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Michael J. Myers
University of South Dakota School of Law

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WAL-MART, SHOPKO CART GATHERING: A CASE FOR SMITH V. CITY OF JACKSON ADEA DISPARATE IMPACT?

Michael J. Myers*

INTRODUCTION

In the fall of 2005, the media gave broad coverage to a leaked memorandum intended for Wal-Mart's board of directors that contained recommendations directed at reducing its healthcare costs by attracting a younger workforce and promoting the physical well-being of its employees by designing "all jobs to include some physical activity (e.g., all cashiers do some cart gathering)."¹ The Memorandum, prepared by McKinsey & Company and authored by Wal-Mart vice president Susan Chambers, caused the Wall Street Journal to ask: "Can Employers Alter Hiring Policies to Cut Health Care Costs?"²

About the same time, I received a call to my law school-based senior legal helpline from a sixty-three-year-old woman with health problems who contended she was constructively

* Michael J. Myers is an Associate Professor with joint appointment to the University of South Dakota School of Law where he teaches healthcare law and policy, and elder law, and the School of Business where he teaches health law, health economics, and health finance. Prior to joining the University, he served as CEO of Mayo-St. Mary's Hospital in Rochester, Minnesota, and Fairview Riverside Medical Center in Minneapolis.

1. Memorandum from Susan Chambers to the Wal-Mart Stores, Inc. Board of Directors, *Reviewing and Revising Wal-Mart's Benefits Strategy*, at 14, available at <http://www.nytimes.com/packages/pdf/business/26walmart.pdf> (last visited Nov. 8, 2006) [hereinafter Wal-Mart Memorandum].

2. Ann Zimmerman et al., *Can Employers Alter Hiring Policies to Cut Health Costs?*, WALL ST. J. (E. ed.), Oct. 27, 2005, at B1.

discharged by an Iowa ShopKo store that had implemented the practice contemplated in the Wal-Mart memorandum.³ Her customer service position had been subjected to a storewide policy requiring her to gather carts from the parking lot, drive a forklift, and transfer appliances into customer vehicles. I referred her to a law firm recommending that the case be used to test whether the physical activity requirement for all employees might form the basis for a successful Age Discrimination in Employment Act of 1967 (ADEA)⁴ challenge based upon the disparate impact doctrine. This recommendation was made in light of the Supreme Court's 2005 ruling in *Smith v. City of Jackson*⁵ that the ADEA authorizes recovery on a disparate impact theory, resolving a long-standing split among the circuits.⁶ The sixty-three-year-old woman is part of a pending class action lawsuit against ShopKo.⁷ This article uses the Memorandum and the *ShopKo Class Action* to argue that an across-the-board physical activity job design would fail under the "business necessity" exception to disparate impact under the ADEA.

THE LEAKED MEMORANDUM

The Memorandum is directed at a legitimate cost-reduction objective: controlling healthcare costs in a globally-competitive market. The Memorandum states that "[Wal-Mart management] evaluated Wal-Mart's current benefits offering through three lenses – cost trends, [employee] satisfaction, and public reputation."⁸ The Memorandum is divided into three sections:

3. The author manages the nation's only law school-based senior legal helpline (The University of South Dakota School of Law Senior Legal Helpline, providing pro-bono legal information, advice and assistance to persons fifty-five and older).

4. Pub. L. No. 90-202, 29 U.S.C.A. §§ 621-34 (Westlaw current through Aug. 17, 2006).

5. 544 U.S. 228 (2005).

6. *Id.* at 232.

7. *Miille v. ShopKo Stores, Inc.*, No. LACV133694 (Iowa D. Ct. Woodbury County filed Apr. 20, 2006) [hereinafter *ShopKo Class Action*].

8. Wal-Mart Memorandum, *supra* note 1, at 1.

(1) “a detailed analysis of the three most significant benefits-related challenges”;⁹ (2) a detailed discussion of the “nine limited-risk initiatives and five bold steps” being recommended;¹⁰ and (3) a summary of the “combined impact of the limited-risk initiatives and the bold steps.”¹¹ The Memorandum stated that:

Wal-Mart’s healthcare benefit is one of the most pressing reputation issues we face because well-funded, well-organized critics, as well as state government officials, are carefully scrutinizing Wal-Mart’s offering. Moreover, our offering is vulnerable to at least some of their criticisms, especially with regard to the affordability of coverage and Associates’ reliance on Medicaid.¹²

The Memorandum discusses in detail what Chambers identifies as nine “limited-risk initiatives,” projecting to reduce 2011 benefits by sixteen percent, and five “bold steps,” which she estimates would yield an additional nine percent reduction.¹³ Total benefits costs were “modeled to be at or below 1.9 percent of sales . . . in 2011.”¹⁴ Cost reduction is the linchpin of this analysis. As discussed below,¹⁵ federal courts have fashioned an ADEA “cost-defense” whereby employers are permitted to remove older employees, not because they are old, but because, generally, older employees have longer tenure and are therefore more expensive.¹⁶ In this case, Wal-Mart targets the cost of providing benefits, particularly the cost of providing healthcare.¹⁷ Globally, U.S. employers are competitively disadvantaged by the burden of providing employer-based health benefits in contrast to virtually all other industrialized nations, which provide universal coverage through their tax

9. *Id.*

10. *Id.* at 2.

11. *Id.* at 3.

12. *Id.* at 2.

13. *Id.* at 17.

14. *Id.*

15. See *infra* notes 37-58 and accompanying text.

16. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993).

17. See Wal-Mart Memorandum, *supra* note 1.

bases. Further, U.S. healthcare costs are two to three times greater than in most industrialized nations.¹⁸ Chambers used cost trends from 2002 through 2005 to sound the alarm.¹⁹ During that period, Wal-Mart's benefits costs grew faster than sales, from 1.5 to 1.9 percent of sales, from \$2.8 billion to \$4.2 billion, a rate of fifteen percent per year.²⁰ Notably, health benefits grew at nineteen percent per year during the same period.²¹ The utilization of medical services grew by ten percent per year, identified as "the primary driver of the rapid growth in [Wal-Mart's] healthcare costs."²² Chambers attributes more than half of this increase to what she characterizes as "three Wal-Mart-specific workforce factors (distinct from national trends):" (1) an aging workforce; (2) workers "sicker than the national population, particularly with obesity-related diseases"; and (3) a segment of the workforce that "consumes healthcare inefficiently, in a pattern similar to a Medicaid population."²³ While the cost of healthcare has been burdensome for the company, ironically the cost for its employees has been even more burdensome. Wal-Mart employees "spend 8 percent of their income on healthcare (premiums plus deductibles plus out-of-pocket expenses) for themselves and their families, nearly twice the national average."²⁴

THE OFFENDING "BOLD STEP"

The five "bold steps" proposed by Chambers were: (1) "[m]ove all [employees] to 'progressively designed' consumer-driven

18. JAMES W. HENDERSON, *HEALTH ECONOMICS & POLICY* 386 tbl. 16.1 (3d ed. 2005) (reporting per diem healthcare expenditures for Japan at \$1,984; Germany, \$2,808; France, \$2,561; Canada, \$2,792, and the United States, at \$4,887).

19. Wal-Mart Memorandum, *supra* note 1, at 4.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 4-5. "Our population tends to over utilize [sic] emergency room and hospital services and underutilize prescriptions and doctor visits. This pattern is most evident among our low-income Associates, and one hypothesis is that this behavior may result from prior experience with Medicaid programs." *Id.*

24. *Id.* at 7.

health plans to help control cost trends”;²⁵ (2) reduce the company’s contribution to its 401(k) program from approximately four percent to approximately three percent of wages;²⁶ (3) “[r]edesign benefits and other aspects of the [employee] experience, such as job design, to attract a healthier, more productive workforce”;²⁷ (4) “[m]ake a series of strategic investments in [the] healthcare offering so it can better withstand external scrutiny”;²⁸ and (5) improve communication of benefits and “work to shape the outcomes of state and national healthcare reform efforts.”²⁹ It is bold step number three that captures the image of my sixty-three-year-old helpline caller, suffering from deep-vein thrombosis of the legs, pushing carts across an ice-packed lot on a December day in Iowa. The offending conduct is inherent in the ShopKo practice and in the Memorandum recommendation that Wal-Mart “[d]esign all jobs to include some physical activity (e.g., all cashiers do some cart gathering).”³⁰ The recommendation was made in the belief that “[g]iven the significant savings from even a small improvement in the health of [the employee] base, Wal-Mart should seek to attract a healthier workforce.”³¹ This language was the object of unflattering headlines in the media; for example, “Wal-Mart Memo: Unhealthy Need Not Apply,”³² “Wal-Mart Memo Lists Ways to Cut Benefits: One Idea Would Be to Discourage Hiring Unhealthy People,”³³ and “Fat? Over 40? Don’t Bother Applying for a Wal-Mart Job.”³⁴ Andrew Stern, president of the Service

25. *Id.* at 11.

26. *Id.* at 13.

27. *Id.* at 14.

28. *Id.*

29. *Id.* at 15.

30. *Id.* at 14.

31. *Id.*

32. *Wal-Mart Memo: Unhealthy Need Not Apply*, CNNMONEY.COM, Oct. 26, 2005, <http://money.cnn.com/2005/10/26/news/fortune500/walmart/index.htm>.

33. Michael Barbaro & Steven Greenhouse, *Wal-Mart Memo Lists Ways to Cut Benefits: One Idea Would Be to Discourage Hiring Unhealthy People*, Oct. 27, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/10/27/BUG3JFE L7F1.DTL> (last visited Sept. 8, 2006).

34. Katherine Griffiths, *Fat? Over 40? Don’t Bother Applying for a Wal-Mart Job*, Oct. 27, 2005, THE INDEPENDENT (UK), at 8, available at <http://www.commondreams>.

Employees International Union (SEIU), told the *Wall Street Journal* “[w]hen you add physical requirements to jobs that don’t need them, you begin to weed out a whole pool of people such as the elderly, the obese, and people with pre-existing medical conditions. . . . I think this memo steps over the line of what’s legal.”³⁵ Whether his prediction is correct will be tested in the *ShopKo Class Action*. The complaint includes a declaratory judgment count asking the court to rule that the practice violates the ADEA as a matter of law and to enjoin its implementation.³⁶

ADEA AND THE “COST DEFENSE”

Congress enacted the ADEA in response to evidence that older workers experienced much of the same bias directed at women and minorities, finding that “older workers [found] themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs.”³⁷ Now, nearly forty years later, it appears that the workplace protections thought to have been contained in the ADEA, are not there after all; that, as implied by one court, the act was never intended to inhibit the process by which a free market economy creates real jobs and wealth.³⁸ Although the Act largely eliminated compulsory retirement based upon fixed, arbitrary age limits, the Supreme Court significantly neutered the Act in *Hazen Paper*, holding that Hazen Paper did not violate the ADEA when it terminated sixty-two-year-old Biggins shortly before his

org/headlines05/1027-05.htm (last visited Nov. 7, 2006). “If you are on the wrong side of 40 and not as fit as you’d like to be, don’t bother applying for a job at Wal-Mart. That is the message for workers in America – revealed in a secret memo, laying out a plan by Wal-Mart to make it harder for older, less healthy people to get a job at one of its legions of stores in the U.S.” *Id.*

35. Zimmerman et al., *supra* note 2, at B1.

36. Complaint at 7, *Miille v. ShopKo Stores, Inc.*, No. LACV133694 (Iowa D. Ct. Woodbury County filed Apr. 20, 2006).

37. 29 U.S.C.A. § 621(a)(1) (Westlaw current through Aug. 17, 2006). The ADEA applies to any employer affecting commerce with twenty or more employees and covered individuals who are at least forty years of age. 29 U.S.C.A. § 631 (Westlaw current through Aug. 17, 2006).

38. *See* Camacho v. Sears Roebuck de Puerto Rico, 939 F. Supp. 113, 121-22 (D.P.R. 1996).

pension would vest because the termination was based on a "reasonable factor other than age."³⁹ That factor was the desire to avoid the costs associated with paying him pension monies.⁴⁰ *Hazen* signaled that employers could replace older, generally more expensive workers, with younger, generally less expensive workers, without running afoul of the ADEA. That is, the ADEA did not confer upon the courts the prerogative to second-guess such management decision-making. In a competitive free market, an employee may be terminated because she or he costs more than an employer is willing to pay; and if another person, regardless of age, is willing to perform the same job at a lower cost, the ADEA may not protect the over-forty higher-cost employee.

Circuit court cases illustrate the impact of *Hazen Paper*. In *Mullin v. Raytheon Co.*,⁴¹ the First Circuit held that the defendant's need to downsize in the competitive defense industry was justified, and the employer did not violate the ADEA by lowering the plaintiff's wage grade to match Raytheon's restructured wage-and-salary program.⁴² *Raytheon* reinforces a judicial trend allowing employers to remove older workers from their ranks, not because they are older, but because they cost more than younger workers. In *Anderson v. Baxter Healthcare Corp.*,⁴³ the plaintiff alleged he was discharged as a unit manager for the sole purpose of reducing costs.⁴⁴ The Seventh Circuit observed that while there was a general correlation between age and higher wage costs, that correlation "is not perfect."⁴⁵ The court observed that "[the plaintiff] could

39. *Hazen Paper Co. v. Biggins*, 501 U.S. 604, 612-13 (1993) (interpreting 29 U.S.C. § 623(f)(1)).

40. *Id.* Biggins remedy, therefore, was under ERISA, not the ADEA. *Id.* at 612.

41. 164 F.3d 696 (1st Cir. 1999).

42. *Id.* at 699. The plaintiff had worked for Raytheon for twenty-nine years and was at the highest management grade. *Id.* at 697. His downgrade was part of a downsizing that was deemed by the court to be a legitimate business decision not to be second-guessed by the courts and therefore a non-discriminatory rationale for reducing company costs. *Id.* at 698.

43. 13 F.3d 1120 (7th Cir. 1994).

44. *Id.* at 1125.

45. *Id.* at 1126.

not prove age discrimination even if he was fired simply because [the defendant] desired to reduce its salary costs by discharging him."⁴⁶ *Anderson* stands for the proposition that employer costs in the form of wage and salary are a reasonable factor other than age; therefore, eliminating older workers because they are more expensive than younger workers does not violate the ADEA. In the *ShopKo Class Action*, the defendant likely will argue that the desire to promote employee health and thereby reduce benefit costs is a reasonable factor other than age, which would permit the discharge of an employee unable to perform the redesigned job duties.

The Eighth Circuit followed the Seventh Circuit's approach from *Anderson* in *Snow v. Ridgeview Medical Center*,⁴⁷ in which the plaintiff contended she was a senior employee and earned the highest salary in her department.⁴⁸ The court, relying on *Hazen Paper*, concluded that age and years of service were distinct factors that lacked correlation; decisions based on years of service (and not age) relied upon reasonable factors other than age.⁴⁹ This cost defense was successfully raised in *Marks v. Loral Corp.*,⁵⁰ a California Court of Appeals decision that affirmed a jury instruction stating, "An employer is entitled to choose employees with lower salaries, even though this may result in choosing younger employees. If the choice is based on salary, there is no age discrimination."⁵¹ This court made no subtle distinctions related to age-tenure correlations. It held that as long as salary costs were not a pretext for a decision actually based on age, there is no violation of the ADEA.⁵² The California court acknowledged that a "whippersnapper MBA [may] increase corporate profits – and his or her own compensation – by across-the-board layoffs," but the court opined that Congress

46. *Id.*

47. 128 F.3d 1201 (8th Cir. 1997).

48. *Id.* at 1208.

49. *Id.*

50. 68 Cal. Rptr. 2d 1 (Ct. App. 1997).

51. *Id.* at 7.

52. *Id.* at 23.

never intended that age discrimination laws should inhibit a free market economy that creates jobs and wealth.⁵³ The *Loral* decision triggered protests that resulted in the California legislature overriding the court's ruling by amending its Fair Employment and Housing Act in the belief that anti-age discrimination laws, like all employment-related statutes, inherently interfere with free-market decisionmaking.⁵⁴

These decisions support a growing judicial view that employment decisions based upon costs (whether pension, salary, or presumably other costs) stand outside the prohibitions of the ADEA. The issue posed by this article, therefore, is whether employer decisions intended to reduce healthcare costs will be treated with the same deference. May an employer impose physically taxing duties on all employees, not because such work assignments are necessary to furnish a product or service, but because such exertion promotes a healthier and more productive workforce, thereby reducing the cost of providing health care? Moreover, while *Hazen* did not address whether disparate impact is applicable to ADEA claims, might the correlation between mandated physical labor and age be found in the definition of disparate impact as developed by the Supreme Court in *Griggs v. Duke Power Co.*⁵⁵ proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation"?⁵⁶

DISPARATE IMPACT UNDER THE ADEA

The circuits long had been divided over whether the disparate impact doctrine could be used to prove age discrimination under the ADEA. The Second, Eighth, and Ninth Circuits held that disparate impact is available under the ADEA.⁵⁷ The First,

53. *Id.* at 24.

54. CAL. GOV'T CODE § 12941 (West 2005) (expressly declaring "its rejection of appeal opinion in *Marks v. Loral Corp.*").

55. 401 U.S. 424 (1971).

56. *Id.* at 431.

57. *Criley v. Delta Airlines Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *Lewis v.*

Third, Sixth, Seventh, Tenth, and Eleventh Circuits questioned the doctrine's application to the ADEA.⁵⁸ The remaining circuits have not addressed the issue. However, now that the Supreme Court has affirmed its application,⁵⁹ it will be interesting to observe how strongly the dissenting circuits embrace such claims. A brief in support of the plaintiff's position in the *ShopKo Class Action* should focus on the ADEA's language, congressional intent, the Equal Employment Opportunity Commission (EEOC) treatment of ADEA claims, the doctrine's limitations under *Hazen*, and the Supreme Court's affirmation of its application.

The statutory language is both problematic and helpful to the *ShopKo Class Action* plaintiff because the purpose of the Act was to "promote employment of older persons based on their *ability* rather than *age*; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."⁶⁰ The problematic aspect resides within the contention that a person should be free of age discrimination as long as she or he has the "ability" to perform the duties required by a particular job classification. The test, reasons the Act, is not a matter of chronological age, but whether a person is capable of performing the duties reasonably required to produce the product or service. The ADEA challenge to the Wal-Mart/ShopKo policy turns on a correlation between aging, the progressive deterioration of physical capacity, and ultimately

Aerospace Cmty. Credit Union, 114 F.3d 745, 750 (8th Cir. 1997); Frank v. United Airlines, Inc., 216 F.3d 845, 856 (9th Cir. 2000); E.E.O.C. v. Local 350, Plumbers & Pipefitters, 998 F.2d 641, 648 n.2 (9th Cir. 1992); Palmer v. United States, 794 F.2d 534, 538 (9th Cir. 1986).

58. Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732-735 (3d Cir. 1995); Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135, 139 n.5 (6th Cir. 1995); E.E.O.C. v. Francis W. Parker Sch., 41 F.3d 1073, 1077-78 (7th Cir. 1994); Elis v. United Airlines, Inc., 78 F.3d 999, 1009 (10th Cir. 1996); Adams v. Fla. Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001).

59. See *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005).

60. 29 U.S.C.A. § 621(b) (Westlaw current through Aug. 17, 2006) (emphasis added).

the “ability” of a worker to perform assigned duties such as gathering carts and moving appliances. Accordingly, an employer probably will assert that the law permits it to terminate an employee who lacks the ability to perform the physical tasks required by a specific job description. In other words, the reasonable factor other than age in this instance is the inability to perform the job. This position accords with the Eleventh Circuit’s rejection of the doctrine in *Adams v. Florida Power Corp.*, noting the Secretary’s recommendation that “Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly, but that factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways.”⁶¹ Also, the court examined the history and amendments to Title VII of the Civil Rights Act of 1964 (Title VII) expressly permitting disparate impact claims in cases involving race and religion while resisting similar treatment to the ADEA.⁶² These pre-2005 rulings illustrate the dramatic turnaround enunciated by the Supreme Court’s in *Smith v. City of Jackson*.

STEPPING OVER THE “BUSINESS NECESSITY” LINE

When SEIU president Andrew Stern told the *Wall Street Journal* he believed that adding “physical requirements to jobs that don’t need them steps over the line of what’s legal,”⁶³ presumably he had in mind the “business necessity” test, which has been applied by courts recognizing disparate impact claims under Title VII,⁶⁴ which does not address age discrimination.⁶⁵ As previously noted, the circuits, prior to 2005, were split on the

61. *Adams*, 255 F.3d at 1325.

62. *Id.* at 1325-26.

63. Zimmerman et al., *supra* note 2, at B1.

64. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655-58 (1989) (holding no disparate impact discrimination to be excused by business necessity exception).

65. Civil Rights Act of 1964, Pub. L. No. 88-352 §§ 701-716, 42 U.S.C.A.

§§ 2000e through 2000e-17 (Westlaw current through Aug. 17, 2006) (prohibiting employers from discriminating in employment because of race, color, religion, sex, or national origin).

ADEA application of the disparate impact theory, but there was a strong trend against its application.⁶⁶ Whether the Wal-Mart/ShopKo job redesign might be protected under a "business necessity" defense requires an examination of how disparate treatment has been treated under Title VII. *Smith v. City of Jackson* affirms the legitimacy of disparate impact claims brought under the ADEA, but does not give it strong status. The Supreme Court's Title VII cases have distinguished between "disparate treatment" and "disparate impact."⁶⁷ The fundamental difference between disparate treatment and disparate impact is that under disparate treatment theory, employers are liable for intentional discrimination, whereas under disparate impact theory, employers are liable for the discriminatory consequences of their selection criteria, regardless of their motivation for adopting them.⁶⁸

Analysis of redesigning job duties may include disparate impact of a neutral rule or disparate treatment by intention, either of which may be defensible under the business necessity exception. Mandating across-the-board physical activity to promote good health and reduced healthcare costs, rather than as a matter of "business necessity," exposes the policy to a disparate impact claim as defined in *Griggs v. Duke Power Co.*, as proscribing,

[N]ot only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . .

. . . .
. . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.⁶⁹

The reduction of health costs as a business necessity

66. See *supra* notes 57-58.

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

68. *Id.*

69. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

appears to have facial neutrality and thus lacks the type of ageist animus required for disparate treatment claims. On the other hand, when the Memorandum's proposed benefit changes are considered as a whole, the sentiment expressed in the headline, "Fat? Over 40? Don't Bother Applying for a Wal-Mart Job" may indeed subject their adoption to a "disparate treatment," rather than a "disparate impact," analysis.⁷⁰ Its emphasis on recruiting a healthy and more productive workforce, by implication, suggests the recruitment and retention of a younger workforce.⁷¹

AGING AND THE CAPACITY FOR PHYSICAL ACTIVITY

It is perhaps axiomatic that increased frailty is a companion of aging. It has been described thusly:

The inevitable decline in physical vigor is the most salient feature of aging. With advancing age bones gradually lose calcium, become weakened, and fracture easily. The bones in the hip widen, the shoulders narrow, joints become stiff and painful, and walking becomes more difficult.

Almost all of the elderly suffer from some loss of vision, including a loss of ability to see close objects, sensitivity to glare, loss of peripheral vision, and difficulty adjusting from light to dark

. . . [T]he Journal of Neurology indicates that the brain typically loses about 10 percent of its mass between ages twenty and forty as the fjord-like crevices on the brain surface – essential for thought – deepen and widen.⁷²

Because the employee must establish disparate impact discrimination with respect to each component of a prima facie case, the *ShopKo Class Action* plaintiffs will be required to offer evidence that cart gathering, driving a forklift, and loading appliances into vehicles was activity that would unnecessarily

70. See Wal-mart Memorandum, *supra* note 1.

71. Griffiths, *supra* note 34, at 8.

72. LAWRENCE A. FROLIK & ALISON MCCHRYSTAL BARNES, ELDER LAW: CASES AND MATERIALS 14 (1st ed. 1992).

jeopardize the job security of older workers.⁷³ The plaintiff should be prepared to show that: (1) she and other members of the class belong to the over-forty protected group; (2) the job design was a condition of employment envisioned by the Act; (3) the job design does not meet the "business exception" criteria; and (4) its implementation will disproportionately and negatively effect older workers. The touchstone will be business necessity.⁷⁴

The Memorandum does not advance a traditional "business necessity" rationale in support of the recommendation to redesign jobs to include physical activity; rather, its rationale is based on the reduction of Wal-Mart's healthcare costs because physical activity is conducive to improved health.⁷⁵ It is improbable that ShopKo will argue that its cashiers and customer service employees must gather carts and load appliances as a necessary condition of conducting its core business. Rather, ShopKo must rely on a finding that the reduction of healthcare costs is a reasonable factor other than age that immunizes an employer from ADEA liability. This theory did not elicit sympathy from the EEOC complaint in the *ShopKo Class Action* because the EEOC issued a right to sue letter.⁷⁶

A SOCIOLOGICAL PERSPECTIVE

Today's law shapes tomorrow's society. Wal-Mart employment practices will influence the workplace for all Americans, a fact recognized by Chambers in recommending that the company improve its communication so that "over the long term, [it can] work to shape the outcomes of state and national healthcare

73. Courts in ADEA cases rely upon the broad four-part test for establishing a prima facie case for an ADEA complaint. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

74. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (identifying "business necessity" as the touchstone of establishing disparate impact discrimination).

75. See Wal-Mart Memorandum, *supra* note 1.

76. Letter from EEOC to Carol A. Miille (on file with author).

reform efforts.”⁷⁷ The Wal-Mart/ShopKo job redesign issue resurrects images of survival-of-the-fittest conditions that existed in this country prior to the labor movement.

My father described an event that occurred on a construction site sometime in the late 1920s. He was about twenty years old and fit. He was working with a man about thirty-five years old, who had been gassed during World War I and suffered from a lingering lung disease. They were digging a foundation by hand, loading wheelbarrows of dirt and pushing each load out of the entrenchment via a ramp consisting of two wooden planks. When the veteran was unable to push the loaded wheelbarrow out of the pit, my father instinctively attempted to help him. The foreman ordered my father to stand back, stating that if the veteran could not complete the task he would be fired. The wheelbarrow tipped, the dirt spilled, and the veteran with impaired lungs was terminated. He was terminated, not because of his age, but because he could not perform the tasks required by the job design.

CONCLUSION

In conclusion, we must ask: How bold was Ms. Chambers’ bold step number three calling for a job redesign for all employees that would include physical activity such as cart gathering?⁷⁸ And to what extent may an employer incorporate into job designs a level of physical activity for the ostensible purpose of improving the physical well-being of its workforce? Does the ADEA stand as a meaningful obstacle to such practices? Will ShopKo be able to persuade the court that its job redesign is ultimately intended to save benefits costs in the highly-competitive retail market? And might not ShopKo escape ADEA liability by providing an exemption to employees who can demonstrate they have a medical condition or physical weakness that prevents them from performing certain physical

77. Wal-Mart Memorandum, *supra* note 1, at 15.

78. *Id.* at 3.

tasks?

The judicial treatment of the *ShopKo Class Action* harbors broad public policy implications. "Big-Box" retailers like Wal-Mart and ShopKo are at the cusp of the American transformation from a manufacturing to a service economy, from twenty-five-dollars-an-hour union-protected jobs to seven-dollars-an-hour part-time employment without collective bargaining capacity. The Wal-Mart Memorandum may be a template for the type of workplace waiting for the next generation of working Americans. It appears that ShopKo, at least in one of its Iowa stores, has implemented a job design requiring all of its non-managerial employees to perform duties requiring physical exertion. A strategic objective to recruit and retain a "younger and healthier" workforce portends a labor market that expels workers years before they are financially prepared to leave it. Chambers describes the benefits of a "recruit-and-retain-the-young" strategy:

A healthier workforce will lead to lower health insurance costs, lower absenteeism through fewer sick days, and higher productivity. It will be far easier to attract and retain a healthier workforce than it will be to change behavior in an existing one. These moves would also dissuade unhealthy people from coming to work at Wal-Mart.⁷⁹

It is safe to say that Chambers is correct when contending that the prospect of gathering carts and hoisting appliances into vehicles would "dissuade unhealthy people from coming to work at Wal-Mart."⁸⁰ She invites, however, consideration of this commentary's central issue: whether job design not essential for production or service purposes, but rather primarily structured to dissuade "unhealthy people" from entering a workforce, by implication and in practice also will dissuade "older people" from entering a workforce, or once there, from remaining in the

79. *Id.* at 14. "Even a modest shift in Wal-Mart's ability to attract and retain a healthier workforce could result in significant savings: \$220 million to \$670 million in FY2011." *Id.*

80. *Id.*

workforce.

The disparate impact doctrine, articulated by the Supreme Court in *Griggs*, accommodates the cart-gathering fact pattern as a practice that likely would have a disproportionate and discriminatory impact upon the class of workers afforded protection under the Act. These facts appear more definitive than the facts of *Smith v. City of Jackson*, wherein the city implemented a new wage structure to ensure that entry-level salaries of police department employees were competitive with the average market wage for similar positions in the region.⁸¹ The Fifth Circuit allowed the petitioners to proceed with discovery for the purpose of establishing intent, then affirmed the dismissal of the disparate impact claim on the assumed grounds that it was not cognizable under the ADEA.⁸² The Supreme Court utilized *Hazen Paper* to invalidate the Fifth Circuit's rationale and to clarify the proper application of the reasonable-factor-other-than-age defense.⁸³ In examining the text of the ADEA, the plurality opinion, authored by Justice Stevens and joined in concurrence by Justice Scalia, relied upon language in the ADEA prohibiting employers' actions that "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . age."⁸⁴

In the *ShopKo Class Action*, ShopKo can be expected to raise the reasonable-factor-other-than-age defense, asserting that the ability to perform the assigned job duties, and not an employee's age, is the controlling criteria for employment. It may correctly argue that its new job designs are not a manifestation of animus toward the elderly but rather are motivated by its desire to promote better health for all employees, regardless of age. However, the plurality in *Smith* effectively dismisses animus as an essential condition for a successful disparate claim, noting

81. *Smith v. City of Jackson*, 544 U.S. 228, 231 (2005).

82. *Id.*

83. *Id.* at 237-40.

84. *Id.* at 235 (quoting 29 U.S.C.A. § 623(a)(2)).

that age discrimination arises predominantly from arbitrary discrimination, rather than animus, and that certain institutional practices may adversely affect older workers.⁸⁵ Job design for the predominant purpose of dissuading "unhealthy workers" from seeking employment, or for the purpose of lowering its health plan costs, is the type of practice recognized in *Smith* as having a prohibited adverse affect on older workers.⁸⁶

85. *Id.* at 240-41.

86. *See id.* at 235-38.