Wards Cove Packing Or Not Wards Cove Packing? That Is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act

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WARDS COVE PACKING OR NOT WARDS COVE PACKING?
THAT IS NOT THE QUESTION: SOME THOUGHTS ON
IMPACT ANALYSIS UNDER THE AGE DISCRIMINATION
IN EMPLOYMENT ACT

Mack A. Player*

I. INTRODUCTION TO THE ISSUE: THE THESIS

Assume two employers, A and B. Each gives a separate objective test to select employees for a particular position. Employer A utilizes a pen-and-paper, multiple choice examination that has questions in three major categories: 1) biology and genetics which includes DNA theory, cloning, etc.; 2) astrophysics, with questions about time, space, light relationships, "black holes," novas, etc. and 3) microprocessor engineering, the internet, silicon chips, and the like.

Employer B utilizes a physical performance test that has three components: 1) strength and stamina including lifting dead weights, carrying weights, and running long distances; 2) speed and agility that includes running short distances for speed, navigating an obstacle course and performing tasks in narrow or tight places, and 3) coordination that involves hand-eye skills, reaction times, etc.

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Assume that the scientific knowledge test given by employer A was evaluated in terms of passage rates by racial group. Those who were white passed at a 60% rate. Hypothetically, a particular ethnic group passed at a 35% rate. The test has an adverse impact on the group who passed at the lower rate. Since Griggs v. Duke Power Co., Title VII of the 1964 Civil Rights Act has been construed to impose on employer A the obligation to prove the "business necessity" of this selection device. The proven adverse impact of the selection device on the protected class shifts the burden to the employer to prove that the test is "job related and consistent with business necessity." Failure of employer A to establish the "job related-

1. "A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded . . . as evidence of adverse impact." 29 C.F.R. § 1607.4(D) (1996).

Applying this standard, a selection rate on the test for the non-white group of less than 48% would be "evidence" of adverse impact. While such a measure may not be mathematically sound, see, Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L.REV. 793 (1978), the wide difference between a 60% pass rate for whites and a 35% pass rate for the other ethnic group probably has statistical significance in that the difference is sufficiently great that chance as an hypothesis for the observed difference could be discounted mathematically to a high level of confidence.


3. See, Connecticut v. Teal, 457 U.S. 440 (1982). As long as no single component of the testing mechanism disqualified the applicant from being considered or taking other components of the test, the employer probably need not validate each component. Rather, the employer would be required to prove that the test as a whole measured or predicted job performance.

4. 42 U.S.C. 2000e-2(k)(1)(A) (1994). This "definition" was added to Title VII by the Civil Rights Act of 1991. Consequently, impact analysis created by Griggs has been codified. The precise meaning of "job related" and "business necessity" have never been defined with any precision. Early cases emphasized the "business necessity" aspect of the definition. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), for example, required precise expert validation of testing devices proving the predictive validity of the devices, utilizing the term "manifest relationship." Two years later the Court in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), emphatically required "business necessity" by requiring the employer to show that the challenged practice was necessary to safe and efficient job performance. Later decisions seemed to lean toward a relaxed form of "job relatedness." The courts look toward "legitimate employer goals" that were "significantly served by" the challenged device. See New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988). I have previously reviewed this authority. See Mack A. Player, *Is Griggs
ness/business necessity" of this test, would result in Title VII liability. A plaintiff from the disadvantaged class would win, even though the employer may have acted in good faith with no racial motivation in adopting or utilizing the test.5

Assume that the physical test of employer B is evaluated for its impact on the two genders, and that this evaluation demonstrates that 75% of the men who take the test pass, but only 55% of the female test-takers are successful. This difference in passage rates between genders would seem to establish the adverse impact of the test on women.6 First, note that the impact analysis pioneered by Griggs v. Duke Power for race discrimination is applicable to gender.7 Title VII analysis of neutral selection devices are applicable to all classes protected by Title VII (i.e., race, color, sex, national origin and religion). As the physical test has been proved to have an adverse impact on women, the burden shifts to the employer to prove the "job relatedness/business necessity" of the device. The employer's failure to carry this burden will result in a judgment for a female plaintiff excluded by virtue of the device. Again, even if the test was adopted and applied in good faith, the exclusion of women who fail a test not justified by the "job relatedness/business necessity" standard is "sex" discrimination within the meaning of Title VII.

5. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . But 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. Griggs, 401 U.S. at 431-32.

6. See supra, note 1. While the difference between the 75% passage rate of males and 55% passage rate of females is closer, the rate is still less than 4/5 of the passage rate of the males, and thus applying the EEOC guideline, the difference is evidence of impact. The more precise statistical evaluation suggested by Professor Shoben in note 1 would require knowing the number of persons involved in the selection process. Engaging in such a calculation is beyond the scope of this essay. So, we should just assume that such a difference proves the impact of the test as envisioned by Griggs.

Now assume the same two employers utilize the same two tests, but this time the tests are analyzed for their effect on the protected age class. On the scientific knowledge test, simply change “white” to “persons under age forty” and “minority” to “persons over age forty.” Assume that the difference in the respective passage rates on the test are the same as when applied to whites and to an ethnic minority. That is, when analyzed for impact on age groups, persons under age forty passed at a 60% rate, and those over age forty passed at a lower 35% rate. On the physical abilities test given by employer B, change “men” to “persons under age forty” and “women” to “persons over age forty.” Here again, the outcome is that older persons are performing at a significantly lower level than persons under age forty. The threshold question in both cases is whether the fundamental analysis of *Griggs v. Duke Power* should be applied? That is, absent evidence of age motivation, would the employer be required under the Age Discrimination in Employment Act (ADEA) to justify the use of these “built in headwinds” for older workers?

If the ADEA does not embrace the concept of impact analysis, absent age motivation presented and proven by the plaintiff, challenges to the tests, regardless of their irrationality, must be dismissed. On the other hand, if the ADEA does envision the concept of impact analysis, the impact of the systems on older workers, would require that the employer justify the use of the exclusionary tests.

Assuming the answer to the above question is affirmative, the next issue, and one that has tended to be ignored by courts and commentators, is the nature of the employer’s burden.

I suggest that 1) impact analysis should be utilized under the ADEA; that is, violations of the ADEA can be established solely through the unjustified impact of devices on employment oppor-


9. If one really wants to test for whether the ADEA should encompass impact analysis, assume that the differential impact was even greater when applied to older workers. On the scientific knowledge test assume that only 5% of those over 40 passed the test, but 75% of those under 40 were successful. What if the physical test produced a similarly stark difference. Should not an “an inexorable zero” of older workers qualifying raise doubt about construing the ADEA to require motive as the sole source of liability?
tunities on those in the protected "over forty" class, but that 2) the employer's burden may be somewhat different from the "business necessity" obligation imposed by Title VII. 10

II. THE CONTEXT: HAZEN PAPER CO. V. BIGGINS 11
WHAT WAS, AND WAS NOT, DECIDED

The Supreme Court has not addressed the issue of whether impact analysis developed by and after Griggs v. Duke Power Co. 12 is applicable to the ADEA. Most courts of appeal prior to 1993, either in dicta, holding or assumption, recognized that the impact concept was appropriate under the ADEA and have applied standards similar to those developed under Title VII. 13

On its face, the 1993 Supreme Court decision in Hazen Paper Co. v. Biggins, 14 did not directly challenge the existing consensus, but resurrected what had become almost a closed issue. The facts of Hazen Paper are simple. A sixty-two year old employee who had been working at Hazen Paper Company for nearly ten years was dismissed. The pension plan provided by the employer provided for vesting upon ten years of service. In addition to this coincidence between the timing of the employee's discharge and the date of the employee's pension vesting, there was some additional evidence that the employer was trying to avoid the cost associated with pension vesting, and evidence that the articulated reason for the plaintiff's dis-

13. The first court of appeals to apply impact analysis to the ADEA was Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980). The Eighth and Eleventh Circuits soon followed. See Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Allison v. Western Union Tel., 680 F.2d 1319 (11th Cir. 1982). Other courts accepted this analysis or assumed that it was valid. See EEOC v. Local 350, Plumbers, 998 F.2d 641 (9th Cir. 1992); Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161 (7th Cir. 1992); Wooden v. Board of Educ., 931 F.2d 376 (6th Cir. 1991); MacNamara v. Korean Airlines, 836 F.2d 1135 (3d Cir. 1988); Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986). The EEOC embraces the concept of impact analysis. See 29 C.F.R. § 1602.2 (1996).
charge was pretextual. Accepting a finding of fact that plaintiff Biggins was dismissed to avoid vesting his pension, but without wrestling with the evidence of age motivation, the lower court concluded that plaintiff had established illegal age motivation. The lower court's reasoning was quite logical:

1) Pension vesting (PV) = passage of time (T)
2) Human age (A) = passage of time (T)
3) Therefore, PV (pension vesting) = A (age)

The Supreme Court disagreed and reversed: "[A]ge and years of service are analytically distinct * * * and it is incorrect to say that a decision based on years of service is necessarily age based." Thus, motivation to avoid pension vesting is not necessarily discrimination based on the employee's chronological age, even though both are premised on a common concept, the passage of time. One might contest the Court's logic, but the Court has spoken, so we shall live with it.

The Court expressed four significant disclaimers to its holding followed by a reservation:

1) Dismissal of an employee to avoid pension vesting or costs will violate ERISA.

2) If an employee's age was a premise behind the pension dismissal, this would be illegal "age" discrimination under the ADEA.

3) If the employer was motivated both by the employee's age and by possible pension vesting, this would be subjected to dual motivation analysis of Price Waterhouse.

15. Hazen, 113 S. Ct. at 1707.
16. One is reminded of Geduldig v. Aiello, 417 U.S. 484 (1974), where the Court held that discrimination on the basis of pregnancy was not discrimination against women, but a distinction based upon "an objectively identifiable physical condition with unique characteristics." Title VII of the 1964 Civil Rights Act was subsequently amended to provide specifically, "The terms 'because of sex' or 'on the basis of sex' include . . . on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. 2000e(2) (1994).
17. See Hazen, 113 S. Ct. at 1707.
18. See id.
19. See id. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), was concerned with an employer's motivation that included both legitimate and illegitimate considerations. The Court concluded that no liability was attached if the employer could prove that
4) If the employer's pension plan vested because of the age of the employee, then discrimination because of the vesting would be a form of age discrimination (e.g., a plan provides that regardless of service years, pension vests at age sixty, or a combination of age and service years will result in pension vesting). 23

The one reservation, extremely relevant for the current discussion, was: "We have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here." 24

I am inclined to take the word of the Court and not assume that without argument the Court was silently extending the implied criticisms drawn from a three justice concurrence, and by this indirect implicitly resolve a major interpretative issue. 25

At least two courts of appeals, however, read between the lines, ignored the Court's reservation, engaged in a scholastic construction of the Hazen Paper language, and revisited established authority to conclude that the ADEA requires proof of motive, and thus impact cannot be a premise for ADEA liability. 26 As three justices are anxious to address the issue, the new division between circuits makes the issue ripe for Supreme Court resolution. And if the Court acts, can Congress be far behind? 27

It would have made the same decision even absent the illegal motive. This holding was overturned by the Civil Rights Act of 1991. See 42 U.S.C. § 2000e-2(m) (1994). Now, an unlawful employment practice is established when a defendant is motivated by race, color, religion, sex or national origin, even though other factors also motivated the practice. 20

20. See Hazen, 113 S. Ct. at 1707.

21. Id. at 1706. Concurring, Justice Kennedy, joined by the Chief Justice and Justice Thomas stated:

Nothing in the Court's opinions should be read as incorporating in the ADEA context, the so-called "disparate impact" theory of Title VII. There are substantial arguments that it is improper to carry over disparate impact analysis from Title VII, to the ADEA. (citations omitted).

Id. at 1710 (Kennedy, J., concurring).


23. See Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996); EEOC v. Francis Parker Sch., 41 F.3d 1073 (7th Cir. 1994). See also, Dibiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995) (dicta).

24. The Court construed ADEA language to permit an employer to force retire-
III. THE TRADITIONAL DEBATE: PROS AND CONS OF THE IMPACT ANALYSIS: INCONCLUSIVE?

The debate on whether impact analysis should be applied under the ADEA has been well-framed over the past twenty years. These arguments can be categorized into three groups: (1) textual language, (2) legislative history and (3) statutory policies. Sound arguments are made on both sides, but appear, in the abstract, to be inconclusive. At the end, however, I am inclined to accept the premise that impact analysis should be applicable, and I draw my conclusion from the unique language of the defense found in section 4(f)(1). But first, a summary of the traditional debate:

A. Textual Prohibition of Age Discrimination in Section 4(a)

Similar to the language of Title VII, the ADEA has two paragraphs broadly proscribing age discrimination. The first paragraph prohibits discrimination "because of such individual's
Those opposed to impact analysis under the ADEA argue that it would take a linguistic stretch to read this phrase to prohibit incidental or unintentional discrimination for any reason other than age. In short, the language cries for motivation. True, and the Court's discussion in Hazen Paper hints of difficulty.

Yet, the 4(a) language is identical to that found in Title VII, and since Griggs v. Duke Power Co., the Court has read this language to reach neutral selection devices that adversely affect a protected class and are not justified by their relationship to the job or job performance. And it is common that where the ADEA and Title VII utilize similar language the two statutes are to be similarly construed. Even when there are differences in the precise wording of the two statutes, the Court has given identical meaning to parallel sections of the statutes.

The second paragraph of Section 4(a) of the ADEA makes it illegal "to limit, segregate or classify employees". Title VII has two words not found in the ADEA, "or applicants." Some have read significance in this ambiguous omission of "applicants," reasoning that impact analysis is primarily applicable to persons seeking jobs, and thus the omission is pregnant with implications that Congress intended to exclude impact concepts of liability from the ADEA.

It is extremely doubtful that Congress had any active intent on this matter. The ADEA was enacted in 1967, five years before the concept of impact analysis was created in the Griggs decision. Moreover, as impact analysis has been invoked under Title VII in non-applicant situations, this omission may be

28. See Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (BFOQ defense under ADEA utilizes Title VII analysis even though there are some differences in the wording of the two statutes); Lorillard v. Pons, 434 U.S. 575 (1978).
more of a drafting oversight than a conscious decision pregnant with implication.

B. Legislative History

The preamble to the ADEA itself states that its purpose was to prohibit "arbitrary age discrimination in employment." Some emphasize the word "arbitrary" to require motive. However, Griggs itself, in creating impact analysis concepts, relied on the notion that selection factors not related to job performance which had an adverse effect on a protected class were "arbitrary" and thus in violation of Title VII. Moreover, the preamble states as a purpose to "promote employment of older persons on their ability rather than age." This too, suggests that a practice that has no relationship to the "ability" of older worker's could serve as a basis for liability when the challenged practice adversely affects employment of older workers.

The opponents of impact analysis rely quite heavily on the 1965 Report from the Secretary of Labor. That report served as a basis for the ADEA itself. The Secretary's report identified discrimination based on age or age stereotypes and recommended the statutory language now found in section 4(a) of the Act. The report also identified issues and problems resulting from factors that affect older workers more strongly than they affect younger workers. The report suggested that factors that merely affect older workers be addressed through programmatic measures designed to improve opportunities of older workers.

This "history" could be discounted as not being a true part of the legislative process. Even if it is suggestive of subsequent legislative intention, the report preceded any definitive constructions of Title VII language, and by about seven years preceded the concept of impact analysis first promulgated in

of Washington, 770 F.2d 1401 (9th Cir. 1985) (rejecting the "comparable worth" approach to pay discrimination based on an assumption that impact analysis did not apply to subjective evaluation systems that go into compensation decisions).

Griggs. Thus, since the report predated the concept, it is very doubtful that the report either supports or rejects the idea that liability under the proposed statute be based on the effect of neutral practices.

Again, a much stronger history is that Congress adopted language virtually identical to that previously used in Title VII expressing an intent that where operative language of the statutes was similar the two statutes were to be given similar interpretation. Consequently, when similarly ambiguous language under Title VII ultimately was construed by the Supreme Court to encompass neutral practices that had an unjustified adverse impact on a protected class, the legislature may have intended that the ADEA should be given a parallel construction.

C. Policy

Perhaps the strongest argument for not applying impact analysis under the ADEA is the recognition that age is a class fundamentally unlike the classes protected by Title VII. With the possible exception of religion (where it remains unclear whether impact analysis applies), classes protected by Title VII are essentially immutable. Generally, a person does not with time move from one gender to the next. They are born of a particular race and with given ethnic origins.

Age, however, is a continuum. All persons of all races and genders move through the age categories. No single age is particularly "suspect." Moreover, we probably have to accept the premise that gradually, imperceptibly, certain abilities decrease with age. But the rate and extent of decline differ from individual to individual. Although there may be compensating increases in other constructs (such as experience, wisdom, patience), in all cases those counterbalancing abilities are constantly changing and vary with each individual. Congress must have recognized this, and even if it did not, impact analysis that works well with finite classes like race and sex does not quite fit with a fluid, continuum concept such as age.

Because of the fluid, non-immutable nature of age, impact on discrete age classes is much harder to isolate than it is on fixed classes such as race or gender. For example, I suspect a device
would rarely have a differential impact on those who are forty-one years old compared to those who are thirty-nine. Comparing impact on an age group consisting of persons between forty-one and forty-six against a class of those between thirty-five and forty might be slight, but still relatively insignificant. Perhaps in comparing outcomes on those a fifteen-year age spread (twenty-five through forty versus forty-one through fifty-six) for the first time the device might demonstrate significant differential impact.

Now reconsider the test given by employer A, the time scored, multiple choice test on scientific developments occurring over the past ten years. One would guess that as a group younger persons (age twenty through forty) would perform at a higher level than those in the fifty through seventy age class, if for no other reason than familiarity with the testing format and subject matter within the educational experiences of the two age groups. Similarly, on the physical test given by employer B, we might assume adroitness and strength demands ultimately would have an adverse impact on an older age group whose ultimate physical conditions would reduce relative performance levels.

From this I am raising two related points: The first is the difficulty in age cases of determining the class against which impact can be measured; it is much fuzzier and more ill-defined than in the classes protected by Title VII. Absent definitive Congressional direction perhaps the courts should resist entering this thicket of uncertainty. Second, as we can assume that at some point a very large number of otherwise rational standards ultimately will adversely affect some class of older workers, the policy question we should ask is whether courts are prepared to force employers to carry the burden of justifying virtually all of their work and selection standards.  

34. For example, a particular practice has been shown to impact workers over the age of 50, but has no impact on those between 40 and 50. Moreover, considering the entire over-40 class, the practice does not impact this larger class when compared to workers between 20 and 40. Held: No adverse impact. See Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364 (2d Cir. 1989). Consider also a device that impacts exclusively on those over 40. See Finnegan v. Trans World Airlines, 967 F.2d 1161 (7th Cir. 1992).

35. See, e.g., Beith v. Nitrogen Prods., Inc., 7 F.3d 701 (8th Cir. 1993) (employer discharged worker for having back problems, and it was asserted that such a practice
On the other hand, motive is always vague and difficult for a plaintiff to prove; no less difficult in age cases than it is in race or sex discrimination under Title VII. *Griggs v. Duke Power Co.* was premised on that difficulty. *Griggs* created impact analysis as an alternative for plaintiffs in situations where effect was clear but proof that the employer intended the outcome was elusive. The Court recognized that reliance solely on a plaintiff's ability to prove invidious motivation for the employer's action based upon ostensibly neutral evaluation techniques would make it difficult to reach the systemic discrimination that Congress was trying to remedy. The fable of the fox and the stork recited by the Court in *Griggs* is equally applicable to discrimination against older workers. A vessel assuring protection against discrimination has been given, but it is a vessel that has little value to the recipient.

As a final note, Title VII has long embraced impact analysis, and the Americans with Disabilities Act specifically recognizes liability based on the effect of practices on qualified individuals with disabilities. It would be ironic if the only major piece of employment discrimination legislation, the one protecting against age discrimination, was construed not to reach neutral practices. Could Congress have intended to treat age differently than any other protected class and provide less protection to older workers than other protected groups? But Congress did expressly provide for impact analysis in the Americans with Disabilities Act. The silence in the ADEA thus may have significance.

In the end both sides have good arguments. Perhaps the "wisdom" of the Court ultimately will tell us which policy direction has the greatest pull. I submit, however, that regardless of policy, the ADEA textually directs us to the result. The statute itself provides a compromise between exclusive reliance on motive as a basis for liability and employers being denied use of otherwise reasonable selection devices because of their inevitable impact on older workers. Congress gave us language not

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37. See 42 U.S.C § 12112(b)(3); McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992).
found in Title VII which I believe virtually imposes a conclusion, even more clearly than Title VII, that impact analysis is appropriate under the ADEA, but in language that permits employers to utilize reasonable selection devices notwithstanding their impact on older workers.

IV. THE SECTION 4(f)(1) DEFENSE AND HOW IT DIRECTS IMPACT ANALYSIS

Section 4(f)(1) of the ADEA provides that an employer may take any action "otherwise prohibited where the differentiation is based on reasonable factors other than age."38

Note, this is a defense. It presupposes in structure and expressed language that the conduct has been "otherwise prohibited" by the terms of this Act. (This is to be contrasted with cautionary proviso stating "nothing herein shall be construed to prohibit."39) Therefore, we must look backward in the statute to the textual prohibitions. This naturally takes us to section 4(a) of the Act.40

As discussed earlier, and emphasized by those who reject an implication of impact liability, section 4(a) prohibits discrimination "because of such individual's age," and this makes illegal any age motivated distinctions against those in the protected over forty age class. All such age motivated distinctions against those over age forty are illegal.

The next step is to put sections 4(a) and 4(f)(1) together. If age motivated the employer's action, section 4(a) establishes prima facie liability. Now turning to section 4(f)(1); it allows the action if the factor used is "reasonable" and "other than age." There is no way section 4(f)(1) could ever have an application if section 4(a) is limited to motivated decision making. If section 4(a) does not extend beyond age motivation, there would be no need to have the 4(f)(1) defense because age motivated decisions could not possibly be for reasons "other than age." The only way for 4(f)(1) to have structural validity is to recognize that

39. See, e.g., 42 U.S.C. § 2000e-2(i) and (j) as applied to preferences for Indians, and preferential treatment based on work force imbalances under Title VII.
4(a) can be violated by non-age or age-neutral factors. At this point, 4(f)(1) would allow the employer to establish the defense that the challenged device was both neutral in terms of intent and was "reasonable." The existence of section 4(f)(1) proves to me that section 4(a) can be violated by employer actions not motivated by age, and will in fact be violated if factors adversely affect the protected group and are not justified by the section 4(f)(1) defense. This logic is supported by two pillars. The first is the old, well-established rule of statutory construction that if one reading of a statute makes no sense or renders the provision redundant or superfluous, and an alternative reading gives effect and meaning to the provision, the court should adopt the reading that gives full meaning and effect to the statute. Again, the only way section 4(f)(1) has any meaningful application is for section 4(a) to proscribe actions that are not motivated by age.

The second pillar of support is found in County of Washington v. Gunther. Ironically, cited by some as supporting a conclusion that the ADEA does not encompass impact analysis, I read this case in fact to support, if not compel, a conclusion that impact analysis must be recognized under the ADEA. Working through this case can be a bit tedious.

Gunther was a Title VII case that involved a construction of the so-called "Bennett Amendment." The Bennett Amendment provides that no action will violate Title VII if that action is "authorized" by the Equal Pay Act, a statute requiring equal pay for men and women who perform work that it "equal." The Equal Pay Act has a defense that permits employers to make pay differences based on any "factor other than sex." Note the similarity of the Equal Pay Act and ADEA "factor other than . . ." defenses. Guess the origins of "factor other than age" defense in the ADEA! Until the mid-1970s the Secretary of Labor administered and enforced the Equal Pay Act. The Secretary of Labor was charged by Congress in Title VII to prepare a report on age discrimination and recommend legislation to Congress. The initial drafts of what eventually became

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the ADEA were thus prepared by the Secretary of Labor, and this proposed statute contained the “reasonable factor other than age” provision, a clause not found in Title VII, but found in similar form as a defense in the Equal Pay Act. It would seem, therefore, that the Secretary who was then enforcing the Equal Pay Act, lifted language and concept from the Equal Pay Act and placed it in the ADEA.\textsuperscript{44}

Back to \textit{Gunther}. The plaintiffs were female prison guards. They were asserting pay discrimination under Title VII because of their sex based on the fact that male guards were receiving higher compensation. There could be no violation of the Equal Pay Act because the work of the male and female guards clearly was not “equal” within the meaning of that Act.\textsuperscript{45} Nonetheless, plaintiffs claimed that they were entitled to proceed based on potential evidence of illegal motivation behind the compensation system. Defendant pleaded the Bennett Amendment and argued therefrom that the pay difference for jobs not requiring equal work was a difference “authorized” by the Equal Pay Act, and being “authorized” by the Equal Pay Act, the pay difference could not, as a matter of law, be a violation of Title VII.

The Court disagreed. It held that pay differences were “authorized” by the Equal Pay Act only if a defense in the Equal Pay Act justified their use.\textsuperscript{46} Thus the mere fact that the work being performed by male and female guards was not “equal” within the meaning of the substantive prohibitions of the Equal Pay Act did not preclude liability under Title VII. The shorthand conclusion of the Court was that the Bennett Amendment did nothing more than incorporate into Title VII the defenses found in the Equal Pay Act; it did not impose on Title VII a substantive standard of liability premised on plaintiff proving equality of work.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{44} An additional point, the Equal Pay Act does not require proof of motive, but is violated by simple inequality of pay between men and women for work in an establishment that is “equal.” The good faith of the employer in establishing the difference is no defense. This could suggest that the ADEA envisioned violations that were not based on motive.
\item \textsuperscript{45} The male guards supervised more male inmates. The dangers and other working conditions differed between male and female guards.
\item \textsuperscript{47} \textit{See} id.
\end{itemize}
The dissent argued that such a construction of the Bennett Amendment rendered it meaningless. As Title VII prohibited sex motivated compensation differences, the Equal Pay Act defense authorizing differences based on any "factor other than sex" would, according to the dissent, have no application. That is, if sex motivated the pay difference, there could be no circumstance where the factor could possibly be "other than sex."

The majority rejoined this argument by pointing out that since Title VII could apply to sex neutral systems that had an adverse impact on a particular sex, and not just sexually motivated decisions, the "factor other than sex" defense in the Equal Pay Act, and incorporated into Title VII, would indeed have continuing validity. It would apply to those sex neutral systems that adversely affected one gender. If the employer utilized an ostensible system to affix compensation, but the plaintiff proved the adverse impact of that system on her gender, the employer could avoid liability by proving the true sex neutrality of the factors and that the system was a job related, rational "factor."

Although somewhat complex and difficult to see at first glance, I suggest that Gunther is virtually controlling on this issue. Indeed, it raises and answers an identical question cast in a different statutory scheme. The similar "factor other than..." defense was given meaning by the Gunther court based on the assumption that the substantive prohibitions to which it applied imposed liability premised on impact. If that is true in this complex intersection of Title VII and the Equal Pay Act, it would seem equally true under ADEA, particularly given the injunction that resolutions of Title VII language will be given similar construction under the ADEA. The substantive prohibitions of section 4(a) are clarified by the section 4(f)(1) defense.

48. See id. at 181 (Rehnquist, J., dissenting).
49. See Corning Glass Works v. Brennan, 417 U.S. 188 (1974). Burden is on the employer to establish one of the Equal Pay Act defenses, and that includes the burden of proving the gender neutrality of the "factor" utilized. A "factor" which perpetuates prior gender segregation by the employer is not sex neutral.
So, the conclusion I reach is that the ADEA can be violated through the use of elements, devices, or systems that have an adverse impact on the protected age group.

Does this require the conclusion that the employer's burden is to prove the "business necessity" of the device proved to adversely affect older workers? I think the answer is no, and the reason is again, that section 4(f)(1), a provision not found in Title VII, sets a different standard for the defense under the ADEA. Thus, while impact analysis is appropriate under the ADEA, there is no transplant of the Title VII concept of business necessity.

V. THE TITLE VII STANDARD: BACK ONWARDS COVE, AND FORWARD TO THE 1991 CIVIL RIGHTS ACT: THE FALSE DILEMMA FOR THE ADEA

Impact analysis as it evolved in a large number of Title VII cases placed the burden on the plaintiff to identify the specific device and prove that the device caused a significant adverse impact on a protected class. Prior to Wards Cove Packing Co. v. Atonio the Court itself, and all of the lower court decisions, uniformly placed the burden on the employer to establish the "business necessity" of the challenged device. The courts were unclear and inconsistent as to the meaning of "business necessity". Some suggested that a rather relaxed showing of "job relatedness" would suffice. Others leaned toward requiring employers to prove something akin to true "necessity."

Wards Cove Packing procedurally rewrote the assumption that the burden was on the employer to prove the business necessity of the device proven to have an adverse impact. It held that the employer's burden was no more than that of presenting evidence that the challenged device significantly served a legitimate employer interest. The ultimate burden was on the plaintiff to prove that the challenged device did not serve the employer's business interests. Wards Cove Packing was also

52. For a summary of this division see, Bernard v. Gulf Oil Corp., 841 F.2d 547 (5th Cir. 1988). See also, Mack A. Player, Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio, 17 FLA. ST. L. REV. 1, 16-23 (1989).
seen by some as substantively diluting the content of "business necessity." Although the Court emphasized that the employer's reasons must be business related and that these ends must be significantly served, the Court moved away from any suggestion of "necessity" and utilized language that suggested mere "legitimacy" would suffice to justify adverse impact.

The Civil Rights Act of 1991 restored pre-\textit{Wards Cove} analysis,\textsuperscript{53} but was silent on the application of this codification to the ADEA. There are four possible constructions of this Congressional inattention.

1. As impact analysis is now codified, and since the codifiers made it applicable only to Title VII, and were silent as to impact analysis under Title VII, there is no impact analysis under the ADEA.\textsuperscript{54}

2. For policy reasons, as well as general statutory language, impact analysis is still appropriate under the ADEA. However, \textit{Wards Cove Packing} provides the definitive judicial construction of the parallel language of Title VII. That construction would be applicable to the ADEA unless statutorily modified. While it was modified as applied to Title VII, it was not modified as applied to the ADEA.\textsuperscript{55} Thus, the ultimate burden is on the plaintiff to prove lack of "business necessity" and "business necessity" is akin to mere "business legitimacy."

3. Impact analysis as construed under Title VII is automatically transferred to the ADEA. Unless the statutory language

\textsuperscript{53} First the Act defined "demonstrates" to mean "meets the burden of production and persuasion." 42 U.S.C. § 2000e(m) (1994). Then in defining liability the Act makes it an unlawful employment practice if the complaining party demonstrates that respondent uses a particular practice that causes a disparate impact on a protected class and that the respondent "fails to demonstrate that the challenged practice is job related for the position and consistent with business necessity." 42 U.S.C. § 2000e-2(k) (1994).

\textsuperscript{54} This is not a bad argument, but Congress did not repeal sections 4(a) and 4(f)(1) of the ADEA, and as pointed out above, these provisions rather clearly imply the viability of liability based on impact.

\textsuperscript{55} This also makes some sense, but it ignores the unique language of section 4(f)(1) which clearly makes the "reasonable factor other than age" a defense that must be proved by the employer. \textit{Wards Cove Packing} was addressing language in Title VII, and not the language unique to the ADEA. \textit{Wards Cove Packing} cannot deny the unique defense language of section 4(f)(1) that places the burden on the employer.
indicates to the contrary, statutory clarifications to Title VII seeking to correct a Court's misconstruction of existing statutory language must be applied to other statutory schemes relying on the existing statutory language. Congress disapproved of the Court's reading of the section 703(a) language of Title VII, upon which section 4(a) of the ADEA was modeled. Thus, the statutory "clarification" of section 703(a) applies to section 4(a) of the ADEA.56

4. "None of the above." I submit that the silence of the 1991 Civil Rights Act leaves the statutory language of ADEA unaffected, and the language of the ADEA itself provides for impact analysis wholly apart from the language of Title VII and the construction given to Title VII language by Wards Cove Packing and the amendments to Title VII in the 1991 Act. The language of section 4(f)(1) of the ADEA not only allows for impact analysis under section 4(a) of that Act, it also supplies the procedural and substantive standard. Procedurally, it is a defense, and as a defense, the burden is upon the employer to establish it. Wards Cove Packing did not undermine this, and the 1991 Amendments do not address the ADEA. Substantively, the section 4(f)(1) defense allows the employer to utilize any age neutral factor that is "reasonable." The employer carries the burden of proving true age neutrality, and age neutrality is not established if the factor perpetuates prior discrimination or segregation because of age.57 But the employer need not prove that the challenged device is a true "business necessity." Its burden is satisfied if the "factor" is proved to be "reasonable."

VI. THE 4(f)(1) STANDARD: WHAT IS A "REASONABLE" FACTOR?

Assuming that section 4(f)(1) of the ADEA frames the employer's burden once the plaintiff proves that a particular device has an adverse impact on the protected age class, the question remains as to what must be considered a "reasonable factor other than age"?

56. This, too, has some logic, but it also ignores the language of section 4(f)(1) of the ADEA that is not present in Title VII.
First, as it is structurally within the Act as a defense and linguistically worded accordingly, the obligation of the employer is to establish the element as a true defense. This means the burden of both producing evidence and establishing its existence rests upon the defendant,\textit{Wards Cove Packing} notwithstanding.

Second, we know that “other than age” imposes on the employer the burden to prove total age neutrality. Thus disclaimers two and three in \textit{Hazen Paper} (age was the premise behind the pension dismissal and dual motive for dismissal) would be a burden on the defendant if the reason articulated for the dismissal was proved by plaintiff to impose an adverse impact on the protected age group. We know from \textit{Corning Glass Works v. Brennan} that neutral appearing systems (in that case day and night shift pay differentials) perpetuate prior segregation and if they do so they are no longer motive-neutral.

Third, we have to define “reasonable factor,” a defense virtually unlitigated under the ADEA. The language and concept no doubt was inspired by similar language found in the Equal Pay Act “factor other than sex” defense, but with the addition of the strengthening modifier “reasonable.” Guidance as to what is meant by “reasonable factor” under the ADEA therefore can be found in the more extensive litigation concerning the “factor other than sex” defense of the Equal Pay Act.

We can begin by assuming that a “factor” cannot be “reasonable” if it is illegal. Illegality is the essence of unreasonableness. Moreover, it would confound policy to allow an employer to avoid liability by asserting as a defense that it acted illegally.\textsuperscript{60} “Reasonableness” presupposes basic bona fides.\textsuperscript{60}

\textsuperscript{58} 417 U.S. 188 (1974).

\textsuperscript{59} Don’t forget that motive is not an issue. Thus, while it is appropriate to argue that if the employer was motivated in a way other than what the particular statute proscribed, the employer did not violate the statute at issue. That is the holding in \textit{Hazen Paper}. However, in an impact case motive is not at issue. The focus is on the legitimacy of using devices that are built in headwinds against employment of members of a protected class. The plaintiff has proved that impact, and the employer has the burden of establishing a true defense to conduct, that if not justified is illegal. Thus, it would seem that illegal conduct should not serve as a defense to conduct that would otherwise be illegal.

\textsuperscript{60} The first step in tort law, for example, would be to determine whether conduct of an alleged tort feasor was itself legal or illegal. If the conduct was violation of the law, it will be \textit{prima facie} tortious.
Reasonableness requires more than mere legality, but that "something more" is not clear. The concept of reasonableness comes in many hues. One shade implies little more than the absence of irrationality. In short, the articulated reason is reasonable if not totally arbitrary or capricious. On the other end of the spectrum "reasonableness" suggests that the factor being relied upon in fact meaningfully serves a significant employer interest. If the employer's stated interest was only passing, remote, or slight, or if the factor advancing that reason served or supported the reason in only insubstantial or insignificant ways, the factor would not be "reasonable." In short, "reasonableness" is a form of "business rationality." Such a heightened sense of "reasonableness" would approach, but fall short of the current definition of "business necessity" and would be far short of any concept that the factor was "required" or "indispensable."

One could argue for any point along this spectrum, but I suggest the starting place should be the definition supplied by the courts that have construed the "factor other than sex" language of the Equal Pay Act. But even here there is no agreement on the meaning of "factor." One line of authority believes that "factor" requires no more than a showing of general rationality. In short, the employer need prove that the "factor" is not arbitrary. It must serve some lawful purpose, but it need not serve any particular business purpose.61 Other authority defines "factor" to presuppose an element that comes from the unique characteristics of the job, from the individual's training, experience, or unique abilities, or from the special exigent circumstances connected with the business.62 The employer therefore must prove that the "factor" contains "business rationality."

The ADEA added the modifier "reasonable." At the very least, it seems that Congress was contemplating an even stronger

61. See EEOC v. J.C. Penney Co., 843 F.2d 249 (6th Cir. 1988); Colby v. J.C. Penney Co., 811 F.2d 1119 (7th Cir. 1987); Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982). For example, providing employees who serve as the head of a household a pay premium might be rationally justified, but fall short of being related to a business need of the employer. See 29 C.F.R. § 1620.21 (1996).

version of "factor" than might emerge from the unmodified term "factor" found in the Equal Pay Act. Thus, while "reasonable factor other than age" seems less demanding than "essential" or "necessary" for the employer's business, "reasonable factor" presupposes something more meaningful than abstract rationality. Parsing the exact formulation of that concept can wait. For now we can rest on the notion that "reasonable factor" requires an employer to prove a heightened form of reasonableness that relates to "business rationality."

A return to the two employment tests hypothesized at the beginning of these remarks could illustrate the broad parameters for the "business rationality" idea. Assume plaintiff has proved the impact of the pen and paper, scientific knowledge test "A." Assume the test was used to select police officers, firefighters, and bus drivers. Absent some unforeseen predictive validity, as the content at best is remotely related to any of these jobs, the employer would be unable to carry the burden of proving that the device was a "reasonable factor." On the other hand, if a correlation between job and test performance could be established, or if the job required current knowledge of these areas, as might be the case in for high school science teachers, the test might be a "reasonable factor" even if it did not pass the more stringent validation required of "business necessity" under Title VII.

Similarly, if the physical performance test "B" was used to select computer programmers or science teachers, absent unlikely predictive validity of the test, the test would seem to lack "reasonableness." Such a test is probably lawful, and it is abstractly reasonable (or not unreasonable) to have extremely fit employees. Nonetheless, a physical test for largely sedentary jobs seems to lack a job relationship that would meet the standard of "reasonableness." However, if the employer were selecting police officers or firefighters, the test might have sufficient content validity to justify its use as "reasonable," even if the test did not meet the more stringent validation demands of the Title VII concept of "business necessity."

63. See 29 C.F.R. § 1607.4(C) (1996); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
64. See LeGault v. Arusso, 842 F. Supp. 1479 (D.N.H. 1994); Police Officers for
VII. SUMMARY AND CONCLUSION BY WAY OF APPLICATION TO PAST CASES

By way of final summary let us hypothesize the application of the proposed “business rationality” standard to three of the recent cases.

A. Hazen Paper Co. v. Biggins

To prove impact, a plaintiff would have the burden of demonstrating that the employer's practice of terminating those whose pensions were about to vest adversely affected those over the age of forty. As ten years were required for vesting, it is conceivable that with a larger employer such a practice might be proven to have adversely affected workers in the over forty age class.

The burden section 4(f)(1) then imposes on the employer would be to prove that the system of dismissal for pension vesting was a “reasonable factor other than age.” The Hazen Court has held that pension vesting, on its face, is age neutral. Whether or not we agree with this conclusion, we must now accept that the “factor” is “other than age.” The question remains whether pension vesting as a premise for discharge is a “reasonable factor”? The Court virtually conceded that the employer's action violated ERISA, a federal statute regulating pension rights. Assuming unlawful cannot be “reasonable,” it would seem that the employer could not establish the “reasonableness” of using pension vesting as a condition of employment.

B. EEOC v. Francis W. Parker School

The employer, a school, would not hire experienced persons because with experience the teacher would expect more salary.

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Equal Rights v. City of Columbus, 916 F.2d 1092 (6th Cir. 1990).
65. 113 S. Ct. 1701 (1993).
66. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (subjective practices appeared to be affecting the individual black plaintiff and the Court allowed impact analysis to be utilized).
67. 41 F.3d 1073 (7th Cir. 1994).
Thus, inexperienced persons were used to fill vacancies as a cost-saving device. This court refused to apply impact analysis.

*Hazen Paper* seems to make clear that utilizing relative experience to allocate jobs or benefits is not per se “age.” Experience and age are conceptually distinct, even though both involve passage of time. However, it seems possible that a plaintiff could demonstrate through the employer’s actual experience with the policy or other statistical methodologies that preferring the non-experienced over the experienced adversely affects individuals over the age of forty. Section 4(f)(1) would shift the burden to the employer to prove that “lack of experience” is a “reasonable factor other than age.”

Unlike pension vesting, “lack of experience” would seem to be otherwise lawful. However, lack of experience does not relate to ability to do the job. Indeed, if one believes that more experience makes one more qualified, the relationship between “lack of experience” and job performance is probably converse.

However, the articulated basis for using experience as a factor was “saving money.” Economic efficiency in terms of salary savings may or may not be “reasonable,” depending upon one’s view of “business rationality.” The EEOC suggests that saving money cannot justify such a distinction.68 However, relative salary demands of competing employees has been considered a reasonable factor in determining which employees to hire or lay off.69 It is business-related to hire the most cost efficient workers, and while not a “business necessity” except in the most extreme cases, it may well be considered “reasonable.” Perhaps employers should be free to engage in a cost-benefit analysis to determine if the marginal value of experienced workers is equal

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68. See 29 C.F.R. § 1625.7 (1996).
69. See Davidson v. Board of Governors, 920 F.2d 441 (7th Cir. 1990); EEOC v. Atlantic Community Sch. Dist., 879 F.2d. 434 (8th Cir. 1989). Compare *EEOC v. Chrysler Corp.*, 733 F.2d 1183 (6th Cir. 1984) which permitted relative salaries to be used in allocating lay offs but only if “necessary” to avoid liquidation of the company. This court applied a variation on the concept of “business necessity,” but did so in the context of an assumption, now erroneous, that use of relative salary was essentially a facial form of “age” discrimination that the employer could justify only under extraordinary circumstances such as the Bona Fide Occupational Qualification defense or, in this case, a constructed “failing business” concept of “necessity.”
to the increased cost of hiring those with experience. In short, economic efficiency of an employer may be "reasonable."

So, it is entirely possible that the outcome of *Francis Parker School* in favor of the employer would have been the same even if impact analysis had been applied. Rather than rejecting impact analysis as a concept, the court might well have found that the employer's system, even if it had an adverse impact, was a "reasonable factor." Was it fear of impact analysis that kept it from making that step?

C. Ellis v. United Airlines

This employer utilized weight maxima that appeared to result in older flight attendants being denied employment at rates higher than younger flight attendants. The court refused to consider impact analysis as a basis for liability.

We might assume that this plaintiff could have established the impact of the weight rule. Nonetheless, it might not be terribly difficult to establish a reasonable business need for general and facially reasonable weight limit for airline flight personnel even though the rule could not be justified as being a "business necessity." If so, and it seems likely, the employer, Ellis, would have prevailed even if the court had recognized impact analysis.

If one reads between the lines, judicial fear that impact analysis would be tantamount to imposing liability on the employer may have caused the two leading cases that rejected impact analysis to take this action. This leads me to a final conclusion. It may be the fear of impact analysis with its intimidating specter of "business necessity" that is leading some courts to jump to the conclusion that the impact concept must be rejected or employers will face unacceptable levels of liability for following common and reasonable selection systems. It is an unfounded fear.

Recognition of impact analysis under the ADEA is necessary to provide significant protection for older workers against irra-

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70. 73 F.3d 999 (10th Cir. 1996).
tional systems that effectively deny them employment opportunities that fail to serve legitimate employer needs. At the same time, as the ADEA section 4(f)(1) defense allows employers to utilize “reasonable factors” employers retain sufficient autonomy to rationally operate their businesses.