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Grant T. Moher  
*Marquette University Law School*

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# The ADEA at the Top of the Food Chain: Who's Protecting the Higher-Salaried Employees?

*Discriminatory practices in employment continue, especially in terms of disparate treatment of employees based on unequal salaries and other factors. Until one significant case discussed here, Hazen Paper, prosecution of disparate treatment was effective, but its future is in jeopardy. Alternative means of combating unjust age discrimination in employment need to be found. And older, higher-salaried employees need to be aware of their remaining rights subject to disparate treatment tests.*

**By Grant T. Moher**

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*Grant T. Moher* is a third-year law student at Marquette University Law School in Milwaukee, Wisconsin. His legal interests focus on the rights of employees in the fields of labor law and worker's compensation.

In 1964, Congress enacted Title VII of the Civil Rights Act,<sup>1</sup> codifying the rights of women, nonwhites, and other minorities to legal action for discriminatory employment practices.<sup>2</sup> Shortly thereafter, Congress enacted the Age Discrimination in Employment Act (ADEA) to protect those age 40 and over from discrimination on the job.<sup>3</sup> The ADEA was modeled after Title VII; thus most of the ADEA's provisions are "substantively identical" to those of its predecessor.<sup>4</sup> For example, both acts use virtually the same language to outlaw discrimination not only by employers but also by labor unions and employment agencies.<sup>5</sup>

There are differences between the two, most notably with regard to motive for the discriminatory action. For example, both Title VII and the ADEA allow a cause of action for disparate treatment—when an employer's actions facially discriminate against a protected group.<sup>6</sup> However, it is not clear that the ADEA allows a cause of action where an employer's action is facially neutral but its results tend to fall more harshly on a protected group.<sup>7</sup> This cause of action is known as disparate impact, and it is recognized both in case law<sup>8</sup> and the statutory language of Title VII.<sup>9</sup>

Although never explicitly rejected by the Supreme Court, disparate impact causes of action in ADEA cases have been effectively rendered obsolete by the Supreme Court's ruling in *Hazen Paper v. Biggins*.<sup>10</sup> Also, disparate treatment claims, although not rendered obsolete, now require direct age-related animus to establish proof of discriminatory intent.<sup>11</sup>

## **The Facts of Hazen Paper**

In *Hazen Paper*, the plaintiff was fired from his job with the defendant when he was 62 years old,

ostensibly because he had been doing business with a competitor.<sup>12</sup> The jury at the trial court level did not believe the defendant's reason and rendered a verdict for the plaintiff, because he had been employed with the defendant for almost 10 years and at the time of termination his pension was "within a hairbreadth of vesting."<sup>13</sup> However, his pension would have vested because of his years of service at the company, not his age.<sup>14</sup> On review, the Supreme Court held that years of service were not a proxy (statutory approximate) for age and thus the plaintiff could not bring a claim under the ADEA.<sup>15</sup> The Court reasoned that the legislative intent of the ADEA was to keep older employees from being discriminated against because of their age, and not because of other factors correlated with age.<sup>16</sup>

As a result of this decision, older employees whose seniority and experience have brought them higher salaries may be vulnerable to termination because of their salaries with no recourse. Advocates for the elderly are now re-evaluating the causes of action available under current law to combat age discrimination in the workplace. This article considers the rights of higher-salaried employees subject to disparate treatment and disparate impact tests, given the impact of *Hazen Paper*.

### **Disparate Treatment Analysis and the Higher-Salaried Employee**

In order to make a prima facie case of disparate treatment under the ADEA, the employee must show that (1) he or she is within the protected age group, (2) that he or she was qualified, (3) that despite these qualifications, he or she was discharged (or subject to some other adverse employment decision), and (4) that the position was filled by someone of similar qualifications.<sup>17</sup> The employer can rebut the charge by exhibiting a legitimate, nondiscriminatory reason for the discharge.<sup>18</sup> One of the main ways of doing this is to show that the discharge was based on a reasonable factor other than age.<sup>19</sup>

Some disparate treatment cases in the courts of appeal can be used to show the development of this doctrine as it applies to the ADEA, as well as its limitations as a cause of action. As demonstrated by the following examples, the problems associated with disparate treatment analysis tend to be twofold: (1) whether the cost of older, higher-

salaried employees can be used for the employer's defense as a reasonable factor other than age, and (2) whether a showing of discrimination based on factors such as tenure status, seniority, or experience can be used as a proxy (statutory approximate) for age.

*Dace v. ACF Industries, Inc.* is a representative example of disparate treatment as a legal theory.<sup>20</sup> In *Dace*, the plaintiff was demoted from his salaried position as a punch press operator to an hourly position.<sup>21</sup> Disparate treatment is applied because plaintiff is demoted at age 53 and replaced by a 40-year-old who was being paid less money.<sup>22</sup> The plaintiff contends, and provides compelling evidence to support his theory, that this is an economically based move<sup>23</sup> done to avoid having to pay the plaintiff his high salary and a large severance package when the company closed.<sup>24</sup>

Although cost was the primary factor in the decision, and *Dace's* higher salary had accrued from his years of service, the court makes the connection to age.<sup>25</sup> It reasons that *Dace's* claim under the ADEA is actionable because years of experience and age are so closely related that they become a sort of statutory approximate (proxy) for one another.<sup>26</sup> This follows an earlier decision that dealt with the proxies of tenure status and age.<sup>27</sup> Both of these courts recognized the close relationship between age and related factors and allowed a disparate treatment claim. When "the plain intent and effect of the defendant's practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts[,]""<sup>28</sup> courts have typically held there to be a cause of action.<sup>29</sup>

Another case to demonstrate the logic of the appellate courts in this area is *Metz v. Transit Mix, Inc.*<sup>30</sup> The court in *Metz* makes it clear that the case is one of disparate treatment, rather than impact, and explains that as such the plaintiff must establish discriminatory intentions on the part of the defendant.<sup>31</sup> The plaintiff, age 54, was replaced by a younger, lower-salaried employee, without being offered a pay cut to keep his job.<sup>32</sup> The court held that the employer's firing of Metz contravened the ADEA because it found that Metz's years of experience were a proxy for age and that firing him because of the salary built up by his years of service did not constitute a "reasonable factor other than age."<sup>33</sup>

These cases are examples among numerous others before *Hazen Paper* in which a connection was made between age and other related factors (experience, etc.) to prove intent and to rule that cost was not a reasonable factor other than age.<sup>34</sup>

### Disparate Impact Analysis and the Higher-Salaried Employee

Until *Hazen Paper*, disparate impact analysis had been a relatively accepted method of pursuing an ADEA claim in which discriminatory intent could not be proven.<sup>35</sup> The reasoning for allowing this sort of claim can best be seen in the fact pattern of *Griggs v. Duke Power*, the first case dealing with disparate impact in a Title VII setting.<sup>36</sup>

In *Griggs*, the employer had an openly discriminatory policy of not promoting blacks until the passage of Title VII.<sup>37</sup> Then, the employer changed its policy to require that for promotion, one needed both a high school diploma and passing scores on two general intelligence tests not related to job performance ability.<sup>38</sup> The employees claimed that even though the employer's policy was facially neutral, it operated to restrict a disproportionate number of minorities and thus contravened Title VII of the Civil Rights Act.<sup>39</sup> The Supreme Court agreed. The holding specified that the absence of discriminatory intent does not absolve an employer from employment practices that operate to exclude minorities for no justifiable business purpose.<sup>40</sup>

This doctrine was first applied to an ADEA case in 1980 in *Geller v. Markham*, a case involving a teacher (Geller) who was a member of the ADEA protected age group.<sup>41</sup> She was not hired to a teaching position because of the school board's conscious effort to hire less experienced, and consequently less costly, teachers.<sup>42</sup> The level of experience was determined in steps, with the "sixth step" being five years of experience or more.<sup>43</sup> The employer's stated policy was to hire only teachers below this sixth step of teaching experience.<sup>44</sup> Geller, along with 92.6 percent of other teachers in the protected age group, was in the sixth-step level of employment experience; however, 60 percent of teachers below the age of the protected age group also had this sixth-step level of experience.<sup>45</sup> Nonetheless, the *Geller* court found that the statistical disparity rendered the policy discriminatory as a matter of law.<sup>46</sup>

The application of disparate impact to ADEA cases has been a source of great contention. One

critic points out the fact that *Geller* failed to even mention *Griggs*—the source of disparate impact doctrine—because the rationale behind *Griggs* did not apply in the ADEA format.<sup>47</sup> This argument centers around the idea that one of the main goals of disparate impact analysis as put forth in *Griggs* is the breaking down of past discrimination.<sup>48</sup> One is unlikely to argue successfully that a higher-paid older worker has been the subject of lifelong discrimination. However, another equally important goal of the disparate impact doctrine is to keep those in a particular protected group from being discriminated against because they are members of that group.<sup>49</sup> In this sense, applying the disparate impact doctrine to ADEA claims would be valid to keep employers from discriminating against older workers for stereotypes about their value and productivity. Regardless of the fact that older workers have not been subject to lifelong discrimination, the discrimination they face in the workplace as they age is just as problematic.

Another theory advanced by the same critic is that, "unlike race, there is an inherent correlation between age and ability."<sup>50</sup> Because of these inequalities, it is argued that disparate impact cannot be a viable theory.<sup>51</sup> While it may be true that as a general matter older workers are not trained in specific current fields such as computer sciences and other highly technical areas,<sup>52</sup> a general lack of training does not translate to a lack of ability. As a group, older people are not inferior workers.<sup>53</sup> Many elderly workers are effectively trained in the same fields as their younger counterparts through continuing education, on-the-job training, and other educational sources. Older workers often bring valuable life experiences to their jobs that younger workers may not yet possess. In fact, to claim that as a group older workers are inferior contravenes the very spirit of the ADEA itself.<sup>54</sup>

### *Hazen Paper's* Effect on Disparate Treatment Analysis

The dissent by Judge Easterbrook in *Metz*<sup>55</sup> provides a compelling argument against a broad reading of employer liability under the ADEA and paves the way for the decision in *Hazen Paper*. It stresses that "you do not get immunity from an otherwise lawful employment decision by growing old."<sup>56</sup> Entrepreneurial decisions such as cutting costs by firing higher-paid workers are argued to be eminently reasonable, as employers often fire

employees who are making salaries out of proportion to their productivity, regardless of whether they are in the ADEA protected age group.<sup>57</sup> Also, it is argued the ADEA was designed *only* to protect those fired because of their age and not for any other reason.<sup>58</sup> These are two of the main themes in the later decision by the Supreme Court in *Hazen Paper*.<sup>59</sup>

The opinion in *Hazen Paper*, while drawing much commentary concerning its effects on disparate impact analysis,<sup>60</sup> will have a serious effect on disparate treatment as well. *Hazen Paper* endorses the extreme position of treating the cost factor of salary as an “inherently reasonable, non-age criterion that remains immune from challenge unless it can be exposed as a pretext to target older workers.”<sup>61</sup> The Court makes it clear that the ADEA is not designed to protect people from discrimination on the basis of other factors, no matter how age-related those factors may be.<sup>62</sup>

However, the Court with *Hazen Paper* does not close the door entirely. The Court specified that factors such as experience, tenure status, and the like may function as proxies for age only in certain instances, specifically when the correlation is statistically sufficient.<sup>63</sup> *Hazen Paper* explicitly rejects using pension status as a proxy for age,<sup>64</sup> but it leaves the door open to using other factors as proxies for age in limited circumstances:

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.<sup>65</sup>

By so saying, the Court has left the possibility of using other factors as proxies for age, but it prevents courts from making the assumption of age discrimination without statistical evidence or proof of discriminatory motive. The fact remains, however, that *Hazen Paper*'s condemnation of pension status and seniority<sup>66</sup> as statutory proxies for age means an uphill battle for employees to prove the sort of intent necessary to win on a disparate treatment claim under the ADEA.

### The Disparate Impact Doctrine After *Hazen Paper*

The most important feature of the disparate impact doctrine is that it does not require a showing of discriminatory intent on the part of the employer.<sup>67</sup> Thus, the emphasis that the Court in *Hazen Paper* places on the necessity for a discriminatory motive casts some doubt as to whether a disparate impact cause of action is still viable. “If defendants can claim they simply overlooked the question of whether their actions violated the law, there would be little use for aggrieved individuals to bring suit under the ADEA unless they could prove a clear intent to discriminate.”<sup>68</sup>

While this point may be somewhat cynical,<sup>69</sup> it has a ring of truth to it. If an employer can make a reasonable argument that his or her actions were taken in ignorance of the fact that they were affecting a disproportionate number of elderly workers, a court's hands would be tied in applying disparate impact. With nothing to stand as a statutory equivalent for age, only age itself could suffice to demonstrate discriminatory intent and not factors that had previously been used as statutory proxies.<sup>70</sup> Employers are nearly always going to have some sort of explanation for their employment decisions, if not at the time of making them, certainly by the time they are hauled into court. Thus, many employers will offer some legitimate business reason (i.e., “reasonable factors other than age” such as cost and low productivity) to protect their decisions from being unreasonable and thus discriminating under the ADEA.

The expansion of reasonable factors other than age may result in employees having a more difficult time bringing an ADEA claim with a disparate impact theory.<sup>71</sup> However, this does not have to be the case. As one supporter of disparate impact after *Hazen Paper* states:

[I]t would be more consistent with the stated policies of the ADEA to allow disparate impact as an offensive weapon and give the reasonable factors other than age as an absolute defensive shield. If one purpose of the ADEA is to promote employment based on ability and not age and to prevent arbitrary discrimination, these policies would be frustrated if the reasonable factors other than age provision absolutely barred any disparate impact claim from the courts.<sup>72</sup>

If this policy were followed, courts could determine what factors other than age are reasonable factors that would act as affirmative defenses and what factors other than age are unreasonable.<sup>73</sup>

This scenario, though logical, is not happening. A number of circuits have expressly rejected the availability of the disparate impact doctrine in ADEA actions.<sup>74</sup> As a result, case law defining the “reasonable factors other than age” that might rebut a discrimination charge has been chilled. Also, the minority of circuits that still recognize disparate impact as a valid cause of action under the ADEA have done so without addressing *Hazen Paper*'s logic.<sup>75</sup> Rather than attempt to modify the disparate impact test so that it comports with the decision in *Hazen Paper*,<sup>76</sup> these circuits have been content to follow their own existing precedent. They continue to allow disparate impact causes of action, relying on the fact that *Hazen Paper* proclaimed to speak only to disparate treatment in the ADEA.<sup>77</sup>

### **Alternatives to ADEA Suits on Facts Showing Disparate Impact**

While the doctrine of disparate treatment is still alive (albeit with a more difficult burden of proof for the plaintiff),<sup>78</sup> disparate impact is in serious trouble. After *Hazen Paper*, older employees are left to ponder what avenues are available to them to pursue cases of unjust discrimination absent evidence of age-related animus.

One possible source could be Congress itself, which could step in to restore the full scope of ADEA claims.<sup>79</sup> However, as one scholar notes: “the ambiguity of *Hazen Paper* may very well be a conscious effort by the Court to avoid the congressional reversal that has met many of its recent pro-employer decisions by forcing lower courts to reach the more ‘palatable decision to reject disparate impact analysis on their own.’”<sup>80</sup> By giving the circuits an ambiguous opinion, those courts can interpret the logic as they see fit. Thus far, a majority of circuit courts that have addressed the issue have come to the conclusion that disparate impact is not a viable cause of action in the ADEA context.<sup>81</sup> With this ambiguous opinion, any effort on the part of Congress to contravene the decision and legislate a coherent standard in its place becomes much more difficult.

Another possibility for contesting age-discriminatory employment procedures is the Employee

Retirement Income Security Act (ERISA).<sup>82</sup> Section 510 of ERISA is endorsed by *Hazen Paper* as a possible remedy for firing to keep an employee's pension from vesting.<sup>83</sup> One scholar in particular also feels that ERISA could be used in a growing number of cases previously thought to be solely within the realm of the ADEA.<sup>84</sup>

After *Hazen Paper*, bringing an ADEA disparate impact claim in a circuit court that does not recognize the cause of action may be impossible. When addressing the matter of an ADEA suit brought solely with statistics of disparate impact, the Seventh Circuit explicitly said that statistics alone would not be sufficient.<sup>85</sup> The court needed evidence that would support an illegal discriminatory employer decision.<sup>86</sup> Considering that most of the circuit courts that have addressed the issue since *Hazen Paper* have held that disparate impact is no longer a viable cause of action,<sup>87</sup> many litigants will be left with little hope of success.

In the circuit courts that still accept disparate impact as a cause of action,<sup>88</sup> no change is likely unless the Supreme Court speaks directly to the issue. The present concern is with the circuit courts that have not explicitly held that disparate impact is unavailable under the ADEA.<sup>89</sup> Arguments such as those mentioned below can be considered.

In order to make a cognizable claim for disparate impact under the ADEA, it is necessary to understand the relationship between age and reasonable factors other than age that cannot be used to prove intent. As it stands, there are three possible approaches to determining when cost and criteria other than age are reasonable factors.<sup>90</sup> The first follows *Hazen Paper* in that it assumes age-based impact is not determinative of liability and, absent legitimate evidence of a discriminatory pretext to target older workers, an employee would not have a cause of action under the ADEA.<sup>91</sup> The second is the majority view prior to *Hazen Paper*.<sup>92</sup> It condemns neutral cost or other comparisons as age-based discrimination by focusing on the correlation between seniority, salary, and age.<sup>93</sup> The third approach is the so-called balancing approach.<sup>94</sup>

This balancing approach, put forth by one advocate of disparate impact analysis, could be something the circuit courts that have not already rejected disparate impact could use in spite of the decision in *Hazen Paper*.<sup>95</sup> This approach would resist both extremes and “focus on the cost comparison as facially neutral, and thus a potential rea-

sonable factor other than age, but undesirable because of its predictable age-based effect.”<sup>96</sup> Thus, an employer would not be subject to liability for using the cost criterion, but would have to justify it beyond simply an entrepreneurial decision.

Another argument that disparate impact should apply to the ADEA as well came before *Hazen Paper* with the passage of the 1991 Civil Rights Act.<sup>97</sup> This act codified the test for disparate impact analysis in a Title VII setting, yet it did not make a corresponding change in the framework of the ADEA.<sup>98</sup> Because of this, opinions are split as to whether the similar nature of the acts means disparate impact analysis is to apply to both acts, or whether the legislative silence is an indirect rejection of disparate impact analysis under the ADEA.<sup>99</sup> While the legislative silence is puzzling, the argument can be made that since the ADEA and Title VII have historically been interpreted in a similar fashion, Congress naturally intended a change to one to be applicable to the other.<sup>100</sup>

## Conclusion

Society has an interest in seeing job security for older Americans, especially ones who have built up higher salaries as a result of faithful years of service. No perfect solution to ensure this job security presents itself, but the fact remains that a solution must be reached. Congressional intent with the ADEA will not be served as long as employers are “able to cloak their actions in economics or feigned ignorance.”<sup>101</sup> As it stands, employees have the difficult (and often impossible) burden of proving bad faith on the employer’s part without having the significant weapon of disparate impact and the ability to use other factors as proxies for age. Indeed, without a pink slip stating “fired—too old,” an employee’s burden of proving discrimination becomes a burden many worthy litigants will be unable to bear.

4. Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 837 (1982).
5. 42 U.S.C. § 2000e-2(b)(c); and 29 U.S.C. § 623(b)(c).
6. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (standard for a prima facie case of disparate treatment explained in a Title VII context); *Lorillard v. Pons*, 434 U.S. 575 (1978) (disparate treatment applied in ADEA context).
7. *See Markham v. Geller*, 451 U.S. 945, 945 (1981)(Rehnquist, J., dissenting from denial of certiorari)(expressing opinion that disparate impact is not a proper cause of action under the ADEA).
8. *See Griggs v. Duke Power*, 401 U.S. 424 (1971).
9. 42 U.S.C. § 2000e-2(k).
10. 507 U.S. 604 (1993).
11. *Cf. Hazen Paper*, 507 U.S. at 609. (“We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee’s age.”)
12. *See Hazen Paper*, 507 U.S. at 606.
13. *Id.* at 607.
14. *See id.* at 611.
15. *See id.*
16. *See id.* at 608–609.
17. *See Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 149 (1995).
18. *See id.*
19. *Cf. Steven J. Kamenshine, The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 237–38 (1990)(saying that the reasonable factors other than age underscored the debate about disparate impact and is thus a very important point).
20. 722 F.2d 374.
21. *See id.* at 375.

## Endnotes

1. 42 U.S.C. § 2000e *et seq.* (1998).
2. *See id.*
3. 29 U.S.C. §§ 621–34 (1998).

22. *See id.*
23. The plaintiff (Dace) presented evidence to the effect that the ACF “benefits” man was knowledgeable about Dace’s pay situation and the situation of the replacement. Also, the company’s scheduled closing lent credence to the idea that Dace’s severance package was being targeted [*Id.* at 378].
24. *See id.* at 378.
25. *See id.*
26. *See id.*
27. *See Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (1983).
28. *Id.* at 691.
29. *See Kaminshine, supra* note 19, at 265–66.
30. 828 F.2d 1202 (1987).
31. *See id.* at 1204.
32. *See id.* at 1209.
33. *See id.* at 1208.
34. *See EEOC v. Chrysler Corp.*, 733 F.2d 1183 (1984); *Leftwich*, 702 F.2d 686 (both supporting *Metz* in that firing for cost is not a reasonable factor other than age and age-related factors can be used as a proxy for age); *but see Mastie v. Great Lakes Steel Corp.*, 424 F. Supp. 1299, 1318 (1976) (“The Act does not contemplate that an employer must ignore employment costs or face possible ADEA violation charges.”)
35. *See generally Geller v. Markham*, 635 F.2d 1027 (1980) (The first case to apply disparate impact to an ADEA claim).
36. 401 U.S. 424 (1971).
37. *See id.* at 427.
38. Actually, the test standards were more stringent than the high school diploma requirement— they would have screened out approximately half of the high school graduates [*Id.* at n.3].
39. *See id.* at 428.
40. *See id.* at 434.
41. 635 F.2d 1027 (1980).
42. *See id.* at 1030.
43. *See id.*
44. *See id.*
45. *See id.* at 1032.
46. *See id.* at 1033.
47. *Krop, supra* note 4, at 848–55.
48. *Id.* at 848.
49. *Id.* at 850–52.
50. *Krop, supra* note 4, at 850.
51. *See id.*
52. *See id.* at 851.
53. *See Hazen Paper*, 507 U.S. at 610–11 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)).
54. *See 29 U.S.C. § 621* (1998) (the legislative goals of the ADEA explained).
55. Easterbrook argued that the ADEA should be applied to discrimination on the basis of age alone. Also, he argued that the cost of keeping on an older employee should be considered a reasonable factor other than age. *Metz*, 828 F.2d at 1212–13 (Easterbrook, J. dissenting).
56. *Metz*, 828 F.2d at 1213.
57. *See id.* at 1212–14.
58. *See id.* at 1215–16.
59. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).
60. *See Jan W. Henkel, The Age Discrimination in Employment Act: Disparate Impact Analysis and the Availability of Liquidated Damages after Hazen Paper Co. v. Biggins*, 47 SYRACUSE L. REV. 1183 (1997); *see also Louis Maslow II, Dual Liability: The Growing Overlap of the Age Discrimination in Employment Act and Section 510 of the Employee Retirement Income Security Act*. 58 ALB. L. REV. 509 (1994).
61. *Kamenshine, supra* note 19, at 233.

62. *See id.* at 609.
63. *See id.* at 611.
64. *See Hazen Paper*, 507 U.S. at 611–12.
65. *Id.* at 612–13.
66. *Hazen Paper* directly condemns pension status and seniority as unrelated to age, although that question was not directly before the Court [*see id.* at 608 (quoting *Williams v. General Motors Corp.*, 656 F.2d 120, 130, n.17 (1985))].
67. *See supra* notes 35–54 and accompanying text.
68. Henkel, *supra* note 60, at 1198.
69. Cynical simply because the Supreme Court in *Hazen Paper* did leave a window—albeit a small one—to allow courts to be able to equate other age-related factors as proxies for age. Prior to *Hazen Paper*, when these factors were often used as per se proxies, employers simply could not plead ignorance to them [*see supra* text accompanying notes 63–65].
70. *See Hazen Paper*, 507 U.S. at 612.
71. *See* Henkel, *supra* note 60, at 1196–97.
72. *Id.* at n.90.
73. *See id.*
74. *See infra* note 80 and accompanying text.
75. *See, e.g.*, *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 (8th Cir. 1996); *Lewis v. Aerospace Community Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997); *Mangold v. California Pub. Util. Comm’n*, 67 F.3d 1470, 1474 (9th Cir. 1995).
76. *See supra* text accompanying note 72.
77. *See, e.g.*, *Criley*, 119 F.3d at 105 (“Although the Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA . . . in our circuit, we have recognized such an action.”) *Id.*
78. *See supra*, section IV and accompanying notes.
79. *Cf.* 42 U.S.C. § 2000e *et seq.* (Congress has the authority to legislate standards for disparate impact in Title VII cases so logically it could do the same in an ADEA setting).
80. Henkel, *supra* note 60, at 1185.
81. *See Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir. 1996) (“disparate impact claims are not cognizable under the ADEA.”); *Gehring v. Case Corp.*, 43 F.3d 340, 342 (7th Cir. 1994) (disparate impact claims under the ADEA are not available in the Seventh Circuit).
82. 29 U.S.C. § 510.
83. *Hazen Paper*, 507 U.S. at 613.
84. *See generally* Maslow, *supra* note 60.
85. *See Maier v. Lucent Technologies, Inc.*, 120 F.3d 730, 735 (1998).
86. *See id.*
87. *See supra* note 81 and accompanying text.
88. *See supra* note 75.
89. *See, e.g.*, *Lyon v. Ohio Educ. Ass’n & Prof’l Staff Union*, 53 F.3d 135, n.5 (6th Cir. 1995) (doubting availability of ADEA disparate impact claim); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732–34 (3d Cir.), *cert. denied*, 116 S. Ct. 306 (1995).
90. For a discussion of these views, see Kamenshine, *supra* note 19 at 257.
91. *See generally* *Hazen Paper*, 507 U.S. 604.
92. *See generally* Metz, 828 F.2d 1202; Dace, 722 F.2d 374.
93. *See* Kamenshine, *supra* note 19, at 257.
94. *Id.*
95. *See id.* at 267–85.
96. *Id.* at 257.
97. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.) (Supp. III 1991).

98. Henkel, *supra* note 60, at 1199.

99. *Id.* at 1200.

100. *Id.*

101. Henkel, *supra* note 60, at 1185.