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Is Business Judgment a Catch-22 for ADEA Plaintiffs? The Impact of *Smith v. City of Jackson* on Future ADEA Employment Litigation

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IS BUSINESS JUDGMENT A CATCH-22 FOR ADEA PLAINTIFFS? THE IMPACT OF *SMITH V. CITY OF JACKSON* ON FUTURE ADEA EMPLOYMENT LITIGATION

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"That's some catch, that Catch-22," [Yossarian] observed. "It's the best there is," Doc Daneeka agreed."[***]

I. INTRODUCTION

In *Smith v. City of Jackson*, the Supreme Court for the first time directly addressed the availability of a "disparate impact" claim under the Age Discrimination in Employment Act ("ADEA" or the "Act").[1] In the face of four decades of requiring plaintiffs to prove discriminatory intent in order to prevail on an ADEA claim, the Court resolved this issue squarely in the plaintiffs' favor.[2] But this initial victory for older workers quickly evaporated. When the Court examined the sufficiency of the plaintiffs' evidence, which indisputably demonstrated that younger workers could demand and command better pay packages than older workers, the Court concluded that the *Smith* plaintiffs had failed to prove a valid disparate impact claim.[3] Deferring to the City of Jackson, Mississippi ("City" or

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[***] Joseph Heller, *Catch-22*, at 55 (Simon & Schuster 1955).

> There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

Id.

[1] *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005). In an earlier case, the Court addressed disparate treatment under the ADEA and held that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993). In that case, however, the Court specifically declined to address the availability of a disparate impact claim under the ADEA. *Id.*

[2] *Smith*, 544 U.S. at 232.

[3] *Id.*

"City of Jackson"), the Court found that the City had articulated a "reasonable" business rationale for its admitted discrimination that would exempt it from the plaintiffs' disparate impact ADEA claim.[4]

In recognizing the "reasonable factor other than age" ("RFOA") exclusion from the Act's protection, the Court handed not only the City of Jackson, but employers everywhere, a virtually impermeable barrier to ADEA disparate impact liability. In elevating the RFOA to a premier status, the Court raised significant questions about the availability of the newly arrived disparate impact claim to ADEA plaintiffs. In light of the business judgment an employer can exercise, will almost any explanation for an employment practice sink a plaintiff's boat? Does the employer have any burden of showing that it employed a truly reasonable factor other than age? Is there any boundary to what constitutes "reasonable"? What are the burdens of proof with respect to an RFOA, and will plaintiffs even be permitted to rebut it when proffered?

Two sequential pay plans were at the heart of the controversy in *Smith*.[5] The first of these plans, which the City of Jackson adopted on October 1, 1998, had a stated aim to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability."[6] This plan raised the salary of all City employees.[7] Several months later, the City focused on law enforcement employees more specifically. With a goal of raising starting salaries to that of the regional average, the City formulated a supplemental approach.[8] There was no real dispute that older officers received a lesser benefit than younger ones under this plan.[9]

Senior police officers filed claims of age discrimination under the ADEA.[10] They asserted that the discrimination was both deliberate

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[4] *Id.* at 242.
[5] *Id.* at 230.
[6] *Id.* at 231.
[7] *Id.*
[8] *Id.* These raises were proportionately more favorable for those officers having less than five years of experience; most of the older officers had tenure longer than five years. *Id.*
[9] *Id.*
[10] In pertinent part, title 29 U.S.C. § 623(a), which codifies the ADEA, makes it unlawful for an employer, with respect to covered employees:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or] (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

However, title 29 U.S.C. § 623(f) further provides:

(disparate treatment) and also an adverse result of the City's May 1, 1999 compensation plan revision, which disproportionately affected older officers with respect to raises granted to all police officers and police dispatchers (disparate impact).[11] The question of whether the plaintiffs could successfully claim disparate impact pursuant to the ADEA was at the heart of the appeals;[12] whether the plaintiffs had established entitlement to relief was secondary.

Due to the similar history and statutory language between Title VII of the Civil Rights Act of 1964 and the ADEA, the *Smith* Court looked to Title VII as a natural focal point of its analysis. With respect to Title VII, the Court had long recognized that disparate impact claims were actionable.[13] The 1991 Amendments to Title VII reinforced this availability.[14] Whether a disparate impact claim was available under the ADEA was a question of first impression for the *Smith* Court.[15]

After examining the legislative background of the ADEA, which included the original omission of "age" as also found in the Civil Rights Act,[16] and its similarity to Title VII with respect to prohibitions,[17] the Court

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> It shall not be unlawful for an employer, employment agency, or labor organization--
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . .

[11] *Smith*, 544 U.S. at 231.

[12] Both the district and appellate courts in *Smith* found such claims to be unavailable under the Act. *Id.* The district court granted summary judgment in favor of the City of Jackson on both claims. The Fifth Circuit ruled that the plaintiffs were entitled to discovery on the issue of intent with respect to the disparate treatment claim prior to summary judgment; it affirmed the dismissal of the disparate impact claim as being unavailable under the ADEA. *Id.* (citing *Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003)).

[13] Several years after the ADEA's passage, the Court recognized that a disparate impact claim theory was actionable under Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *see also Smith*, 544 U.S. at 231; Aida M. Alaka, *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has* Smith v. City of Jackson *Substantially Expanded the Rights of Older Workers under the ADEA?* 70 Alb. L. Rev. 143, 149-50 (2006) (discussing the evolution of disparate treatment and disparate impact theories of recovery).

[14] "The 1991 amendments codified and clarified disparate impact claims under Title VII, and restored the plaintiff and defendant burdens articulated in *Griggs*." Sarah Benjes, Smith v. City of Jackson*: A Pretext of Victory for Employees*, 83 Denv. U. L. Rev. 231, 236 (2005) (citation omitted).

[15] *Smith*, 544 U.S. at 237. The federal circuit courts of appeals had grappled hard with this question. After *Griggs* and before *Hazen Paper*, federal appellate courts "uniformly interpreted the ADEA as authorizing recovery on a 'disparate-impact' theory in appropriate cases." *Id.* The Court's ruling in *Hazen Paper* disrupted the circuits' harmony. The Court held that a discharge shortly before a pension vested did not constitute disparate treatment. *Id.* (citing *Hazen Paper*, 507 U.S. at 612). Although the Court in *Hazen Paper* specifically declined to address the availability of a disparate impact claim under the ADEA, some circuit courts withdrew from their approval of an ADEA disparate impact claim. *Id.*

[16] Although omitting it from the Civil Rights Act, Congress did direct the Secretary of Labor to study and report on factors that "might tend to result in discrimination in employment because of age," together with any consequences on the affected individuals as well as the economy. *Id.* at 232. The subsequent report, known as the "Wirtz Report," concludes there was "little discrimination arising from dislike or intolerance of older people, but that 'arbitrary' discrimination did result from certain age limits." *Id.* (citing Dept. of Lab., *The Older American Worker: Age Discrimination in Employment* 22

presumed "that Congress intended that text to have the same meaning in both statutes."[18] The Court also identified statutory language in both the ADEA and Title VII that did not simply prohibit actions that "limit, segregate, or classify" persons or deprive them of employment opportunities.[19] Rather, the statutory protection extended to situations where an employee's status as an employee was "otherwise adversely" affected.[20]

The Court then addressed business decisions in light of the ADEA and the proceedings below and whether the plaintiffs had articulated a valid disparate impact claim. In spite of their similarities, Title VII and ADEA provisions differ in critical respects. First, the ADEA does not prohibit an action based on an RFOA.[21] For the *Smith* plaintiffs, this wording in the ADEA constituted a daunting hurdle. Second, ADEA plaintiffs had not received the benefit of the 1991 Amendments to the Civil Rights Act, which eased the restrictive proof requirements for Title VII plaintiffs established in *Wards Cove Packing Co. v. Atonio*.[22] The Court concluded that the *Smith* plaintiffs had failed to articulate "the *specific* employment practices that are

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(Sec. of Lab. Rpt. 1965) (reprinted in U.S. EEOC, *Legislative History of the Age Discrimination in Employment Act* (1981)) [hereinafter Wirtz Report]). The Wirtz Report observes further that "discriminatory effects resulted from '[i]nstitutional arrangements that indirectly restrict the employment of older workers.'" *Id.* (citing Wirtz Report at 15) (noting that with this evidence of age discrimination, Congress responded in 1977 with the ADEA and its employment protections, codified in title 29 U.S.C. § 623(a)(2)).

[17] With respect to the legislative background of the ADEA, Congress had intentionally omitted older workers from the employment discrimination protection under the Civil Rights Act. *Id.* at 232 n. 2 (citing 110 Cong. Rec. 2596-2599 (1964)). Section (a)(2) of the ADEA provides that it is unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2) (2006). This language was identical to that in the corresponding section of Title VII of the Civil Rights Act of 1964, § 703(a)(2), which instead addressed "race, color, religion, sex, or national origin." *Smith*, 544 U.S. at 233. The Court noted that both the ADEA and Title VII recognized the affirmative defense of a bona fide occupational requirement ("BFOQ"). *Id.* at 233 n. 3. These provisions placed the burden on the employer to prove that a purportedly discriminatory employment decision was a BFOQ that was "reasonably necessary to the normal operation of the particular business." *Id.* Importantly, the wording in the ADEA differed with respect to exemptions from prohibited activities, specifically permitting making employment decisions based on "reasonable factors other than age." *Id.*

[18] *Smith*, 544 U.S. at 233 n. 3 (citing *Northcross v. Bd. of Educ. of Memphis City Schools*, 412 U.S. 427, 428 (1973) (per curiam)). The *Smith* Court also recalled the deference it gave to Equal Employment Opportunity Commission ("EEOC") guidelines in *Griggs*. *Id.* at 235 (citing *Griggs*, 401 U.S. at 433-34). These guidelines supported the viability of disparate impact claims under Title VII. As a result, the Court recalled: "We thus squarely held that § 703(a)(2) of Title VII did not require a showing of discriminatory intent." *Id.*

[19] *Id.* (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (quoting 42 U.S.C. § 2000e-2(a)(2) (1988))).

[20] *Id.* (emphasis omitted).

[21] *Id.* at 253 (citing 29 U.S.C. § 623(a) (2000)).

[22] 490 U.S. 642 (1989). In *Wards Cove*, the Court held that, under Title VII, proving that a general policy had a discriminatory effect was insufficient to establish a disparate impact claim. *Smith*, 544 U.S. at 241 (citing *Wards Cove*, 490 U.S. at 656). There, the Court had "narrowly construed the employer's exposure to liability" for disparate impact discrimination. *Id.* at 240 (citing Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071 (1991)). The 1991 Amendments "incorporated the business necessity defense from *Griggs* rather than the more lenient business justification test from *Wards Cove*." Benjes, *supra* n. 14, at 236.

allegedly responsible for any observed statistical disparities," making their claim deficient.[23] The Court also found that the City's proffered business rationale for its pension plan was a reasonable one and excluded its employment practice from the ADEA prohibitions.[24]

The *Smith* decision "is likely to have profound implications on a wide range of corporate decision-making regarding layoffs, reductions in force and employee benefit plans. It also significantly increases liability risks for age discrimination claims."[25] While the *Smith* plaintiffs lost their battle, have plaintiffs generally already lost the war against disparate impact age discrimination with respect to business judgment issues?

"There is a paucity of judicial authority"[26] with respect to the sufficiency of an RFOA proffers and what burdens, if any, the courts will place on employers raising them in the face of ADEA discrimination claims.[27] This Article explores the viability of ADEA disparate impact claims post-*Smith* by examining how business employment decisions are likely to fare in light of yet-to-be articulated burdens of proof. Part II discusses the impact of business decisions on liability in the context of business judgment, disparate treatment, and disparate impact claims. Part III explores how courts examine these business decisions in light of applicable burdens of proof under Title VII and the new gauntlet that likely exists post-*Smith* under the ADEA. Finally, in Part IV, the Article addresses the viability of ADEA disparate impact claims and obstacles facing ADEA claimants in light of Supreme Court jurisprudence, post-*Smith* cases, and burdens of proof and production when business judgment comes into play.

II. THE IMPACT OF BUSINESS DECISIONS ON LIABILITY

A business decides to revise its benefits plan in order to attract scarce workers. It knows that workers with ages forty and over will not receive the same boost to their total compensation package. The business has now engaged in the type of activity prompting disparate impact that the Supreme Court in *Smith* recognized as actionable under the ADEA. This Article examines what, if any, boundaries courts will place on such business decisions.

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[23] *Smith*, 544 U.S. at 241 (emphasis added) (citing *Wards Cove*, 490 U.S. at 656).

[24] *Id.*

[25] Alaka, *supra* n. 13, at 146 (citing Gerald L. Maatman, Jr., *New ADEA Ruling Huge for Employers*, 109 Natl. Underwriter Prop. & Casualty/Risk & Benefits Mgt. 34, 34 (June 13, 2005) (available at http://www.propertyandcasualtyinsurancenews.com/cms/nupc/Weekly+Issues/issues/2005/23/Buyers+Report/P23-MAATMAN.htm); Linda Greenhouse, *A Boon to Age-Bias Suits*, Deseret Morning News (Salt Lake City, Utah) A01 (Mar. 31, 2005)).

[26] Donald J. Spero, Smith v. City of Jackson*: Does It Really Open New Opportunities for ADEA Plaintiffs to Recover under a Disparate Impact Theory?* 36 U. Mem. L. Rev. 183, 204 (2005).

[27] *Id.* For a discussion of pre-*Smith* cases addressing RFOAs and employer burdens, see *id.* at 205-10.

A. Disparate Impact in Employment: A Brief Background

Unlike disparate treatment, which traditionally embraces intent to discriminate, disparate impact involves a facially neutral employment practice that has a significant impact on a protected group.[28] At least that is the way it is supposed to be. In fact, as commentators have pointed out, there has been some blurring between the two theories,[29] even by the Supreme Court itself.[30] Suggestions that one or the other theory dominates further complicate the analysis.[31] Consequently, the parameters of disparate treatment and its relationship to disparate impact provide an important context for discussing business judgment questions in light of Title VII and the ADEA.

Intent to discriminate is the bedrock of a disparate treatment allegation in an employment discrimination case. As the Supreme Court outlined in *McDonnell Douglas Corp. v. Green*, a plaintiff claiming disparate treatment establishes a prima facie case of discrimination by asserting that he or she is a part of the protected class in question, that he or she has the required qualifications for the job, and that the employer took action adverse to the plaintiff while other similarly situated employees were treated in a different manner.[32] The defendant-employer may then offer evidence of a legitimate, nondiscriminatory reason for its action, after which the plaintiff may offer evidence that the proffered reason is actually a pretext for intentional discrimination.[33]

Disparate treatment can be viewed as being straightforward: "The employer simply treats some people less favorably than others because of their [protected characteristic]. Proof of discriminatory motive is critical," and the fact-finder may be able to extract it "from the mere fact of differences in treatment."[34] However, a decision may be deliberate without

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[28] *See Griggs*, 401 U.S. 424.

[29] That disparate impact is a clear, straightforward theory has been questioned in some commentary. For instance, Joseph Seiner argues that "the history of disparate impact is a story of misapplication and misunderstanding." Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 Yale L. & Policy Rev. 95, 99 (2006). This writer also asserts that the "blurry legal landscape of disparate impact and disparate treatment in cases alleging discriminatory employment standards cries out for clarity." *Id.* at 97.

[30] *See e.g. Watson*, 487 U.S. 977; *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

[31] *See e.g.* Michael Selmi, *Was the Disparate Impact Theory a Mistake?* 53 UCLA L. Rev. 701, 754 (2006) (asserting that "intentional discrimination" under disparate treatment would have yielded better results than the disparate impact approach, which the author asserts "effectively precluded the development of a more robust theory of intentional discrimination—a theory that might have been more effective in addressing structural discrimination"). In contrast, Charles Sullivan concludes that an expansion of the disparate impact theory "is the more likely route to reform." Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 Wm. & Mary L. Rev. 911, 1002 (2005).

[32] 411 U.S. 792, 802 (1973).

[33] *Id.* at 798, 802.

[34] *Hazen Paper*, 507 U.S. at 609. Justice O'Connor, writing for the majority, noted that the Court had not decided whether a disparate impact claim was cognizable under the ADEA and that it need not do so in this case as the plaintiff had asserted only a claim of disparate treatment. *Id.* at 610.

embracing any "evil" motive to discriminate and may be actionable as such.[35]

While the distinguishing characteristic of a disparate treatment case is discriminatory motive or intent, a disparate impact theory proceeds irrespective of whether the employer acted with any such intent. The disparate impact theory addresses scenarios where the employer's action or practice, sans overt or intentional discrimination, has had a negative impact on a protected class. In this regard, the ADEA "text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer."[36] Without animus, disparate impact has sometimes been "likened to a negligence theory in claims of discrimination."[37] It has also been called "counterintuitive" in that "it defines 'discrimination' differently than the term is normally used."[38] Although no showing of intent is required in disparate impact cases, they are brought much less often than disparate treatment cases.[39]

The Supreme Court first recognized a disparate impact claim as actionable under Title VII in *Griggs v. Duke Power Co.*[40] In that 1971 case, it was the Court's endorsement of the Fourth Circuit's finding that the employer had acted without any intent to discriminate that led the Court to recognize a disparate impact claim under Title VII.[41] Unlike disparate treatment, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[42] Congress also "directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation," and "placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[43]

Although later cases developed both the disparate treatment theory and business necessity and job relatedness standards, there was a surprising lack of significant case law development on the disparate impact theory.[44] In a 1988 case, *Watson v. Fort Worth Bank & Trust*, the Court extended disparate impact to "subjective or discretionary employment practices."[45] The defendant had hired Clara Watson in 1973 and promoted her in 1976.[46]

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[35] *See e.g.* Sullivan, *supra* n. 31, at 916.
[36] *Smith*, 544 U.S. at 236 (emphasis in original).
[37] Seiner, *supra* n. 29, at 99.
[38] Sullivan, *supra* n. 31, at 954.
[39] Seiner, *supra* n. 29, at 99.
[40] 401 U.S. 424.
[41] *Id.* at 432.
[42] *Id.*
[43] *Id.* (emphasis in original).
[44] *See* Sullivan, *supra* n. 31, at 954 (pegging the stalling point at 1991).
[45] 487 U.S. at 991.
[46] *Id.* at 982.

Ms. Watson, who was black, applied for four other positions during 1980 and 1981, each of which Fort Worth Bank filled with white employees.[47] In the absence of formal evaluation criteria, the bank relied on supervisors' judgments.[48] All of the supervisors involved in these four decisions were white.[49] While the lower courts found for the defendant-employer under a disparate treatment analysis, the plaintiff asserted that the courts should have applied a disparate impact analysis instead.[50]

Typically, disparate impact had most frequently been applied to testing or qualifications, such as requiring an applicant to have a high school diploma.[51] However, the *Watson* Court concluded that "subjective or discretionary employment practices" could lend themselves to a disparate impact analysis.[52] After all, "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[53]

B. The Employer's Rationale: Business Judgment and Business Necessity

More profoundly after *Smith,* the litigation process affords employers in ADEA cases an opportunity to articulate some rationale for actions that might otherwise trigger liability for their business actions. Once the plaintiff can show a specific action that adversely affected older workers, liability turns on how and to what extent the employer's reason is tested. Are the courts, in the context of employment discrimination and especially with respect to age, on a trajectory to defer to employers' business judgments in employment decisions? And if so, will this be in a manner akin to the deference given business decisions under the corporate doctrine known as the business judgment rule? The standards for evaluating disparate impact claims brought under the ADEA are now up for grabs; looking at how business decisions fare in the courts informs the inquiry.

Courts have frequently deferred to businesses in their day-to-day operations under what has come to be known as the business judgment rule.

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[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 984.
[51] *Id.* at 988.
[52] *Id.* at 982.
[53] *Id.* at 987. Once the Court made that decision, it went on to discuss what evidentiary standards should be applied. *Id.* at 991-93. However, the Court's ultimate decision was to remand the case for a determination under a disparate impact analysis. *Id.* at 1000. It seems that the courts, in determining whether or not plaintiffs can properly establish a disparate impact claim, have, at least once, flummoxed even the EEOC. In *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000), the Eleventh Circuit vacated a judgment of gender-based disparate impact discrimination for, among other things, failure to identify "one facially neutral employment practice [that] proximately caused the [statistical] disparity." *Id.* at 1278. The Eleventh Circuit suggested that, in fact, this might be a case of intentional discrimination, i.e., a case of disparate treatment. *Id.* at 1270-71.

Most usually applied in the context of corporate decision-making at the board of directors' level, the language has sometimes been used in the realm of employment discrimination. In this arena, courts typically use the related doctrines of "business necessity," "reasonable factor other than age," or "bona fide occupational qualification." In addition, sometimes courts even accept explanations falling in the category of financial considerations.[54]

1. The Business Judgment Rule

In addition to an outright denial of discriminatory intent or impact, employers usually defend their actions by invoking principles of business judgment; that is, businesses have the prerogative to select and implement a course of action that is in keeping with acceptable business practice. Under the traditional business judgment rule, courts extend hefty latitude to companies regarding day-to-day decisions. The rule, at its most basic, allows corporate directors the flexibility of governing a corporation "without having to account to courts for their decisions."[55] Much of the jurisprudence arises from Delaware state court decisions, which evidence "a robust interpretation of the business judgment rule and respect for the principle of nonintervention in corporate governance."[56] This is commonly manifested in "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[57]

Courts have found this deference appropriate at times in employment discrimination cases. In *Deines v. Texas Department of Protective & Regulatory Services*, the Fifth Circuit considered a jury instruction on pretext in a national origin Title VII claim.[58] The issue was whether the instruction placed too much of a burden on plaintiff.[59] Noting that the plaintiff has the burden of establishing pretext, the court reiterated that it should defer to a business's evaluation of qualifications "unless disparities . . . are so apparent as virtually to jump off the page and slap us in the face."[60] The court, with what might be thought of as a summary of the business judgment rule, concluded that "it is not the function of the jury to

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[54] *See* Ernest F. Lidge, III, *Financial Costs as a Defense to an Employment Discrimination Claim*, 58 Ark. L. Rev. 1 (2005) (discussing when an employer's costs are relevant in an employment discrimination claim).

[55] Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 Duke L.J. 1, 12 (2005).

[56] *Id.*

[57] *Id.* at 15 (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

[58] 164 F.3d 277 (5th Cir. 1999).

[59] *Id.* at 279.

[60] *Id.* at 280 (emphasis omitted) (quoting from its earlier decision in *Scott v. U. of Miss.*, 148 F.3d 493, 508 (5th Cir. 1998)). The Fifth Circuit cited a number of earlier decisions emphasizing, for example, that "discrimination laws [are not] vehicles for judicial second-guessing of business decisions." *Id.* at 281 (alteration in original) (quoting *Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 372 (5th Cir. 1997)).

scrutinize the employer's *judgment* as to who is best qualified . . ."; nor is the jury to decide "[w]hether the employer's decision was the correct one, or the fair one, or the best one."[61]

Applying a traditional business judgment rule approach effectively can end litigation short of trial and in the defendant's favor. In *Blackman v. City of Dallas*, a City of Dallas code inspector filed a race discrimination case alleging disparate treatment and retaliation under Title VII.[62] Citing an earlier Fifth Circuit decision in which the court invoked the business judgment rule in a Title VII case, the district court determined that the only issue was whether the plaintiff had successfully shown that the defendant's reasons were "a pretext for discrimination."[63] In granting summary judgment in favor of the defendant, the court noted that there was no evidence that the plaintiff was better qualified than the successful candidate and "decline[d] to challenge the business judgment of the City in its staffing decisions."[64]

In another case involving a pretext issue, *Webber v. International Paper Co.*, the First Circuit considered a claim of state law disability discrimination.[65] The plaintiff, an engineer at International Paper, lost his job in a company-wide 3,000-employee reduction in force one month after the plaintiff's knee replacement surgery.[66] The plaintiff's lack of an engineering degree and sufficient experience sufficiently justified his termination.[67] The court advised: "In addition, pursuant to the 'business judgment' rule an employer is free to terminate an employee for any nondiscriminatory reason, even if its business judgment seems objectively unwise."[68] The court approvingly cited the oft-quoted maxim that "[w]e may not sit as super personnel departments assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions."[69]

2. Business Necessity

Business necessity, or job relatedness, is another principle that offers employers a defense to a disparate impact claim. The Supreme Court introduced business necessity as a limit to the disparate impact doctrine

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[61] *Id.* (emphasis in original).
[62] 2006 U.S. Dist. LEXIS 45021 (N.D. Tex. July 3, 2006).
[63] *Id.* at *9, *11.
[64] *Id.* at *10.
[65] 417 F.3d 229 (1st Cir. 2005), *cert. denied*, 546 U.S. 1215 (2006).
[66] *Id.* at 232.
[67] *Id.* at 237-38. The court found no merit in the plaintiff's arguments that the defendant's rationale was a pretext, noting that the plaintiff did not contest the legitimacy of the reduction in force or that some of the engineering positions needed to be eliminated. *Id.* at 238.
[68] *Id.*
[69] *Id.* The court specifically recognized that "[u]nder the business judgment rule, the possession of a degree can be a reasonable criterion for retaining one employee over another." *Id.*

under Title VII in *Griggs*.[70] Regarding Title VII of the Civil Rights Act of 1964, the Court observed that "[t]he touchstone is business necessity. If an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited."[71] The Court did not distinguish between an employment practice that was a "business necessity" and one that was "job related."[72] Later, the Equal Employment Opportunity Commission ("EEOC") would adopt the Court's approach in *Griggs* with respect to RFOAs and the ADEA.[73]

The business necessity test has acquired what would be considered a "reasonableness" standard. Apart from areas of testing and qualifications standards, determining business necessity "is almost entirely subjective in nature" and "courts routinely defer to employer practices . . . ."[74] That sounds more than a little like the deference given under the business judgment rule.

Courts have since struggled with what would be sufficient to establish business necessity or job relatedness and the respective burdens of proof for the plaintiff-claimant and defendant-employer. In *Watson*, the Court confronted discretionary employment practices that may be "insufficiently related to legitimate business purposes."[75] Even in this scenario, the Court observed that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."[76]

The essence of evaluating disparate impact claims in light of business decisions seems to be the balancing of discriminatory results with the employer's needs. That weighing is what makes raising a disparate impact claim unappealing to those who deem "the business necessity defense the main theoretical reason to avoid disparate impact."[77] This will prove even truer with respect to ADEA disparate impact claims.

The Supreme Court attempted to solidify the standard for business necessity, or business justification, in *Wards Cove*.[78] There it expressed business necessity as "evidence of a business justification for [the]

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[70] 401 U.S. at 431.

[71] *Id.*

[72] *Id.* at 429, 431.

[73] Brief for the United States as Amicus Curiae Supporting Petition for a Writ of Certiorari, *Meacham v. Knolls Atomic Power Laboratory*, 9 n. 2 (No. 06-1505) (available at www.usdoj.gov/osg/briefs/2007/2pet/6invit/2006-1505.pet.ami.invi.html) [hereinafter United States Brief]. "From the outset, EEOC has made clear that the employer bears the burden of establishing RFOA in any age-discrimination case." *Id.*

[74] Selmi, *supra* n. 31, at 769.

[75] *Watson*, 487 U.S. at 999.

[76] *Id.* (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978)).

[77] Sullivan, *supra* n. 31, at 994.

[78] 490 U.S. at 642.

employment practice."[79] Importantly, an employer need not prove the disputed practice was "essential" or "indispensable" to its business to meet the standard of business justification.[80] Despite the employer's proffer of business necessity, the burden of proof remained with the plaintiff.[81]

In 1991, Congress enacted amendments to Title VII in response to the Court's decision in *Wards Cove* and its limitation on what the concept of business necessity encompassed. The 1991 Amendments specifically state that the exclusive legislative history for business necessity is an Interpretive Memorandum provision included in the legislative proceedings.[82] The Memorandum states: "The terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*."[83]

3. Exemptions from Liability: The BFOQ and RFOA

In addition to defenses available under Title VII of the Civil Rights Act of 1964 and the ADEA concerning job relatedness, both statutes provide employers exemptions from liability for decisions based on a bona fide occupational qualification ("BFOQ"). Title VII provides that it will not be unlawful for an employer to consider "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business."[84] In virtually identical language, the ADEA permits an employer to take an otherwise prohibited action where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ."[85] BFOQ standards are fairly rigorous. For instance, a BFOQ is an affirmative defense that the employer must prove by a preponderance of the evidence.[86] In addition, the EEOC has issued guidelines that such exceptions shall be "interpreted narrowly"[87] in the case of sex discrimination, "strictly construed"[88] in the case of national origin discrimination, and "narrowly construed"[89] under the ADEA with "limited scope and application."[90]

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[79] *Id.* at 659.
[80] *Id.*
[81] *Id.* at 659-60.
[82] 137 Cong. Rec. S15276 (daily ed. Oct. 25, 1991).
[83] *Id.* (citations omitted).
[84] 42 U.S.C. § 2000e-2(e) (2006).
[85] 29 U.S.C. § 623(f)(1) (2006).
[86] *See e.g. Smith*, 544 U.S. at 233.
[87] 29 C.F.R. § 1604.2(a) (2008).
[88] 29 C.F.R. § 1606.4 (2008).
[89] 29 C.F.R. § 1625.6(a) (2008).
[90] *Id.*

The ADEA contains additional language that makes its coverage significantly narrower than Title VII offers. It permits "any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age,'"[91] or RFOAs. While startling in its application, the Court did not evoke the RFOA concept for the first time in *Smith*. Previously, in *Hazen Paper*, the Court visited the concept in the context of a disparate treatment ADEA claim.[92] There, the employer fired a sixty-two years old nine-year employee just a few weeks before his pension vested.[93] The Court determined that the employer's decision was based on years of service and that the determination "is [not] necessarily 'age based.'"[94] Although the Court did not use the terminology of an RFOA, it noted that "[w]hen the employer's decision *is* wholly motivated by factors other than age," there is no violation of the ADEA under a disparate treatment analysis.[95]

III. PLAINTIFFS' PROOF AND EMPLOYERS' BUSINESS JUDGMENT DECISIONS: A FACE-OFF

Whether disparate treatment or disparate impact claims are involved, employment decisions scrutinized through burdens of proof and production standards provide challenges for the parties and courts alike in discrimination cases. While the Supreme Court addressed the questions of business judgment factors and considerations with respect to the ADEA in *Reeves v. Sanderson Plumbing Products, Inc.*[96] and *Smith*, it left many issues unresolved. Even when given the opportunity to tackle the applicable protocol for a disparate treatment claim under the ADEA in *Reeves*, the Court failed to do so.[97] Rather, because the parties did not dispute this question, it assumed that the standard it had articulated for Title VII disparate treatment cases in *McDonnell Douglas* was applicable to the ADEA.[98] What burden of proof the Court will apply to disparate treatment and disparate impact ADEA cases and whether it will be the same for both remain open questions.

The *Reeves* opinion offers a clue: at least with respect to disparate treatment cases, the Court clearly had a comfort level with the *McDonnell Douglas* proof protocol in which the burden of proving intentional discrimination remained solidly with the plaintiff.[99] Further, as the Court reiterated, the plaintiff must prove by a preponderance of the evidence that

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[91] *Smith*, 544 U.S. at 233 (quoting 29 U.S.C. § 623(f)(1) (2000)).
[92] 507 U.S. 604.
[93] *Id.* at 607.
[94] *Id.* at 611.
[95] *Id.* (emphasis in original).
[96] 530 U.S. 133 (2000).
[97] *Id.* The Court would wait until the *Smith* case to examine this issue.
[98] *Id.* at 142 (citing *McDonnell Douglas*, 411 U.S. 792).
[99] *Id.* at 143.

an employer's proffered nondiscriminatory reason for the job action is "unworthy of credence."[100]

When the Court revisited the ADEA in *Smith*, it again sidestepped the applicability of the *McDonnell Douglas* approach to the ADEA. While throughout the *Smith* opinion the Court referred to the various burdens parties faced in discrimination cases, the Court did not address any protocol for producing evidence in a case involving an RFOA. Rather, it simply offered: "In this case not only did petitioners thus err by failing to identify the relevant practice, but it is also clear from the record that the City's plan was based on reasonable factors other than age."[101]

As the *Smith* opinion hints, in determining the availability of a disparate impact claim under the ADEA, the Court may look to its Title VII jurisprudence for guidance in answering these questions. In particular, examining the deference courts have given to business judgment and the development of standards for proof and production in disparate treatment and disparate impact discrimination cases sheds light on these questions.[102] For instance, in *Griggs* and *McDonnell Douglas*, the Court established the basic protocol for presenting and rebutting evidence.[103] It then clarified the respective burdens in cases resting on whether the employer had exercised appropriate business judgment in light of allegedly impermissible discrimination in *Texas Department of Community Affairs v. Burdine*[104] and *Price Waterhouse v. Hopkins*.[105] However, as the Court made clear in *Smith*, its decision in *Wards Cove* and the inapplicability of the 1991 Amendments to the ADEA may shift the dynamics considerably away from Title VII protocols.[106]

To what extent will the standards articulated by the Court in Civil Rights Act cases apply to ADEA age discrimination claims? As with a BFOQ, after the plaintiff makes a prima facie showing of age discrimination under the ADEA, must the defendant come forward with evidence to show the factor considered was an RFOA, even though an RFOA is exempted from the ADEA's prohibitions? Or conversely, will the plaintiff have to prove the activity is not an RFOA in order to state a claim? Does the plaintiff have an opportunity to show pretext or otherwise rebut the proffered RFOA? Is it material that the case is one of disparate treatment

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[100] *Id.*

[101] *Smith*, 544 U.S. at 241. The Court then outlined the evidence with respect to the plan and the petitioner-officers' evidence. It concluded that the City's approach was "unquestionably reasonable." *Id.* at 242. This conclusion was made somewhat murkier by the penultimate paragraph in which the Court referred to the City's plan as being "not unreasonable." *Id.* at 243.

[102] The authors present cases chronologically in this section.

[103] *Griggs*, 401 U.S. at 424; *McDonnell Douglas*, 411 U.S. at 792.

[104] 450 U.S. 248 (1981).

[105] 490 U.S. 228 (1989).

[106] *Smith*, 544 U.S. at 240-41.

and not disparate impact? And what standard should judges use in addressing motions for summary judgment and directed verdicts? These are just a few of the questions the *Smith* case raises regarding burdens of proof and production in age-based claims when business judgment is in play.

A. The Foundation: Griggs v. Duke Power Co. *and* McDonnell Douglas v. Green

In the early 1970s, the Court began examining burdens of proof and production and business judgment in discrimination cases. The seminal and once-again applicable[107] fundamental standard for the respective evidentiary responsibilities of parties in discrimination lawsuits brought under Title VII of the Civil Rights Act was established in *Griggs*.[108] In the *Griggs* class action lawsuit, in which the Court first recognized disparate impact claims under Title VII, the plaintiffs challenged diploma and intelligence testing requirements.[109] Noting that the legislation prohibited overt discrimination as well as those actions that had the effect of being discriminatory, the Court determined that with respect to requirements for employment, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[110]

The Court refined this concept of a "showing" in the context of burdens of proof and establishing a prima facie case. In *McDonnell Douglas*, the Court addressed disparate treatment in connection with race and a reduction in force ("RIF").[111] Green, a black civil rights activist, engaged in protest activity after a RIF, claiming that race motivated the company's employment practices.[112] His attempt to be rehired for a position for which he was qualified failed.[113] Green sued claiming retaliation and disparate treatment.[114]

Green's employer, McDonnell Douglas, denied any kind of discrimination and instead asserted that it had justifiable reasons for refusing to rehire Green.[115] Consequently, the primary issue before the Court was how to address these "opposing factual contentions."[116] From this question

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[107] The Court implicitly overruled *Griggs* in *Wards Cove*. *Wards Cove*, 490 U.S 642. However, the 1991 Amendments to Title VII of the Civil Rights Act effectively resurrected the *Griggs* standard in this regard. *See e.g. Smith*, 544 U.S. at 240; Sullivan, *supra* n. 31, at 961-63.

[108] 401 U.S. 424.

[109] *Id.* at 425-26.

[110] *Id.* at 432; *see also* Seiner, *supra* n. 29, at 100.

[111] 411 U.S. at 792.

[112] *Id.* at 794-96.

[113] *Id.* at 796.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 801. The Court also resolved the question of whether it was necessary to procure a reasonable-cause finding from the EEOC in order to sue in the employee's favor. *Id.* at 798.

sprang the requirements for burdens of proof and production in Title VII cases—what became known as the *McDonnell Douglas* protocol.

The Court first outlined that in a Title VII case the complainant carries the "initial burden under the statute of establishing a prima facie case of racial discrimination."[117] If the plaintiff has made such a showing by a preponderance of the evidence, the burden of production then shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for the employment decision—in this case, rejecting the employee's application.[118] If the employer meets this production requirement, the respondent is then "afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext."[119] Evidence relevant to this determination can be quite wide-ranging. In *McDonnell Douglas*, it could include how the company treated similarly situated white employees, how the company reacted to lawful civil rights activities, and the company's general policies and practices regarding minorities in the workplace.[120]

B. Job Relatedness and Business Necessity: Albemarle Paper Co. v. Moody *and* Furnco Construction Corp. v. Waters

Shortly after *Griggs* and *McDonnell Douglas*, the Supreme Court addressed the concepts of job relatedness within the context of two disparate impact race discrimination cases. In them, while placing burdens on employers with respect to proof, the Court also recognized the deference that employers should receive for job-related decisions. In both cases, the Court seemed to extend greater latitude to employers in making employment decisions.

In *Albemarle Paper Co. v. Moody*, the Court clarified the appropriate standard for proving job relatedness in the context of racially discriminatory preemployment tests.[121] After reviewing the history of the

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[117] *Id.* at 802.

[118] *Id.* at 802-03; *see also Burdine*, 450 U.S. at 254. In *McDonnell Douglas*, the Court found that the employee had established a prima facie case based on his satisfactory work history with McDonnell Douglas and the availability of a position for which he was undisputedly qualified, but for which he was not hired. 411 U.S. at 802. However, the Court also found that the employer's purported reason for not hiring the plaintiff, i.e., because he had engaged in unlawful activity, was sufficient to "meet" the plaintiff's prima facie showing. *Id.* at 804.

[119] *McDonnell Douglas*, 411 U.S. at 804.

[120] *Id.* at 804-05. The Court distinguished Green's situation from that which it had considered in *Griggs*, where neutral standardized testing tools excluded blacks that were otherwise capable of performing their job duties effectively. *Id.* at 805-06. The failure of the trial judge in *McDonnell Douglas* to afford the plaintiff a fair opportunity to show that the proffered "legitimate, nondiscriminatory reason" was pretextual or discriminatory necessitated a remand to do so. *Id.* at 802.

[121] 422 U.S. 405. The employer had revised its seniority system when it reorganized its "lines of progression" under a new collective bargaining agreement that resulted in a whites-only seniority in the higher job categories. *Id.* at 409. In the reorganization of the lines of progression, the formerly "Negro" lines were "merely tacked on to the bottom of the formerly 'white' lines." *Id.* Albemarle's study to validate the testing program only considered "job-experienced, white workers," even though Albemarle required the tests of all new job applicants, many of whom were not white. *Id.* at 435.

testing program, its application in the plant by Albemarle, and the EEOC Guidelines on employment testing, the Court determined that the Guidelines and the *Griggs* case both required a nexus between the test and the employment.[122] Discriminatory employment tests are "impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'"[123] The Court then remanded the case for, among other things, a determination of whether the testing could be justified under these standards.[124]

Three years later in *Furnco Construction Corp. v. Waters*, the Court granted certiorari to consider whether the Seventh Circuit "had gone too far in substituting its own judgment as to proper hiring practices."[125] The Court again considered the meaning of "business necessity" in light of race discrimination allegations.[126] Employer Furnco asserted that its practice of hiring only bricklayers whom superintendents knew to be competent or had been recommended was a business necessity.[127] It claimed that this approach ensured the work was performed safely and in a timely fashion and that Furnco's "reputation and ability to secure similar work" was not adversely affected.[128]

In its review, the Court reined in the appellate court's restraint on employers, finding that it had acted improperly by equating "a prima facie showing [under *McDonnell Douglas*] with an ultimate finding of fact as to discriminatory refusal to hire under Title VII."[129] However, the Court did not directly consider whether the business necessity standard was appropriate in a disparate treatment case or whether it was met.[130]

C. Business Justification and Mixed Motives: Texas Department of Community Affairs v. Burdine *and* Price Waterhouse v. Hopkins

In two disparate treatment cases decided after *McDonnell Douglas—Price Waterhouse* and *Burdine*—the Court refined the production and proof requirements for Title VII discrimination cases; in each instance the Court lightened the evidentiary load for employers in presenting

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[122] *Id.* at 431.
[123] *Id.* (quoting 29 C.F.R. § 1607.4(c) (1975)).
[124] *Id.* at 436.
[125] 438 U.S. 567 (1978).
[126] *Id.* at 574.
[127] *Id.* at 571. The Seventh Circuit had reversed the district court's finding that the employer had successfully established that its employment practice was a business necessity. The Supreme Court, however, agreed with the district court that the employer had established a business necessity. *Id.* at 573.
[128] *Id.* at 571.
[129] *Id.* at 567-68.
[130] *Id.* at 573.

nondiscriminatory reasons for the employment decision.[131] In *Price Waterhouse*, the Court tackled the question of burdens the plaintiffs and defendants face in a "mixed motive" case.[132] Plaintiff Hopkins was a senior manager who resigned after making an unsuccessful bid for partnership in 1982.[133] She filed suit, claiming Price Waterhouse had violated Title VII by discriminating against her in making its partnership decisions based on her sex.[134]

At trial, Hopkins presented evidence of gender stereotyping, an activity prohibited under Title VII.[135] Although Price Waterhouse offered evidence that supported its decision not to make her a partner, Hopkins prevailed after the lower courts required her employer to prove by clear and convincing evidence that it would have made the same decision regardless of gender.[136] The Supreme Court granted certiorari "to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives."[137]

The Court rejected the tough clear and convincing evidence hurdle the lower courts had placed on defendants.[138] Instead, it held that when a plaintiff in a Title VII case proves that gender was a motivating factor in an employment decision—that is, that the employer's motives were "mixed"—in order to establish an affirmative defense, the defendant must prove by a preponderance of the evidence that it would have made the same decision even if gender were not part of the decision-making process.[139] That a

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[131] *Price Waterhouse*, 490 U.S. 228; *Burdine*, 450 U.S. 248.

[132] *Price Waterhouse*, 490 U.S. at 232 (addressing an employment decision arising from "a mixture of legitimate and illegitimate motives").

[133] *Id.* at 231-32.

[134] *Id.* at 232.

[135] *Id.* at 250-51. The evidence included remarks that Hopkins's partners characterized her as being "macho," that she "overcompensated for being a woman," and that she was told she should take "a course at charm school." *Id.* at 235. She was also advised to behave and dress more femininely. *Id.* The Court stated:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

Id. at 251 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))).

[136] *Id.* at 232.

[137] *Id.*

[138] *Id.* at 254-55.

[139] *Id.* at 244-46. The Court distinguished this requirement from merely justifying the decision. *Id.* at 252. The Court looked to the general proof test in civil cases—that is, proof by a preponderance of the evidence—and adopted that standard where a discriminatory motive was part of an employment decision. *Id.* at 252-53. The 1991 Amendments to the Civil Rights Act buttress this approach. Should a plaintiff

decision was motivated only in part by a legitimate factor would not meet the burden of proving an affirmative defense; only the employer's showing "that its legitimate reason, standing alone, would have induced it to make the same decision" would suffice.[140] Although the *Price Waterhouse* Court reached consensus in according an employer an affirmative defense in a mixed motive case, it was divided "over the predicate question of when the burden of proof may be shifted to an employer to prove the affirmative defense."[141]

In another decision easing proof requirements on employers, *Texas Department of Community Affairs v. Burdine*, the Court distinguished between a production requirement and a proof requirement.[142] In *Burdine*, a female employee claimed gender discrimination after her employer, the Texas Department of Community Affairs, failed to promote her and then terminated her employment.[143] In light of *McDonnell Douglas*, the Fifth Circuit had placed on the employer the burden of proving that there were nondiscriminatory reasons for the employment action and that a replacement employee was better qualified than the plaintiff in response to the plaintiff's prima facie showing of discrimination.[144]

Elaborating on its discussions in *McDonnell Douglas* and *Price Waterhouse*, the Supreme Court rejected the Fifth Circuit's imposition of such a burden on the employer.[145] Instead, it held that upon the plaintiff's establishment of a prima facie case of discrimination, "the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions."[146] In other words, evidence of intentional discrimination did not convert a production requirement to a proof requirement. Rather, the Court

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fail to show that the decision probably was based on an impermissible factor, "then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual." *Id.* at 247.

[140] *Id.* at 252. Under this "mixed motive" test, proof presented by the defendant remained required but only with respect to an affirmative defense to the plaintiff's evidence that the defendant would have made the same decision had no impermissible factor come into play. *Id.* at 240. Although the Court imposed an expectation that the employer's evidence be "objective," on the whole, employers faired well under *Price Waterhouse*. *Id.* at 251. Therefore, an employer that did in fact base a decision in part on a discriminatory basis could still escape liability if it could show that it would have taken the same action adverse to the employee. *Id.* at 258. However, the employer's responsibility to offer evidence to escape liability is of a different nature than a reciprocal burden: "[T]he employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another." *Id.* at 246.

[141] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003). The Court resolved the sufficiency of circumstantial evidence in this regard. *Id.* In doing so, the Court concluded that conventional rules of civil litigation applicable in Title VII cases would allow circumstantial evidence to support a claim and that the 1991 Amendments to the Civil Rights Act did not require any other. *Id.* at 99.

[142] *Burdine*, 450 U.S. 248.

[143] *Id.* at 249.

[144] *Id.* at 252.

[145] *Id.*

[146] *Id.* at 260. The Court noted that in its *McDonnell Douglas* opinion, it intended "prima facie case" to mean the establishment of a "legally mandatory, rebuttable presumption," and not to "describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue," which is also a correct use of the term. *Id.* at 254 n. 7.

evoked the *McDonnell Douglas* requirement that the employer must articulate "some legitimate, nondiscriminatory reason" for the action.[147] Once this occurs, the plaintiff, still carrying the burden of proving intentional discrimination, must establish by a preponderance of the evidence that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[148]

The Court did not share what it believed were the appellate court's concerns—"that limiting the defendant's evidentiary obligation to a burden of production will unduly hinder the plaintiff."[149] Instead, the Court highlighted that the defendant still had obligations: the employer must clearly and with reasonable specificity explain its legitimate reason for the employment decision.[150] This obligation resulted from the defendant's need to rebut the inference of discrimination inherent in the plaintiff's offering a prima facie case, as well as "the requirement that the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext."[151] Perhaps referring to reputation with the public and the jury, but without elaborating, the Court added that "the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful."[152]

D. Putting on the Brakes: Watson v. Fort Worth Bank & Trust *and* Wards Cove Packing Co. v. Atonio

Almost twenty-five years after Congress enacted sweeping reforms through the Civil Rights Act of 1964, not only parties but also courts were still wrangling with the concepts of business necessity and burdens of proof with respect to disparate impact cases.[153] Deference to business judgment decisions reached its height in two cases the Court decided in the late 1980s, which will prove critical to any prediction of how the Court will approach the ADEA on these issues.

In *Watson*, the Court addressed the burdens of proof and persuasion in a manner with which Congress would later disagree.[154] Citing *Griggs* and *Albemarle*, the Court noted that although an employer must show that a job requirement is employment-related, this obligation "should not be interpreted as implying that the ultimate burden of proof can be shifted to

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[147] *Id.* at 253 (citing *McDonnell Douglas*, 411 U.S. at 802).
[148] *Id.* at 253 (citing *McDonnell Douglas*, 411 U.S. at 804).
[149] *Id.* at 258.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 258.
[153] *See Wards Cove*, 490 U.S. at 649-50. In that case, the Court noted that the issues presented were ones that the Court had been evenly divided over in *Watson*. *Id.*; *see also* Benjes, *supra* n. 14, at 236 (citing 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, 632-33 (1996)).
[154] 487 U.S. 977.

the defendant."[155] The burden would remain with the plaintiff.[156] Instead, once a plaintiff has established a prima facie case and the employer has shown that "its employment practices are based on legitimate business reasons," the plaintiff must offer evidence that another practice would meet the employer's legitimate need without the same adverse effect.[157]

The next year, in *Wards Cove Packing Co. v. Atonio*, the Court tackled many of the questions regarding burdens in discrimination lawsuits in an opinion that remains a landmark for ADEA cases.[158] In short, the Court resolved the issue of "the proper application of Title VII's disparate-impact theory of liability" soundly for the employers.[159] It shifted all proof requirements from the employers' shoulders to the plaintiffs'. While the 1991 Amendments to Title VII would negate the *Wards Cove* decision's effect in Title VII discrimination cases, the *Smith* Court would revert to its analysis in *Wards Cove* in narrowly construing the scope of liability an employer faces in an ADEA disparate impact case.[160]

Wards Cove involved a factual scenario reminiscent of that in *Griggs* and an evidentiary stand-off the likes of which the Court would face in *Smith*. Salmon cannery workers filed a class action suit challenging the hiring and promotion practices that fell disproportionately on non-white employees.[161] The plaintiffs presented statistical evidence showing a racial disparity between non-white employees holding cannery jobs and those holding jobs not in the cannery.[162] The Court was not impressed.

Citing a concern that to hold otherwise would provoke quotas, the Court held that such a statistical comparison was insufficient to establish a prima facie case of disparate impact.[163] As it would also require in *Smith*, the Court held that it was incumbent upon the plaintiffs to show specific employment practices causing "a significantly disparate impact on employment opportunities for whites and nonwhites."[164] While its earlier decisions may have indicated otherwise, the Court underscored that in a disparate impact case no burden of proof automatically is born by the employer. It is only upon the plaintiff's establishment of a prima facie case—that is, "specific employment practices responsible for creating the

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[155] *Id.*
[156] *Id.* at 997.
[157] *Id.* at 998.
[158] 490 U.S. 642.
[159] *Id.* at 650.
[160] *Smith*, 544 U.S. at 240.
[161] *Wards Cove*, 490 U.S. at 647-48.
[162] *Id.* at 650.
[163] *Id.* at 655. The Court even went so far as to opine: "[I]f the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities." *Id.* at 653.
[164] *Id.* at 657, 665; *see also* Alaka, *supra* n. 13, at 152; Seiner, *supra* n. 29, at 102.

alleged disparate impact"—that the employer must go forward.[165] The Court again distinguished between a burden to produce and a burden to prove: the employer only has the "burden of producing evidence of a business justification for his employment practice"; the burden of persuasion or proof remains with the plaintiff.[166] The plaintiff can then challenge the business necessity defense or prove that other alternatives without a discriminatory impact would serve the business interests, thereby demonstrating that the employer's explanation was, in fact, pretext.[167]

E. Congressional Responses to Wards Cove *and* Price Waterhouse*: The 1991 Amendments to the Civil Rights Act of 1964*

In 1991 Congress officially endorsed and codified the availability of a disparate impact theory under Title VII. Largely in response to various court decisions,[168] Congress amended Title VII to restore the burdens of proof and persuasion that were in place prior to *Wards Cove*.[169] In so doing, it removed any requirement *Wards Cove* had set that plaintiffs allege and prove a specific problematic employment practice. Rather, the 1991 Amendments made it clear that a plaintiff could allege that an employment process as a whole created an impermissible disparate impact.[170]

In addition to solidifying disparate impact claims under Title VII in light of *Price Waterhouse* and *Wards* Cove, Congress "codified a new evidentiary rule for mixed-motive cases arising under Title VII."[171] Congress amended Title VII to allow a plaintiff to establish an unlawful practice when an impermissible consideration (e.g., race, color, religion, sex, or national origin) "was a motivating factor for any employment practice, even though other factors also motivated the practice."[172] In addition, the amendments also permit an employer, once a plaintiff

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[165] *See also* Benjes, *supra* n. 14, at 235.

[166] *Wards Cove*, 490 U.S. at 659.

[167] *Id.* at 660; *see also* Benjes, *supra* n. 14, at 235.

[168] *See e.g. Landgraf v. USI Film Prods.*, 511 U.S. 244, 250 (1994). In *Landraf*, the Court discussed various sections of the Act and the corresponding cases prompting the legislation. *Id.* at 250-51.

[169] There have been recommendations that Congress respond to the *Smith* decision in a manner similar to the enactment of the Civil Rights Act Amendments of 1991 in response to the *Wards Cove* decision. One commentator has recommended that Congress amend the ADEA to preclude disparate impact cases and to establish an RFOA as a safe harbor from, and not merely as a defense to, a disparate impact claim. Adam N. Bitter, Smith v. City of Jackson*: Solving an Age-Old Problem?* 56 Cath. U. L. Rev. 647 (2007).

[170] *See Smith*, 544 U.S. at 240.

[171] *Desert Palace*, 539 U.S. at 94, 102 (O'Connor, J., concurring). Justice O'Connor further offered:

> In my view, prior to the Civil Rights Act of 1991, the evidentiary rule we developed to shift the burden of persuasion in mixed-motive cases was appropriately applied only where a disparate treatment plaintiff 'demonstrated by direct evidence that an illegitimate factor played a substantial role' in an adverse employment decision.

Id. (quoting *Price Waterhouse*, 490 U.S. at 275).

[172] *Id.* at 94 (citing 42 U.S.C. § 2000e-2(m) (2000)).

establishes that the employer had used an impermissible factor as a motivating factor, to assert the affirmative defense that it "would have taken the same action in the absence of the impermissible motivating factor."[173]

The amendments also narrowed an employer's discretion in selecting from alternative courses to support an action taken. Once the plaintiff makes a prima facie case of disparate impact, the employer has the burden "to demonstrate that the challenged practice [was] job related for the position in question and consistent with business necessity."[174] Consequently, now an employment decision must be a business necessity and not just a justifiable approach as the Court had permitted in *Wards Cove*. These amendments did not reach the ADEA,[175] however, leaving the Court's previous analyses with respect to Title VII, including *Price Waterhouse* and *Wards Cove*, and its comfort with business judgment ripe for the picking in *Smith*.

IV. BURDENS, THE ADEA, AND REASONABLE FACTORS OTHER THAN AGE

At this point, the burdens of proof or production with respect to a plaintiff's claim and a defendant's purported lawful business decision are well-entrenched in Title VII cases and provide litigants and lower courts with well-marked evidentiary maps. Less predictable is how much latitude courts will accord parties with respect to business judgment and what the burdens of proof and production will be with respect to the ADEA post-*Smith*, including the "important and recurring" question of the burden of proof with respect to an RFOA.[176] Importantly, the Court has not yet officially endorsed the *Burdine* and *McDonnell Douglas* protocol with respect to the ADEA. The parties did not raise it as an issue in *Smith*; the Court simply adopted it for purposes of that case.[177] However, the Court will partially address outstanding issues when it considers the burdens associated with establishing an RFOA in *Meacham v. Knolls Atomic Power Laboratory*.[178] Is the Court likely to adopt Title VII protocols and apply them to the ADEA? For instance, will the Court extend to ADEA plaintiffs the opportunity to show that an employer's articulated RFOA is pretext? Or does the deference to business judgment inherent in an RFOA make such a question, for all practical purposes, moot after *Smith*? Examining the Court's own language in relevant decisions, as well as those cases decided

[173] *Id.* at 94-95 (citing 42 U.S.C. § 2000e-5(g)(2)(B) (2000)). Subsequently, in *Desert Palace*, the Supreme Court held that circumstantial evidence could support proof of a violation and that direct evidence was not necessary. *Id.* at 101.

[174] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

[175] *Smith*, 544 U.S. at 240.

[176] United States Brief, *supra* n. 73, at 7.

[177] *Smith*, 544 U.S. at 252.

[178] 461 F.3d 134 (2d Cir. 2006), *cert. granted*, 128 S. Ct. 1118 (2008).

post-*Smith*, provides insight and suggests that ADEA plaintiffs likely will encounter additional hurdles.

A. The ADEA: No Title VII

Both Title VII and the ADEA have been important vehicles for change and for shielding workers from unfair discrimination. The scope and protections of Title VII are wide, deep, and now, entrenched. Even under Title VII there is no assurance of employment;[179] Congress designed ADEA protections to be even more encumbered. Consequently, while in *Smith* Title VII served as a vantage point from which the Court determined the availability of a disparate impact claim under the ADEA, the Court also used it to limit ADEA protections.[180] These differences may very well launch different burden of proof approaches for ADEA cases than for Title VII claims.

First, the Court found the disparate factual prompts for Title VII and the ADEA to be significant. Unlike the social context surrounding the passage of Title VII, "little discrimination arising from dislike or intolerance of older people" existed at the time the ADEA came to be.[181] Rather, Congress sought to address "'arbitrary' discrimination [that] did result from certain age limits" in the ADEA.[182] Absent the kind of insidious and distasteful prejudice associated with other protected classes like race and ethnicity, Congress gave employers additional latitude in making employment decisions with respect to an ADEA-covered employee[183] if "based on reasonable factors other than age."[184] With this less compelling impetus for the ADEA, the Court found the ADEA's language excluding liability for an RFOA to be historically and significantly narrower than the coverage that Title VII afforded workers.[185]

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[179] As the Court underscored in *McDonnell Douglas*, even protections under Title VII are not expansive:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

411 U.S. at 800-01 (quoting *Griggs*, 401 U.S. at 430-31).

[180] *Smith*, 544 U.S. at 240-41.

[181] *Id.* at 232.

[182] *Id.*

[183] The ADEA only protects individuals who are "at least 40 years of age." 29 U.S.C. § 631 (2006).

[184] *Smith*, 544 U.S. at 238 (citing 29 U.S.C. § 623(a)). Contrasting the race-based scenario in *Griggs* with the age-based challenge in *Smith*, "the [Seventh Circuit] explicitly recognized the key distinction between Title VII challenges to practices that froze the erstwhile intentionally discriminatory status quo and maintained a racially segregated work force and practices that adversely affected older workers who had historically not been the victims of intentional discrimination." Alaka, *supra* n. 13, at 157.

[185] *Smith*, 544 U.S. at 233. The ADEA permits "any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'" *Id.* (quoting 29 U.S.C. § 623(a)). In

B. The Impact of RFOAs and Business Judgment

In *Smith*, the Court found that the City of Jackson's grant of larger raises to lower-level employees in order to align their salaries with those of the surrounding area sufficiently demonstrated that the City had an "unquestionably reasonable" factor other than age that had prompted the plan terms.[186] The Court's boldness in coming to this conclusion undoubtedly relates to the very nature of disparate impact cases: they do not cry "discrimination"; rather, they "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another."[187] An RFOA purportedly involves such a seemingly impartial employment practice with respect to the treatment of different groups.[188] Its key role is to preclude "liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'"[189]

The Court has already articulated the special sanctuary an RFOA provides. In *Smith*, the Court returned to its decision in *Hazen Paper* in which the Court, without using the RFOA nomenclature, deemed an employment action based on years of service exempt from the ADEA prohibitions: "In those disparate-treatment cases, such as in *Hazen Paper* itself, the RFOA provision is simply unnecessary to avoid liability under the ADEA, since there was no prohibited action in the first place."[190]

Clearly the Court has drawn a line in the sand between the employer's defenses of business necessity and an RFOA.[191] Prior to *Smith*, some commentators maintained that it was commonly understood that an RFOA was codified shorthand for business necessity.[192] However, *Smith* specifically distinguishes the two.[193] Unlike business necessity, an RFOA merely must meet a reasonableness test; there is no inquiry concerning whether there is a better way to achieve a goal—an inquiry required under business necessity.[194] As Justice O'Connor framed it in her concurring

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Smith, this language was critical to whether the petitioner-officers had established a disparate impact claim under the ADEA. "In disparate-impact cases, however, the allegedly 'otherwise prohibited' activity is not based on age." *Id.* at 239.

[186] *Id.*

[187] *Id.* (quoting *Intl. Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 335-36, 335 n. 15 (1977)).

[188] *Id.*

[189] *Id.*

[190] *Id.* at 238 (citing *Hazen Paper*, 507 U.S. at 609). "[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Hazen Paper*, 507 U.S. at 609. In *Hazen Paper*, Respondent Biggins sued his employer, Hazen Paper, alleging it had violated the ADEA because his age (62) was "a determinative factor in [its] decision to fire him." *Id.* This claim was contested on an RFOA theory—that is, that Biggins was fired because he did business with Hazen Papers' competitors. *Id.* at 610.

[191] *See also* Bitter, *supra* n. 169, at 680.

[192] *E.g.* Benjes, *supra* n. 14, at 248.

[193] *Smith*, 544 U.S. at 243. The *Smith* Court concluded that the City's "[r]eliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities." *Id.* at 242.

[194] *Id.* at 243.

opinion in *Smith*: "There may be many 'reasonable' means by which an employer can advance its goals, and a given nonage factor can certainly be 'reasonable' without being necessary."[195]

The deference accorded businesses in decision-making, even in discrimination cases, may very well eradicate any prospect that a plaintiff could prevail on an ADEA disparate impact theory. Although judges periodically have employed the language of the business judgment rule in discrimination cases, in light of *Smith*, it is likely that the esteem usually accorded to companies under the business judgment rule will become even more of a factor in employment discrimination cases. Already, some ADEA cases decided in light of the RFOA application in *Smith* suggest that courts will carve out RFOAs for deferential handling and even tighten the noose on a plaintiff's case beyond that caused by the traditional concepts of business necessity, BFOQs, and job relatedness.

One post-*Smith* federal appellate decision, *Bender v. Hecht's Department Stores*, indicates that while the business judgment rule may not always protect employers from employment discrimination claims, it allows employers considerable leeway even with imperfect decision-making.[196] In *Bender*, the Sixth Circuit considered the plaintiffs' claims of age discrimination in connection with a RIF.[197] The court acknowledged that it would not allow the business judgment rule to act as a shield for employers when faced with a claim of discrimination.[198] However, it could serve as an antidote to it. The court determined that Hecht's rationale for the RIF, to reduce expenses and to maintain the "strongest" employees, was sufficient to respond to the plaintiffs' prima facie case and did not constitute "pretext."[199] Instead, the rationale qualified as a "legitimate, nondiscriminatory [reason] for the company's actions."[200] Considering Hecht's business decisions, the court noted that "employers are generally 'free to choose among qualified candidates,' and that '[t]he law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with.'"[201] Setting an even tougher standard for the plaintiffs, the court stated that a plaintiff's evidence of pretext "must be of sufficient significance itself to call into question the honesty of the employer's explanation."[202] Quoting an earlier decision, the

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[195] *Id.* at 266.
[196] 455 F.3d 612 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 2100 (2007).
[197] *Id.*
[198] *Id.* at 627 (citing *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564 (6th Cir. 2003)).
[199] *Id.* at 615.
[200] *Id.* at 624.
[201] *Id.* (citations omitted) (alteration in original) (quoting *Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir. 1987); *Hartsel v. Keys*, 87 F.3d 795, 801 (6th Cir. 1996)). The Sixth Circuit also noted its earlier *Wexler* decision in which it "ultimately rejected . . . a rigid invocation of the business-judgment rule to shield employers from claims of discrimination." *Id.* at 627 (citing *Wexler*, 317 F.3d 564).
[202] *Id.*

Court emphasized that one way a plaintiff could demonstrate pretext is to show that the "asserted business judgment was so ridden with error that the defendant could not honestly have relied upon it."[203]

In *Meacham*, the Second Circuit reconsidered a disparate impact claim under the ADEA in connection with a RIF and came to a very different conclusion than it had originally before the *Smith* decision issued.[204] The plaintiffs had identified as problematic a RIF characterized by its "unaudited and heavy reliance on subjective assessments of 'criticality' and 'flexibility.'"[205] The employer justified its approach as necessary to reduce its workforce while keeping the employees with critical skills.[206] Upon reconsideration, the Second Circuit, applying *Smith*, found that the employer was not liable under the ADEA so long as the employment action at issue was "a reasonable means to [achieve] the employer's legitimate goals."[207] The Second Circuit then concluded that the two criteria of "criticality" and "flexibility" were appropriate because these criteria were needed to ensure that the employer "could carry on operations with a shrinking workforce."[208]

In yet another post-*Smith* case involving a RIF, *Pippin v. Burlington Resources Oil & Gas Co.*, the Tenth Circuit required the plaintiff in an ADEA disparate impact claim to prove "that the employer's asserted basis for the neutral policy is *unreasonable*."[209] There, the defendant-employer purportedly looked to retain only the "best performers" selected on past performance and skills needed for future operations.[210] In reviewing the summary judgment award for the employer on Pippin's ADEA claims, pursuant to *Smith*, the Tenth Circuit confined its disparate impact analysis under the ADEA to the pre-1991 protocol for disparate impact liability as set forth in *Wards Cove*.[211] Upholding the grant of summary judgment, the court differentiated between a RFOA under the ADEA and "business necessity" under other disparate impact claims: "Corporate restructuring, performance-based evaluations, retention decisions based on needed skills, and recruiting concerns are all reasonable business considerations" that

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[203] *Id.* (quoting *In re Lewis*, 845 F.2d 624, 633 (6th Cir. 1988)).

[204] 461 F.3d 134. In its initial consideration of the case, the Second Circuit affirmed the district court's decision upholding the employees' claims under the ADEA after finding that the plaintiffs had established a prima facie case and that, although the employer had demonstrated a "facially legitimate business justification[,] . . . there was sufficient evidence of an equally effective alternative . . . ." *Id.* at 138.

[205] *Id.* (quoting *Meacham v. Knolls Atomic Power Laboratory*, 381 F.3d 56, 75 n. 8 (2d Cir. 2004)).

[206] *Id.* at 140 (citing *Meacham*, 381 F.3d at 74).

[207] *Id.*

[208] *Id.* at 144.

[209] 440 F.3d 1186, 1200 (10th Cir. 2006) (emphasis in original).

[210] *Id.* at 1189.

[211] *Id.* at 1191, 1199. *Smith* was decided after the briefing of the appeal in *Pippin*; therefore, the Tenth Circuit undertook to analyze the appeal under a disparate impact theory. *Id.* at 1199.

constitute reasonable factors other than age.[212] Whether *Wards Cove* will be the surviving mode of analysis remains to be seen. The Solicitor General, in the impending *Meachem* case, has argued to the Supreme Court that the *Wards Cove* decision "sheds no light" on the burden of proof issues with respect to an RFOA.[213]

C. Burdens of Proof and the ADEA: What Standards Will the Courts Adopt?

The Supreme Court has yet to articulate the context in which it will evaluate RFOAs and the business rationale supporting them.[214] While it remains an open question, the shifting Title VII procedure used in *Burdine* and *McDonnell Douglas* may very well be the standard courts will adopt for ADEA cases. The *McDonnell Douglas* approach is familiar and lends some predictability for courts and litigants. For instance, in *Wexler v. White's Fine Furniture, Inc.*, a disparate treatment ADEA case decided after *Smith*, the Sixth Circuit applied the *McDonnell Douglas* analysis to the circumstantial evidence claim and described a "three-step framework."[215] The framework first requires the plaintiff-employee to establish a prima facie case of age discrimination.[216] Upon the establishment of a prima facie case, the employer "may respond by offering a legitimate, nondiscriminatory reason for the adverse employment action at issue."[217] The employee bears the burden of responding to this proffer by "proving that it was a pretext designed to mask age discrimination."[218]

Pursuant to *Smith*, a plaintiff would have to establish a prima facie case that specific employment practices, and not merely a general approach, had a disparate impact on protected workers.[219] In order to defeat the presumption of age-based disparate impact that arises from the plaintiff's case, one avenue would require the employer to articulate a legitimate rationale, other than age-based considerations, for its employment action. Under the *McDonnell Douglas* model the Court used in *Reeves* regarding ADEA disparate treatment, the plaintiff then would have the opportunity to show that the proffered "legitimate" basis is unfounded.[220]

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[212] *Id.* at 1200-01.

[213] United States Brief, *supra* n. 73, at 7.

[214] In the Supreme Court's review of *Meacham* (461 F.3d 134, *cert. granted*, 128 S. Ct. 1118 (2008)), the Court will address the specific question of whether, in a disparate impact case, the ADEA plaintiff or the employer bears the burden with respect to an RFOA. *Meacham v. Knolls Atomic Power Laboratory* (No. 06-1505).

[215] 317 F.3d at 574 (citing *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350 (6th Cir. 1998) (articulating the burden-shifting that occurs with respect to ADEA claims)).

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Smith*, 544 U.S. at 241.

[220] *Reeves*, 530 U.S. 133.

Lack of believability of the employer's proffered explanation will also prove to be an important tool. The Court has cracked the window a bit wider in this respect for ADEA plaintiffs, at least with respect to disparate impact. At least for now, the Court has resolved the conflict among the circuits regarding whether circumstantial evidence can rebut an employer's claim that it had a legitimate basis for the employment action, first with respect to the ADEA and subsequently with respect to Title VII.[221] In *Reeves*, the Court determined that the fact-finder's disbelief of the employer's proffered explanation in a disparate treatment case could support a finding in favor of the plaintiff on that issue.[222] There, the Court addressed circumstantial evidence in the form of age-based derogatory comments directed at the plaintiff, including the employer's comments that the plaintiff "was so old [he] must have come over on the Mayflower," and "was too damn old to do [his] job."[223] The Court found that lack of credibility is a form of circumstantial evidence that can be "quite persuasive," even to the extent that the fact-finder could "infer the ultimate fact of discrimination from the falsity of the employer's explanation."[224]

Three years later, the Court again underscored the validity and value of circumstantial evidence, this time with respect to Title VII. In *Desert Palace, Inc. v. Costa*, the Court elaborated on the proof required to trigger the necessity of an employer proving an affirmative defense, a threshold with which the Court had struggled.[225] As it had in *Price Waterhouse*, and invoking *Reeves*, the Court resorted to the "conventional rule of civil litigation" generally applicable in Title VII cases to establish the standard for a mixed-motive case under the Title VII: requiring the plaintiff to meet a "preponderance of evidence" standard.[226] This standard would permit circumstantial evidence to prove intentional discrimination.[227] Citing

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[221] *Id.* at 140-41. In spite of their scope, the 1991 Amendments failed to resolve important sufficiency-of-evidence considerations. A lingering issue, upon which the federal circuit courts disagreed, was the availability to plaintiffs of circumstantial evidence in proving their claims. *Desert Palace*, 539 U.S. at 95. While in *Price Waterhouse* the Court had concluded that this occurred upon the plaintiff's proving "that [ ] gender played a *motivating* part in the employment decision," it left unresolved the question of whether the plaintiff must use direct evidence to do so. *Id.* at 93-95 (emphasis added by *Desert Palace*) (quoting *Price Waterhouse*, 490 U.S. at 258). In light of the amendment language and Justice O'Connor's concurring opinion in *Price Waterhouse*, many courts held that direct evidence was required to establish liability under title 42 U.S.C. § 2000e-2(m), the section that addresses "mixed motive" decisions. *Id.* While recognizing a "mixed motive" claim, the 1991 Amendments contain no clarifying language in this regard. *Id.* at 99.

[222] 530 U.S. 133.

[223] *Id.* at 151 (alteration in original). Given the evidence produced, the Court saw "no reason to subject the parties to an additional round of litigation" and found that the evidence was sufficient to support the jury's finding of intentional discrimination. *Id.* at 153.

[224] *Id.* at 147 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)). "[T]he continued prevalence of discrimination in our society suggests that, when other reasons are ruled out, prejudice is a natural inference, although not the only possible inference." Sullivan, *supra* n. 31, at 930.

[225] 539 U.S. 90.

[226] *Id.* at 99 (citing *Price Waterhouse*, 490 U.S. at 253).

[227] *Id.* at 99-100.

Rogers v. Missouri Pacific Railroad Co.,[228] the Court stated that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"[229] A plaintiff who produces such sufficient evidence earns a mixed-motive jury instruction.[230]

Finding that circumstantial evidence was sufficient to rebut the employer's case and is evidence a judge must consider in deciding a motion for a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure, the *Reeves* decision also requires the judge to draw all reasonable inferences in favor of the nonmoving party.[231] Given the Court's strong endorsement of the value of circumstantial evidence and its traditional availability in civil cases, circumstantial evidence should be admissible to rebut the tendered reasonableness of an employer-proffered RFOA in both pre-trial and trial proceedings.[232] In many instances, it may create a question of fact necessitating a jury determination and not a question for the Court to determine by summary judgment or directed verdict.

This all assumes that the question of believability will reach the jury. In a disparate impact case, the specter of intentional discrimination does not raise its head, and the plaintiff has no obligation to prove it. Certainly had a plaintiff been able to do so, he or she would or should have also filed a claim under a disparate treatment theory. Using the *McDonnell Douglas*, *Burdine*, and *Furnco* analyses in the face of a RFOA, the only recourse to a plaintiff would be to show pretext or that the factors were unreasonable. But how will the courts interpret this? For instance, does the Tenth Circuit's requirement in *Pippin* that the plaintiff show that the neutral policy was unreasonable suggest that a plaintiff's weight is a step beyond the *Smith* analysis, which looked to whether the employer's approach was "not unreasonable"?[233] And just as a lack of good faith does not equate to bad faith, will "reasonable" mean "not unreasonable," as *Smith* dicta suggests?[234] With this approach, is the only scenario that would prompt a court to find a practice unreasonable be one that is also a likely candidate for a disparate treatment claim?

While perhaps not anticipating the RFOA questions raised decades later in *Smith*, the *Price Waterhouse* Court suggested some analogous

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[228] 352 U.S. 500, 508 n. 17 (1957).
[229] *Desert Palace*, 539 U.S. at 100.
[230] *Id.*
[231] *Reeves*, 530 U.S. at 150-52.
[232] This assumes that the Court would recognize that a plaintiff would have an opportunity to respond to the RFOA introduced into evidence.
[233] *Pippin*, 440 F.3d at 1210-11; *Smith*, 544 U.S. at 243.
[234] *Smith*, 544 U.S. at 243.

scenarios.[235] There, in addressing the issue of burdens and gender questions, it recalled requirements placed on employers from other statutes.[236] The Court noted: "[A]lthough the Equal Pay Act expressly permits employers to pay different wages to women where disparate pay is the result of a 'factor other than sex,' we have decided that it is the employer, not the employee, who must prove that the actual disparity is not sex linked."[237] The Court also noted that "some courts have held that, under Title VII as amended by the Pregnancy Discrimination Act, it is the employer who has the burden of showing that its limitations on the work that it allows a pregnant woman to perform are necessary in light of her pregnancy."[238]

A final fly in the ointment for plaintiffs is the question of whether a plaintiff will need to show affirmatively that a business decision is not a RFOA in order to establish a violation of the Act. Unlike Title VII, as the Court noted in *Smith*, the ADEA "contains language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'"[239] If a reasonable factor, other than age, prompted the adverse impact, there can be no liability.[240]

This RFOA exemption of employers from liability may have huge repercussions for burdens of proof, production, and persuasion. Should an action based on a RFOA be viewed as legal in itself, courts may determine that there is simply no need to even address burdens of proof or the shifting of production with respect to RFOAs in a disparate impact case. As in *Smith*, the Court may instead directly focus on whether the employer has articulated a reasonable factor other than age in support of its decision. This could occur simply by filing an affidavit to this effect in support of a motion for summary judgment.

Along this same line, a given plaintiff may never be accorded an opportunity to show that a practice is unreasonable. With respect to general burdens in discrimination cases, other than the RFOA and specific employment practices at issue in *Smith*, the respective burdens on the parties articulated in *Burdine* and *McDonnell Douglas* are much like those on parties in a summary judgment motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. The moving party first must present evidence entitling it to relief. Under Title VII, "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully

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[235] *Price Waterhouse*, 490 U.S. at 248-49.

[236] *Id.* at 248.

[237] *Id.* (citation omitted) (citing 29 U.S.C § 206(d)(1); *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974)).

[238] *Id.* (citing *Hayes v. Shelby Meml. Hosp.*, 726 F.2d 1543, 1548 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172, 1187 (4th Cir. 1982)).

[239] *Smith*, 544 U.S. at 233 (quoting 29 U.S.C. § 623(f)(1)).

[240] *Id.* at 238.

discriminated against the employee."[241] And, as with summary judgment, "[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case."[242] Should the employer present sufficient evidence, the plaintiff then faces a heightened challenge: "[T]he factual inquiry proceeds to a new level of specificity."[243] The plaintiff can produce direct evidence that a discriminatory reason was likely the motivation or show by indirect evidence that the employer's proffered reason is not worthy of belief.[244]

However, the RFOA specter adjusts the equation in ADEA cases. For instance, in *Pippin*, a post-*Smith* disparate impact case, the defendant-employer looked to retain only the "best performers" selected on past performance and skills needed for future operations, which was criteria the plaintiff apparently did not meet.[245] The Tenth Circuit not only affirmed an award of summary judgment for the employer but also noted that even if the plaintiff had established a prima facie case, which it had not, the defendant "was entitled to summary judgment pursuant to the RFOA defense."[246] And even should a plaintiff survive summary judgment, courts may construe *Smith*, especially absent clarification, as directing them to grant a defendant-employer's motion for a directed verdict after the defendant's case and before the plaintiff has a chance to show that a practice is pretext, or in a disparate impact case, unreasonable.

Due process and fairness considerations may cause the Court to lift its umbrella of protection over the heads of ADEA plaintiffs, even after *Smith*. While it is not clear from the *McDonnell Douglas* or *Furnco* protocol, the *Burdine* Court noted the import of according plaintiffs a "full and fair opportunity" to show pretext with respect to Title VII cases.[247] Permitting the plaintiff an opportunity to show pretext or that a practice is not reasonable is consistent with the traditional protocol of Title VII claims, which the Court at least found palatable in *Reeves*. After all, even the *Wards Cove* Court extended to plaintiffs an opportunity to show that the employer's tendered rationale for a decision causing a disparate impact was pretext.[248]

Consistently with due process rights, it may be available and necessary for plaintiffs to circle their wagons before even filing a discrimination claim. Filing a discovery action simply to obtain RFOA and

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[241] *Burdine*, 450 U.S. at 254.
[242] *Id.*
[243] *Id.* at 255.
[244] *Id.* at 256 (citing *McDonnell Douglas*, 411 U.S. at 804-05).
[245] 440 F.3d at 1189.
[246] *Id.* at 1201.
[247] *Burdine*, 450 U.S at 258.
[248] *Wards Cove*, 490 U.S. at 668.

business rationales for actions might be a wise first foot in the courthouse door. Discovery as generally available in discrimination cases is a tool for plaintiffs as the Court suggested in *Burdine*.[249] There the Court deemed that the plaintiffs' access to information through "liberal discovery rules," as well as the EEOC's findings, would augment the plaintiffs' information-gathering process.[250] The approval of EEOC findings may be pivotal for plaintiffs for whom, at this juncture, the EEOC remains sympathetic. While acknowledging the impact of *Smith*, the EEOC has not amended its regulations interpreting an RFOA in light of the decision. For example, it has issued informal guidance in which it distinguished the business necessity standard and a RFOA. Discussing what can be included in job descriptions, the EEOC stated that "if an employer wishes to include a job requirement in a job description that negatively affects employees based on their age, the requirement should be reasonable."[251]

V. CONCLUSION

Has *Smith* sharpened the RFOA harpoon to the extent that plaintiffs should abandon any hope of recovery under an ADEA disparate impact theory of liability? The familiar path arising from the *McDonnell Douglas* protocol may well be the map for ADEA litigants and courts. However, it does not appear that the Court will offer much latitude to ADEA plaintiffs. Beyond looking to the lethargic legislative force behind the ADEA, courts exercise restraint when business judgment is at issue. Post-*Smith* decisions to date signal that courts will allow significant deference to employers akin to that of the business judgment rule in the employment discrimination arena, and most certainly, with respect to the ADEA. The language in *Meacham* finding that employers' decision-making "will usually be reasonable,"[252] or that in *Pippin* citing many acceptable business considerations,[253] certainly suggest that courts are likely to consider favorably, and even dispositively, the rationale and approach of the business judgment rule in disparate impact employment ADEA discrimination cases.

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[249] *Burdine*, 450 U.S. at 258.

[250] *Id.* The Court offered that these considerations would smooth the way for the plaintiff: "Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext. We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination." *Id.*

[251] Open Ltr. from Carol R. Miaskoff, Asst. Leg. Counsel, EEOC, *Title VII and ADA: Hiring/Job Requirements/Job Descriptions* [¶ 6] (June 21, 2005) (available at www.eeoc.gov/foia/letters/2005/titlevii_ada_job_requirements_descriptions.html). The current regulations recognize that "[n]o precise and unequivocal determination can be made as to the scope of the phrase 'differentiation based on reasonable factors other than age.'" 29 C.F.R. § 1625.7(b) (2008). The EEOC establishes a case-by-case standard of review: "Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation." *Id.*

[252] *Meacham*, 461 F.3d at 146; *Pippin*, 440 F.3d at 1201.

[253] *Pippin*, 430 F.3d at 1201.