This test "assumes that the natural logarithm of the odds on [the adverse affect occurring] is a linear function of age." *Id.* at 289.

114. Two converse arguments have been set forth regarding the complexity of the statistics. Herbert and Shelton argue that Congress never intended for jury trials in Title VII disparate impact cases because the statistics are too complex for lay people. Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625, 650-60 (1996). However, Fentonmiller argues that the reason Congress did not make jury trial available in Title VII disparate impact cases is not because of the statistical complexity, but rather that damages are not available for such claims; thus, there is no constitutional right to jury trial for such claims. Fentonmiller, *supra* note 10, at 1123 n.315.

115. As Evan H. Pontz points out, there is a major difficulty in administering a statistical test for an ADEA disparate impact claim, namely identifying the relevant populations for the comparisons. Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 278-79 (1995). For instance, the total number of employees at a particular company changes on a frequent basis. *Id.* Further, older workers retire and are replaced by younger employees. *Id.* This greatly complicates the statistical analysis. *Id.*

IV. PROPOSAL

In establishing a prima facie case for disparate impact,[116] plaintiffs should be allowed to use statistical tests that are based on individuals and not groups. Courts should not treat the age variable as a dichotomous variable, where a disparate impact claim would fail if the whole forty and over group was not disparately impacted (i.e. the "bright-line" rule discussed above). Nor should the courts allow plaintiffs to "sub-group" their ages to establish a disparate impact claim. Yet, allowing plaintiffs to use statistical tests that do not require age grouping also has its imperfections. However, there will always be some imperfection no matter which approach is taken by the courts. Further, an approach focusing on individuals seems more in line with Supreme Court's decisions regarding discrimination in general.[117]

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116. While there are small variations to the elements needed to establish a disparate impact claim under the ADEA, generally a plaintiff must: (1) identify a facially neutral employment policy of the employer that (2) causes (3) a statistically discernable disparate impact on a protected employee group. Mullin v. Raytheon Co., 2 F. Supp. 2d 165, 173 (Mass. 1998). The protected employee group in ADEA cases is an employee who is forty years of age or older. 29 U.S.C. § 631(a) (2000). The main focus of the proposal in this comment is on how a plaintiff should satisfy the third element. In order to satisfy this element, a plaintiff should use statistical data to prove he or she was disparately impacted. However, in order to do that, the plaintiff must use the "bright-line rule," sub-grouping technique, both of which this comment rejects, or use statistical tests that focus on individuals, which this comment proposes is the best way to satisfy the third element.

117. In *Teal*, 457 U.S. at 453, the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 was enacted to protect individuals and not protect groups as a whole. In that case, African-American employees brought a disparate impact claim under Title VII. *Id.* at 443. The employer required employees to pass a written exam as one step in obtaining permanent status as a manager. *Id.* The exam results yielded a fifty-four percent pass rate for African-American candidates and a seventy-nine percent pass rate for Caucasian candidates. *Id.* at 443 n.4. Nevertheless, the employer promoted approximately twenty-three percent of the African-American candidates and approximately fourteen percent of the Caucasian candidates. *Id.* at 444.

The District Court ruled that at the "bottom line" the employer's policy did not adversely affect African-American candidates. *Id.* at 445. Therefore, the plaintiffs did not establish a prima facie case for disparate impact. *Id.* However, the Second Circuit Court of Appeals reversed this ruling and the Supreme Court affirmed. *Id.* The Court rejected the bottom line argument, stating that "Congress intended Title VII to achieve equality in employment opportunities for every individual, not just equality in the overall number of minorities actually hired or promoted." *Id.* at 453. The Court reasoned that Congress did not intend to allow employers to discriminate against some employees while favorably treating other employees within that protected group. *Id.* at 455.

In reaching its conclusion, the Court relied on section 703(a)(2) of Title VII, which prohibits practices that would deprive or tend to deprive "any individual of employment opportunities." *Id.* at 453-54 (citation omitted). Section 703(a)(2) provides the statutory basis for the disparate impact theory

If the courts were to use the "bright-line" rule, which treats age as a dichotomous variable, they would blatantly ignore the purpose of the ADEA. The ADEA is meant to protect individuals and not groups. As the Supreme Court stated in *O'Connor*, "[the] language [of the ADEA] does not ban discrimination against employees because they are aged [forty] or older; it bans discrimination against employees because of their age, but limits the protected class to those who are [forty] or older."[118] Thus, the ADEA prohibits discrimination on the basis of age and not class membership. Accordingly, the approach of grouping all forty-year-olds and above as one group should not be employed by the courts.

The use of sub-grouping by the courts would be equally flawed and would lead to multiple problems. Plaintiffs could essentially manipulate the statistical result by making an arbitrary decision of who should be in the comparison group.[119] For instance,

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under Title VII. 42 U.S.C. § 2000e-(2)(a)(2) (2000). The same language of section 703(a)(2) also appears in the ADEA section 623(a)(2). 29 U.S.C. § 623(a)(2) (2000).

In *Smith*, the Supreme Court essentially reached its decision that disparate impact is available under the ADEA because the language in both the ADEA and Title VII are almost identical. 544 U.S. at 232. Since disparate impact was available under Title VII, the *Smith* Court reasoned it should also be available under the ADEA because of the identical language. *Id.* at 235-36. Thus, the Court would ostensibly hold that the disparate impact claims under the ADEA, just like disparate impact claims under Title VII, protect individuals and not groups. *See also* Graffam v. Scott Paper Co., 848 F. Supp. 1, 4 (Me. 1994) (stating that a rule that plaintiffs may only establish a disparate impact claim under the ADEA by showing the forty year old and over group as a whole was disparately impacted would allow employers' policies that "clearly have an adverse impact on individuals based on their age to escape judicial scrutiny").

118. *O'Connor*, 517 U.S. at 312-13. *O'Connor* was a unanimous decision by the Supreme Court on a disparate treatment case under the ADEA. *Id.* at 309. However, the issue in that case was whether the plaintiff must show he was replaced by someone outside the protected group (i.e. someone under forty years old) to establish a claim under the ADEA. *Id.* Thus, the Court was essentially deciding what the purpose of the ADEA was (i.e. that the ADEA protects individuals and not groups). This reasoning should also apply to disparate impact claims brought under the ADEA. *But see Mullin*, 2 F. Supp. at 174 (stating that the *O'Connor* reasoning should only be applied to disparate treatment claims under the ADEA, and further noting that "[t]he reasoning behind [the *O'Connor* decision] is less compelling in a disparate impact case, where the proof derives its force from an analysis of the impact on the protected group as a whole").

119. The Second Circuit has expressly condoned the use of sub-grouping for disparate impact claims brought under the ADEA. *Lowe*, 886 F.2d at 1373 (2d. Cir. 1989). The *Lowe* court set forth an example, albeit an unlikely one, which shows some of the shortfalls of using sub-groups. The example states that if the sub-group approach was followed "an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the 'sub-group' of those age 85 and above, even though all those hired were in their late seventies." *Id.* However, the Lowe court did

consider a fifty-one-year-old employee who is fired from his job and brings a disparate impact claim against his employer. Assuming he establishes the first two elements of a disparate impact claim, he would then attempt to sub-group ages to establish the third element. There may be no disparate impact on the forty and above group as a whole. Nor would the use of a group of employees fifty to fifty-five years old establish a disparate impact claim. However, a sub-group of employees between fifty-one and fifty-four years old would be more likely to establish a disparate impact claim against the employer. Thus, this hypothetical employee would attempt to use this sub-group to establish his claim, even though many other sub-groups would not establish the claim. With just a little imagination, one can tell that plaintiffs could find a sub-group that helps them establish a disparate impact claim.

To remedy this problem, courts could establish sub-groups with a fixed number of years. For instance, plaintiffs could only use sub-groups of forty- to fifty-year-olds, fifty- to sixty-year-olds, and sixty-year-olds and above. However, this has the same major flaw as using the forty year old and above group: it takes class membership into account and not individuals, which is neither the purpose nor spirit of the ADEA.

Further, the use of sub-grouping would ostensibly raise more questions for the court then answers. Once a sub-group is introduced, at least three categories are formed: the under forty-year-old group (the unprotected class), the sub-group of forty year olds and above not included in the disparate impact showing, and the sub-group alleged to have suffered the disparate impact.

The formation of these three categories when sub-grouping requires courts to deal with many additional questions, such as: whether the sub-group bringing the disparate impact claim should include all people over a certain age or include only people within a certain age range (for example, employees between the ages of fifty-one and fifty-four); whether the comparison group should include all people under a certain age or include only some people under a certain age (for example, if the allegation is a disparate impact against employees over forty-five years old, should the comparison group include all employees under forty-five years old or only employees under forty years old); and, whether the comparison group should include people both older and younger than the sub-group bringing the disparate impact claim (for example, if the allegation is a disparate impact against employees between fifty and fifty-five years old, should the comparison group

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fall back on the "bright-line" approach requiring the plaintiff to show disparate impact for the forty year old and above group as a whole, *id.* at 1374, which, as this comment states, is also the wrong approach.

include employees younger than fifty years old and older than fifty-five years old).

The use of sub-grouping and treating the forty- year-old and over group as a whole has too many problems for the courts to effectively use it. While the use of statistical tests not employing grouping has its fair share of problems, using this approach best fits the purpose of the ADEA, which, again, is to protect individuals and not groups. There are a variety of tests, discussed above, that courts can use for age discrimination cases that focus on the individual and not a group.

For example, there are statistical tests that can be used for cases that involve large sample sizes, the means analysis test,[120] and small sample sizes, the Mann-Whitney test.[121] The means analysis test does have a drawback though. While the test can reveal that a discrepancy in the means of the ages is not by chance, it does not reveal how much, if any, of the discrepancy is explained by some factor other than age.[122] For instance, if employees whose ages range from fifty to sixty were terminated because of a cost-based decision by an employer, the employees might bring a disparate impact claim under the ADEA. The plaintiffs might use the means analysis test to establish that the employer's decision had a disparate impact on them. Cost-based firing, assuming the law allows it, is highly correlated with age. Thus, the means analysis test would fail to factor this into account in discerning why the disparity occurred.

However, this is exactly why the ADEA contains the "reasonable factors other than age provision."[123] If the plaintiffs establish a disparate impact claim, the employer would simply state that the terminations were based on a factor other than age — namely, cost-based terminations. Unless the plaintiffs could prove this reason was a mere sham,[124] the employer would win on

120. Harper, *supra* note 80, at 1362-63.

121. *Id.* at 1369; *see also id.* at 1369-74 (illustrating why the Mann-Whitney test is the superior test over using sub-grouping and how it is applicable to cases that contain a small sample size). The Mann-Whitney test is also known as the "rank-sum" test. *Id.* at 1369.

122. Luce, *supra* note 107, at 489 n.322.

123. 29 U.S.C. § 623(f)(1) (2000). The statute specifically states: "It shall not be unlawful for an employer . . . to take any action otherwise prohibited under [the ADEA] . . . where the [action] is based on reasonable factors other than age." *Id.*; *see also supra* note 65 and accompanying text (stating that the reasonable factors other than age provision under the ADEA are less stringent then the business necessity provision under Title VII).

124. Once the plaintiff establishes a prima facie case for disparate impact, the burden of proof shifts to the employer/defendant to prove that the disparate impact was caused by a reasonable factor other than age. *McDonnell Douglas*, 411 U.S. at 802-03. Once the employer proves there was a reasonable factor other than age for its decision or policy, the burden then shifts back to the plaintiff to show that the employer's reasonable factor other

summary judgment or a motion for a directed verdict. Alternatively, other tests that can be used besides the means analysis test, such as a logistic regression analysis and a multivariate regression analysis that take other factors into account.[125]

Not only should courts use statistical tests that focus on individuals because the purpose of the ADEA is to protect individuals and not groups, but "[s]tatistical analysis is most appropriately done on an individual age basis."[126] There is simply too much difficulty in justifying the use of statistical data for specific groups or sub-groups.

V. CONCLUSION

Now that the Supreme Court has ruled disparate impact available under the ADEA, courts must decide if plaintiffs can or must use groups in helping to establish such a claim. The answer should be no on both accounts. The ADEA's purpose is to protect individuals and not groups. Comparison groups do not fulfill that purpose. Thus, courts should use statistical tests that focus on individuals and not groups. All tests have imperfections, and such individual tests are no exception. Individual statistical tests, however, would fulfill the purpose of the ADEA — protecting individuals, not groups.

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than age was a mere "pretext for discrimination." *Id.* at 804-05. As the *Smith* Court stated, however, it is not required that the employer's selected method be the only method for achieving the desired goal, unlike Title VII cases. *Smith*, 544 U.S. at 243.

125. Reagan, *supra* note 110, at 293-95.

126. Harper, *supra* note 80, at 1375.