

Reasonable Factors Other Than Age: The Emerging Specter of Ageist Stereotypes

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It is beyond question that ageism plays a particularly pernicious role in the workplace. Older workers face widely held societal stereotypes that they are cognitively, socially, and performatively deficient in the workplace. They are also the targets of ageist attitudes, ageist communication, and age discrimination.¹

I. INTRODUCTION

In spite of two recent Supreme Court cases that ostensibly reinstated a more expansive interpretation of discrimination under the Age Discrimination in Employment Act (ADEA), the protection that the ADEA affords still faces the same danger that threatened it before these decisions. The courts, including the Supreme Court, have been allowing employers to interpose defenses that correlate so strongly with age that they can be used as thinly veiled covers for discrimination.² If the Court is serious about enforcing the purpose of the ADEA, it must interpret the “reasonable factor other than age” (RFOA) defense to protect older employees from discrimination by requiring employers to justify adverse actions that use age-correlative criteria such as greater seniority,³ higher position⁴ or salary,⁵ higher healthcare costs,⁶ proximity to retirement,⁷ or

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1. Robert McCann and Howard Giles, *Ageism in the Workplace: A Communication Perspective*, in *AGEISM STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS* 188 (Todd D. Nelson ed., MIT Press 2002).

2. *See infra* Part V.B.2.

3. *See, e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 242–43 (2005).

4. *Id.*

5. *See, e.g.*, *Townsend v. Weyerhaeuser Co.*, No. 04-563, 2005 WL 1389197, at *13 (W.D. Wis. June 13, 2005).

6. *Id.* It should be noted that the employer may provide less in healthcare benefits for older workers. *See infra* note 71.

retirement status.⁸ The ADEA was designed to preclude consideration of these factors, or at least to require that they be closely scrutinized.⁹

The problem is that the courts, including the Supreme Court, have not come to grips with what “reasonable” means for RFOA purposes. At this point, the courts seem to be interpreting “reasonable” to be whatever the employer wants it to mean, without reference to the effect on the protected class. It surely cannot be reasonable to apply factors that have such an obvious impact on older workers without justifying the need for burdening the protected class in particular. An employer-showing that less discriminatory alternatives were not feasible is the usual method of showing that a factor was reasonable. In fact, without a showing that alternatives were not feasible, the employer must have been aware of a substantial risk that he would be adversely affecting the protected class; in other words, the employer must have been acting recklessly with regard to whether he was engaging in discrimination.¹⁰ The ADEA imposes liquidated damages on employers who act recklessly, so recklessness is already a state of mind punished by the Act.¹¹ The employer is acting recklessly when he is subjectively aware of a substantial risk that he will be discriminating against the protected class.¹² This article argues that if the employer is acting with a sufficiently culpable state of mind with regard to whether the criterion treats the protected class unfavorably, he should not be able to interpose the criterion itself as a reasonable method of achieving his goals, without further justification.¹³ For example, employer actions based on seniority are usually reasonable unless more senior employees are adversely affected. If the employer uses greater seniority as the criterion for a layoff, for instance, he should have to explain why he did not use a criterion with a less obvious impact on the protected class.

In *Smith v. City of Jackson*, the Supreme Court agreed that the ADEA was designed to attack practices that have a disparate impact on older employees, unless such practices are justified by a “reasonable factor other than age.”¹⁴ The Court has also decided that RFOA¹⁵ is an af-

7. See, e.g., *Silver v. Leavitt*, No. 05-0968, 2006 WL 626928 (D.D.C. Mar. 13, 2006).

8. See, e.g., *Rollins v. Clear Creek Indep. Sch. Dist.*, No. 06-081, 2006 WL 3302538 (S.D. Tex. Nov. 13, 2006).

9. See *infra* text accompanying notes 147–56.

10. See *infra* Part VI.

11. See *infra* Part II.

12. See *infra* text accompanying notes 282–83..

13. See *infra* Part VI.

14. 544 U.S. 228, 253 (2005).

15. 29 U.S.C. § 623(f) (1988 & Supp. V 1993). See *infra* note 71 for the full text of the provision.

firmative defense, as to which the employer bears the burden of persuasion;¹⁶ however, the Court has indicated that RFOA will not be difficult to prove,¹⁷ and lower courts are so holding.¹⁸

Prior to these recent Supreme Court cases, but after a case decided by the Court in 1993, *Hazen Paper Co. v. Biggins*,¹⁹ lower courts began restricting protections previously afforded by the ADEA. Although most of these restrictions have been removed, the meaning of the RFOA defense has not been resolved.²⁰

The most serious obstacle to proving discrimination was the lower courts' refusal to apply the disparate impact theory to the ADEA. Thus, the plaintiff was limited to the disparate treatment theory of discrimination,²¹ which is more difficult to prove.²² This limitation was removed in *Smith v. City of Jackson*, in which the Supreme Court decided that the disparate impact theory applies to the ADEA.²³ The Court, however, went further and decided that RFOA would be the defense to disparate impact, which was an issue that had not been presented.²⁴ The Court further held, with little analysis, that the employer's justification was an

16. *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008).

17. See *infra* text accompanying notes 99, 130–31.

18. See *infra* Part V.B.2. Determining when RFOA should be interposed as a defense, other than in disparate impact cases, is beyond the scope of this article. As I discuss in two other articles on the RFOA defense, whenever the employee presents substantial proof of discrimination, such as when an employer uses age-correlated criteria, he should have to bear the burden of persuasion to show RFOA. Judith J. Johnson, *Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other Than Age" Defense and the Disparate Impact Theory*, 55 HASTINGS L. J. 1399, 1430 (2004) [hereinafter *Rehabilitate*]; Judith J. Johnson, *Semantic Cover for Age Discrimination: Twilight of the ADEA*, 42 WAYNE L. REV. 1, 64–68 (1995) [hereinafter *Semantic Cover*]. The employer should also have to bear the burden of persuasion to prove RFOA in cases of widespread disparate treatment similar to pattern or practice cases. See *Rehabilitate, supra*, for an explanation of these theories.

19. 507 U.S. 604 (1993). See *infra* text accompanying notes 83–86 for a discussion of the case.

20. Of the four common court-imposed restrictions, the first was refusing to apply the disparate impact theory to the ADEA, thus limiting proof of discrimination to disparate treatment. Second, those courts that continued to apply the disparate impact theory to the ADEA failed to recognize that the defense to disparate impact should not be a watered-down version of business necessity, but RFOA. Third, most courts applying disparate impact, whatever defense they applied, assigned the burden of persuasion to the plaintiff throughout the case. Fourth, factors that obviously correlated with age were no longer considered impermissible but were actually accepted as defenses to the ADEA. The first three of these restrictions have been removed; however, the fourth restriction, allowing a selection criterion that correlates with age to be a defense, has not been resolved and makes recent plaintiffs' victories fairly meaningless.

21. See *infra* text accompanying notes 87–91.

22. See Mack A. Player, *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*, 31 U. OF RICH. L. REV. 819, 831 (1997).

23. *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005).

24. *Id.* at 239.

RFOA that precluded liability.²⁵ Subsequently, in *Meacham v. Knolls Atomic Power Laboratory*, the Court decided that RFOA is an affirmative defense, as to which the employer bears the burden of persuasion, but the Court gratuitously noted that it may make little difference in the outcome.²⁶ However, neither of these cases answered what has become an important question in age discrimination: What does RFOA mean? No arguments were presented in either *City of Jackson* or *Meacham* regarding the meaning of RFOA,²⁷ and there was no reference to any authority on the meaning of RFOA.²⁸ Consequently, the Court's unexplained pronouncement in *City of Jackson* that the defendant's justification was reasonable leaves the meaning of RFOA uncertain.²⁹ Before *Meacham*, the lower courts generally put the burden of persuasion on the employee and required very little to establish RFOA. The lower courts were responding to *City of Jackson*, and the result was that disparate impact cases under the ADEA were bound to fail.³⁰ Even though the Court decided in *Meacham* that the employer bears the burden of persuasion to show RFOA,³¹ the Court insinuated in both cases that RFOA would not be difficult for the employer to prove.³²

Therefore, for the purpose of this article, this question is presented: How difficult will it be to prove RFOA? If the employer may interpose any defense that does not discriminate on its face against older employees, RFOA will mean nothing more than "legitimate non-discriminatory reason," which is the defense to disparate treatment.³³ A "legitimate non-discriminatory reason" is "any" factor other than age. Allowing the employer to use unjustified age-correlated factors gives "reasonable factors other than age" little meaning beyond "any" factor other than age, an interpretation precluded by the Court in recent decisions.³⁴ Nevertheless, the lower courts have failed to scrutinize the meaning of "reasonableness" for RFOA purposes.³⁵ This article examines the possibilities and concludes that "reasonable" must include an employer-justification of any factor that has an obvious impact on older workers, such as seniority, higher salary, or any of the factors cited above. Despite recent Supreme

25. *Id.* at 241–42.

26. 128 S. Ct. 2395, 2404 (2008). See *infra* text accompanying notes 130–31.

27. See *infra* notes 95, 130, 137.

28. See *Meacham*, 128 S. Ct. at 2403; *City of Jackson*, 544 U.S. at 242–43.

29. See *infra* Part III.C.

30. See *infra* Part V.B.2.

31. *Meacham*, 128 S. Ct. at 2402.

32. See *infra* text accompanying notes 99, 130–31.

33. See *infra* Part IV.B.2.

34. See *infra* Part III.

35. See *infra* Part V.B.

Court plaintiffs victories, unless courts interpret RFOA to forbid the unjustified use of age-correlated factors, the result will be the same for plaintiffs: Age-stereotyping will continue unabated.

Both the Equal Employment Opportunity Commission (EEOC) and the Department of Labor, the agencies interpreting the ADEA, have always equated RFOA with factors that are shown to predict success in the job.³⁶ As Justice Scalia pointed out, *City of Jackson* was a perfect case for deferring to the agencies' interpretation of the ADEA.³⁷ The early judicial interpretations of the ADEA were consistent with the EEOC and Department of Labor's understanding of RFOA³⁸ and showed that factors that were "inherently time-based, such as experience, years on the job, and tenure . . . [were] inherently age-related and thus [could not] be considered 'factors other than age.'"³⁹

The danger of inherently age-related factors is that many superficially reasonable employer practices negatively impact older employees and make it difficult for them to obtain and retain employment.⁴⁰ For example, in a reduction in force, if the employer decides to cut costs by eliminating higher-salaried workers, this inevitably has a negative impact on older workers who have been employed longer and benefited from raises over the years. If the older worker is then laid off, he may have difficulty obtaining new employment because he is considered overqualified and, to match his former salary, overpaid.⁴¹ Being able to use the disparate impact theory to prove that a higher-salary justification adversely impacts older employees and putting the burden of persuasion on the employer to show RFOA does not alleviate the problem. Disparate impact discrimination occurs when the employer uses an unjustified neutral employment practice that has a disparate impact on a protected class.⁴² If the employer may interpose higher salary as an RFOA, the older worker is no better protected than he was before *City of Jackson* and *Meacham*. While saving money is clearly a reasonable *goal*, the employer should not be able to defend the disparate impact on older employees by interposing as an RFOA a *method* of achieving that goal if it

36. See *infra* text accompanying notes 150–52. The Department of Labor was originally responsible for administering the ADEA. The EEOC has the current responsibility. See *infra* note 151.

37. *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (Scalia, J., concurring).

38. See *infra* text accompanying notes 147–156.

39. Mack A. Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is A Transplant Appropriate?*, 14 U. TOL. L. REV. 1261, 1278 (1983). Professor Player also thought that RFOA, as defined here, should be the defense to disparate impact cases under the ADEA. *Id.* at 1278–83.

40. See *Rehabilitate*, *supra* note 18, at 1400.

41. *Id.*

42. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971).

obviously correlates with age without justifying the use of such a factor. In order to use a factor such as eliminating higher-paid workers, the employer should have to explain why that factor was used instead of a factor with a less obvious impact on the protected class.

When Congress passed the ADEA, it recognized that the number of unemployed older people in the workforce was becoming a serious problem and that this problem was caused in large part by age discrimination.⁴³ Acting on the assumption that disabilities caused by the aging process affected job performance and should be valid disqualifications, Congress created the RFOA defense.⁴⁴ Current research challenges the assumption that age-related incapacity is prevalent, and consequently, Congress may have been acting on incorrect assumptions regarding older people when it passed the ADEA.⁴⁵

Since Congress enacted the ADEA in 1967, social scientists have extensively studied the phenomenon of age discrimination. A new understanding of ageism should now figure into the development of the law of RFOA.⁴⁶ Social scientists have concluded that although most people will live well into “old age,” older people are a category against which younger people are generally prejudiced.⁴⁷ Older people are no longer seen as founts of wisdom; rather, they are seen as less competent, even if endearing and warm.⁴⁸ These prejudices lead to older people being

43. 29 U.S.C. § 621(a) (1988).

44. See Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 301–02 (1990).

45. See *infra* notes 53–57. Age discrimination was not included in Title VII because it was “different.” See *Smith v. City of Jackson*, 544 U.S. 228 (2005), where the Court recognized that Congress’s decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual’s capacity to engage in certain types of employment. To be sure, Congress recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact. However, as Secretary Wirtz noted in his report, “certain circumstances . . . unquestionably affect older workers more strongly, as a group, than they do younger workers.” Wirtz Report 11. Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group. Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII. While the ADEA reflects Congress’ intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference.

Id. at 241.

46. See McCann & Giles, *supra* note 1, at 198.

47. See Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, AGEISM, *supra* note 1, at 49.

48. Amy J.C. Cuddy & Susan T. Fiske, *Doddering but Dear: Process, Content, and Function in Stereotyping of Older Persons*, AGEISM, *supra* note 1, at 9–10. The authors attribute this phenomenon to modernization that has increased the size of the older population; retirement, which has removed older people from prestigious jobs; technological advances that have produced jobs that older people are not trained for; urbanization that has divided younger people from older family

viewed less positively in interviews and thus being less likely to be hired. They are seen as less trainable, resistant to change, less promotable, and likely to perform less ably.⁴⁹ Experts have found that the origin of this prejudice against old people is in large part based on a fear of our own mortality.⁵⁰ In addition, the authors of these studies note the stereotypical views that older workers should retire and make way for the young fuel stereotypical attitudes and discrimination.⁵¹ Because the negative attitudes about older people are not based on a strong hatred, negative views of older people are more acceptable.⁵²

The surprising fact is that most generalizations about the effects of aging are unfounded. Numerous studies have found that brain activity in healthy people does not differ substantially between ages twenty and eighty. The only major change in intellectual capacity is in speed and reaction time. “Nevertheless, stereotypical beliefs about the mental decrements of older individuals are ubiquitous and well-documented in the research literature.”⁵³ Additionally, “[i]n contrast to widely held stereotypes that depict older workers as chronically absent and injury prone, the research literature on absenteeism and workplace injuries suggests quite a different story.”⁵⁴ With regard to the stereotypes that older workers are unable to cope with change, literature shows that older workers are comparable to younger workers in their ability to be re-trained.⁵⁵ Also, several studies show a nonexistent or even slightly positive correlation between age and job performance.⁵⁶

Now that social scientists have refuted the assumption that many common age distinctions are accurate,⁵⁷ it is interesting to note that the ADEA itself was based on inaccurate stereotypes. Age discrimination

members; and public education, which has removed the need for the wise elder to pass on the culture. *Id.* at 12–13.

49. *Id.* at 18.

50. *Id.* at 1. See Jeff Greenberg, Jeff Schimel & Andy Martens, *Ageism: Denying the Face of the Future*, AGEISM, *supra* note 1, at 27, for a complete discussion of this cause of age discrimination.

51. McCann & Giles, *supra* note 1, at 176.

52. Levy & Banaji, *supra* note 47, at 50–51. See Joann M. Montepare & Leslie A. Zebrowitz, *A Social-Developmental View of Ageism*, AGEISM, *supra* note 1, at 77, for a discussion of how these attitudes developed.

53. McCann & Giles, *supra* note 1, at 167.

54. *Id.* at 169. Studies have found a negative or insignificant correlation between age and absenteeism. Employers rate older employees more highly in terms of reliability and dependability. *Id.* at 169–70. The studies show a tradeoff in on-the-job accidents: younger workers are more accident-prone, while older workers take longer to recover. *Id.* at 170.

55. *Id.* at 171–72.

56. *Id.* at 172. Output of older employees has been found to be equal to younger employees, and older workers are more accurate and steadier in their performance. *Id.*

57. *Id.*

has long been considered less invidious than other forms of discrimination.⁵⁸ To the contrary, it is more insidious because it is more acceptable.⁵⁹ Thus, courts must scrutinize common age-correlated factors more closely. In the midst of a recession with layoffs and plummeting retirement accounts,⁶⁰ discrimination against older people will be even more devastating.

This article will examine the possible meanings of “reasonable factors other than age” and suggest a solution. Part II will briefly describe the ADEA generally. Part III will examine the recent Supreme Court cases that have addressed RFOA. Part IV will explore the possible meanings of RFOA by reviewing the hierarchy of employment discrimination defenses. Part V will fit RFOA into the hierarchy and investigate recent judicial interpretations. Part VI will explain the solution, which is to require employers to justify criteria that obviously impact older workers, such as seniority and higher salary. Part VII will conclude.

II. THE PASSAGE OF THE ADEA, ITS PROVISIONS AND INTERPRETATIONS

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, sex, religion, color and national origin.⁶¹ The ADEA was passed shortly after Title VII took effect. During the Title VII debates, Congress pondered including age as a prohibited basis for discrimination but decided instead to refer the issue of age discrimination to the Secretary of Labor for study.⁶² In response, the Secretary issued what came to be known as the “Wirtz Report,”⁶³ in which he noted the seriousness of the age-discrimination problem.⁶⁴ The report led to the passage of the ADEA in 1967.⁶⁵

58. See Kaminshine, *supra* note 44, at 306–07.

59. See *supra* text accompanying note 52.

60. Jennifer Levitz & Philip Shishkin, *More Workers Cite Age Bias After Layoffs*, WALL ST. J., Mar. 11, 2009, at D1, available at <http://online.wsj.com/article/SB123673216882289971.html>; see also Peter S. Goodman, Jack Healy, & David Stout, *Job Losses Hint at Vast Remaking of U.S. Economy*, N.Y. TIMES, Mar. 7, 2009, at A1, <http://www.nytimes.com/2009/03/07/business/economy/07jobs.html>

61. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq (1989 & Supp. 1995).

62. See 110 CONG. REC. 2596–99; 9911–13; 13,490–92 (1964).

63. Michael Bentley, Note, *How American Employers (Almost) Learned to Respect Their Elders: Smith v. City of Jackson and the Availability of the Disparate Impact Theory Under the Age Discrimination in Employment Act*, 26 MISS. C. L. REV. 347, 350 (2007).

64. U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER, AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965).

65. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 8 Stat. 602 (codified as amended in scattered sections of 29 U.S.C.).

The ADEA prohibits employment discrimination based on age against persons over the age of forty.⁶⁶ The language of the ADEA's central prohibition was taken word for word from Title VII of the Civil Rights Act of 1964.⁶⁷ Thus, the ADEA, on its face, provides the same basic protections from discrimination based on age that Title VII provides based on race, sex, religion, color, and national origin.⁶⁸ The principal differences between the two acts are in the remedial provisions and some of the defenses.

The ADEA's remedial provisions were drawn not from Title VII, but from the Fair Labor Standards Act, which provide for liquidated damages for willful violations.⁶⁹ An employer engages in a willful violation when he is reckless with regard to whether he is violating the ADEA.⁷⁰ Some defenses to the ADEA⁷¹ are also available under Title

66. *Id.* at 602, 607. The ADEA originally protected persons ages forty to sixty-five. The upper age limit was removed in 1986. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3342.

67. *See* *Smith v. City of Jackson*, 544 U.S. 228, 233–34 (2005) (citing *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)).

68. *Compare* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 8 Stat. 602 (codified as amended in scattered Sections of 29 U.S.C.) *with* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., 2000e–2(a) (1989 & Supp. 1995). The ADEA provides:

It shall be unlawful for an employer:

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

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 8 Stat. 602 (codified as amended in scattered Sections of 29 U.S.C.). "Except for substitution of the word 'age' for the words 'race, color, religion, sex, or national origin,' the language of that provision in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII)." *City of Jackson*, 544 U.S. at 233.

69. Age Discrimination in Employment Act, codified at 29 U.S.C. § 626(b) (1990). The Supreme Court has held that the violation is willful if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Trans-World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985).

70. *See infra* text accompanying notes 260–62.

71. The defenses provide in pertinent part:

It shall be unlawful for an employer, employment agency, or labor organization—

- (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

VII.⁷² However, the ADEA contains additional defenses not found in Title VII. An employer may defend against an ADEA claim by showing its actions were based on “reasonable factors other than age,” were pursuant to a bona fide benefit plan, or constituted discipline or discharge for good cause.⁷³

Although the Court has considered differences between the statutes to be significant,⁷⁴ because of the similarities, Title VII has often served as a source of interpretation for the ADEA,⁷⁵ and vice versa.⁷⁶ Under Title VII, the Supreme Court identified two theories of discrimination:

(2) to take any action otherwise prohibited under subsection (a), (b), (c) or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, Title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act. Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

29 U.S.C. § 623(f) (1988 & Supp. V 1993).

72. 42 U.S.C., § 2000e-2(e), (h) (1988); 42 U.S.C. § 2000e-2(h) (1988). The Bona Fide Occupational Qualification (“BFOQ”) defense is not absolute under Title VII but applies only to sex, religious, and national origin discrimination, not to race or color. *Id.* § 2(e).

There are defenses under Title VII that are also not contained in the ADEA, such as action taken pursuant to a merit system or a system that measures quantity or quality of production or a professionally developed test. *Id.* § 2(h).

73. See *supra* note 71 for full text of defenses.

74. See *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2406 (2008), *Smith v. City of Jackson*, 540 U.S. 228, 240 (2005).

75. See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Monce v. City of San Diego*, 895 F.2d 560, 561 (9th Cir. 1990); MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 517 (1988); Kaminshine, *supra* note 44, at 231.

76. See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993). The Supreme Court again approved this proposition in the *City of Jackson* case, discussed below. *City of Jackson*, 544 U.S. at 233–34.

disparate impact and disparate treatment.⁷⁷ Disparate treatment discrimination occurs when the employer intentionally treats persons of different protected classes differently.⁷⁸ Disparate impact discrimination occurs when the employer uses an unjustified neutral employment practice that has a disparate impact on a protected class.⁷⁹ Courts originally applied both theories to the ADEA,⁸⁰ however, controversy arose regarding whether the disparate impact theory rightly applied.⁸¹ Other questions arose as well: (1) If disparate impact applied to the ADEA, would the business necessity defense apply, as under Title VII, or would RFOA apply, as under the ADEA but not Title VII? (2) Should the employer bear the burden of persuasion to prove the defense? (3) If the defense is RFOA, what employer justifications would be considered reasonable? The Court resolved the first two of these issues in two cases: *Smith v. City of Jackson* and *Meacham v. Knolls Atomic Power Laboratory*, described in the next part. Some background is useful first.

Until 1993, courts consistently interpreted the ADEA in line with Title VII in regard to disparate impact.⁸² However, in *Hazen Paper v. Biggins* in 1993, the Court created confusion as to the meaning of RFOA when it said that the defense to discrimination under the ADEA was *any* factor other than age, without referring to the RFOA defense.⁸³ This could be interpreted to mean that the disparate impact theory did not apply to the ADEA, even though the Court said it was addressing intentional discrimination, not disparate impact.⁸⁴ *Hazen Paper* was a disparate treatment case in which the plaintiff contended that being discharged to prevent his pension from vesting was intentional discrimination based on age.⁸⁵ The Court said that pension-vesting and age, while correlated, were not perfectly correlated; as a result, the plaintiff had to prove more

77. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (constructing the burden and order of proof in an intentional discrimination case).

78. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

79. *Griggs v. Duke Power Co.*, 401 U.S. at 431.

80. See *Rehabilitate*, *supra* note 18, at 1408–09. After *Hazen Paper*, the courts ceased to apply the disparate impact theory to the ADEA. See *City of Jackson*, 544 U.S. at 236–37; see *infra* text accompanying notes 87–91. However, *City of Jackson* recognized that the theory does apply to the ADEA. See Part III.A.

81. See *Semantic Cover*, *supra* note 18, at 48–52.

82. See *City of Jackson*, 544 U.S. at 236–37.

83. 507 U.S. 604, 611 (1993) (finding that the employer is not guilty of intentional discrimination under the ADEA if his decision “is wholly motivated by factors other than age . . . even if the motivating factor is correlated with age, as pension status typically is”).

84. *Id.* at 611.

85. *Id.* at 609.

than the mere fact that he was discharged because his pension was about to vest.⁸⁶

Despite the Court's clearly stating that it was not deciding whether disparate impact applied to the ADEA,⁸⁷ the lower courts clutched at language from *Hazen Paper* to hold that disparate impact did not apply under the ADEA.⁸⁸ Lower courts also found further support in the concurrence to *Hazen Paper*, which opined that there were substantial arguments why disparate impact did not apply under the ADEA.⁸⁹ Neither the issue of the meaning of RFOA nor disparate impact was argued in *Hazen Paper*.⁹⁰ Nevertheless, after *Hazen Paper*, most lower courts held that the disparate impact theory did not apply to the ADEA.⁹¹

In the 2005 case of *Smith v. City of Jackson*, the Court decided that the disparate impact theory applies under the ADEA and that RFOA is the defense, but that the burdens of proof articulated in *Wards Cove v. Atonio* also apply to the ADEA.⁹² From this and other loose language in *City of Jackson*, most lower courts considering the issue held that a plaintiff bears the burden of persuasion to refute RFOA.⁹³ In addition, courts also decided that almost any employer justification would suffice to establish RFOA,⁹⁴ even though the issue of RFOA had not been presented in *City of Jackson*.⁹⁵ Subsequently, in the 2008 case *Meacham v. Knolls Atomic Power Laboratory*, the Court decided that the employer bears the burden of persuasion to prove RFOA.⁹⁶ These two cases are discussed in the following part.

86. *Id.* at 611–12.

87. *Id.* at 610.

88. See *Rehabilitate*, *supra* note 18, at 1416 n.101.

89. 507 U.S. at 618 (Kennedy, J., concurring).

90. *Id.* at 610.

91. See *Rehabilitate*, *supra* note 18, at 1416 n.101.

92. *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005). See *infra* text accompanying notes 198–201 for a discussion of *Wards Cove*.

93. See *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2400 (2008).

94. *Id.*

95. Brief of Petitioner at *3, *Smith v. City of Jackson*, 544 U.S. 228 (2005) (No. 03-1160), 2004 WL 1369172. The Petitioners argued that *City of Jackson* did not address any issue beyond whether disparate impact claims are ever cognizable under the ADEA. *Id.* The case presented no questions relating to the elements of a disparate impact claim, the defenses that might be available to employers, or the allocation of burdens of proof between the parties. *Id.* The Petitioners argued that the lower courts can and should address those issues in the first instance, consistent with Congress's intent that the statute should be given practical construction. *Id.*

96. *Meacham*, 128 S. Ct. 2395.

III. RECENT SUPREME COURT CASES

A. *Smith v. City of Jackson*

In *Smith v. City of Jackson*, the Supreme Court decided that the disparate impact theory applies to the ADEA. The Court based the decision primarily on the fact that the language of the ADEA was taken word-for-word from Title VII, which originally created the disparate impact theory.⁹⁷ The Court decided, however, that the plaintiff had failed to show the criterion causing the disparate impact.⁹⁸ The Court also opined, with little or no analysis, that the criteria used by the City were “reasonable factors other than age,” which precluded liability.⁹⁹

City of Jackson involved a pay plan initiated by the City of Jackson, Mississippi. The plan resulted in police officers with less than five years of service receiving proportionately more in raises. Most of the officers in the protected class had more than five years of service.¹⁰⁰ The Court decided that although disparate impact is cognizable under the ADEA, the plaintiffs had failed to prove their case.¹⁰¹

The Court held that there were two textual differences between the ADEA and Title VII that indicated that liability under the disparate impact theory should be narrower under the ADEA than it is under Title VII. The first was that the 1991 Civil Rights Act amended Title VII to codify the disparate impact theory and to modify *Wards Cove v. Ato-*

97. *City of Jackson*, 544 U.S. at 233–34. The Court had unanimously decided that the disparate impact theory applied to Title VII, so the same language in the ADEA could not be interpreted to exclude the theory. *Id.* at 234. In addition, the Court noted that the defense of “reasonable factors other than age” provides additional support that Congress intended to proscribe employment criteria that had a disparate impact unless they were “reasonable.” *Id.* at 239. Finally, regulations promulgated by the agencies that administered the ADEA support the view that the disparate impact theory applies to the ADEA. *Id.* at 239–40.

The decision is a plurality decision; however, Justice Scalia concurred in the judgment that disparate impact applies to the ADEA, but based his conclusion on the reasonableness of the agency interpretation. *Id.* at 243 (Scalia, J., concurring). In other words, five justices agreed that disparate impact applies to the ADEA. The issue is no longer in doubt because the opinion in *Meacham* was joined by a majority of the Court. See *infra* text accompanying note 113.

98. *City of Jackson*, 544 U.S. at 241.

99. *Id.* at 242–43.

100. *Id.* at 231. The plan divided the five basic officer positions into steps and half-steps. The wage range was based on wages paid in comparable cities in the Southeast. Most of the officers were in the three lowest ranks, where there were officers both over and under age forty. The officers in the two highest ranks were all over forty. Those in the two highest ranks were given raises that represented a smaller percentage of their salaries, but the raises were higher in dollar amount than the raises given to officers in the lower ranks. The evidence showed that the City gave raises of over 10% to more than 66% of the officers under forty, but only 45% of the officers over forty received such raises. Additionally, officers with less than five years of service received higher percentage raises than those with longer service. *Id.*

101. *Id.*

nio.¹⁰² Because the 1991 amendments did not apply to the ADEA in this regard, *Wards Cove* applies to the ADEA.¹⁰³ In *City of Jackson*, the plaintiffs had failed to comply with the *Wards Cove* requirement of identifying “the specific test, requirement or practice within the pay plan” that was causing the disparate impact.¹⁰⁴

The second textual difference—the existence of the defense of RFOA in the ADEA and not in Title VII—requires RFOA to be the defense to a disparate impact case.¹⁰⁵ The Court said that, unlike race and the other classifications protected under Title VII, age may have relevance to a person’s ability to do the job.¹⁰⁶ Thus, some criteria that adversely affect older workers more than younger workers may be used if they are reasonable.¹⁰⁷ In addition to determining that the plaintiffs had failed to identify the criterion causing the disparate impact, the Court said that the City of Jackson’s reason for implementing the pay plan was an RFOA. The Court reasoned that the City’s explanation for the differential was the need to make the salaries of junior officers competitive in the market. “Thus the disparate impact is attributable to the City’s decision to give raises based on seniority and position. Reliance on seniority and rank is unquestionably reasonable given the City’s goal of raising employees’ salaries to match those in surrounding communities.”¹⁰⁸ The Court opined that the City’s decision to give employees with less seniority and lower positions a larger raise “for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a ‘reasonable factor other than age’ that responded to the City’s legitimate goal of retaining police officers.”¹⁰⁹

The Court then diluted the effect of applying the disparate impact theory in another respect by declaring inapplicable the part of the business necessity test that allows the plaintiff to prevail by showing that there are less discriminatory alternatives. The Court said that RFOA does not include such an inquiry.¹¹⁰ “While there may have been other

102. *Id.* at 240. See *infra* text accompanying notes 199–202 for an explanation of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which modified the business necessity defense and, *inter alia*, required the plaintiff to bear the burden of persuasion throughout the case.

103. *City of Jackson*, 544 U.S. at 241. See *infra* text accompanying notes 199–202 for a further discussion of *Wards Cove*.

104. *Id.* at 241.

105. *Id.* at 240.

106. *Id.* at 240–41.

107. *Id.* at 241.

108. *Id.* at 242–43.

109. *Id.*

110. *Id.* at 243.

reasonable ways for the City to achieve its goals, the one selected was not unreasonable.”¹¹¹

Justice Scalia agreed with the plurality’s rationale but would have used it as a basis for deferring to the reasonable views of the EEOC in this regard. The concurrence noted that the regulation reflected the long-standing position of the Department of Labor, which had originally administered the Act, as well as the EEOC, which had taken this position in several proceedings. The concurrence concluded that the EEOC’s interpretation of the statute was reasonable and entitled to deference.¹¹²

Two important issues remained after *City of Jackson*: who bears the burden of persuasion regarding RFOA, and what does RFOA mean? Only one of these issues has been resolved. With regard to who bears the burden, the Supreme Court again decided the issue in favor of the plaintiff.

B. *Meacham v. Knolls Atomic Power Laboratory*

*Meacham v. Knolls Atomic Power Laboratory*¹¹³ involved a reduction in force (RIF) at an atomic power laboratory in which, of the thirty-one salaried employees affected, thirty were in the protected age group.¹¹⁴ The employees contended that the RIF had a disparate impact on them, in violation of the ADEA.¹¹⁵ The employees’ statistical expert showed that some of the criteria chosen to determine who would be laid off caused the disparate impact. The jury found for the employees on the disparate impact claim. The Court of Appeals reversed, holding that the employees had not carried the burden of persuasion to show that the plan was not reasonable.¹¹⁶ The Supreme Court disagreed with putting the burden of persuasion on the plaintiffs.¹¹⁷

111. *Id.*

112. *Id.* See *infra* text accompanying notes 150–53 for a full explanation of the regulations in this regard.

113. *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008). Justice Souter wrote the opinion for the majority of six, as opposed to the *City of Jackson* opinion in which only four members of the Court joined. *Smith v. City of Jackson*, 544 U.S. 228, 229 (2005). Only Justice Thomas dissented, arguing that disparate impact does not apply at all under the ADEA. He concurred, however, that RFOA is an affirmative defense in disparate treatment cases. *Meacham*, 128 U.S. at 2407 (Thomas, J., concurring in part and dissenting in part). Justice Scalia concurred in the judgment, *id.* at 2407 (Scalia, J., concurring), and Justice Breyer took no part in the case. *Id.* at 2407.

114. *Meacham*, 128 S. Ct. at 2398.

115. *Id.* at 2398–99. The employees also alleged disparate treatment, but the jury did not find for them on that claim, and they did not pursue it. *Id.* at 2399–2400.

116. The procedure was more complicated than this. In fact, in its first opinion, the court of appeals affirmed the jury’s verdict. The Supreme Court vacated and remanded in light of the intervening *City of Jackson* decision. The court of appeals then reversed the jury verdict because it had been based on a showing of no business necessity, rather than a showing of no RFOA. *Id.* at 2400.

117. *Id.* at 2402.

The Court based its decision on the text of the ADEA, pointing out that the ADEA's prohibitions against discrimination are followed by exemptions for employer practices that would otherwise be prohibited.¹¹⁸ RFOA is one of those exemptions, as to which the employer bears the burden of persuasion.¹¹⁹ The Court applied a principle of statutory construction—that those who claim an exception must prove it. There was no reason to believe that Congress intended otherwise.¹²⁰

The Court also noted that in enacting the ADEA, Congress had drawn upon the Fair Labor Standards Act, especially the equal pay provisions.¹²¹ The Court had formerly recognized the undesirability of departing from consistent interpretations of the two acts. Thus, treating RFOA as an affirmative defense was further bolstered by the fact that the Equal Pay Act defense of “any other factor other than sex” was treated as an affirmative defense.¹²²

The employer argued that *City of Jackson* had applied the *Wards Cove*¹²³ burdens of proof to the ADEA, which precluded the court from putting the burden of persuasion on the employer to prove RFOA as an affirmative defense.¹²⁴ *Wards Cove* had put the burden of persuasion on the plaintiff throughout the case,¹²⁵ and when the Court in *City of Jackson* said that *Wards Cove* applied to the ADEA, the implication was that the burdens of proof applied also. In *Meacham*, however, the Court stated that the employer was over-reading *City of Jackson*, that the only part of *Wards Cove* that applied to the ADEA related to the plaintiff's burden to prove a prima facie case of disparate impact.¹²⁶ Specifically, the employee must identify the particular practice causing the disparate impact.¹²⁷

118. *Id.*

119. *Id.* at 2401.

120. *Id.* at 2400.

121. *Id.* at 2401.

122. *Id.* The Court also noted that its recognition of bona fide employee benefit plans as an affirmative defense was rejected by Congress. Congress had legislatively overruled that case, stating that the action was necessary to restore its original intent to regard the defense of bona fide employee benefit plan as an affirmative defense. Congress then changed the introductory language to that defense to bring it in line with the language preceding the BFOQ and RFOA defenses. *Id.* at 2401–02.

123. In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court held that the business justification defense for Title VII had to be disproved by the plaintiff. Congress later codified the business necessity defense as an affirmative defense to Title VII to specifically overrule this decision. See *infra* discussion accompanying notes 203–04.

124. *Meacham*, 128 S. Ct. at 2404–05.

125. See *infra* notes 198–201 for a full discussion of *Wards Cove*.

126. *Meacham*, 128 S. Ct. at 2404.

127. It should be noted that the 1991 Civil Rights Act codified the requirement of picking out the specific practice for Title VII disparate impact claims. 42 U.S.C. § 2000e–2(k) (Supp. III 1991).

In *Meacham*, the employer also argued that RFOA means *any* factor other than age, whether reasonable or not. The Court rejected this argument as having been resolved by *City of Jackson*.¹²⁸ When the Court in that case decided that classifications based on non-age factors that have a disparate impact on older workers may be actionable, the Court was implicitly rejecting the argument that RFOA means *any* factor other than age.¹²⁹ However, the Court in *Meacham* also cited *City of Jackson* for the proposition that a reasonable factor may nevertheless lean more heavily on older workers.¹³⁰ The Court further added that putting the burden of persuasion on the defendant will be important only in cases in which the reasonableness of the non-age factor is obscure.¹³¹ The question for RFOA is now whether the non-age factor is reasonable.

Despite two Supreme Court cases applying RFOA, there is no clear answer as to what it means. The dictum from *City of Jackson* and *Meacham* does not bode well for a restrictive meaning of RFOA, however.¹³² Nevertheless, because the issue of the meaning of RFOA has not properly been before the Court, there is still hope that the Court will interpret RFOA as originally intended.¹³³ Until that time, however, confusion persists among lower courts when interpreting the meaning of RFOA.¹³⁴

C. Where Has the Supreme Court Left Us with Regard to the Meaning of RFOA?

As noted earlier, three Supreme Court cases developed the RFOA defense. Two of these cases, *Hazen Paper v. Biggins*¹³⁵ and *City of Jackson*, led to confusion regarding RFOA application—confusion that the Court has had to correct.¹³⁶ In addition, both cases, along with *Meacham*, have added to the confusion about the *meaning* of RFOA. Most

Thus, there is no ostensible difference between the *Wards Cove* requirement that applies to the ADEA and the 1991 Civil Rights Act provision that applies to Title VII.

128. *Meacham*, 128 S. Ct. at 2402–03.

129. *Id.*

130. *Id.* at 2403. It should be noted that the Court declined to grant certiorari on the meaning of RFOA, so this issue was never argued. *Id.* at 2400 n.8.

131. *Id.* at 2406.

132. See *supra* text accompanying notes 99, 130–31.

133. See *infra* Part IV.A.

134. See *infra* Part V.B.2.

135. 507 U.S. 604 (1993). For a more complete discussion of *Hazen Paper*, see *Rehabilitate*, *supra* note 18, at 1412–16.

136. See *Meacham*, 128 S. Ct. at 2400; Appellate Petition, Motion, and Filing at *10–13, *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008) (No. 06-1505), 2007 WL 1434965.

importantly, the issue of the meaning of the RFOA was not presented in any of these cases.¹³⁷

Now, although the Court in *Meacham* said that the employer bears the burden of persuasion, it also implied that RFOA will not be difficult to prove and will be dispositive only when the reason is obscure.¹³⁸ The Court also noted that the lower court did not hesitate to accept the employer's defense and that the lower court would have to determine whether the outcome of the case would change by putting the burden on the employer.¹³⁹ The Court was again foreshadowing issues not argued in the case. Because of these interpretations of RFOA, lower courts have already begun to find employers' justifications reasonable, even if they are obviously correlated—or even synonymous—with age, such as retirement, seniority, higher position, and higher salary.¹⁴⁰

The next part will explore the possible meanings of RFOA. The first possibility is that RFOA means the same as “legitimate non-discriminatory reason,” which is any criterion that does not discriminate on its face.¹⁴¹ *City of Jackson* specifically precluded this interpretation,¹⁴² however, if an employer may interpose unjustified age-correlated factors, RFOA will mean little more than “any” factor other than age. The question becomes what does reasonable mean in the context of RFOA, especially in the context of factors that correlate with age? There are four possibilities, other than legitimate non-discriminatory reason, as discussed below: (1) bona fide occupational qualification, which requires that the criterion be essential to the business,¹⁴³ (2) business necessity, which requires that the factor be shown to predict success in the job;¹⁴⁴ (3) business justification, which requires that the criterion be rationally related to the employer's legitimate goals;¹⁴⁵ and (4) “any factor other than sex,” which is a defense to an Equal Pay Act case, but which often requires the employer to justify a factor that historically discrimi-

137. See *Rehabilitate*, *supra* note 18, at 1433; see also Brief of Petitioner, *supra* note 95. In *Meacham*, the Court noted:

Petitioners also sought certiorari as to “[w]hether respondents’ practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during a reduction in force constituted a ‘reasonable factor other than age’ as a matter of law.” We denied certiorari on this question and express no views on it here.

128 S. Ct. at 2400 n.8 (citation omitted).

138. *Meacham*, 128 S. Ct. at 2406–07.

139. *Id.* at 2406–07.

140. See *infra* Part V.B.2.

141. See *infra* Part IV.B.2..

142. See *supra* text accompanying note 128.

143. See *infra* Part IV.B.1.

144. See *infra* Part IV.B.4.

145. *Id.*

nates on the basis of sex.¹⁴⁶ This part examines the possibilities and concludes that “reasonable” must include an employer justification of any factor that has an obvious impact on the older workers. Such a justification need not be essential to the business or predict success in the job, but it must include proof that less discriminatory alternatives were not feasible.

IV. DEFINING THE MEANING OF RFOA USING A HISTORICAL PERSPECTIVE OF DEFENSES TO EMPLOYMENT DISCRIMINATION CLAIMS

A. History of RFOA

Before the decision in *Hazen Paper v. Biggins*,¹⁴⁷ the prevailing view was that to be a RFOA, the factor could not be correlated with age.¹⁴⁸ Thus, factors that are “inherently time-based, such as experience, years on the job, and tenure . . . are inherently age-related and thus [could not] be considered ‘factors other than age.’”¹⁴⁹ The Secretary of Labor, who reported on the necessity of the ADEA,¹⁵⁰ and who administered the ADEA in its early days,¹⁵¹ issued guidelines shortly after the Act was

146. See *infra* Part IV.B.3.

147. 507 U.S. 604 (1993).

148. See *infra* cases cited at note 154; Player, *supra* note 39, at 1278.

149. Player, *supra* note 39, at 1278. Professor Player also thought that RFOA as here defined should be the defense to disparate impact cases under the ADEA. *Id.* at 1278–83. See Kaminshine, *supra* note 44, at n.131 for studies correlating age, seniority and compensation.

150. See *supra* text accompanying notes 62–65.

151. The EEOC took over administration of the ADEA and retained the Secretary of Labor’s interpretation of RFOA. Kaminshine, *supra* note 44, at 302–03. See Howard Eglit, *The Age Discrimination in Employment Act’s Forgotten Defense: The Reasonable Factors Other Than Age Exception*, 66 B.U. L. REV. 155, 195 (1986) (citing 29 C.F.R. § 860.103(e) (1985) (rescinded)). The EEOC position before and after *City of Jackson* is as follows:

Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that * * * it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * *.

(b) No precise and unequivocal determination can be made as to the scope of the phrase “differentiation based on reasonable factors other than age.” Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a “factor other than” age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as “reasonable factors other than

passed. These guidelines provided that to be a RFOA, a criterion must be “‘reasonably necessary for the specific work to be performed’ or ‘shown to have a valid relationship to job requirements.’”¹⁵² “[T]he Department of Labor’s contemporaneous understanding of the newly passed statute is unusually germane, given its involvement and influence in the legislation.”¹⁵³ The lower courts generally followed the Secretary’s position.¹⁵⁴ In the absence of extensive legislative history on RFOA,¹⁵⁵ these early interpretations are the most relevant indications of congressional intent.¹⁵⁶

Although the regulations issued by the Department of Labor made it clear that disparate impact applied to the ADEA,¹⁵⁷ disparate impact was rarely applied in the early days of the ADEA.¹⁵⁸ A majority of courts simply assumed that an employer using criteria that correlate with age, such as over-qualification, high salary, tenure, or seniority, was intentionally discriminating and thus guilty of disparate treatment.¹⁵⁹ Many of these decisions were made shortly after the ADEA was enacted, so this was the consensus regarding the intent and meaning of the ADEA at that time.¹⁶⁰ It was only after *Hazen Paper*—decided over twenty-five

age” will be scrutinized in accordance with the standards set forth at Part 1607 of this Title.

(e) When the exception of “a reasonable factor other than age” is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the “reasonable factor other than age” exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f) (2) exception to the Act.

29 C.F.R. § 1625.7 (1985).

152. 29 C.F.R. § 1625.7 (1985).

153. *Id.* The EEOC, which took over responsibility for the ADEA, used the term business necessity to describe the defense to disparate impact. *See supra* note 151.

154. *See, e.g.*, *Taggart v. Time, Inc.*, 924 F.2d 43 (2d Cir. 1991); *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 875–76 (6th Cir. 1990); *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1157–58 (7th Cir. 1989); *White v. Westinghouse Electric Co.*, 862 F.2d 56, 62 (3rd Cir. 1988); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987), *overruled by* *Anderson v. Baxter HealthCare Corp.*, 13 F.3d 1120 (7th Cir. 1994); *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 280–81 (2d Cir. 1987); *Dace v. ACF Indus., Inc.*, 722 F.2d 374, 378 (8th Cir. 1983); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 691 (8th Cir. 1983); *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980). *Contra* *Williams v. General Motors Corp.*, 656 F.2d 120, 131 n.131 (5th Cir. 1981); *Laugeon v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975).

155. The legislative history of the RFOA is sparse and inconclusive. *Eglit, supra* note 151, at 180–81.

156. *See* *Kaminshine, supra* note 44, at 303.

157. *See supra* text accompanying notes 150–52. The Court recognized this in *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005).

158. *See Rehabilitate, supra* note 18, at 1410–11.

159. *See* cases *supra* note 154.

160. *See Semantic Cover, supra* note 18, at 27–28.

years after the enactment of the ADEA—that the consensus regarding age-correlated factors and the applicability of the disparate impact theory to the ADEA began to change.¹⁶¹

The courts that thought that age-correlated factors were discriminatory per se were incorrect. Congress intended for employers to retain the ability to justify decisions based on reasonable factors, even if such factors correlate with age. Otherwise, employers would be forced to retain employees who could no longer perform.¹⁶² *Hazen Paper* made it clear that factors that correlate with age are not per se discriminatory.¹⁶³ The lower courts over-read this decision, however, and began to hold that any factor that was not facially discriminatory was a defense to an ADEA suit.¹⁶⁴

Now that *City of Jackson* and *Meacham* have clarified that disparate impact does apply to the ADEA, that RFOA is the defense, and that the employer bears the burden of persuasion to prove it, the question of the meaning of RFOA remains. Specifically, what is reasonable? Although the use of age-correlated factors should not be treated as discriminatory per se, there is a large gap between holding that age-correlated factors are discriminatory per se and holding that such factors

161. *Id.* at 30–33. The Supreme Court recognized this in *City of Jackson*:

Indeed, for over two decades after our decision in *Griggs*, the Courts of Appeals uniformly interpreted the ADEA as authorizing recovery on a “disparate impact” theory in appropriate cases. It was only after our decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L.Ed.2d 338 (1993), that some of those courts concluded that the ADEA did not authorize a disparate impact theory of liability.

City of Jackson, 544 U.S. at 236–37.

162. See Kaminshine, *supra* note 44, at 289. See *Rehabilitate*, *supra* note 18, at 1429.

163. 507 U.S. 604, 608 (1993).

164. With regard to whether the disparate impact theory applies to the ADEA, the courts held as follows: the First, Fifth, Seventh, Tenth, and Eleventh Circuits said unequivocally that the theory did not apply. See *Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003), *cert. granted*, 541 U.S. 958 (2004); *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325 (11th Cir. 2001), *cert. granted*, 534 U.S. 1054 (2001), *cert. dismissed as improvidently granted*, 535 U.S. 228 (2002); *Mullin v. Raytheon Co.*, 164 F.3d 696, 700–01 (1st Cir. 1999); *Ellis v. United Airlines*, 73 F.3d 999, 1006–07 (10th Cir. 1996); *Gehring v. Case Corp.*, 43 F.3d 340, 342 (7th Cir. 1994).

The Third and the Sixth Circuits did not say that disparate impact did not apply but expressed serious misgivings. See *Dibiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732–35 (3d Cir. 1995); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 (6th Cir. 1998).

The Second, Eighth and Ninth Circuits continued to allow disparate impact claims. See *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir. 2000); *Lewis v. Aerospace Cmty. Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997). The Eighth Circuit had indicated some doubt as to whether disparate impact applies, however. See *Allen v. Entergy*, 193 F.3d 1010, 1015 n.5 (8th Cir. 1999).

The Fourth Circuit and the D.C. Circuit had not addressed this issue. See *Adams*, 255 F.3d at 1325 n.5. In a case on an unrelated issue, however, the D.C. Circuit interpreted *Hazen Paper* to cast doubt on the applicability of the disparate impact theory to the ADEA. *Contractors’ Labor Pool, Inc. v. N.L.R.B.*, 323 F.3d 1051 (D.C. Cir. 2003). See *Rehabilitate*, *supra* note 18, at 1418–22 for a complete discussion of the rationales used by the various courts.

are reasonable and thus a defense to an ADEA claim. The middle ground is that the employer should have to justify the use of factors that obviously correlate with age. Thus, the employer should not simply interpose a factor that correlates with age and denominate it as reasonable without some justification. The challenge for this article is to determine what kind of justification the employer should have to make. To put this query into perspective, it will be helpful to explore the hierarchy of defenses to discrimination cases to see where RFOA belongs. The hierarchy of defenses about to be described starts with the most difficult defense to prove, bona fide occupational qualification, and continues to the least difficult to prove, legitimate non-discriminatory reason. The gap in between is where RFOA should fit.

B. Other Defenses

Any discussion of the meaning of defenses to discrimination cases has to begin with Title VII, the patriarch of the anti-discrimination statutes.¹⁶⁵ Because Title VII did not define discrimination, this task was left to the courts.¹⁶⁶ As noted above,¹⁶⁷ the Supreme Court identified two theories of discrimination under Title VII: disparate impact and disparate treatment.¹⁶⁸ Because of the similarity between Title VII and the ADEA, the Court then applied both theories to the ADEA.¹⁶⁹ These theories have resulted in five defenses: bona fide occupational qualification, legitimate non-discriminatory reason, “any other factor other than sex” under the Equal Pay Act, business necessity, and business justification.

1. Statutory Defense of Bona Fide Occupational Qualification

Bona fide occupational qualification is the only general statutory defense for a Title VII disparate treatment case, and it is also a statutory

165. Title VII, one of the comprehensive anti-discrimination acts, was enacted in 1964. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., (1989 & Supp. 1995). The ADEA was enacted in 1967. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 8 Stat. 602 (codified as amended in scattered Sections of 29 U.S.C.). The Americans with Disabilities Act was not enacted until 1991. 42 U.S.C. §§ 12101-12213 (2000).

166. See JOEL W. FRIEDMAN & GEORGE M. STRICKLER, *THE LAW OF EMPLOYMENT DISCRIMINATION* 246 (Foundation Press 2000).

167. See *supra* text accompanying notes 77-79.

168. See *Griggs v. Duke Power*, 401 U.S. 424, 431 (1971). See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (in which the Court constructed the burden and order of proof in an intentional discrimination case).

169. See *Rehabilitate*, *supra* note 18, at 1409-10. After *Hazen Paper*, the courts ceased to apply the disparate impact theory to the ADEA. *City of Jackson* then clarified that the theory does apply to the ADEA. See *supra* Part III.A.

defense to an ADEA disparate treatment case.¹⁷⁰ Whenever the employer makes employment decisions based on a factor that on its face names a protected class, or a part thereof, such as a policy that denies employment to women or to persons over forty, the employer is required to defend the policy using the bona fide occupational qualification (BFOQ) defense. BFOQ requires the employer to prove that the policy is essential to the business.¹⁷¹ The defense is strictly construed and is difficult to prove under both Title VII and the ADEA.¹⁷²

BFOQ is available as a defense only when the employer has a facially discriminatory policy; consequently, there is a gap in Title VII's statutory scheme in the more common circumstance that does not involve facial discrimination. Because there are no other general defenses to discrimination under Title VII, the courts were called upon not only to define discrimination but to create defenses to both disparate impact and disparate treatment discrimination.

2. Legitimate Non-Discriminatory Reason

For disparate treatment cases, the Court created the defense of "legitimate non-discriminatory reason."¹⁷³ Commentators and courts assumed for many years that "legitimate" meant "proper," so that a legitimate non-discriminatory reason could not be just any reason that did not discriminate on its face.¹⁷⁴

However, in *Hazen Paper v. Biggins*,¹⁷⁵ the Court held that discriminating based on pension benefits is not per se discriminatory under the ADEA because the defense to disparate treatment cases is any reason that does not discriminate on its face.¹⁷⁶ The Court said that although language in prior decisions could be interpreted to mean that the legitimate non-discriminatory reason excludes any employer justification that is improper, this interpretation is not correct. "For example, it cannot be

170. Title VII and the ADEA also have in common the bona fide seniority system defense, but it is not helpful to this discussion. See *Semantic Cover*, *supra* note 18, at 9.

171. See *id.* at 34.

172. See *Rehabilitate*, *supra* note 18, at 1423.

173. *McDonnell Douglas v. Green*, 411 U.S. 792. The Court has decided cases under the ADEA interpreting legitimate non-discriminatory reason, but it has continued to "assume without deciding" that legitimate non-discriminatory reason applies to the ADEA. See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 n.1 (1993); *but see Hazen Paper v. Biggins*, 507 U.S. 604, 612 (1993).

174. See *Player*, *supra* note 75, at 334. "The term 'legitimate' presupposes that the articulated reason is lawful. If an employee establishes a prima facie case of sex discrimination, an employer does not articulate a reason that is 'legitimate' by presenting evidence that the employee was illegally discriminated against her because of her race, age or union membership." *Id.*

175. *Hazen Paper*, 507 U.S. 604.

176. *Id.* at 611.

true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA."¹⁷⁷

Interpreting legitimate non-discriminatory reason to be "any reason," regardless of how improper it is, reads out the "legitimate" part of "legitimate non-discriminatory reason." This interpretation means that any factor that does not facially discriminate can be a legitimate non-discriminatory reason. However, the Court has now recognized in *City of Jackson* that RFOA does not mean the same thing as legitimate non-discriminatory reason.¹⁷⁸ Applying RFOA, the Court said that the employer's justification has to be reasonable.¹⁷⁹ Beyond the fact that reasonable must be more than any reason that is not facially discriminatory, the quest for this article is to define what "reasonable" means.

3. "Any Other Factor Other Than Sex" Under the Equal Pay Act

Because Congress was not legislating in a vacuum when it adopted RFOA, there are other sources for the meaning of what is reasonable for RFOA purposes. In *Meacham*, the Court noted that in enacting the ADEA, Congress had drawn on the equal pay provisions of the Fair Labor Standards Act.¹⁸⁰ The Court recognized that the defense of RFOA was obviously modeled on the Equal Pay Act's defense of "any other factor other than sex" (FOTS). Thus, the Court's decision to treat RFOA as an affirmative defense was bolstered by the fact that FOTS was already treated as an affirmative defense.¹⁸¹ The Court in *City of Jackson* also referenced the FOTS defense to support its determination that RFOA did not mean just *any* neutral factor, that is, any factor that is not facially discriminatory.¹⁸²

177. *Id.* at 612.

178. See generally *Smith v. City of Jackson*, 544 U.S. 228, 238–39 (2005). The Court said in *City of Jackson* that RFOA does not mean any factor other than age. *Id.* Similarly, the Court in *Hazen Paper* stated that legitimate non-discriminatory reason does mean any factor other than age. 507 U.S. at 612.

179. *City of Jackson*, 544 U.S. at 238–39.

180. 29 U.S.C. § 206(d); *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2406 (2008).

181. *Meacham*, 128 S. Ct. at 2401.

182. *City of Jackson*, 544 U.S. at 238–39. If RFOA had meant any neutral factor, disparate impact would not apply under the ADEA, as the Court said was the case under the Equal Pay Act because of FOTS. *Id.* at 239 n.11.

The connection between the Equal Pay Act and the ADEA is not limited to the defenses. The remedial provisions of the ADEA were also drawn from the Fair Labor Standards Act. See Judith J. Johnson, *A Standard for Punitive Damages Under Title VII*, 46 FLA. L. REV. 521, 551 (1995) [hereinafter *Standard*].

The Equal Pay Act requires that the employer not discriminate on the basis of sex for employees performing equal work.¹⁸³ At first blush, a defense to the Equal Pay Act does not seem relevant to an ADEA discussion. However, because of the Court's recognition of the connection between FOTS and RFOA, the meaning of FOTS may be important in determining what is reasonable under the RFOA defense.

In the first and only case in which the Supreme Court squarely confronted the meaning of FOTS, *Corning Glass Works v. Brennan*,¹⁸⁴ the Court indicated that "any other factor other than sex" should not include factors that perpetuate the effects of past discrimination.¹⁸⁵ Although the courts have not been in agreement on what FOTS means after *Corning Glass*,¹⁸⁶ a similar argument can be made that unjustified criteria that historically impact older workers should not be considered RFOA's under the ADEA.

Despite the Equal Pay Act's language that "any other factor other than sex" is a defense, many courts require some business justification for the use of a factor that has historically had an adverse impact on women.¹⁸⁷ Even under the Equal Pay Act, therefore, a factor that correlates with sex is not necessarily considered just "any" factor other than sex and may not be a sufficient defense.¹⁸⁸

183. See Friedman, *supra* note 166, at 779.

184. 417 U.S. 188 (1974). The Supreme Court held that the employer violated the Equal Pay Act by paying male night inspection workers at a higher base wage than female day inspection employees. The employer did not cure its violation by permitting women to work as night shift inspectors or by equalizing rates on the two shifts, but retaining "red circle" rate that perpetuated the discrimination. *Id.* at 209. In *City of Jackson*, the Supreme Court stated in dicta:

[I]f Congress intended to prohibit all disparate impact claims, it certainly could have done so. For instance, in the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), Congress barred recovery if a pay differential was based "on any other factor"—reasonable or unreasonable—"other than sex." The fact that Congress provided that employers could use only *reasonable* factors in defending a suit under the ADEA is therefore instructive.

544 U.S. at 239 n.11 (emphasis added).

185. 417 U.S. at 209. The Court concluded that "the company's continued discrimination in base wages between night and day workers, though phrased in terms of a neutral factor other than sex, nevertheless operated to perpetuate the effects of the company's prior illegal practice of paying women less than men for equal work." *Id.*

186. The Court denied certiorari in 1992, refusing to resolve the conflict in the circuits. *Al-drich v. Randolph Central Sch. Dist.* 963 F.2d 520 (2d Cir. 1992), *cert. denied*, 506 U.S. 965 (1992) (White, J., dissenting). In a dissent to the denial of certiorari, Justice White, with two other justices agreeing, outlined the conflict in the circuits. *Id.*

187. See, e.g., *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982).

188. See Player, *supra* note 75, at 419. "If the factor has a bona fide relationship to employer concerns, is not premised on gender considerations, and is uniformly applied, it will be a 'factor other than sex.'" *Id.*

An illustration of how courts have interpreted FOTS is in the treatment of whether the use of previous salary to determine present salary is an FOTS because past salary tends to perpetuate historical discrimination against women. In *Kouba v. Allstate Ins. Co.*, the court concluded that the

Although the Court has recognized that FOTS was the model for the RFOA defense, it noted that the addition of the word “reasonable” to RFOA indicates a congressional concern that RFOA be more limited than FOTS.¹⁸⁹ Thus, with many courts elevating the proof required for FOTS to require a business justification for criteria that have historically discriminated against women, the case for requiring an age-correlated factor to be more justified is even stronger.

After *Hazen Paper*, a legitimate non-discriminatory reason does not have to be rationally related to the employer’s goals; however, FOTS may fill this gap. In addition, the Court created another defense that does require a rational relationship to the employer’s goals, the defense of “business justification,” as a defense to disparate impact. Because business justification is an interpretation of the business necessity defense, that defense must also be examined.

4. Business Justification and Business Necessity in Title VII Cases

Title VII prohibits not only intentional discrimination, but also discrimination that has a disproportionate impact on the protected class.¹⁹⁰ Disparate impact is generally associated with unintentional discrimination, in which the employer is using a neutral factor that has an incidental impact on the protected class. However, disparate impact can also detect intentional discrimination that is difficult to prove.¹⁹¹ In *Griggs v. Duke Power Co.*, the Court said that if the employer uses an employment crite-

employer cannot use such a factor “which causes a wage differential between male and female employees absent an acceptable business reason.” 691 F.2d at 876. In *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988), the Eleventh Circuit went further and said that relying on past salary was per se not an FOTS, except in limited circumstances. The court cited *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1988), in which the Court rejected the market force theory that allowed women to be paid less because this was the evil the Act was designed to eliminate. Similarly, in *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2002), the court rejected the “reasonableness” requirement, but said that the record must be carefully reviewed “for evidence that contradicts an employer’s claim of gender-neutrality.”

Obviously, if a factor that correlates with sex must be justified in some way to be “any other factor other than sex,” it is even more evident that “reasonable factors other than age” must be justified.

189. *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2401 (2008).

190. See *supra* text accompanying notes 74–81.

191. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Professor Lawrence argued that proof of discriminatory intent does not cure the problem of workplace discrimination, which is a by-product of societal discrimination, largely brought about by unconscious discrimination. See also David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993). Professor Oppenheimer suggests that since most discrimination is unintentional, a better theory of discrimination would be based on negligence, rather than intent. Disparate impact theory would more effectively eradicate societal discrimination, including age discrimination. See *Semantic Cover*, *supra* note 18, at 58 n.251 for further discussion of this issue.

tion that has a disparate impact on a protected class under Title VII, the employer must justify it as a business necessity.¹⁹² Before Congress enacted the 1991 Civil Rights Act, the Court had not provided an exact meaning of business necessity.¹⁹³ Generally, business necessity required the employer to prove that the criterion having the disparate impact predicted success in the job.¹⁹⁴

To prove business necessity, the EEOC Selection Guidelines require the employer to validate employment criteria by one of three psychological methods¹⁹⁵—an expensive and difficult process.¹⁹⁶ The Court has cited the guidelines with approval, emphasizing that criteria must be “predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.”¹⁹⁷

Until 1989, the lower courts agreed that employment criteria having a disparate impact had to be justified by business necessity, and that meant the criterion predicted success in the job.¹⁹⁸ In 1989, the Court decided in *Wards Cove Packing Co. v. Atonio*¹⁹⁹ that the plaintiff bore

192. 410 U.S. 424, 431 (1971). “The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.” *Id.*

193. See Mack A. Player, *Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio*, 17 FLA. U.L. REV. 1, 2 (1989).

194. See BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 112–14 (2d ed. 1983).

195. EEOC Selection Guidelines, 29 C.F.R. § 1607.5(A) (1994).

Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. . . . Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. . . . Evidence of validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated.

Id. at § 1607.5(B).

196. See SCHLEI & GROSSMAN, *supra* note 194, at 68–73.

197. *Albemarle Paper Co. v. Moody*, 433 U.S. 321, 331 n.14 (1975).

198. See Friedman, *supra* note 166, at 252.

199. 490 U.S. 642 (1989). Until that point, the courts universally held that once the plaintiff demonstrated a prima facie case by showing that an employment practice had an adverse impact, the employer had to bear the burden of proof and persuasion to show that the practice was justified by business necessity. *Id.*; see also Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1129–30 (1993). Professor Player succinctly explained the effect *Wards Cove* had on the burden of proof:

the burden of persuasion throughout the case and that the employer's burden of proving its defense was not as onerous as previously thought.²⁰⁰ According to *Wards Cove*, when justifying its actions, the employer must show that "the challenged practice serves, in a significant way, the legitimate employment goals of the employer," but it is not necessary that the practice be "essential" or "indispensable" to the business.²⁰¹ At this point, as with all disparate impact cases, if the employer met its burden of proof, the employee could still win by showing an alternative selection criterion that had less of a disparate impact.²⁰²

Shortly after *Wards Cove*, Congress passed the Civil Rights Act of 1991, which was principally directed at correcting *Wards Cove's* interpretation of the protections offered by Title VII.²⁰³ Among other things, the Act codified the disparate impact test and clarified the burden of proof by providing that, once the plaintiff has shown disparate impact, the employer must bear the burden of proof and persuasion to demonstrate that the practice is "job related to the position in question and consistent with business necessity."²⁰⁴

In *City of Jackson*, the Supreme Court ruled that because the provisions of the 1991 Civil Rights Act that overruled *Wards Cove* for Title VII did not specifically include the ADEA, *Wards Cove* continued to

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 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.

Player, *supra* note 22, at 836.

200. See Friedman, *supra* note 166, at 252.

201. 490 U.S. at 659 (citations omitted).

202. *Wards Cove* added another obstacle to the plaintiff's case. He would win at this stage only if the employer refused the suggested alternative. 490 U.S. at 661.

203. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

§ 2. Findings

The Congress finds that—

- (1) additional remedies under Federal Law are needed to deter unlawful harassment and intentional discrimination in the workplace;
- (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and
- (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

204. 42 U.S.C. § 2000e-2(k) (Supp. III 1991). The Act defines the term "demonstrate": "The term 'demonstrate' means meets the burden of production and persuasion." *Id.* § 2000e.

apply to the ADEA.²⁰⁵ The applicable defense, however, is RFOA instead of business necessity.²⁰⁶ Additionally, as opposed to *Wards Cove*, in an ADEA case the plaintiff does not have an opportunity to show a less discriminatory alternative to counter the defense.²⁰⁷ Subsequently, in *Meacham*, the Court clarified that the *Wards Cove* requirement that the burden of persuasion rests on the plaintiff at all times did not apply to the ADEA because RFOA is an affirmative defense, as to which the employer bears the burden of persuasion.²⁰⁸

Before *City of Jackson*, there was a good argument that RFOA should be equated with business necessity, and it is true that the EEOC and the Department of Labor regulations indicated that RFOA should predict success in the job, which was the generally accepted meaning of business necessity. *City of Jackson* precluded that argument.²⁰⁹ Yet it can still be argued that RFOA should be equated with *Wards Cove*'s business justification defense. The next part explores these arguments.

V. WHERE DOES RFOA FIT IN THE HIERARCHY OF EMPLOYMENT DISCRIMINATION DEFENSES?

A. Generally

Where does RFOA belong in this hierarchy of defenses to various employment discrimination claims? Obviously RFOA has to fit somewhere between BFOQ, which is the most difficult defense to prove, and legitimate non-discriminatory reason, which is the easiest defense to prove. It is not necessary for RFOA to be as strict as BFOQ. In fact, this would conflict with the statutory scheme that distinguishes between the two defenses.²¹⁰ Similarly, business necessity, which requires validation to show that a criterion predicts success in the job,²¹¹ would also seem to be a stricter standard than Congress intended. In any event, *City of Jackson* said that the defense is not business necessity.²¹² “Any other factor other than sex” sheds some light on the best solution, which is that the employer should have to justify using criteria that correlate with age.²¹³ For criteria not correlated with age, business justification provides guid-

205. *Smith v. City of Jackson*, 544 U.S. 228, 239 (2005).

206. *Id.* at 238–39.

207. *Id.* at 243.

208. *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2402 (2008).

209. See *supra* text accompanying notes 151–53 for a full explanation of the EEOC regulations in this regard.

210. See *supra* note 71.

211. See *supra* Part IV.B.4.

212. See *supra* note 105.

213. See *supra* Part IV.B.3.

ance for justifying such factors as furthering the employer's legitimate goals.²¹⁴ One point is clear: RFOA should not be as lax as legitimate non-discriminatory reason because this would allow any employer conduct that is not facially discriminatory.²¹⁵ Unfortunately, despite the fact that *City of Jackson* said that RFOA must be reasonable²¹⁶ and is thus not the same as legitimate non-discriminatory reason,²¹⁷ courts are still equating the two.²¹⁸

B. Judicial Interpretations of RFOA

1. Supreme Court

In both *Meacham* and *City of Jackson*, the Court overextended itself and made pronouncements that affected the meaning of RFOA.²¹⁹ The Court in both cases said that RFOA could disproportionately affect the protected class, and even then, the defense would not be difficult to prove.²²⁰ However, the issue of RFOA was neither briefed nor argued in either case.²²¹

In *City of Jackson*, the Court held that the plaintiffs had not identified the part of the plan that was causing the disparate impact, so they did not prove a prima facie case.²²² Nevertheless, the Court reached out and decided that, even if the plaintiffs had proven a prima facie case, RFOA should be the defense, and, without further analysis, it determined that the City of Jackson's plan was reasonable.²²³ The Court said that the City of Jackson had used the factors of seniority and position, which would always be reasonable.²²⁴ This may be true if seniority is used to grant a benefit to those with greater seniority, but surely not if it is used to impose a detriment. The city used greater seniority and higher posi-

214. See *supra* Part IV.B.4.

215. See *supra* Part IV.B.2.

216. 544 U.S. at 538–39.

217. See *supra* Part IV.B.2 and text accompanying note 178.

218. See, e.g., *Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 997 (10th Cir. 2005) (citing jury instructions that included the following: "If, however, Plaintiff persuades you . . . then you must consider Defendant's defense that its actions regarding Plaintiff's employment were based upon a reasonable factor other than age discrimination. . . . [R]emember that Defendant must only articulate a legitimate, non-discriminatory reason for its actions."); *Armstrong v. Jackson*, No. 05-0075, 2006 WL 2024975, at *6 (D.D.C. July 17, 2006); *Reese v. Potter*, No. 03-1987, 2005 WL 3274052, at *5 (D.D.C. Sept. 28, 2005); *Embrico v. U.S. Steel Corp.*, 404 F. Supp. 2d 802, 829 (E.D. Penn. 2005). In all of these cases, the courts equated RFOA with legitimate non-discriminatory reason.

219. See *supra* text accompanying notes 99, 130–31.

220. *Id.*

221. See *supra* notes 95, 130, 137, and text accompanying notes.

222. *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005).

223. *Id.* at 239.

224. *Id.* at 242–43.

tion to the detriment of those employees with more seniority and higher positions.²²⁵ Greater seniority and higher position correlate strongly with age and should never be reasonable unless justified.²²⁶

The Court also said that the city's desire to attract and retain officers was a legitimate goal,²²⁷ which is certainly true; however, at this point, the Court was confusing the goal with the method of achieving it. The Court provided no explanation for why the city's decision to use greater seniority and higher position as criteria to confer a detriment was reasonable.²²⁸ Part of the employer's burden to show reasonableness should be to show why it was necessary to use an age-correlated factor to detrimentally affect the protected class.

In *Meacham*, the Court did not accept certiorari on the issue of "[w]hether respondents' practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during a reduction in force constituted a 'reasonable factor other than age' as a matter of law."²²⁹ Nevertheless, despite the fact that the Court said it was expressing no views on the issue, it gratuitously noted that putting the burden of proving RFOA on the defendant will matter only in the cases "where the reasonableness of the non-age factor is obscure for some reason"²³⁰

Thus, *Meacham* and *City of Jackson* both said that RFOA could disadvantage the protected class and made pronouncements that affect

225. *Id.*

226. *See supra* Part IV.A.

227. 544 U.S. at 242–43.

228. This is contrary to the Court's view in other cases, in which it has protected seniority to the detriment of other federal rights. In *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the Court held that accommodating the plaintiff's disability by overriding the seniority system was not a reasonable accommodation in the usual case under the Americans with Disabilities Act. "[W]hether collectively bargained or unilaterally imposed by the employer, seniority systems provide 'important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment.'" *Id.* at 404–05. "The lower courts have unanimously found that collectively bargained seniority trumps the need for reasonable accommodation." *Id.* at 403. Similarly, in *TWA v. Hardison*, 432 U.S. 63 (1977), the Court said that "[c]ollective bargaining aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts." *Id.* at 84. Furthermore, in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), the Court upheld the exemption to Title VII for bona fide seniority systems:

[A]lthough a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

Id. at 352–53.

229. *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2400 n.8 (2008).

230. *Id.* at 2406.

the meaning of RFOA.²³¹ In *City of Jackson*, the Court said that the plan was reasonable with little analysis,²³² and in *Meacham*, the Court commented on when RFOA would make a difference, also without analysis.²³³ Again, in neither case had the issue of RFOA been briefed or argued.²³⁴ The lower courts have taken these hints and found proof of RFOA to be anything but onerous.

2. Lower Courts After *City of Jackson*

Following the decision in *City of Jackson*, lower courts continue to confuse legitimate non-discriminatory reasons with RFOA's reasonableness standard by ignoring alternative measures that contribute to the overall reasonableness of the action in question. The fact that both *Meacham* and *City of Jackson* said that the plaintiff may no longer show less discriminatory alternatives has added to the lower courts' failure to scrutinize justifications interposed by employers as reasonable. The lower court's opinion in the *Meacham* case is instructive as to this trend.²³⁵

There were two circuit court opinions appealed to the Supreme Court in *Meacham*.²³⁶ In the first opinion, the lower court applied the *Wards Cove* order of proof.²³⁷ To reiterate, *Wards Cove* requires the plaintiff to prove a prima facie case, to which the employer must respond with a business justification; the plaintiff can win only by showing a less discriminatory alternative.²³⁸ In the original *Meacham* opinion, the court decided that the plaintiffs had proven a prima facie case by showing that the employer's subjective assessments of "criticality" and "flexibility" caused a disparate impact,²³⁹ but that the employer articulated a business justification of workforce reduction. The plaintiffs prevailed only because they were allowed to present proof of a less discriminatory alternative—that the same result could have been achieved with more objective evaluations.²⁴⁰

The defendants then appealed, and the Court remanded for reconsideration in light of *City of Jackson*.²⁴¹ The court of appeals remanded

231. *Id.* at 2403, 2406; *City of Jackson*, 544 U.S. at 241.

232. *City of Jackson*, 544 U.S. at 242–43.

233. *Meacham*, 128 S. Ct. at 2406–07.

234. *See supra* notes 95, 130, 137.

235. *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134 (2d Cir. 2006) (on remand from the Supreme Court for reconsideration in light of *Smith v. City of Jackson*) [hereinafter *Meacham II*].

236. *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56 (2d Cir. 2004) [hereinafter *Meacham I*]; *Meacham II*, 461 F.3d.

237. *Meacham I*, 381 F.3d at 74.

238. *See supra* text accompanying notes 199–202.

239. *Meacham I*, 381 F.3d at 74.

240. *Meacham I*, 381 F.3d at 74–75.

241. *Meacham II*, 461 F.3d at 137.

the case to the district court with instructions to enter judgment as a matter of law for the defendant.²⁴² On remand, the lower court held that because *City of Jackson* said that the order of proof ended with the defendant's articulation, the RIF plan was reasonable. In other words, the plaintiffs lost on remand because they were no longer allowed to show a less discriminatory alternative.²⁴³ The defendant's facially legitimate business justification for reducing its workforce, while at the same time retaining employees who had skills that were critical to the operation, was sufficient to absolve it of liability. The fact that the decisions were made almost totally subjectively using age-correlated factors did not figure into the court's determination that the justification was reasonable.²⁴⁴

Although the Supreme Court reversed and remanded the decision because the court of appeals had put the burden of persuasion on the plaintiffs, the Court did agree that the plaintiffs could no longer show less discriminatory alternatives.²⁴⁵ The Court also opined that putting the burden of persuasion on the defendant might not make any difference in the lower court's decision.²⁴⁶

It surely cannot be the case that a plaintiff could win under the less strenuous standard of proof in *Wards Cove*,²⁴⁷ under which the defendant has no burden of persuasion, and yet lose when the burden of persuasion is placed on the defendant to show that its plan was reasonable. In situations where the impact of using age-related factors will predictably fall on older employees, the employer is at least reckless with regard to whether he is discriminating against the protected class. In such situations, part of the showing of reasonableness must be the lack of suitable alternatives.

Instead of showing reasonableness by way of a lack of suitable alternatives, however, the lower courts are deciding that age-correlated factors standing alone are reasonable factors other than age. By deciding cases in this way, the courts are creating case law that is counter to the protections afforded by the ADEA.

For example, in *Townsend v. Weyerhaeuser Co.*, the court opined that "[c]ertainly, an employer that decides to terminate an employee to

242. *Id.*

243. *Id.*

244. *See id.*

245. *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2405 n.14 (2008).

246. *Id.* at 2406. The court of appeals remanded the case to the district court, *Meacham v. Knolls Atomic Power Laboratory*, 302 Fed. Appx. 748 (2d. Cir. 2009), and the district court held that the defendants had waived the defense of RFOA and reinstated the judgment for the plaintiffs. *Meacham v. Knolls Atomic Power Laboratory*, No. 97-CV-12, 2009 WL 1212797 (N.D.N.Y. May 1, 2009).

247. *See supra* text accompanying notes 199–202.

relieve itself of the burden of that employee's high salary or health care costs has based its decision on 'reasonable factors' other than the employee's age."²⁴⁸ This is exactly what the ADEA was enacted to prevent—discrimination based on factors so closely correlated with age that the factors disguise actual age discrimination.²⁴⁹

Similarly, in *Silver v. Leavitt*,²⁵⁰ the court said that the defendant had valid concerns regarding its strained budget, the cost of salaries and benefits, attracting new workers, and losing a large number of employees. The court said that it was reasonable for the defendant to recruit candidates at the lowest level possible in order to accomplish its goals. "By recruiting workers who cost less to employ and *are less likely to retire in the near future*, defendant was arguably making the most of the money spent on the selection, hiring, and training of employees."²⁵¹ This is an obvious example of court-approved age discrimination, and a decision of this sort directly contravenes the intent of the ADEA.

Even more explicitly contradicting the purpose of the ADEA, the court in *Rollins v. Clear Creek Independent School District* flatly said that retirement status was a reasonable factor other than age.²⁵² In *Aldridge v. City of Memphis*, another case producing an astounding interpretation of disparate impact under the ADEA, the city eliminated the position of captain of the police force to cut costs.²⁵³ The court said that because promotion to captain was automatic after thirty years of service, this assured that all captains were in the protected age group. The court therefore reasoned that because this statistical disparity was expected,

248. *Townsend v. Weyerhaeuser Co.*, No. 04-563, 2005 WL 1389197, at *14 (W.D. Wis. June 13, 2005).

249. *See supra* Part IV.A.

250. *Silver v. Leavitt*, No. 05-0968, 2006 WL 626928, at *14 (D.D.C. Mar. 13, 2006).

251. *Id.* (emphasis added). In *Turner v. Jewel Food Stores, Inc.*, No. 05-5061, 2005 WL 3487788 (N.D. Ill. 2005), the court denied the defendant's motion to dismiss for failure to state a claim, citing *Smith*, but it did not comment on the employer's statement that its practices, such as greater seniority, which allegedly had a disparate impact, were related to RFOAs. *Id.* at *3.

252. *Rollins v. Clear Creek Indep. Sch. Dist.*, No. 06-081, 2006 WL 3302538, at *5 (S.D. Tex. Nov. 13, 2006). A state statute required the school district to give hiring preference to teachers who had not previously retired. *Id.* In order to comply with the statute, the school district developed a policy: teachers who had retired and then been rehired were required to re-apply, rather than having their contracts automatically renewed. *Id.* at *1. Although 100% of the contracts of the people in the protected class were not renewed, the court said the policy was not discriminatory under either disparate treatment or disparate impact theories. *Id.* at *3, *5. With regard to disparate treatment, the employer had acted based on retirement, which was a legitimate non-discriminatory reason because it was a trait that was analytically distinct from age. *Id.* at *3. In the disparate impact portion of the opinion, the court said that the employer's desire to give preference to non-retired teachers who were not drawing a pension was an RFOA. *Id.* at *5. The court granted summary judgment in this obvious case of age discrimination.

253. *Aldridge v. City of Memphis*, No. 05-2966, 2008 WL 2999557 (W.D. Tenn. July 31, 2008).

there could be no inference of discrimination.²⁵⁴ In other words, the method of saving money caused a completely predictable 100% impact on the protected class but was not considered sufficient evidence of disparate impact.²⁵⁵

What is this but allowing blatant age discrimination to be an RFOA?²⁵⁶ Allocating the burden of persuasion is irrelevant if courts are going to allow retirement, seniority, and higher healthcare costs to be RFOAs.²⁵⁷ So far, the courts (and *the* Court) have not distinguished between those factors that correlate obviously with age and those that are just incidentally shown to have a disparate impact on older employees. The latter should be easier to justify; the former should be more difficult. The most important point here is that if the employer chooses a factor that obviously correlates with age, RFOA should require proof of justification. It should be clear that if the employer is reckless about using a factor that screens out older employees, he is very close to intentionally discriminating, and such a factor should not be an RFOA without further justification.

VI. PROPOSED SOLUTION TO THE MEANING OF RFOA

RFOA should not require validation in the usual case, as would business necessity. However, when the criterion has a predictably disparate impact on the protected class, the employer should have to show more than that the criterion served his legitimate goal. If the employer is acting with a sufficiently culpable state of mind with regard to whether the criterion treats the protected class less favorably, he should not be able to interpose the criterion itself as a reasonable method of achieving

254. *Id.* at *7.

255. The court also accepted the defendant's reason that it "had no need for a management level rank achieved solely by length of service," that it "was not operationally necessary," and that it resulted in a substantial savings. *Id.* at *8. Quoting *City of Jackson v. Smith*, the court noted that there may have been other ways for the city to accomplish its goals, but it had to show only that this one was reasonable. *Id.*

256. Policies that are facially discriminatory have to be defended by proof that age is a bona fide occupational qualification. *See supra* Part IV.B.1; *but see* *Kentucky Retirement Sys. v. EEOC*, 128 S. Ct. 2361 (2008). In a blatant misinterpretation of the ADEA, the Court decided that a facially discriminatory disability policy was not discrimination because of age. *Kentucky Retirement Sys.*, 128 S. Ct. at 2364. The plan provided less in benefits for people who became disabled after they became eligible for retirement—at age fifty-five or after twenty years of employment—than for those who became disabled at a younger age. *Id.* at 2365. Although this was facially discriminatory, the Court said that there was no intent to discriminate based on age. As the dissent said: "The Court's apparent rationale is that, even when it is evident that a benefits plan discriminates on its face on the basis of age, an ADEA plaintiff still must provide additional evidence that the employer acted with an 'underlying motive' to treat older workers less favorably than younger workers." *Id.* at 2373 (Kennedy, J., dissenting) (citation omitted).

257. High position also generally correlates with age. *See, e.g., Aldridge*, 2008 WL 2999557.

his goals without further justification. In this way, the purpose of the ADEA will be fulfilled because improper factors will not be used to substantiate the RFOA defense.

City of Jackson is a perfect illustration. To justify its pay plan, the city articulated the legitimate goal of recruiting and retaining police officers.²⁵⁸ What the Court failed to appreciate was that to achieve that goal, the city was using the obviously age-correlated factors of greater seniority and higher position.²⁵⁹ In this situation, the city was at least reckless with regard to whether the criteria would screen out older employees.

In such a case of reckless disregard, the employer should have to justify the criteria used to achieve the goal, not just the goal itself. In other words, any employer using criteria that obviously correlate with age should be considered reckless with regard to whether he is discriminating based on age, in which case he should have a heavier burden to prove RFOA. The employer should have to prove not only that the goal was legitimate, but also that a less discriminatory alternative was not feasible.

Surely an employer acting recklessly with regard to whether he is discriminating could not also be declared reasonable without more, as the Court did in *City of Jackson*.²⁶⁰ Under the ADEA, if the employer is reckless with regard to whether he is violating the Act, he is guilty of a willful violation and must pay liquidated damages.²⁶¹ It is counterintuitive that an employer who would otherwise be guilty of a willful violation would be exonerated of liability because the criterion he recklessly used was an RFOA.²⁶²

There may be other situations in which the employer may have acted recklessly without using obviously age-correlated factors. For example, in *Meacham*, the employer also had a legitimate goal of cutting

258. *Smith v. City of Jackson*, 544 U.S. 228, 242–43 (2005).

259. *Id.*

260. Recklessness is already an important consideration in ADEA cases. If the employer is guilty of a reckless violation of the ADEA, he has committed a willful violation and has to pay liquidated damages. 29 U.S.C. § 626(b)–(c) (1988). See *Standard*, *supra* note 182, at 41. For a discussion of the meaning of reckless indifference for the purpose of awarding punitive damages under Title VII, see *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535–37 (1999) (equating the standard for punitive damages under Title VII with the standard for liquidated damages under the ADEA).

261. See, e.g., *Hazen Paper Co. v. Biggins*, 506 U.S. 604, 616–17 (1993).

262. The inquiry is somewhat different in that recklessness for willful violations looks at the employer's state of mind regarding violating the Act. See *Semantic Cover*, *supra* note 18, at 47–49. With regard to liability, the employer's state of mind relates to his state of mind regarding treating people in the protected class differently. *Id.* The employer may believe that he has a defense to the discrimination, for example, so that he may be intending to treat people in the protected class differently, but he thinks that his reason is a BFOQ. For the history of the standard for imposing liquidated damages under the ADEA, see *id.* at 86–91.

costs. This goal was accomplished using “criticality” and “flexibility” criteria,²⁶³ which were not as obviously age-correlated as those used in *City of Jackson*. The method of achieving the goal was to use subjective evaluations, however, and the criteria were shown to have a disparate impact on older employees.²⁶⁴ Such criteria could predictably be used to stereotype older employees as less flexible and less critical to the organization.²⁶⁵ In this case, the employer should have to show that subjectively evaluating the candidates for RIF was a reasonable method of achieving the goal, which should require a showing that less discriminatory alternatives were not available.

If the employer has a legitimate goal and was not reckless in the methods he used to accomplish his goal—in other words, the criteria he used would not predictably affect the protected class negatively—then RFOA should be easier to prove. Proof akin to business justification would be sufficient; the employer would have to show only that the selection criterion was reasonably related to his legitimate goals.²⁶⁶ For example, in *Walker v. City of Cabot*,²⁶⁷ the plaintiff complained that the employer’s reduction in force disproportionately impacted the protected class.²⁶⁸ The employer’s justification was the need to eliminate redundant positions to save money, which the court said was reasonable. In the plaintiff’s case, the method of choosing him for the RIF involved re-

263. *Meacham II*, 461 F.3d 134, 139 (2d Cir. 2006).

264. *Id.*; see also Kaminshine, *supra* note 44, at n.127 (citing to discussions of subjective evaluations).

265. See *supra* text accompanying notes 53–55. Stereotyping and discrimination often appear to be unconscious phenomena:

In fact, the Wirtz Report sounded a warning against the allowance of such post-action rationalization when it noted that “discriminatory practices [against older workers] were often defended on grounds apparently different from their actual explanation.” *Smith v. City of Jackson*, 315 F.3d 183, 194 n.13 (5th Cir. 2003) (quoting the Wirtz Report at 7). Such an exercise in legal rationalization may serve to perpetuate unconscious discrimination. As the American Psychological Association noted in an amicus curiae brief to the Supreme Court, “research indicates that stereotyping is part of the normal psychological process of categorization that, under pertinent conditions, can lead to inaccurate generalizations about individuals often transformed into discriminatory behavior.” Brief for American Psychological Association as Amicus Curiae Supporting Respondent at 4, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167).

Bentley, *supra* note 63, at 370.

266. See *Wards Cove Packing Co. Inc. v. Atonio*, 490 U.S. 642, 659 (1989).

267. No. 4:08-00139, 2008 WL 4816617 (E.D. Ark. Nov. 4, 2008) (granting summary judgment for defendant). In this case, the plaintiff alleged that the RIF had a disparate impact based on age because the majority of employees whose jobs were eliminated were in the protected group. *Id.* at *2. Rejecting this allegation, the court said that the plaintiff had not identified the particular practice causing the disparate impact. *Id.* Nevertheless, the court decided that even if the plaintiff had proved his case of disparate impact, the defendant’s justification was reasonable. *Id.* at *4. The court thus held that the defendant’s motion for summary judgment was properly granted. *Id.* at *3.

268. *Id.* at *2.

turning his duties to the position from which they had been taken to create his job.²⁶⁹ In such a case, neither the goal, eliminating redundant positions, nor the method of achieving the goal, reassigning job duties, appears to be correlated with age. Thus, the employer has shown that his goal was legitimate and his method of accomplishing it was reasonable. In other words, the selection criterion was rationally related to the employer's legitimate goal.

In sum, the solution to the meaning of RFOA depends on identifying those situations in which the defendant recklessly used a factor that is likely to discriminate. If so, he should be held to a higher standard to prove RFOA. Proof of the accidental use of a factor that has a disparate impact should require less onerous proof, similar to a business justification.

When will the employer be considered reckless? What does this state of mind mean in this context? To put the states of mind required for employment discrimination in context, disparate treatment discrimination requires intentional discrimination,²⁷⁰ while disparate impact discrimination does not require proof of intentional discrimination.²⁷¹ Disparate impact requires only statistical proof that an employment criterion adversely affects the protected class.²⁷²

The meaning of intent to discriminate under the anti-discrimination acts is akin to the purposeful or intentional state of mind in criminal law.²⁷³ The Court has recognized that reference to criminal states of mind is appropriate to describe recklessness in the discrimination context.²⁷⁴ In addition, the criminal states of mind cover all the possibilities

269. *Id.* at *4.

270. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

271. *See, e.g., Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 988 (1988).

272. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *see also* Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799 (1985) (discussing the difference between the two theories).

273. *See Standard, supra* note 182 at 534–35. Will the Court say that this is confusing disparate impact with disparate treatment, as it has in other cases? *See Raytheon v. Hernandez*, 540 U.S. 44, 52 (2003). This is simply not the case. The Court has made it clear that knowledge is insufficient to prove intentional discrimination. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). In addition, the Court has said that the line between disparate impact and disparate treatment is not always distinct. For example, in *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), the Court was presented with the question of whether subjective decision making was subject to the disparate impact theory or could be proven only under the disparate treatment theory. *Id.* at 977–78. The Court decided that the disparate impact theory would be nullified if it did not apply to subjective decision making. Whether the criteria are objective or subjective, a facially neutral policy may have effects that are not distinguishable from intentionally discriminatory practices. “Even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain.” *Id.* at 989–91.

274. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 536 (1999) (equating the standard for punitive damages under Title VII with the standard for liquidated damages under the ADEA and

in this context and are capable of accurate definition.²⁷⁵ Thus, if the defendant intends to do the act that brings about the statutorily proscribed result—for example, if he intends to treat people of another race differently because of their race—then the defendant has acted with specific intent comparable to purposefulness in criminal law.²⁷⁶ The Supreme Court has said that knowing that the criterion discriminates against persons in a protected class is insufficient to prove intentional discrimination.²⁷⁷ The employer must be using the criterion with the intent to cause the discrimination.²⁷⁸ In other words, the employer must act with the purpose of discriminating. If he acts only knowingly, which is doing the act knowing that the result is practically certain to occur, he is not guilty of intentional discrimination.²⁷⁹ In a disparate impact case, an employer imposing a criterion that he knows discriminates should not escape liabil-

cited a criminal standard). The Court looked at the standard for punitive damages developed under 42 U.S.C. § 1983, which requires that the defendant's conduct be shown to "be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Id.* at 537. The minimum standard under § 1983 is recklessness, a "subjective consciousness of a risk of injury or illegality and a 'criminal indifference to civil obligations.'" *Id.* (emphasis added). The Court explained that criminal law employs this subjective form of recklessness and requires that the defendant "disregards a risk of harm of which he is aware." *Id.* Justice Stevens also invoked a criminal standard in his concurrence and dissent:

The ADEA provides for an award of liquidated damages—damages that are "punitive in nature"—when the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."

. . . In *Thurston*, we interpreted the ADEA's standard the same way and explained that the relevant mental distinction between intentional discrimination and "reckless disregard" for federally protected rights is essentially the same as the well-known difference between a "knowing" and a "willful" violation of a criminal law. [W]hile a criminal defendant, like an employer, need not have knowledge of the law to act "knowingly" or intentionally, he must know that his acts violate the law or must "careless[ly] disregard whether or not one has the right so to act" in order to act "willfully." We interpreted the word "willfully" the same way in the civil context. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L.Ed.2d 115 (1988) (holding that the "plain language of the Fair Labor Standards Act's "willful" liquidated damages standard requires that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute," without regard to the outrageousness of the conduct at issue).

527 U.S. at 548–49 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

275. See *Standard*, *supra* note 182, at 535.

276. MODEL PENAL CODE § 2.02(2)(a); see also *Standard*, *supra* note 182, at 534–35.

277. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

278. *Id.* In *Feeney*, the Court said, "[D]iscriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* (citation omitted).

279. MODEL PENAL CODE § 2.02(2)(b).

ity by simply interposing that criterion as an RFOA, however.²⁸⁰ *City of Jackson* is a good example of an employer acting knowingly. The City must have known that using reverse seniority would impact the protected class.²⁸¹

Recklessness is the next less serious state of mind after knowledge. Recklessness requires a conscious disregard of a substantial risk that the statutorily proscribed result will occur.²⁸² *Meacham* is an example of the employer acting recklessly. Although the criteria used there (flexibility and criticality) are not as obviously age-related as those used in *City of Jackson*, the employer was reckless in combining those criteria with subjective evaluations. Although the employer may not be guilty of intentional discrimination in either case, recklessness should suffice to elevate the burden of proving RFOA in a disparate impact case.²⁸³

The question of whether the defendant has been reckless should be a jury question. Again, the state of mind of recklessness is not unknown under the ADEA. In order to find that the defendant is not guilty of a willful violation of the ADEA, which would foreclose the imposition of liquidated damages, the jury must find that the employer “incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision”²⁸⁴

The point of this article is that if the employer is acting with a sufficiently culpable state of mind with regard to whether the criterion treats the protected class less favorably, he should not be able to interpose the criterion itself as a reasonable method of achieving his goals without further justification. Thus, if the employer is reckless with regard to whether the criterion discriminates, he should have to justify it by evidence that there were no reasonable alternatives. If he has a less culpable state of

280. Knowledge is a more serious state of mind than recklessness. Compare MODEL PENAL CODE § 2.02(2)(b) (defining knowledge), with MODEL PENAL CODE § 2.02(2)(c) (defining recklessness).

281. “[R]everse seniority is almost inherently tied to the age of the employee, [and] such a reason necessarily is based on age and should lack legitimacy.” Mack A. Player, *Proof of Disparate Treatment Under the Age Discrimination In Employment Act: Variations on A Title VII Theme*, 17 GA. L. REV. 621, 656 (1983).

282. MODEL PENAL CODE § 2.02(2)(c).

283. It could be argued that even if the employer is only grossly or criminally negligent, he should have to meet the higher standard to prove RFOA. Under the Model Penal Code, recklessness requires that the employer be subjectively aware of risk; criminal negligence requires only that a reasonable person would be aware of the risk. Compare MODEL PENAL CODE § 2.02(2)(c), with MODEL PENAL CODE § 2.02(2)(d).

284. *Hazen Paper Co. v. Biggins*, 506 U.S. 604, 616–17 (1993).

mind, interposing a defense should not require as much proof, as long as the practice serves his legitimate employment goals.²⁸⁵

The Court has developed a penchant for declaring employer practices reasonable without analysis.²⁸⁶ *City of Jackson* is emblematic of this problem. There, the Court said that the use of seniority would always be reasonable without stopping to inquire how the employer used seniority. The employer in fact used reverse seniority, which should never be considered reasonable without some justification. This is especially troubling because in several cases, the Court has referred to the traditional use of seniority—to provide more benefits for greater seniority—as one of the most important rights in employment, and it has protected seniority to the disadvantage of other federally protected employment rights.²⁸⁷ The Court's proclivity for declaring employer practices reasonable without analysis must not continue. Otherwise, the ADEA is in serious jeopardy, as are other anti-discrimination acts that afford similar protections.

VII. CONCLUSION

The Court has held that the ADEA was designed to combat “inaccurate and stigmatizing stereotypes.”²⁸⁸ If obviously age-correlated factors are considered reasonable, older employees can easily be discriminated against based on these stereotypes. The courts that interpreted the ADEA shortly after its enactment almost uniformly recognized that using

285. ADEA cases are tried before a jury. See Friedman, *supra* note 166, at 868. Decisions regarding the defendant's state of mind are virtually always entrusted to juries in serious criminal cases. U.S. CONST. amend. VI.

286. In a case under Title VII, which requires reasonable accommodation without undue hardship in religion cases, the Court said that the accommodation the employer offered, an unpaid leave, was reasonable and that the employer need not show that the accommodation requested by the employee was an undue hardship. *Ansonia v. Philbrook*, 479 U.S. 60, 70 (1986). Similarly, in *TWA v. Hardison*, 432 U.S. 63, 84–85 (1977), the Court decided that requiring the employer to bear more than a de minimis cost, violate the seniority system, burden other employees, or leave the employer shorthanded would all be undue hardships and thus not reasonable accommodations. *Id.* at 84. Under the Americans with Disabilities Act, which also requires reasonable accommodation without undue hardship, in *US Airways, Inc. v. Barnett*, 535 U.S. 391, 404–05 (2002), the Court said that overriding the seniority system to accommodate the plaintiff's disability was not reasonable in the usual case. The Court cited the standard for reasonable accommodation under the Title VII case of *TWA v. Hardison*, despite the fact that Congress had clearly said it was intending to set a more stringent standard for the ADA. *Id.* at 422 (Scalia, J., dissenting). Although the Court's misinterpretation of congressional intent has recently required congressional action relating to the ADA, the preamble to that Act did not refer to the *Barnett* case, and Congress was nevertheless clearly admonishing the Court to pay attention to its prior intention of protecting disabled people. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). To avoid congressional action regarding the ADEA, the Court should be more careful in following congressional intent in interpreting RFOA.

287. See discussion, *supra* note 228.

288. *Hazen Paper*, 507 U.S. at 610–611.

such criteria indicated an intention to discriminate against older employees.²⁸⁹ These courts were stating an obvious truth that the courts today are failing to see: If an employer chooses a criterion that so obviously discriminates against older people, he may very well be acting based on the stereotypes that the ADEA was designed to eradicate, that older people are less competent, less trainable, resistant to change, less promotable, and expected to perform less ably.²⁹⁰ Especially in view of the fact that these myths have now been thoroughly debunked by the studies cited earlier,²⁹¹ age-correlated criteria should be highly scrutinized, not lightly accepted as reasonable. Even the Court in *Hazen Paper*, the case that started the trend to restrictively interpret the ADEA, said:

We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, but in the sense that the employer may suppose a correlation between the two factors and act accordingly.²⁹²

Nevertheless, many courts have subsequently failed to accord any significance to age-correlated criteria.

Despite the Court's recent decisions that have applied the disparate impact theory to the ADEA and put the burden of persuasion on the employer to prove the RFOA defense, older employees are still in danger of losing a large measure of protection under the ADEA. Unless the defendant is required to justify the use of factors that correlate so strongly with age that he can only be considered reckless, older employees may still be terminated because they have too much seniority, too much experience, are close to retirement, and make too much money. These are the exact employer actions that the ADEA was enacted to prevent.

The quote that introduced this article, to the effect that ageism is a pernicious problem in the workplace, ends as follows, and I want to end on a hopeful note, as well:

Nevertheless, older Americans in great numbers continue to work. And as they continue to succeed in their jobs, we become increasingly hopeful for the future. As greater numbers of older Americans continue to break the negative stereotypes toward older individuals that exist in our society, we feel confident that societal per-

289. See *supra* cases cited in note 154.

290. See *Cuddy & Fiske*, *supra* note 48, at 18.

291. See *supra* text accompanying notes 47–57.

292. *Hazen Paper*, 507 U.S. at 613 (citation omitted).

ceptions will gradually shift, as well. After all, older Americans are not just reminders of our past; they are also our future.²⁹³

293. See McCann & Giles, *supra* note 1, at 188.