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Employees Bringing Disparate-Impact Claims Under the ADEA Continue to Face an Uphill Battle Despite the Supreme Court's Decisions in *Smith v. City of Jackson* and *Meacham v. Knolls Atomic Power Laboratory*

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In March 2005, in *Smith v. City of Jackson*,[1] the Supreme Court held that disparate-impact claims are cognizable under the Age Discrimination in Employment Act (ADEA).[2] In *City of Jackson*, the Court recognized that an employer may successfully defend against a disparate-impact age discrimination claim if the challenged action is based on a reasonable factor other than age (RFOA defense) but provided no guidance as to who bears the ultimate burden in establishing that defense.[3] Most courts addressing the issue post–*City of Jackson* placed the ultimate burden on the employee to prove the policy or practice at issue was not based on reasonable factors other than age.[4]

In June 2008, in *Meacham v. Knolls Atomic Power Laboratory*,[5] the Supreme Court held that the RFOA defense is an affirmative one, for which the employer bears the burdens of production and persuasion. The Court acknowledged the fears of many employers that making the

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1. *See* 544 U.S. 228, 243 (2005).
2. 29 U.S.C. §§ 621–34 (2006).
3. *City of Jackson*, 544 U.S. at 239.
4. *See, e.g.*, Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 144 (2d Cir. 2006), *rev'd*, 128 S. Ct. 2395, 2407 (2008); Pippin v. Burlington Res. Oil & Gas Co., 440 F.3d 1186, 1200–01 (10th Cir. 2006); Aldridge v. City of Memphis, No. 05-2966 B, 2007 WL 4370707, at *3 (W.D. Tenn. Dec. 10, 2007); Embrico v. U.S. Steel Corp., 404 F. Supp. 2d 802, 830 (E.D. Pa. 2005), *aff'd*, 245 F. App'x 184, 190 (3d Cir. 2007).
5. 128 S. Ct. 2395, 2401 (2008).

RFOA defense an affirmative one could "encourage strike suits or nudge plaintiffs with marginal cases into court, in turn inducing employers to alter business practices in order to avoid being sued."[6] To date, these fears have not been realized; the *City of Jackson* and *Meacham* decisions have not resulted in a flood of successful disparate-impact age discrimination claims. Rather, as was the case prior to these Supreme Court decisions, employees bringing disparate-impact age claims have faced difficulty surviving summary judgment.[7] Courts continue to find that employees fail to meet their prima facie burdens to identify a specific employment policy or practice responsible for an observed statistical disparity and to provide sufficient statistics evidencing such a disparity. In those cases where courts go beyond the prima facie analysis to address the RFOA defense, most courts have found that the challenged practice was based on a reasonable factor other than age.[8]

On February 18, 2010, the Equal Employment Opportunity Commission (EEOC) published for public comment a proposed rule addressing the scope of the RFOA defense "in light of recent Supreme Court decisions."[9] The EEOC's proposed rule appears to contradict the Supreme Court's decision in *Meacham* and, if adopted, will likely be challenged.

Despite the Supreme Court's decisions in *City of Jackson* and *Meacham*, plaintiffs will likely continue to face an uphill battle when bringing disparate-impact ADEA claims. Plaintiffs will continue to confront the "nontrivial" burden of establishing a prima facie case of disparate-impact age discrimination and will continue to face employers' RFOA defenses. Furthermore, any reliance by plaintiffs on EEOC regulations that are contradictory to Supreme Court precedent will likely be subject to challenge. This article reviews the differences between disparate-impact claims brought under Title VII of the Civil Rights Act of 1964 (Title VII)[10] and under the ADEA, analyzes post–*City of Jackson* and *Meacham* disparate-impact ADEA claims, examines the EEOC's proposed rules regarding the scope of the RFOA defense, and concludes by explaining the practical difficulties of successfully prosecuting disparate-impact ADEA claims.

I. The History of Disparate-Impact Claims and Defenses Under Title VII

In disparate-treatment cases brought under Title VII or the ADEA, plaintiffs must show that their employers treated them less favorably

6. *Id*. at 2406.
7. *E.g., Aldridge*, 2007 WL 4370707, at *8.
8. *Id*.
9. Definition of "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act, 75 Fed. Reg. 7212, 7213 (Feb. 18, 2010) (to be codified at 29 C.F.R. pt. 1625).
10. 42 U.S.C. §§ 2000e-1 to -17 (2006).

because of the employee's membership in a protected class, such as race, gender, or age.[11] The employee must prove through direct or circumstantial evidence that the discrimination was intentional.[12]

In contrast, a disparate-impact claim does not require proof of an intention to discriminate. Instead, showing that a facially neutral employment practice has a disproportionately adverse impact on a protected group states a prima facie case of unlawful disparate-impact discrimination.[13] The premise of disparate-impact claims "is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[14]

The disparate-impact theory has long been recognized as a viable theory of discrimination under Title VII.[15] In 1989, the Supreme Court established the burden-shifting analysis applicable to Title VII disparate-impact claims in *Wards Cove*.[16] The Supreme Court held that a plaintiff has the burden of "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."[17] If a plaintiff successfully makes this prima facie showing, the burden of production shifts to the defendant to produce evidence of a business justification for the challenged practice.[18] The Court made clear that it is only the burden of production, not persuasion, that shifts to the defendant in Title VII disparate-impact cases: "In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff."[19] If the defendant meets its burden of production, the plaintiff bears the ultimate burden of persuading the factfinder that "other tests or selection devices, without a similarly undesirable discriminatory effect, would also serve the employer's legitimate hiring interests" and would be "equally effective" in achieving the employer's goals.[20]

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11. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–07 (1993); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 670 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (codified in scattered sections of 16 U.S.C. and 42 U.S.C. (2006)).

12. *See St. Mary's*, 509 U.S. at 507 (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)); *Wards Cove*, 490 U.S. at 670 (Stevens, J., dissenting).

13. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

14. *See* Pippin v. Burlington Res. Oil & Gas Co., 440 F.3d 1186, 1199 (10th Cir. 2006) (citing Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1242 (10th Cir. 1991), *superseded by statute*, Civil Rights Act of 1991).

15. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989), *superseded by statute*, Civil Rights Act of 1991; Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

16. *See* 490 U.S. at 657.

17. *Id*. at 656 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)).

18. *Id*. at 658.

19. *Id*. at 659.

20. *Id*. at 660–61 (internal citation omitted).

Unhappy with the *Wards Cove* decision, Congress amended Title VII through the Civil Rights Act of 1991[21] to clarify that employers bear the burdens of both production and persuasion in establishing the business necessity defense.[22] An employer may satisfy this affirmative defense by showing that the challenged action is "related to safe and efficient job performance and is consistent with business necessity."[23]

II. The History of Disparate-Impact Claims and Defenses Under the ADEA

A. *Smith v. City of Jackson*[24]

In 1993, in *Hazen Paper Co. v. Biggins*,[25] the Supreme Court expressly left open the question of whether disparate-impact claims could be brought under the ADEA.[26] Prior to *City of Jackson*, the courts of appeals were divided on whether such claims existed under the ADEA.[27]

In *City of Jackson*, the Court resolved the issue, holding that disparate-impact claims are cognizable under the ADEA.[28] In reaching its decision, the Court reasoned that, like Title VII, the ADEA "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer."[29] The Court noted that the appellate courts had uniformly found disparate-impact age claims cognizable under the ADEA prior to the *Hazen* decision and stated that nothing in that decision required a different result.[30]

The Court further found support for disparate-impact claims in the language of the ADEA, which provides, "It shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age."[31] The Court concluded that this provision would only

21. Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 16 U.S.C. and 42 U.S.C. (2006)).

22. *Id*.

23. EEOC v. Dial Corp., 469 F.3d 735, 742 (8th Cir. 2006) (quoting Firefighters' Inst. for Racial Equality v. City of St. Louis, 220 F.3d 898, 904 (8th Cir. 2000)).

24. 544 U.S. 228 (2005).

25. 507 U.S. 604 (1993).

26. *Id*. at 610 ("[W]e have never decided whether a disparate-impact theory of liability is available under the ADEA . . . and we need not do so here.").

27. *City of Jackson*, 544 U.S. at 237 n.9 ("In contrast to the First, Seventh, Tenth, and Eleventh Circuits, which have held that there is no disparate-impact theory, the Second, Eighth, and Ninth Circuits continue to recognize such a theory.").

28. *Id*. at 243.

29. *Id*. at 236.

30. *Id*. at 237–38. The Court also relied on interpretive regulations promulgated by the EEOC to find that disparate-impact claims may be brought under the ADEA. *Id*. at 239–40 (citing 29 C.F.R. § 860.103(f)(1)(i) (1970); *id*. § 1625.7 (2004)).

31. 29 U.S.C. § 623(f)(1) (2006).

be implicated in a disparate-impact case because if a defendant's actions were based on a reasonable factor other than age in a disparate-treatment case, there would be no ADEA violation.[32]

While finding such claims cognizable, the Court held that the scope of disparate-impact claims under the ADEA is narrower than the scope of such claims brought under Title VII.[33] The Court reasoned that the RFOA defense found in the ADEA was added to the statute because age may be relevant to an individual's capacity to engage in certain types of employment.[34] The Court also noted that the Civil Rights Act of 1991 broadened the scope of disparate-impact claims under Title VII but did not similarly amend the ADEA.[35] The Court stated that *Wards Cove* was "a case in which [the Court] narrowly construed the employer's exposure to liability on a disparate-impact theory" and held that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."[36]

The Court in *City of Jackson* also articulated the standard for analyzing disparate-impact claims under the ADEA. To establish a prima facie case, a plaintiff must do more than simply allege that a generalized policy has an adverse impact on older workers.[37] Rather, the plaintiff is "responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities."[38] Even after a prima facie case is established, if an employer then shows that the challenged employment practice is "based on reasonable factors other than age,"[39] a disparate-impact claim cannot survive.

The Court then applied this test to the pay plan at issue. In *City of Jackson*, police and public safety officers challenged the city's pay plan, arguing that it was less generous to officers over the age of forty than to younger officers.[40] Under the city's plan, officers with fewer than five years of tenure (who tended to be younger) received proportionately greater raises when compared to their former pay than officers with more seniority (who tended to be older).[41] The Court held that the officers failed to establish a valid disparate-impact claim under the ADEA because they did not identify any specific test, requirement, or practice within the city's pay plan that had an adverse impact on older

32. *See City of Jackson*, 544 U.S. at 239 (2005).
33. *Id*. at 240.
34. *Id*.
35. *Id*.
36. *Id*.
37. *Id*. at 241.
38. *Id*. (citations omitted).
39. *Id*.
40. *Id*. at 241–42.
41. *Id*. at 242.

workers.[42] The Court also found that the city's pay plan was based on reasonable factors other than age. Specifically, the plan was based on the city's decision to give raises based on seniority and rank in an effort to make compensation for junior officers competitive with that of comparable positions in the market.[43] Given that goal, the Court found the city's pay plan "unquestionably reasonable."[44]

The Court went on to differentiate the RFOA defense available under the ADEA from the business necessity defense available under Title VII:

> While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.[45]

City of Jackson left open the issue of who bears the burden of proof on the RFOA defense.

B. Meacham v. Knolls Atomic Power Laboratory[46]

In *Meacham*, the Supreme Court answered the question left open in *City of Jackson* by holding that employers bear the burdens of both production and persuasion with respect to the RFOA defense in disparate-impact claims brought under the ADEA.[47] In that case, the plaintiffs were challenging a reduction in force (RIF) that resulted in job loss for thirty-one employees, thirty of whom were over the age of forty.[48] In implementing the RIF, the defendant had provided a guide to over-budget managers that required such managers to rank their subordinates according to performance, flexibility, and criticality of their skills, awarding up to ten points for years of service.[49] The plaintiffs alleged that the presence of "flexibility" and "criticality of skills" in the RIF decisions caused a disparate impact on the basis of age.[50]

Initially, the Second Circuit affirmed the jury verdict in favor of the plaintiffs.[51] However, on a petition for writ of certiorari, the Su-

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42. *Id*. at 241–42.
43. *Id*. at 242–43.
44. *Id*. at 242.
45. *Id*. at 243.
46. 128 S. Ct. 2395 (2008).
47. *Id*. at 2402.
48. *See* Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 139 (2d Cir. 2006), *vacated*, 128 S. Ct. 2395 (2008).
49. *Id*. at 138.
50. *See id*. at 139 (quoting Meacham v. Knolls Atomic Power Lab., 381 F.3d 56, 75 n.8 (2d Cir. 2004), *vacated*, 544 U.S. 957 (2005)).
51. *Meacham*, 381 F.3d at 79.

preme Court vacated and remanded the case to the Second Circuit for reconsideration in light of the *City of Jackson* decision.[52] On the initial remand, the court reaffirmed its earlier finding that the plaintiffs established a prima facie case of disparate-impact discrimination but concluded that the plaintiffs failed to demonstrate that the defendant's justification for its RIF decisions was "unreasonable."[53] In its decision, the Second Circuit placed the burden of persuasion for the RFOA defense on the plaintiffs.[54] The court then vacated the judgment of the district court and remanded with instructions to dismiss the case.[55]

A second petition for certiorari was granted in *Meacham* to address whether a plaintiff alleging disparate-impact discrimination under the ADEA bears the burden of persuasion on the RFOA defense, and oral argument was heard on April 23, 2008.[56]

On June 19, 2008, the Supreme Court held that the RFOA defense is an affirmative one, for which employers bear the burdens of production and persuasion.[57] The Court found support for this decision in the text and structure of the ADEA, where the defense is listed separately from the general prohibition and is defined as applying to actions that are "otherwise prohibited" by the ADEA.[58] The Court also noted that the RFOA provision appears next to the bona fide occupational qualification (BFOQ) exemption, which the Court previously held to be an affirmative defense.[59] The Court found further support for its holding in its prior decision giving affirmative defense construction to the 1963 Equal Pay Act's exemption to pay differentials based on "any other factor other than sex," since "Congress inten[ded] . . . that the ADEA be enforced in accordance with the 'powers, remedies, and procedures' of the FLSA."[60] The Court clarified that its statement in *City of Jackson* that "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA" did not pertain to the RFOA defense, as Title VII does not include any similar defense.[61]

Highlighting that the plaintiffs' responsibility to isolate and identify a specific employment practice responsible for an observed statistical disparity is "not a trivial burden," the Court hoped to "allay some of the concern . . . that recognizing an employer's burden of persuasion on

52. *Meacham*, 461 F.3d at 138.
53. *Id*. at 144.
54. *Id*. at 143.
55. *Id*. at 147.
56. *See* Meacham v. Knolls Atomic Power Lab., 128 S.Ct. 1118 (2008).
57. *See* Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2396 (2008).
58. *Id*. at 2400 (citing 29 U.S.C. § 623(a)–(c), (e) (2006)).
59. *Id*.
60. *Id*. at 2401 (citing Lorillard v. Pons, 434 U.S. 575, 580 (1978) (quoting 29 U.S.C. § 626(b) (2006)); Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974)).
61. *Id*. at 2404 (citing Smith v. City of Jackson, 544 U.S. 228, 240 (2005)).

an RFOA defense to impact claims will encourage strike suits or nudge plaintiffs with marginal cases into court."[62] The Court also provided further guidance on the application of the RFOA defense:

> The RFOA defense in a disparate-impact case, then, is not focused on the asserted fact that a non-age factor was at work; we assume it was. The focus of the defense is that the factor relied upon was a "reasonable" one for the employer to be using. Reasonableness is a justification categorically distinct from the factual condition "because of age" and not necessarily correlated with it in any particular way: a reasonable factor may lean more heavily on older workers, as against younger ones, and an unreasonable factor might do just the opposite.[63]

The Court also clarified that in many cases employers will easily satisfy the RFOA defense:

> And the more plainly reasonable the employer's "factor other than age" is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious. It will be mainly in cases where the reasonableness of the non-age factor is obscure for some reason, that the employer will have more evidence to reveal and more convincing to do in going from production to persuasion.[64]

The Court then vacated the judgment of the Court of Appeals and remanded the case for further proceedings consistent with its decision.[65]

III. Following *City of Jackson* and *Meacham*, Few Disparate-Impact Age Discrimination Cases Have Survived Summary Judgment

Although the *City of Jackson* decision gave plaintiffs the right to bring disparate-impact claims under the ADEA, and although the *Mea-*

62. *Id*. at 2406.
63. *Id*. at 2403.
64. *Id*. at 2406.
65. *Id*. at 2407. On remand, the district court found that the employer waived the right to assert the RFOA defense when it "failed to seek judgment on the defense, request a jury instruction or special interrogatory on the defense, or object to the charge or verdict form for omitting any instruction or question on the defense." Meacham v. Knolls Atomic Power Lab., 627 F. Supp. 2d 72, 83 (N.D.N.Y. 2009), *vacated and remanded*, 358 F. App'x 233 (2d Cir. 2009). Additionally, the court concluded that the employer's waiver was not excused as the result of conflicting statements in the case law because "[a]s of the time of trial in June and July, 2000, no decision in the Second Circuit had discussed the burden of proof on the RFOA defense, directly or otherwise." *Id*. Thus, the court reinstated the second amended judgment in favor of the employees. *Id*. at 85.

On appeal, the Second Circuit Court of Appeals vacated the district court's judgment, finding that the Supreme Court impliedly rejected the plaintiffs' waiver argument. *See* Meacham v. Knolls Atomic Power Lab., 358 F. App'x 233, 235 (2d Cir. 2009). Thus, the Second Circuit remanded the case for a new trial. *Id*. at 236.

cham decision firmly placed the burdens of production and persuasion on employers to prove the RFOA defense, courts have continued to reject ADEA disparate-impact claims following those decisions. Plaintiffs pursuing disparate-impact ADEA claims following *City of Jackson* and *Meacham* generally have had their claims rejected for their failure to establish a prima facie case or because courts have found that the challenged actions were based on reasonable factors other than age.

A. *Disparate-Impact ADEA Claims Rejected Because of Plaintiffs' Failure to Establish a Prima Facie Case*

As was true before *City of Jackson* and *Meacham*, many post–*City of Jackson* and *Meacham* disparate-impact ADEA claims have failed because the plaintiffs cannot meet the nontrivial burden to isolate and identify the specific employment practices responsible for an observed statistical disparity.

For example, in *Pippin v. Burlington Resources Oil & Gas Co.*,[66] the Tenth Circuit rejected the plaintiffs' disparate-impact age challenge to their employer's RIF because of the plaintiffs' failure to establish a prima facie case.[67] The court found that plaintiffs merely presented statistics showing that the RIF resulted in the termination of more over-forty workers than under-forty workers and held "absent any evidence of the 'comparables'—i.e., the age of [the company's] other employees or even the age of the other employees in the San Juan Division—this statistic has little significance."[68]

Similarly, in *Durante v. Qualcomm, Inc.*,[69] the Ninth Circuit found that the plaintiffs failed to establish a prima facie case to support their disparate-impact challenge to their former employer's company-wide RIF.[70] The plaintiffs alleged that their former employer used "solely subjective criteria in the absence of standardized rules or tests" in making RIF decisions.[71] The court recognized that an overall decision-making process can be subject to a disparate-impact challenge if the employer uses an "undisciplined system of subjective decisionmaking."[72] The *Durante* court, however, found that the evidence demonstrated that Qualcomm utilized neutral guidelines for its RIF selections, "many of which included objective criteria, including recommending the layoff of employees whose projects were eliminated and utilizing past performance review scores."[73] Thus, because the plaintiffs failed to present evidence

66. 440 F.3d 1186 (10th Cir. 2006).
67. *Id.* at 1201.
68. *Id.*
69. 144 F. App'x 603 (9th Cir. 2005).
70. *Id.* at 607.
71. *Id.* at 606.
72. *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988)).
73. *Id.*

that Qualcomm's RIF decisions were solely due to subjective discretion and otherwise failed to identify a specific disparate impact, the Ninth Circuit affirmed the lower court's summary judgment in favor of the employer.[74]

Likewise, in *Butts v. McCullough*,[75] the Sixth Circuit rejected the plaintiff's ADEA disparate-impact challenge to the union's policy against referring retirees for open positions.[76] While the plaintiff alleged that the union's referral preference for nonretirees was discriminatory in operation, he failed to present any evidence of the impact of the policy on older workers.[77] Acknowledging that the challenged policy may discriminate against older workers, the court held that such discrimination could not be assumed, particularly because workers were permitted to retire at any age.[78] Thus, the court concluded that plaintiff's "complete failure to make any . . . statistical showing [was] fatal to his claim."[79]

The Sixth Circuit similarly rejected a disparate-impact ADEA claim in *Allen v. Highlands Hospital Corp*.,[80] where it held that plaintiffs failed to satisfy their prima facie burden when they merely alleged that "the effect of the policy demanding terminations of the highest paid employees has an age discrimination effect that is improper."[81] Finding that plaintiffs' allegations only identified a generalized policy as opposed to a specific practice, the court held that summary judgment on plaintiffs' disparate-impact ADEA claim was proper.[82] Additionally, the court found that the plaintiffs' statistics proffered in support of their disparate-impact claim were insufficient because the percentage of total workers in the protected class actually increased during the relevant timeframe; younger workers were terminated in a higher proportion than those age forty and older. In addition, the numbers showing that terminations for those age forty and older increased during the relevant time frame were not statistically significant since the percentages were drawn from a very small pool.[83]

The Sixth Circuit also rejected a disparate-impact ADEA claim in *Adams v. Lucent Technologies, Inc*.[84] The plaintiffs alleged that they were victims of age discrimination when Lucent offered senior employ-

74. *Id*. at 607.
75. 237 F. App'x 1 (6th Cir. 2007).
76. *Id*. at 9.
77. *Id*. at 8–9.
78. *Id*. at 9.
79. *Id*.
80. 545 F.3d 387 (6th Cir. 2008).
81. *Id*. at 404.
82. *Id*. at 404–05.
83. *Id*. at 405.
84. 284 F. App'x 296 (6th Cir. 2008).

ees enhanced voluntary retirement benefits while engaged in merger negotiations with a competitor and then failed to advise the older workers that merger negotiations had collapsed until after many of the employees had accepted the packages.[85] The court affirmed the lower court's decision granting summary judgment for the employer, finding that plaintiffs' complete failure to utilize relevant statistics to make a showing of adverse impact doomed plaintiffs' claim.[86]

Similarly, in *Combs v. Grand Victoria Casino & Resort*,[87] the court held that the plaintiffs failed to make out a prima facie showing of disparate-impact discrimination under the ADEA.[88] In that case, plaintiffs alleged that their former employer's "unreasonable and arbitrary methods and subjective practices" of investigation and decision making concerning (a) terminations, (b) alleged rule and policy violations, (c) alleged employee misconduct, and (d) disciplinary procedures had a disparate impact on the basis of age.[89] The court granted the employer's motion to dismiss, finding that the employees failed to identify a specific employment practice or policy "that is facially neutral but discriminatory in effect."[90]

In the numerous other disparate-impact ADEA cases heard following *City of Jackson* and *Meacham*, courts have rejected plaintiffs' prima facie cases on the following grounds: (1) failure to isolate and identify a specific employment practice that caused a disparate impact;[91]

85. *Id*. at 303.
86. *Id*. at 304.
87. No. 1:08-cv-00414-RLY-JMS, 2008 WL 4452460 (S.D. Ind. Sept. 30, 2008).
88. *Id*. at *3.
89. *Id*. at *2.
90. *Id*. at *3.
91. *See* Stamm v. Inter-Con Sec. Sys., Inc., No. 09-1374, 2010 WL 2663079, at *2 (C.D. Ill. June 29, 2010) (granting employer's motion to dismiss where employee failed to identify specific policy causing disparate impact on basis of age); Stipe v. Shinseki, 690 F. Supp. 2d 850, 873 (E.D. Mo. 2010) (granting employer's motion for summary judgment where employee's challenge to job duties failed to identify specific practice causing disparate impact on the basis of age); Oinonen v. TRX, Inc., No. 3:09-CV-1450-M, 2010 WL 396112, at *4–5 (N.D. Tex. Feb. 3, 2010) (granting employer's motion to dismiss employee's disparate-impact challenge to RIF because employee failed to identify any specific test, requirement, or practice in the layoff process allegedly responsible for purported statistical disparities); Gillman v. Inner City Broad. Corp., No. 08 Civ. 8909(LAP), 2009 WL 3003244, at *6 (S.D.N.Y. Sept. 18, 2009) (granting employer's motion to dismiss disparate-impact ADEA claim because "listing thirteen individuals terminated after reaching the age of forty, without more information about the reasons for their termination or specific employment practices by the Defendant, does not make out a plausible age discrimination claim"); Walker v. City of Cabot, No. 4:08-CV-00139 BSM, 2008 WL 4816617, at *3–4 (E.D. Ark. Nov. 4, 2008) (granting employer's motion for summary judgment where employee's general challenge to two RIFs failed to identify specific employment practice responsible for statistical disparity); Reshard v. Peters, 579 F. Supp. 2d 57, 75–76 (D.D.C. 2008) (granting summary judgment in favor of employer where employee alleged disproportionate numbers of persons age fifty-five and older in certain managerial positions but failed to identify a specific test, requirement, or practice that caused an

(2) absence of sufficient statistics to support their claims;[92] and (3) fail-

adverse impact based on age and failed to present evidence of statistical disparity to support her claim), *aff'd sub nom*. Reshard v. LaHood, 358 F. App'x 196 (D.C. Cir. 2009) (per curiam); Aliotta v. Bair, 576 F. Supp. 2d 113, 127–28 (D.D.C. 2008) (granting employer's motion for summary judgment where plaintiffs challenged RIF but failed to identify specific employment practice that resulted in adverse impact on older employees); Syverson v. IBM Corp., No. C-03-04529 RMW, 2007 WL 2904252, at *6 (N.D. Cal. Oct. 3, 2007) (finding plaintiffs failed to identify specific employment practice that caused disparate impact on older workers); EEOC v. Honda of Am., Mfg., No. 2:06-cv-00233, 2007 WL 1541364, at *4–5 (S.D. Ohio May 23, 2007) (noting that plaintiffs failed to do "more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers"); Jagla v. Harris Bank, No. 05 C 5422, 2007 WL 433112, at *3–4 (N.D. Ill. Feb. 2, 2007) (noting that even if disparate-impact ADEA claim had been properly alleged, claim would fail because plaintiff pointed only to a general policy—employer's "purported preference for recent college graduates in entry-level positions"—rather than specific employment practice responsible for disparity); Adams v. Lucent Techs., Inc., No. 2:03CV300, 2007 WL 14593, at *7 (S.D. Ohio Jan. 3, 2007) (rejecting challenge to employer's voluntary retirement plan because plaintiffs specified no neutral policy that had disparate impact on older workers), *aff'd*, 284 F. App'x 296 (6th Cir. 2008); Wooler v. Citizens Bank, No. 06-1439, 2006 WL 3484375, at *8 (E.D. Pa. Nov. 30, 2006) (finding that plaintiff failed to provide evidence of specific test or practice that had adverse impact on older workers), *aff'd*, 274 F. App'x 177 (3d Cir. 2008); Kourofsky v. Genencor Int'l, Inc., 459 F. Supp. 2d 206, 215 (W.D.N.Y. 2006) (rejecting challenge to RIF where plaintiffs merely alleged disparate impact on older workers and failed to identify facially neutral policy that produced such result); Howard v. Kiewit Pac. Corp., No. 05-00525 ACK/KSC, 2006 WL 2860663, at *4–5 (D. Haw. Oct. 4, 2006) (rejecting claim where plaintiff failed to present evidence of practice that had disparate impact on older workers); Angelico v. Agilent Techs., No. 06-348, 2006 WL 2854377, at *6 (E.D. Pa. Oct. 3, 2006) (rejecting disparate-impact challenge to termination because plaintiff failed to establish prima facie case); White v. Am. Axle & Mfg., No. 05-CV-72741-DT, 2006 WL 335710, at *5–6 (E.D. Mich. Feb. 14, 2006); Davis v. Valley Hospitality Servs., LLC, 372 F. Supp. 2d 641, 655–56 (M.D. Ga. 2005) (granting summary judgment because employer's policy of achieving "right look" for hotel was not facially neutral employment policy required to establish a disparate-impact claim), *aff'd in part*, 214 F. App'x 877 (11th Cir. 2006) (per curiam), *and rev'd in part*, 211 F. App'x 841 (11th Cir. 2006) (per curiam).

92. *See* Apsley v. Boeing Co., No. 05-1368-EFM, 2010 WL 2670880, at *18–19 (D. Kan. June 30, 2010) (granting employer's motion for summary judgment because employees' statistics did not support finding that excessive subjectivity in selective rehire process caused protected workers to suffer a statistically significant adverse effect based on age); Clark v. Matthews Int'l Corp., No. 4:07CV2027SNLJ, 2009 WL 3680771, at *10–11 (E.D. Mo. Oct. 30, 2009) (granting summary judgment in favor of employer in RIF case in part because plaintiff's statistical evidence focused on employees over age forty-five rather than over age forty); Gallagher v. IBEW Local Union No. 43, No. 5: 00CV1161, 2008 WL 4613758, at *5–6 (N.D.N.Y. Oct. 15, 2008) (dismissing plaintiff's challenge to union's referral because statistical report did not account for other potential causes of variations, and plaintiff's challenge to layoff process did not identify specific layoff procedure adversely impacting older workers); Aldridge v. City of Memphis, No. 05-2966-STA-dkv, 2008 WL 2999557, at *6–7 (W.D. Tenn. July 31, 2008) (granting employer's summary judgment motion because challenged action only affected captains rather than all employees and thus did not present a cognizable disparate-impact claim); Golter v. Square D Co., No. 4:06CV3287, 2007 WL 4225273, at *8 (D. Neb. Nov. 27, 2007) (finding plaintiff's failure to present statistics challenging company's plan to hire workers at lower tier with fewer benefits doomed disparate-impact claim); Wagner v. Pac. Mar. Ass'n, No. 05-1729-PK, 2007 WL 2407093, at *5–6 (D. Or. Aug. 21, 2007) (rejecting disparate-impact challenge to evaluation and selection processes because plaintiff failed to present sufficient statistics); Rollins v. Clear Creek Indep. Sch. Dist., No. G-06-081, 2006 WL 3302538, at *4–5 (S.D. Tex. Nov. 13, 2006) (granting motion for summary judgment

ure to identify a protected group affected by the alleged discriminatory practice or policy.[93]

B. Disparate-Impact ADEA Claims Rejected Under the RFOA Analysis

Even when a prima facie case can be established, few ADEA disparate-impact challenges in the aftermath of *City of Jackson* and *Meacham* have survived the RFOA analysis because defendants have established that their rationale for engaging in the challenged behavior was reasonable. Unlike the business necessity defense, which asks whether there are other ways for the defendant to achieve its goals that do not result in a disparate impact on a protected class, the RFOA inquiry includes no such requirement.[94]

In *Pippin v. Burlington Resources Oil & Gas Co.*,[95] the Tenth Circuit held that it was reasonable for the defendant to make its RIF decisions based on employees' job performances and skill sets and to honor its prior commitment to hire several recent graduates.[96] In its decision, reached after *City of Jackson* but before *Meacham*, the Tenth Circuit placed the ultimate burden on the plaintiffs with regard to the RFOA analysis and concluded that the plaintiff cast no doubt on the reasonableness of the employer's RIF decisions. "All of these deci-

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because although plaintiff alleged that rehired retirees who received nonrenewal notices were over forty, she failed to present statistics regarding how many teachers in general did not have contracts renewed); Gottermeyer v. Norstan, Inc., No. 1:05 CV 1399, 2006 WL 1966613, at *8–9 (N.D. Ohio July 11, 2006) (rejecting ADEA disparate-impact challenge to employer's severance package that required employees to waive age claims without providing additional compensation because policy did not create disparate impact on basis of age), *aff'd*, 241 F. App'x 284 (6th Cir. 2007) (per curiam); Lit v. Infinity Broad. Corp. of Pa., No. Civ.A. 04-3413, 2005 WL 3088364, at *3–4 (E.D. Pa. Nov. 16, 2005) (finding that plaintiff failed to show that radio station's changing its format created discriminatory impact on basis of age); Iyer v. Everson, 382 F. Supp. 2d 749, 756 n.13 (E.D. Pa. 2005) (rejecting disparate-impact challenge to IRS's failure to hire plaintiff for position posted on law school bulletin board because plaintiff failed to present evidence showing age of those enrolled in program, and did not present evidence of disparity in IRS's hiring pattern), *aff'd*, 238 F. App'x 834 (3d Cir. 2007) (per curiam); Townsend v. Weyerhaeuser Co., No. 04-C-563-C, 2005 WL 1389197, at *14 (W.D. Wis. June 13, 2005) (rejecting disparate-impact claim because plaintiff failed to introduce statistics showing older employees were adversely impacted by RIF); Ackerman v. Home Depot, Inc., No. Civ.A. 304CV0058N, 2005 WL 1313429, at *5 (N.D. Tex. May 31, 2005) (rejecting ADEA challenge to wage standardization policy because plaintiff failed to present statistics showing disparate impact).

93. *See* McKnight v. Gates, No. 3:06-1019, 2007 WL 1849986, at *14 (M.D. Tenn. June 20, 2007) (dismissing disparate-impact ADEA claim because plaintiffs failed to identify protected group impacted by neutral policy), *aff'd*, 282 F. App'x 394 (6th Cir. 2008).

94. *But see* Smith v. Allstate Ins. Co., 195 F. App'x 389, at *7 (6th Cir. 2006) (appearing to endorse continuing applicability of business necessity test in disparate-impact age discrimination cases following *City of Jackson*).

95. 440 F.3d 1186 (10th Cir. 2006).

96. *See id*. at 1201.

sions were based on reasonable factors other than age. Corporate restructuring, performance-based evaluations, retention decisions based on needed skills, and recruiting concerns are all reasonable business considerations."[97] Accordingly, the court affirmed the lower court's decision to grant the employer's motion for summary judgment.[98]

The court in *Durante v. Qualcomm* likewise rejected an ADEA disparate-impact challenge to a RIF based on the RFOA defense.[99] The Ninth Circuit found that Qualcomm produced "unrebutted evidence" of the reasonableness of its RIF selection decisions, which were made to "satisfy the differing business needs of the varying divisions and departments within Qualcomm."[100] The court went on to find that plaintiffs' only evidence offered in opposition was a showing that the RIF decisions were not uniform or standardized. The court found such evidence insufficient: "[b]ecause this does not raise a triable issue of reasonableness within the context of the ADEA, the grant of summary judgment on plaintiffs' disparate-impact claim of age discrimination was proper."[101]

In *Aldridge v. City of Memphis*,[102] the court found that the city met its burden to demonstrate the RFOA affirmative defense, thus defeating the plaintiffs' disparate-impact challenge to the city's decision to abolish the captain rank in its police department.[103] The city alleged that it abolished the captain rank because such a rank was not operationally necessary, there was no need for a management-level rank achieved solely by seniority, and eliminating the positions would result in great savings for the city.[104] Finding that these justifications were "plainly reasonable," the court granted the city's motion for summary judgment.[105]

Similarly, in *Aliotta v. Bair*,[106] the employer established the RFOA affirmative defense to a RIF when it demonstrated that its downsizing was based on a reduced workload in the relevant division: "even if the [Division of Resolutions and Receiverships] was the oldest division in the FDIC, the Agency has shown that the division was not targeted because of age but because of a drastic reduction in workload."[107] The plaintiffs attempted to rebut the defendant's reason for the downsizing

97. *Id*.
98. *Id*. at 1202.
99. Durante v. Qualcomm, Inc., 144 F. App'x 603, 607–08 (9th Cir. 2005).
100. *See id*. at 607.
101. *Id*. at 607–08.
102. No. 05-2966-STA-dkv, 2008 WL 2999557 (W.D. Tenn. July 31, 2008).
103. *Id*. at *8.
104. *Id*.
105. *Id*.
106. 576 F. Supp. 2d 113 (D.D.C. 2008).
107. *Id*. at 127–28.

by pointing to younger individuals hired during the relevant timeframe. The court rejected this argument because the new hires assumed different responsibilities for lower pay in other departments: "[c]learly, the two groups are not so similarly situated as to support the proposition that the FDIC conducted the voluntary buyout, transfers and RIF as an elaborate ruse to flush the agency of senior staff."[108]

Likewise, in *Walker v. City of Cabot*,[109] the court found that the employer's RIF decisions were based on reasonable factors other than age.[110] In light of the company's financial problems, the court found that its decision to eliminate redundant positions was "reasonable."[111]

C. Disparate-Impact Challenges That Survived Motions to Dismiss or Motions for Summary Judgment

While most courts following *City of Jackson* and *Meacham* have rejected disparate-impact ADEA claims, some courts have found that plaintiffs established prima facie cases of disparate-impact liability or

108. *Id*. at 128.

109. No. 4:08-CV-00139 BSM, 2008 WL 4816617 (E.D. Ark. Nov. 4, 2008).

110. *Id*. at *4.

111. *Id. See generally* Blandford v. Exxon Mobil Corp., No. 3:08-CV-394, 2010 WL 2270884, at *10 (E.D. Tenn. June 3, 2010) (granting employer's motion for summary judgment because employer's decision to implement a salary program was based on reasonable factors other than age); Summers v. Winter, No. 5:07cv28/RH/EMT, 2008 WL 576489, at *12 (N.D. Fla. Feb. 29, 2008) (finding 9/11 terrorist attacks to be RFOA for police department's increased training requirements for officers) *aff'd*, 303 F. App'x 716 (11th Cir. 2008); Adams v. Lucent Techs., Inc., No. 2:03CV300, 2007 WL 14593, at *8 (S.D. Ohio Jan. 3, 2007) (finding that employer's decision to delay announcement of merger talks until after stock market closed and reliance upon seniority to offer benefits were RFOAs), *aff'd*, 284 F. App'x 296 (6th Cir. 2008); Rollins v. Clear Creek Indep. Sch. Dist., No. G-06-081, 2006 WL 3302538, at *5 (S.D. Tex. Nov. 13, 2006) (finding defendant's decision to give preference in contract renewal to nonretired teachers who were not drawing retirement salary over retired teachers who were drawing such salaries was RFOA); Lit v. Infinity Broad. Corp. of Pa., No. Civ.A. 04-3413, 2005 WL 3088364, at *4 (E.D. Pa. Nov. 16, 2005) (finding radio station's uncontroverted evidence that a repackaging effort that was a result of marketing research was "properly attributable to a 'reasonable factor other than age' so as to overcome [plaintiff's] disparate impact claim"); Overstreet v. Siemens Energy & Automation, Inc., No. EP-03-CV-163-KC, 2005 WL 3068792, at *4 n.2 (W.D. Tex. Sept. 26, 2005) (finding that even if plaintiff presented statistics demonstrating that RIF created disparate impact on basis of age, plaintiff's disparate-impact claim would fail because "there is a reasonable explanation other than age for the termination—namely the RIF"); Wilson v. MVM, Inc., No. Civ.A.03-4514, 2005 WL 1231968, at *18 (E.D. Pa. May 24, 2005) (rejecting disparate-impact ADEA challenge to plaintiffs' discharges for failing to meet medical standards because rationale that such employees were not medically qualified for positions was RFOA), *aff'd*, 475 F.3d 166 (3d Cir. 2007); Duggan v. Orthopaedic Inst. of Ohio, Inc., 365 F. Supp. 2d 853, 862 (N.D. Ohio 2005) (rejecting disparate-impact challenge to policy because it was based on RFOA—an attempt to attract new physician-shareholders); Embrico v. U.S. Steel Corp., 404 F. Supp. 2d 802, 829–30 (E.D. Pa. 2005) (rejecting challenge to U.S. Steel's voluntary retirement program which preselected employees for retention on basis of technical background, finding that plaintiffs failed to show that defendant's stated rationale for program was unreasonable), *aff'd*, 245 F. App'x 184 (3d Cir. 2007).

otherwise sufficiently pled disparate-impact claims to survive a motion to dismiss or motion for summary judgment.

For example, in *Turner v. Jewel Food Stores, Inc.*,[112] the court denied Jewel's motion to dismiss the plaintiff's disparate-impact challenge. Plaintiff asserted that Jewel's policies of reducing hours, denying promotions, and providing less favorable schedules to employees covered by older collective bargaining agreements constituted unlawful age discrimination.[113] Recognizing that the plaintiff failed to set forth an age-related factor on which to base her claim, the court found that, at the pleading stage, the plaintiff "must only have alleged that the misconduct resulted from age discrimination on Jewel's part."[114] In response to Jewel's contention that the alleged discriminatory factors could be attributed to a RFOA, such as seniority, the court stated:

> Although we do not deny that the alleged misconduct may well be attributed to reasonable factors other than age in the end, viewing the complaint in the light most favorable to [plaintiff] at this stage of the litigation, it cannot be concluded that no set of facts would entitle her to relief.[115]

Similarly, in *EEOC v. Allstate Insurance Co.*,[116] the district court granted partial summary judgment in favor of the plaintiffs, who alleged that Allstate's no-rehire policy associated with a reorganization plan had a disparate impact on former employee-agents who were age forty and over.[117] Under the reorganization plan, Allstate terminated the employment contracts for its 6,300 employee-agents and gave such individuals the option of becoming independent contractors, ending their employment, and receiving enhanced severance benefits in exchange for a signed release, or not signing a release and receiving standard severance benefits at the termination of their employment.[118] Allstate's plan provided that former employee-agents were ineligible for rehire for a period of one year following their termination and were also ineligible after all severance payments had been received.[119]

In concluding that the plaintiffs were entitled to partial summary judgment, the *Allstate* court found evidence of a disparate impact based on statistics showing that over ninety percent of the employees subject to the reorganization plan were over age forty.[120] Rejecting Allstate's

112. No. 05 C 5061, 2005 WL 3487788 (N.D. Ill. Dec. 21, 2005).
113. *See id*. at *2–3.
114. *Id*. at *3.
115. *Id*.
116. 458 F. Supp. 2d 980 (E.D. Mo. 2006), *modified*, No. 4:04CV01359 ERW, 2007 WL 38675 (E.D. Mo. Jan. 4, 2007), *aff'd*, 528 F.3d 1042 (8th Cir. 2008), *vacated en banc*.
117. *See id*. at 993.
118. *Id*. at 983.
119. *Id*.
120. *Id*. at 992–93.

argument that plaintiffs made improper comparisons, the court found that Allstate failed to provide any evidence that the plaintiffs' statistics were mathematically incorrect.[121]

The court then went on to find that the RFOA analysis was a jury question.[122] Allstate offered five separate reasons for implementing its no-rehire policy, all of which were disputed by the plaintiffs, who offered evidence to rebut Allstate's proffered reasons.[123] Confronted with this evidence, the court concluded that it was "not in a position to decide on summary judgment whether these factors were reasonable" and sent the case to a jury.[124] On January 4, 2007, the district court granted Allstate's motion to certify for interlocutory appeal the following questions: (1) whether a disparate-impact claim is cognizable under the ADEA in the context of a rehire case and (2) whether the two approaches to disparate impact adopted by the district court may establish disparate impact as a matter of law.[125] On appeal, the Eighth Circuit Court of Appeals affirmed the lower court's decision, finding that Allstate's rehire policy could be challenged under the ADEA and that the EEOC's statistical evidence established a prima facie showing that the policy caused a disparate impact on older workers.[126] However, on September 8, 2008, a rehearing en banc was granted and the Eighth Circuit's opinion was vacated.[127]

IV. EEOC Proposed Rules

In its notice of proposed rulemaking published on March 31, 2008, the EEOC stated its intention to bring its current regulations into line

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121. *Id*. at 993.

122. *Id*. at 994.

123. *Id*. at 993–94.

124. *Id*. at 994; *see also* Nathe v. Weight Watchers Int'l, Inc., No. 06 Civ. 4154(LTS)(DFE), 2007 WL 2729015, at *2 (S.D.N.Y. Sept. 13, 2007) (finding that plaintiff's challenge to sales quotas, which alleged that such policies resulted in leaders over age forty being subject to more supervision and discipline than younger leaders, was sufficient to state a claim); Allen v. Sears Roebuck & Co., No. 07-11706, 2007 WL 2406921, at *5 (E.D. Mich. Aug. 20, 2007) (denying motion to dismiss because plaintiff's challenge to company's policy of transitioning certain sales associates satisfied Federal Rules' minimal notice pleading requirements); Ricciardi v. Elec. Data Sys. Corp., No. 03-CV-5285, 2005 WL 2782932, at *1 (E.D. Pa. Oct. 24, 2005) (denying motion to dismiss challenge to performance management process that allegedly "arbitrarily assign[ed] workers to categories by an evaluation process participated in at times by persons who are without specific knowledge of the performance of the employees"); Mihalik v. Expressjet Airlines, No. 3:04CV258 RV/EMT, 2005 WL 1787350, at *3 (N.D. Fla. July 27, 2005) (denying defendant's motion to dismiss because although plaintiff failed to allege existence of facially neutral employment practice that has disparate impact on basis of age, the court was obliged to liberally construe *pro se* plaintiff's pleadings and hold them to less stringent standards than those drafted by lawyers).

125. *See* EEOC v. Allstate Ins. Co., No. 4:04CV01359 ERW, 2007 WL 38675 (E.D. Mo. Jan. 4, 2007), *aff'd*, 528 F.3d 1042 (8th Cir. 2008), *vacated en banc*.

126. *See* EEOC v. Allstate Ins. Co., 528 F.3d 1042 (8th Cir. 2008), *vacated en banc*.

127. *Id*.

with the Supreme Court's decision in *City of Jackson*.[128] The EEOC proposed to amend its regulations to provide that "an employment practice that has an adverse impact on individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a 'reasonable factor other than age.'"[129] The EEOC also proposed to clarify that while the plaintiff bears the burden to establish a prima facie case of disparate-impact age discrimination, the employer bears the burden on the RFOA defense.[130]

Published in the *Federal Register* on February 18, 2010, the EEOC's second notice of proposed rulemaking purports to clarify the scope of the RFOA defense "[c]onsistent with [*City of Jackson*] and *Meacham*."[131] This proposed regulation provides that whether the RFOA defense applies "must be decided on the basis of all the particular facts and circumstances surrounding each individual situation" and that "[a] reasonable factor is one that is objectively reasonable when viewed from the position of a reasonable employer (i.e., a prudent employer mindful of its responsibilities under the ADEA) under like circumstances."[132] In its preamble, the EEOC states that "a prudent employer knows or should know that the ADEA was designed in part to avoid the application of neutral employment standards that disproportionately affect the employment opportunities of older individuals."[133]

In its proposed rule, the EEOC lists the following nonexhaustive factors as relevant to a determination of whether an employment practice is reasonable:

> (i) Whether the employment practice and the manner of its implementation are common business practices;
> (ii) The extent to which the factor is related to the employer's stated business goal;
> (iii) The extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately (e.g., training, guidance, instruction of managers);
> (iv) The extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;
> (v) The severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventive or corrective steps to minimize the

128. Disparate Impact Under the Age Discrimination in Employment Act, 73 Fed. Reg. 16,807 (Mar. 31, 2008) (to be codified at 29 C.F.R. pt. 1625).

129. *Id*. at 16,808.

130. *Id*.

131. *See* Definition of "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act, 75 Fed. Reg. 7212, 7214 (Feb. 18, 2010) (to be codified at 29 C.F.R. pt. 1625).

132. *Id*. at 7218.

133. *Id*. at 7215.

> severity of the harm, in light of the burden of undertaking such steps; and
> (vi) Whether other options were available and the reasons the employer selected the option it did.[134]

While acknowledging *Meacham*'s holding that the business necessity test "should have no place in ADEA disparate-impact cases,"[135] the EEOC attempts to thwart Supreme Court precedent by including "[w]hether other options were available and the reasons the employer selected the option it did" as one factor relevant to whether an employment practice is "reasonable" under the RFOA defense.[136] The EEOC explains that "[t]his does not mean that an employer must adopt an employment practice that has the least severe impact on members of the protected age group" but states that "[i]f the actor can advance or protect his interest as adequately by other conduct which involves less risk of harm to others, the risk contained in his conduct is clearly unreasonable."[137] Contrary to Supreme Court guidance that the business necessity test "should have no place in ADEA disparate-impact cases,"[138] the EEOC argues that the business necessity inquiry is "relevant" in such cases:

> That the reasonableness inquiry does not require an employer to use the least discriminatory alternative, however, does not mean that the existence of alternatives is irrelevant. An employer's knowledge of and failure to use equally effective, but less discriminatory, alternatives is relevant to whether the employer's chosen practice is reasonable. This is especially true if the chosen practice significantly affects the employment opportunities of older individuals but only marginally advances a minor goal of the employer.[139]

In its preamble, the EEOC explains that if the severity of the harm to older workers is great, as in a RIF, "the determination of reasonableness includes consideration of whether the employer knew or should have known of measures that would reduce or eliminate the harm and the extent of the burden that implementing such measures would place on the employer."[140] By way of example, the EEOC states that an employer implementing a RIF of its sales force as a cost-cutting measure should consider employees' sales revenues as well as their salaries when making RIF decisions, as a consideration of salaries alone "might

134. *Id*. at 7218.
135. *Id*. at 7214 (citing Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395 (2008)).
136. *Id*. at 7218.
137. *Id*. at 7218 n.1 (citing RESTATEMENT (SECOND) OF TORTS § 292 cmt. c (1965)).
138. *Meacham*, 128 S. Ct. at 2404.
139. Definition of "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act, 75 Fed. Reg. at 7216.
140. *Id*.

severely affect older workers,"[141] and the inclusion of the additional revenue factor "would reasonably achieve the employer's important goal of cutting costs without unfairly limiting the employment opportunities of older individuals."[142]

In addition to attempting to extend the business necessity test to disparate-impact age discrimination claims, the EEOC's proposed rules seek to impose a high burden on employers who rely on subjective decision making. The EEOC strongly discourages such practices, warning that "employers that give their supervisors unchecked discretion to make subjective decisions expose themselves to liability on this basis."[143] The proposed rule provides that "[w]hen disparate impact results from giving supervisors unchecked discretion to engage in subjective decision making . . . the impact may, in fact, be based on age because the supervisors to whom decision making was delegated may have acted on the bases of conscious or unconscious age-based stereotypes."[144] The EEOC counsels that supervisors should not be given discretion "to rate employees on criteria known to be susceptible to age-based stereotyping, such as flexibility, willingness to learn, or technological skills," and encourages employers instead to give supervisors objective evaluation criteria whenever feasible.[145] The EEOC suggests that "instead of asking supervisors in the abstract to rate employees' willingness to take on new tasks, employers should instruct supervisors to identify times that an employee was asked to perform new tasks and to describe the employee's reaction to such assignments."[146] The EEOC cautions that supervisors should be trained to recognize and avoid engaging in ageist stereotypes. Furthermore, the EEOC advises employers to analyze their employment decisions when supervisors are given unchecked discretion to determine whether doing so created a disparate impact. If a disparate impact is found, employers should "take reasonable steps to determine whether that impact might be attributable to supervisors' conscious or unconscious age bias and to mitigate the problem."[147]

In the proposed regulation, the EEOC provides the following nonexhaustive items as relevant to determining whether a factor is "other than age":

> (i) The extent to which the employer gave supervisors unchecked discretion to assess employees subjectively;
> (ii) The extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes; and

141. *Id*.
142. *Id*.
143. *Id*. at 7217.
144. *Id*. at 7218.
145. *Id*. at 7217.
146. *Id*.
147. *Id*.

(iii) The extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.[148]

Comments on these EEOC proposed rules were to be submitted on or before April 19, 2010.[149] If the EEOC's proposed rules are adopted and plaintiffs seek to rely on them, employers are likely to challenge those regulations as contrary to the Supreme Court's holding in *Meacham*.[150]

V. Conclusion

Although victories in *City of Jackson* and *Meacham* allowed employees to bring disparate-impact claims under the ADEA and to place the RFOA defense burdens of production and persuasion on employers, the narrow scope of such claims, as set forth by the Supreme Court, has resulted in very few successful ADEA disparate-impact claims. Most plaintiffs bringing such claims fail at the prima facie stage either because they cannot identify a specific employment policy or practice responsible for an observed statistical disparity or because their statistics are insufficient to establish such a disparity. Although the Supreme Court has clarified that employers bear the burdens of production and persuasion with respect to the RFOA defense, cases addressing the defense post-*Meacham* have generally held that the employers satisfied their burdens to show the reasonableness of their decisions.

The EEOC's proposed rules seek to reverse the trend of disparate-impact ADEA plaintiffs having their claims dismissed. Plaintiffs, however, will continue to face the nontrivial burden to isolate and identify the specific employment practices allegedly responsible for any observed statistical disparities. It is not clear that the EEOC's rules, even if adopted in their current format, will succeed in reversing this trend; furthermore, employers are likely to challenge those regulations as contrary to the Supreme Court's holding in *Meacham*.

While disparate-impact ADEA claims may continue to fail under the *City of Jackson* and *Meacham* standards, any statistical evidence showing a disparity on the basis of age can be used as evidence of discrimination in *disparate-treatment* cases, including class actions brought under the ADEA. In fact, the Supreme Court recognized that such statistical evidence is relevant in disparate-treatment claims alleging both individual and classwide pattern-or-practice age discrimination claims.[151] Furthermore, some state antidiscrimination statutes

148. *Id*. at 7218.

149. *Id*. at 7212.

150. *See, e.g*., Neal v. United States, 516 U.S. 284, 290 (1996) (principle of *stare decisis* requires that Supreme Court adhere to its earlier decisions rather than to commission's subsequent interpretation of statute); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990) (same).

151. *See* Bazemore v. Friday, 478 U.S. 385, 400 (1986).

authorize disparate-impact claims,[152] and those statutes may be broader in scope than the ADEA. Thus, even though statistics showing an age disparity may not result in successful disparate-impact ADEA actions against employers, such statistics may still present troublesome problems for employers facing disparate-treatment or state disparate-impact age discrimination claims. Notably, when evidence of a disparate impact is presented in a disparate-treatment case, employers often face an uphill battle in convincing a judge to grant summary judgment.[153]

Thus, prudent employers should still scrutinize any employment decision that may cause a disparate impact on the basis of age, such as reductions in force; compensation, progression, and promotion of employees; and other decisions that can be analyzed on a group basis. This is particularly important when the employment decision implicates unchecked subjective supervisor discretion. Employers should avoid giving supervisors unchecked discretion and instead provide objective criteria for making employment decisions whenever feasible.

152. *See, e.g.*, Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1113 n.20 (Cal. 2000); MacAlpine v. Digital Equip. Corp., No. 966728C, 1998 WL 1184184, at *2 (Mass. Super. Ct. Sept. 11, 1998); Alspaugh v. Comm'n on Law Enforcement Standards, 634 N.W.2d 161, 170 (Mich. Ct. App. 2001); Sigurdson v. Carl Bolander & Sons Co., 532 N.W.2d 225, 229 (Minn. 1995); Allen v. AT & T Techs., Inc., 423 N.W.2d 424, 433 (Neb. 1988); Moore v. Nashville Elec. Power Bd., 72 S.W.3d 643, 651 (Tenn. Ct. App. 2001); Breslauer v. Fayston Sch. Dist., 659 A.2d 1129, 1136 (Vt. 1995); Hume v. Am. Disposal Co., 880 P.2d 988, 995 (Wash. 1994); Barefoot v. Sundale Nursing Home, 457 S.E.2d 152, 165 (W. Va. 1995).

153. *See, e.g.*, Bell v. EPA, 232 F.3d 546, 554–55 (7th Cir. 2000) (reversing summary judgment for employer in Title VII case and remanding for trial because lower court's rejection of employee's statistical evidence was improper).