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I. INTRODUCTION

In 1992, Congress enacted the Energy Policy Act, which opened the energy industry to competition and forced the Florida Power Corporation, once a publicly regulated utility monopoly, to reorganize.[1] In the course of those reorganizations, the Florida Power Corporation terminated Wanda Adams and 117 others, all of whom were over forty years of age.[2] The terminated employees formed a class and sued the Florida Power Corporation and its parent corporation, the Florida Progress Corporation, on a theory of disparate impact.[3] The district court certified the class of plaintiffs, but later decertified it and ruled that as a matter of law, without making findings of fact, disparate impact cannot form a basis for liability under the Age Discrimination in Employment Act (ADEA).[4] Adams and her fellow employees appealed the district court's decision to the Eleventh Circuit Court of Appeals.[5] The Eleventh Circuit affirmed the district court's ruling, holding that the ADEA precludes disparate impact liability. In doing so, it took a stand on an issue that has caused a pervasive circuit split:[6] it is generally recognized that the ADEA prohibits disparate treatment of workers because of their age,[7] but the federal circuits are split on whether the

1. Adams v. Fla. Power Corp., 255 F.3d 1322, 1323 (11th Cir. 2001).

2. *Id.*; Glen Elsasser & Judy Peres, *High Court to Mull Age Bias in Layoffs*, CHI. TRIB., Dec. 4, 2001, at 11.

3. *Adams*, 255 F.3d at 1323. For an explanation of the meaning of the terms "disparate impact" and "disparate treatment," as used in this Note, see *infra* Part II.B.

4. *Adams*, 255 F.3d at 1323–24. This is a condensed version of the facts and only contains those facts essential to understanding the case. The district court's opinion is unpublished. The Age Discrimination in Employment Act is codified at 29 U.S.C. § 623 (2000).

5. *Id.* at 1323.

6. *Id.* at 1324–25.

7. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) ("The disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear.").

ADEA prohibits disparate impact as well.[8] The issue is crucial: whether plaintiffs seeking relief under a theory of disparate impact can recover for age discrimination will have a serious effect on the scope of the ADEA, which will likely be increasingly litigated as more workers continue to work past retirement age.[9]

This Note argues that the Eleventh Circuit correctly held that the ADEA precludes disparate impact claims, but that the court's analysis illuminates a judicial tendency to dilute the ADEA's reasonable factors test. In the past, that trend had been perpetuated by applying Title VII's tripartite burden-shifting scheme[10] to ADEA cases, but the *Adams* decision dilutes the reasonable factors test by analogizing between the ADEA and the Equal Pay Act (EPA). However it is accomplished, such a dilution makes it easier for allegedly infringing employers to justify their actions and is in contravention of Congress's intent in enacting the ADEA. The Eleventh Circuit should have instead relied on an alternative plain language argument—presented in this Note—to resolve the claims of the terminated Florida Power Corporation employees. Part II of this Note provides background into the ADEA's pertinent provisions and the definition of disparate impact. Part III outlines the history of disparate impact vis-à-vis the ADEA and explains the Eleventh Circuit's decision in *Adams*. Part IV identifies the accepted judicial application of Title VII burden-shifting to the ADEA—an application that, in some instances, may allow employers to escape discrimination liability without meeting the statutory requirement to

8. For cases holding that the ADEA permits disparate impact liability, see Criley v. Delta Air Lines, Inc., 119 F.3d 102 (2d Cir. 1997); Lewis v. Aerospace Cmty. Credit Union, 114 F.3d 745 (8th Cir. 1997); Equal Employment Opportunity Comm'n v. Local 350, 998 F.2d 641 (9th Cir. 1993); Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000). For cases holding that the ADEA precludes disparate impact liability, see Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995); Equal Employment Opportunity Comm'n v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994); Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996).

9. A recent study indicated that 69 percent of workers in the current workforce plan on working past retirement. Hire Consulting Services, *Survey: Majority of Workers Won't Quit at 65*, *in* THE HIRE REPORT, *at* http://www.hireconsultant.com/HireReport3.htm (last visited Sep. 23, 2002). This trend has resulted in an increase in complaints filed with the Equal Employment Opportunity Commission. Michele Himmelberg, *Age-based Complaints on the Rise*, ORANGE COUNTY REGISTER, July 30, 2002, http://www.ocregister.com/archive/ ("Age-discrimination complaints filed with the Equal Employment Opportunity Commission increased 13 percent in 2000 and rose almost 9 percent last year [2001] to 17,405.").

10. See *infra* Part IV.A for an explanation of Title VII's tripartite burden-shifting scheme. See also *infra* Part IV.C.1 for a history of that scheme.

show that the allegedly discriminatory employment action was based on reasonable factors other than age, thereby diluting the ADEA's reasonable factors test. Part IV will also show how the Eleventh Circuit demonstrated this judicial tendency to weaken the ADEA's reasonable factors defense by analogizing between the ADEA and the EPA,[11] as well as how that analogy may illustrate a new rationale for lowering a defendant employer's burden of proof. Diluting the ADEA's reasonability requirement to any degree beyond that evinced in the Act's statutory language is impermissible because it makes it easier for allegedly infringing employers to defend themselves against the discrimination liability that Congress intended them to face; in cases where plaintiff employees do not have sufficient evidence to prove that the defendant's proffered reasons for its allegedly discriminatory action are pretextual, a defendant can escape liability without the statutorily-required showing of reasonable factors other than age. The burden-shifting scheme that has produced this result is inapplicable in ADEA contexts, and reducing an employer's burden by any means allows employers to escape liability in situations where Congress likely intended them to face liability. Part V argues that the Eleventh Circuit could have avoided participating in the trend to dilute the ADEA's reasonability requirement simply by considering the ADEA's plain language; Part V presents the plain language argument that the Eleventh Circuit should have used and demonstrates how that analysis solves the question at bar without needlessly diluting the ADEA's reasonability requirement. A plain language analysis yields a conclusion consistent with Supreme Court statements on the issue, the congressionally-stated purpose of the ADEA, and the Eleventh Circuit's conclusion that Title VII and the ADEA are not analogous,[12] and would

11. 29 U.S.C. § 206(d)(1) (2000). The Equal Pay Act provides, in pertinent part, that:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility . . . except where such payment is made pursuant to . . . (iv) *a differential based on any other factor other than sex.*

Id. (emphasis added). See *infra* Part IV.B for an explanation of the analogy the Eleventh Circuit employed.

12. Proponents of allowing disparate impact liability under the ADEA have pointed to cases holding that disparate impact liability is available under Title VII and that the prohibitory language of Title VII and the ADEA is the same; therefore, the ADEA must also allow

preserve the *Adams* court's correct analysis of those issues. Part VI offers conclusions.

II. BACKGROUND

A. The Age Discrimination in Employment Act

The ADEA[13] protects workers over forty years of age[14] and prohibits three principal groups from engaging in age discrimination: employers, employment agencies, and labor organizations.[15] According to section 623(a), employers may not fire, refuse to hire, or discriminate against any employee by paying that employee less or by providing inferior terms, conditions, or privileges of employment because of that employee's age; additionally, employers may not

disparate impact liability. *See infra* Part III.A. To illustrate, note for example that the ADEA's prohibition against age discrimination by an employer makes it illegal for an employer

> (1) to fail or refuse to hire or to 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; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a)(1)–(3) (2000). Likewise, Title VII makes it unlawful

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment 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 race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1)–(2) (2000). See *infra* Part V.D for an explanation of why Title VII and the ADEA are in fact not analogous.

13. 29 U.S.C. § 623. The ADEA is a detailed system of rules; this section will therefore discuss only those rules most pertinent to an analysis of disparate impact theory under the ADEA.

14. *Id.* § 631(a) ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age."). Though the ADEA protects workers of over forty years of age, it "does not provide a remedy for reverse age discrimination," i.e., discrimination based on the youth of an employee, rather than old age. Hamilton v. Caterpillar Inc., 966 F.2d 1226, 1228 (7th Cir. 1992).

15. 29 U.S.C. § 623(a)–(c). For additional expositions of the ADEA's prohibitions, see Kay H. Hodge, *The Age Discrimination in Employment Act*, SG060 A.L.I.-A.B.A. 337, 340–41 (2002); Marilyn V. Yarbrough, *Disparate Impact, Disparate Treatment, and the Displaced Homemaker*, 49 LAW & CONTEMP. PROBS. 107, 110 (Autumn 1986).

segregate or classify any employee in any way because of that employee's age that would adversely affect that employee, nor can they reduce the wages of younger employees in order to mask a discriminatory discrepancy between younger and older employees' wages.[16]

Section 623(f) of the ADEA sets forth categories of permissible employment practices which would otherwise be impermissible if not explicitly sanctioned.[17] First, it permits employers to engage in what would otherwise be discriminatory behavior so long as "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[18] Second, and most important for purposes of this Note, it allows employers to differentiate between employees "based on reasonable factors other than age."[19] Third, it also allows employers to violate the ADEA's provisions if compliance with the Act would be illegal in the country where the workplace is located, if a foreign country.[20] Employers may also observe a bona fide seniority system[21] or employee benefit plan,[22] even if such systems or plans violate the ADEA.[23]

B. Disparate Treatment and Disparate Impact Defined

Disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[24] The United States Supreme Court has held that "[p]roof of discriminatory motive . . . is not required under a disparate-impact theory."[25] For example, a disparate impact claim might challenge a policy to require a job applicant's birthdate; that policy may not have as its purpose the weeding out of older

16. 29 U.S.C. § 623(a)(1)–(3).

17. For further reading on the ADEA's prohibitions, see Hodge, *supra* note 15, at 341–42; Yarbrough, *supra* note 15, at 110–11.

18. 29 U.S.C. § 623(f)(1).

19. *Id.*

20. *Id.*

21. *Id.* § 623(f)(2)(A).

22. *Id.* § 623(f)(2)(B).

23. *Id.* § 623(f)(2). For an additional enumeration of defenses provided for under the ADEA, see Hodge, *supra* note 15, at 341–42.

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

25. *Id.*

applicants, but it may deter older employees from applying for the job or, at a minimum, cause an unsuccessful applicant to believe that she was not hired because of her age.[26] In that circumstance, the plaintiff employee would not need to demonstrate that the employer intended to discriminate against older applicants; she would only need to prove that the employer's policy "more harshly" impacted older applicants.

Disparate treatment, on the other hand, is intentional discrimination. It occurs when an employer purposefully discriminates in her employment decisions on the basis of the employee's race, gender, religion, or some other characteristic.[27] In a disparate treatment claim, therefore, a plaintiff must demonstrate the defendant employer's discriminatory intent. In contrast to a disparate impact claim, which argues that an otherwise facially neutral employment policy impacts one class of workers more harshly than another, a disparate treatment claim would, for example, claim that an employee had been terminated because of sex or race.[28] In a disparate impact claim, those characteristics are incidental to the discrimination; in a disparate treatment claim, those characteristics are the reason for the discrimination.

26. Michael Faillace, *Current Employment Law Issues*, 687 PRACTISING L. INST./PAT. 205, 211 (2002) (noting that "while asking for [an] applicant's date of birth does not in and of itself violate the statute, such a request may tend to either deter older applicants or could permit a discriminatory inference of age discrimination if the applicant is not hired").

27. *Teamsters*, 431 U.S. at 335 n.15 (noting that disparate treatment occurs when "[t]he employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics]" and that "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment"); *see also* Johnson v. Chapel Hill Indep. Sch. Dist., 853 F.2d 375, 381 (5th Cir. 1988) (noting that a plaintiff claiming disparate treatment must show discriminatory motive as well as disparate treatment but that the plaintiff may establish a prima facie case of disparate treatment by simply presenting evidence of disparate treatment). For more reading on the difference between a disparate impact claim and a disparate treatment claim, including evidentiary standards, see Laina Rose Reinsmith, Note, *Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine After* Reeves v. Sanderson Plumbing Products, 55 VAND. L. REV. 219, 224–39 (2002).

28. *See, e.g.*, Nanda v. Bd. of Trustees of Univ. of Ill., 303 F.3d 817, 819, 830 n.6 (7th Cir. 2002) (noting that a doctor claimed, under a disparate treatment theory, that she had been terminated from her employment as an assistant professor of microbiology because of her sex, race, and national origin).

III. THE *ADAMS* DECISION: OUTLINING AND TAKING A STAND ON THE CIRCUIT SPLIT

A. How the Circuit Split Arose

The Eleventh Circuit's decision in *Adams v. Florida Power Corp.* maps out the path that disparate impact theory took in integrating itself into ADEA jurisprudence.[29] That path began with two United States Supreme Court decisions. In 1971, the Court decided *Griggs v. Duke Power Co.*,[30] which held that disparate impact in employment discrimination was a cognizable injury under Title VII.[31] Then, in 1978, the Court decided *Lorillard v. Pons*,[32] which pointed out that the language of Title VII's prohibitions on discrimination mirrors that of the ADEA; specifically, the Court noted that "the prohibitions of the ADEA were derived *in haec verba* from Title VII."[33] Taken together, those decisions seem to say that disparate impact liability is available under the ADEA; if disparate impact liability is available under Title VII, and the prohibitory language of the ADEA mirrors that of Title VII, then the ADEA must also permit disparate impact liability.

Twenty-two years after *Griggs*, in *Hazen Paper Co. v. Biggins*,[34] the Supreme Court attacked the notion that disparate impact was a cognizable injury under the ADEA, but not in a way that would provide clear guidance to other courts deciding that issue. Hearing the case of an ADEA-covered employee who was terminated immediately before his pension benefits vested,[35] the Court noted that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA,"[36] and that "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears.

29. Adams v. Fla. Power Corp., 255 F.3d 1322, 1324 (11th Cir. 2001).

30. 401 U.S. 424 (1971).

31. *Id.* at 431; *see also* Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982) (noting that the "legislative history of the 1972 amendments to Title VII" shows that "Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*").

32. 434 U.S. 575 (1978).

33. *Id.* at 584. *See supra* note 12 for a brief explanation of Title VII's relevance to this Note's argument, as well as the relevant text of both the ADEA and Title VII.

34. 507 U.S. 604 (1993).

35. *Id.* at 606–07.

36. *Id.* at 610.

This is true even if the motivating factor is correlated with age . . . ."[37] Also, in his concurring opinion, Justice Kennedy noted that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[38] On their face, these statements seem to conclusively demonstrate that the Court believed disparate impact to have no place in ADEA jurisprudence, but the majority explicitly noted that *Hazen Paper* was a disparate treatment case, not a disparate impact case, and that the Court had "never decided whether a disparate impact theory of liability is available under the ADEA" and that it would not do so in deciding *Hazen Paper*.[39] In addition, Justice Kennedy's concurrence explained that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII."[40] As such, even though the Court seems to believe that disparate impact has no place in ADEA jurisprudence, there is considerable doubt as to whether *Hazen Paper* is a disparate impact case at all.

Two perspectives therefore result. One perspective relies on the similarity in language between the ADEA and Title VII and the fact that the *Hazen Paper* Court explicitly refused to invalidate that argument. The other perspective relies on the *Hazen Paper* dicta to argue that disparate impact liability has no place in ADEA jurisprudence. Those two conflicting perspectives caused a split in the circuits. The Eleventh Circuit in *Adams* noted that "[t]he Second, Eighth, and Ninth Circuits have read [the language in *Hazen* specifying that the Supreme Court does not decide whether disparate impact may form a basis for liability under the ADEA] literally and continue to allow disparate impact claims."[41] However, the "First, Third, Sixth, Seventh, and Tenth Circuits have questioned the viability of disparate impact claims under the ADEA post-*Hazen*."[42] These cases rely both on the *Hazen Paper* majority opinion and concurring statements.[43]

37. *Id.* at 611.

38. *Id.* at 618 (Kennedy, J., concurring).

39. *Id.* at 610.

40. *Id.* at 618 (Kennedy, J., concurring).

41. Adams v. Fla. Power Corp., 255 F.3d 1322, 1324 (11th Cir. 2001); *see supra* note 8 for cases holding that the ADEA permits disparate impact liability.

42. *Adams*, 255 F.3d at 1324–25; *see supra* note 8 for cases holding that the ADEA precludes disparate impact liability. In *Adams*, the Eleventh Circuit incorrectly names the Sixth

B. The Reasoning in Adams[44]

After presenting the history of disparate impact in the ADEA context and outlining the circuit split on that issue, the court in *Adams* went on to reject the claim that disparate impact can form the foundation for a claim under the ADEA. In doing so, the Eleventh Circuit relied on the plain language of the ADEA, its legislative history, and an interpretation of the Supreme Court's *Hazen Paper* decision.

The court began by addressing whether Title VII and the ADEA are analogous. Specifically, the court cites as a key difference section 623(f)(1) of the ADEA, which explains that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . . ."[45] Title VII contains no such provision, so this language must be read to preclude disparate impact from the scope of the ADEA; if not, "it becomes nothing more than a bromide to the effect that 'only age discrimination is age discrimination,'" producing "a circular construction" that would render the provision superfluous.[46]

The court argues that this language is more similar to that found in the Equal Pay Act, which prohibits gender-based wage discrimination unless the discriminatory result is "based on any other factor other than sex."[47] The court then cites *County of Washington v. Gunther*, in which the Supreme Court held that the Equal Pay Act precludes disparate impact claims,[48] and argues that if the two provisions are linguistically similar, and the EPA precludes disparate impact, then the ADEA must preclude disparate impact as well.

Circuit as one that has questioned whether disparate impact is available under the ADEA. The Sixth Circuit, although recognizing that "[t]here is considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory," has actually "stated that a disparate-impact theory of age discrimination may be possible." Lyon v. Ohio Educ. Ass'n, 53 F.3d 135, 139 n.5 (6th Cir. 1995).

43. The *Adams* decision also mentions that these circuits have relied on "other factors" in deciding against applying disparate impact theory to the ADEA. *Adams*, 255 F.3d at 1325.

44. For a synopsis of the facts in *Adams*, see *supra* Part I.

45. *Adams*, 255 F.3d at 1325 (citing 29 U.S.C. § 623(f)(1) (2000)).

46. *Id.* (quoting Mullin v. Raytheon Co., 164 F.3d 696, 702 (1st Cir. 1999)).

47. *Id.* (quoting 29 U.S.C. § 206(d)(1)(iv)).

48. *Id.* (citing County of Washington v. Gunther, 452 U.S. 161, 170–71 (1981)).

After holding, through these comparisons, that the ADEA precludes disparate impact, the court goes on to note that the ADEA's legislative history further distinguishes it from Title VII. The court cites a report, issued by the Secretary of Labor before the ADEA was adopted, on age discrimination.[49] That report, according to the court, "recommended 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, [should] be addressed in alternative ways."[50] That report was key in the drafting of the ADEA. As such, the ADEA's legislative history differs from that of Title VII, which did not have as its policy the suppression of stereotypes and should not be compared.[51]

Finally, the court admits that the *Hazen Paper* decision did not explicitly address disparate impact under the ADEA, but contends that the Supreme Court's language in that decision hints that the Court is inclined to preclude disparate impact from the ADEA. First, the court cites to the *Hazen Paper* Court's observation that disparate treatment (and by inference, not disparate impact) is the "essence" of the ADEA's prohibition.[52] Second, the court points out that the *Hazen Paper* Court noted that disparate impact "[does] not rely on 'inaccurate and stigmatizing stereotypes'"—the problem the ADEA sought to remedy—and therefore does not fall within the ambit of the ADEA.[53] The majority therefore affirmed the district court's ruling against plaintiffs that disparate impact cannot form the basis of an ADEA claim.

49. *Id.* at 1325–26.

50. *Id.* (citing *Mullin*, 164 F.3d at 702–03; Ellis v. United Airlines, Inc., 73 F.3d 999, 1008 (10th Cir. 1996)).

51. *See* 29 U.S.C. § 621. Congress's findings of fact included findings that older workers are "disadvantaged in their efforts to retain employment" because of increased affluence; that employers commonly set arbitrary age limits; that unemployment is higher among older workers than it is among younger workers; and that arbitrary discrimination affects commerce. *Id.* Its stated purpose in enacting the ADEA 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." *Id.* There is no statement concerning the suppression of stereotypes.

52. *Adams*, 255 F.3d at 1326 (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)).

53. *Id.* (quoting *Hazen Paper*, 507 U.S. at 611).

In her concurrence, Judge Barkett joins with the majority's holding, but on the ground that the plaintiffs' complaint did not plead "a disparate impact claim sufficient to qualify for class certification"; she therefore argues that it is unnecessary in this case to decide whether disparate impact is a viable basis for liability under the ADEA.[54] That said, she proceeds to argue that disparate impact may act as a basis of ADEA liability, taking the position advocated by the Second, Eighth, and Ninth Circuits: that the *Hazen Paper* Court explicitly refused to decide whether disparate impact may form a basis for ADEA liability, therefore making any language to the contrary inapposite;[55] that section 623(f)(1) of the ADEA does not bar disparate impact from the ADEA, but rather constitutes a statutory manifestation of the commonly accepted business necessity defense;[56] that the Equal Pay Act and the ADEA are really not analogous;[57] and that the legislative history does not in fact betray an intent to exclude disparate impact from ADEA jurisprudence.[58]

In summary, the Eleventh Circuit's holding in *Adams* relied upon several distinct lines of reasoning. First, it conducted a faux plain language analysis and reasoned that Title VII and the ADEA are not analogous and that the ADEA is, in fact, more analogous to the Equal Pay Act—a provision which, the Supreme Court has held, does not allow disparate impact theories. It then reasoned that the ADEA's legislative history indicates a congressional intent to remove disparate impact from the purview of the ADEA. Finally, it reasoned that in *Hazen Paper*, the Supreme Court manifested its inclination to reject disparate impact claims under the ADEA. As will be demonstrated in the remainder of this Note, the court's conclusions with respect to Title VII, the ADEA's legislative history, and the

54. *Id.* (Barkett, J., concurring).

55. *Id.* at 1329 (Barkett, J., concurring).

56. *Id.* at 1327 (Barkett, J., concurring). The business necessity defense allows a defendant employer to defend herself against a discrimination action by showing that the employment decision in controversy was related to employment and justified by a business necessity. *See* Toni J. Querry, Note, *A Rose By Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After* Hazen Paper Co. v. Biggins, 81 CORNELL L. REV. 530, 576–79 (1996) (explaining the business necessity defense).

57. *Adams*, 255 F.3d at 1328–29. Judge Barkett noted that the remedial provisions of the ADEA and the Equal Pay Act are analogous, but the substantive provisions, which were the proper focus of the court's analysis in *Adams*, are not. *Id.* Also, the Equal Pay Act requires a neutral explanation, not a presentation of "reasonable factors" as required by the ADEA. For an explanation of the difference this makes in the *Adams* majority's analysis, see *infra* Part IV.

58. *Id.* at 1330–31.

Supreme Court's statements were all correct; its analogy between the ADEA and the Equal Pay Act, however, could prove disastrous for future disparate treatment plaintiffs.

IV. HOW THE ELEVENTH CIRCUIT ILLUMINATED THE JUDICIAL TENDENCY TO DILUTE THE ADEA'S REASONABLE FACTORS EXCEPTION

The Eleventh Circuit correctly held that the ADEA precludes disparate impact claims and provided a correct answer to the circuit split,[59] but its analysis is dangerous to future disparate treatment plaintiffs. Its analogy between the ADEA and the Equal Pay Act was designed to show that because the ADEA is linguistically akin to the Equal Pay Act—a statute that the Supreme Court has held to preclude disparate impact—the ADEA should be similarly construed. Its result, however, may be to articulate an interpretation of the term "reasonable," as used in the ADEA, so as to make it inordinately difficult for disparate treatment plaintiffs to successfully sue discriminating employers. If this is indeed the result of the analogy, then *Adams* would conform to a long line of cases that improperly dilute the term "reasonable."

This Part will first analyze the tripartite burden-shifting scheme currently applied in ADEA cases and demonstrate that, in some cases, the scheme may significantly reduce the burden of proof a defendant must meet to rebut a prima facie case of age discrimination. It will then analyze the Eleventh Circuit's analogy between the ADEA and the Equal Pay Act and show how the analogy also reduces a defendant's burden of proof, although through a different means; this illustrates a judicial trend, manifested in at least two ways, of limiting a defendant's burden of proof. This Part will then present two reasons why diluting the ADEA's reasonability requirement is improper. First, cases applying the tripartite burden-shifting scheme to ADEA cases rely on unfounded reasoning. Second, diluting the reasonable factors exception is inconsistent with Congress's intent in passing the ADEA.

59. The argument that the Eleventh Circuit reached the correct result will be presented *infra* Part V. That Part will argue that a plain language analysis—the more appropriate analysis in this case—reaches the same result.

A. The Trend of Reducing a Defendant Employer's Burden of Proof

Courts, including the Eleventh Circuit, have departed from the plain language of the ADEA's "reasonable factors other than age" test by applying Title VII's tripartite burden-shifting to ADEA cases. That burden-shifting scheme is tripartite in nature.[60] First, an ADEA plaintiff must establish a prima facie case.[61] A plaintiff establishes a prima facie case by demonstrating (1) that she was at least forty years old at the time of termination; (2) that she was terminated; (3) that she was meeting the defendant employer's reasonable expectations of employee performance at the time of the termination; and (4) that she was replaced by a younger employee.[62] Once the plaintiff establishes that prima facie case, the burden of production then shifts to the employer, who must defend by presenting evidence of a legitimate, nondiscriminatory reason for the allegedly discriminatory action.[63] According to the Eleventh Circuit, "a legally sufficient, legitimate, nondiscriminatory reason [exists] if the defendant

60. *See* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311–12 (1996) (applying Title VII burden-shifting to an ADEA case).

61. *Id.* at 310.

62. *See* Mayer v. Nextel W. Corp., 318 F.3d 803, 807 (8th Cir. 2003). *But see O'Connor*, 517 U.S. at 312 (noting that a requirement that a terminated worker be replaced by someone under forty years of age is irrelevant to the proper analysis: "[t]he fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he has lost out *because of his age*").

63. *O'Connor*, 517 U.S. at 311. This Note will assume that a "legitimate, nondiscriminatory reason" is synonymous with a "reasonable factor other than age." That assumption, however, is only for purposes of simplifying the Note's argument. See *infra* note 70 for some explanation of why the two standards may in fact not be synonymous. Whatever the term used, it seems that a defendant employer would have two opportunities to invoke that defense. First, a defendant may move to dismiss a claim based on legitimate but nondiscriminatory reasons, or reasonable factors, on the ground that it fails to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6)—that it is, in fact, a disparate impact claim for which the ADEA grants no remedy. Second, a defendant may invoke such reasons or factors to rebut a plaintiff's prima facie case. The obvious difference is that the former situation awards dismissal based solely on the pleadings, while the latter is an affirmative defense granted after the production of at least some evidence. *See Mayer*, 318 F.3d at 807 (noting that once a plaintiff establishes a prima facie case, a defendant employer "must then produce evidence of a legitimate, nondiscriminatory reason" for terminating plaintiff). No matter which term is used, these are a defendant's opportunities to take the case out of the scope of disparate treatment and place it in the netherworld of disparate impact; the two phrases, though different, would fulfill the same procedural role. This Note argues simply that the phrase "legitimate, nondiscriminatory reason" should be replaced with the phrase "reasonable factors other than age"—that an employer should be required to produce reasonable reasons rather than legitimate reasons as defined herein. *See supra* Part V.A.

articulates a clear and reasonably specific factual basis upon which it based its subjective opinion."[64] A defendant employer meets its burden when the admissible "evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff with clear reasons for its decision;"[65] evidence, not mere testimony, must be presented to meet that burden.[66] If the defendant remains silent, the court will enter judgment in favor of the plaintiff as a matter of law;[67] presumably, the same result obtains if, for some reason, the defendant cannot meet its burden. But if the defendant meets its burden, then the burden shifts back to the plaintiff to prove that the legitimate, nondiscriminatory reason set forth by the defendant is a pretext.[68]

This burden-shifting scheme is, in some cases, fundamentally inconsistent with the ADEA's requirement that a defendant employer defend itself by producing "reasonable factors other than age" for its employment decision. As noted, once the defendant employer presents evidence sufficient to shift its burden, the plaintiff then must show that the reasons the defendant proffered for its allegedly discriminatory action are pretextual. There are clearly some situations where the defendant can present irrefutable evidence of a legitimate, nondiscriminatory reason and rightly avoid liability. However, if the plaintiff can demonstrate that the defendant's reasons are pretextual, then it follows that the reasons the defendant proffered were plainly never reasonable, for a proffered reason cannot be both pretextual and reasonable.[69] The tripartite burden-shifting scheme thus, in some cases, inherently allows the burden to shift back to the plaintiff even though the defendant has presented something less than a reasonable factor other than age, as required by the ADEA. So long as the defendant presents evidence that raises

64. Steger v. Gen. Elec. Co., 318 F.3d 1066, 1076 (11th Cir. 2003) (quotations omitted) (citing *Chapman v. AI Transp.*, 229 F.3d 1012, 1033 (11th Cir. 2000)).

65. *Id.* (quotations omitted) (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254–55 (1981)).

66. *Id.* at 1075 (noting that a "defendant may not satisfy this burden by mere argument, but must present evidence of the legitimate reason for its decision").

67. *O'Connor*, 517 U.S. at 311.

68. *Mayer*, 318 F.3d at 807.

69. Dishonesty is inherent in a pretext, which is defined as "[a] false or weak reason or motive advanced to hide the actual or strong reason or motive." BLACK'S LAW DICTIONARY 967 (abridged 7th ed. 2000). In contrast, something that is reasonable is fair or proper under the circumstances. *See id.* at 1018.

an issue of fact, the burden will shift. The ADEA-mandated showing of reasonableness is not required, but rather a showing of facts that might bear on the employer's decision.[70]

Of course, the plaintiff will sustain no injury if she can rebut the defendant's proffered reasons. Conversely, though, the plaintiff will be severely injured in instances where she has enough evidence to assert a prima facie case, but not enough evidence to rebut the defendant's pretext. As noted, in order to present a prima facie case, a plaintiff must show that she was over forty years old, that she was terminated, that she was meeting the defendant employer's reasonable employment expectations, and that the plaintiff was replaced by someone younger.[71] Those four factors require very little in the way of evidence: age and termination are easy to prove, as is the age of replacement workers, and a plaintiff can demonstrate that she was meeting the defendant's reasonable expectations by proffering easily obtainable performance review records. Proving a pretext, however, requires a considerably higher showing of evidence: the plaintiff must show that she was the "victim of intentional discrimination by showing that the employer's proffered explanation is unworthy of credence."[72] To say that a reason for terminating an employee is pretextual is to say that, even though the reason might be valid, the employer was looking for an excuse to terminate an older employee and that it used that reason as an excuse. Employees may not be able to meet such a high burden, and therefore their ADEA claims may fail even if the defendant employer does not present evidence of a reasonable factor other than age.[73]

70. Consequently, the "legitimate, nondiscriminatory reason" and "reasonable factor other than age" tests might not be synonymous. If the presentation of a legitimate, nondiscriminatory reason for an employer's action requires only the presentation of evidence sufficient to raise an issue of fact, it clearly does not rise to the level of reasonableness required by the ADEA. Reasonableness would per se preclude a plaintiff from proving that the proffered reason is a pretext because something that is reasonable is not pretextual. *See id.* at 967. However, the presentation of a legitimate, nondiscriminatory reason, as defined as a showing of an issue of material fact, obviously produces some pretexts—otherwise, the tripartite burden-shifting scheme would not allow the defendant to foist its burden on the plaintiff to show pretext.

71. *See supra* note 62.

72. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (quotations omitted).

73. Note that courts would not place too great a burden on the plaintiffs by requiring them to prove that their employers' proffered reasons are pretextual. Just as defendants should not be able to escape liability by proffering something less than a reasonable factor other than

Such a situation arose in the Eleventh Circuit in *Walker v. Prudential Property & Casualty Insurance Co.*[74] In that case, the plaintiffs claimed that they were passed up for a job on the basis of their age and gender.[75] The Eleventh Circuit assumed that a prima facie case existed with respect to at least one of the employers that decided not to offer the plaintiffs a job,[76] and the defendant employer sought to rebut this prima facie case by setting forth evidence demonstrating that the candidate the defendant in fact hired was more qualified than the plaintiffs.[77] The plaintiffs sought to rebut defendant's reasons by arguing that they were more qualified than the candidate actually hired and that the defendant had deviated from its hiring practices.[78] The Eleventh Circuit then articulated an extraordinarily high burden for the plaintiffs to meet in order to rebut the defendant's proffered reasons and prove that they were more qualified than the candidate that was actually hired: the court required plaintiffs to "show more than superior qualifications; rather, they must show that they were so much more qualified that the disparity virtually jumps off the page and slaps one in the face."[79] The court found that the plaintiffs did not meet that burden.[80] Similarly, though the court cited no explicit standard governing the pretextuality of hiring procedures, the plaintiffs were nevertheless unable to prove that hiring procedures were not satisfied; the court held that evidence showing that the job opening was not posted was not sufficient to rebut the employer's proffered reasons because the defendant testified that a decision to post was left to the discretion of the human resources department and that the opening arose so late

age, employees should not be able to recover if they do not have sufficient evidence to demonstrate that their employer discriminated against them because of their age. It is beyond the scope of this Note to articulate a preferable procedure for adjudicating ADEA claims, but a system that allowed plaintiffs to prove affirmatively at the outset that their employer discriminated against them because of their age, and then shifted the burden to the defendants to articulate reasonable factors other than age as an affirmative defense, would solve this problem. Under such a scheme, both the plaintiff and the defendant would be required to make their respective arguments with the maximum possible quantum of evidence.

74. 286 F.3d 1270 (11th Cir. 2002).

75. *Id.* at 1273.

76. *Id.* at 1276.

77. *Id.*

78. *Id.* at 1277.

79. *Id.*

80. *Id.* at 1278.

in the hiring process that there was no time to post.[81] Tellingly, there was no evidence of how long it actually took to post a job opening[82]—evidence that might have been helpful in proving that the defendant's proffered reasons were pretextual. It is irrelevant to the analysis of this Note whether the defendant's proffered reasons were actually pretextual; they very well could have been, but the plaintiffs had virtually no hope of even rebutting that potential pretext because of the high burden to which they were held.[83] With such a high burden of proof placed upon the plaintiffs, the defendant could have proffered a pretext and succeeded,[84] so long as its proffered reasons created an issue of material fact.

Use of the tripartite burden-shifting scheme, as taken from the *McDonnell Douglas* burden-shifting scheme,[85] predates *Adams* in the Eleventh Circuit[86] and is in wide usage in virtually all the circuit courts of appeal.[87] As such, it is the generally accepted application (or misapplication) of the ADEA's reasonable factors test, in spite of its elimination of the reasonable factors exception in some instances; it is also the trend to which the Eleventh Circuit in *Adams* conformed.[88]

81. *Id.* at 1279.

82. *Id.*

83. Admittedly, this problem might occur in any Title VII case; indeed, in given situations plaintiffs might not have enough evidence to prove that the reasons being proffered by the defendants are pretextual. The difference between the application of a burden-shifting scheme in Title VII and the ADEA is that the ADEA specifically mandates that employers present evidence of "reasonable factors other than age" as part of their affirmative defense; Title VII contains no such requirement. *See infra* Part V.D.

84. For obvious reasons, it will be difficult to find a case that makes clear that this has happened; the crux of this analysis is the potential of undetected pretexts. For that reason, it is sufficient for the purposes of this argument to demonstrate situations in which it could have happened.

85. *See infra* Part IV.C.1.

86. *See* Chapman v. AI Transp., 229 F.3d 1012, 1033 (11th Cir. 2000).

87. Holtz v. Rockefeller & Co., 258 F.3d 62, 78 (2d Cir. 2001); Fakete v. Aetna, Inc., 308 F.3d 335, 338 n.3 (3d Cir. 2002); Hill v. Lockheed Martin Logistics Mgmt., 314 F.3d 657, 663 (4th Cir. 2003); Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893, 897 (5th Cir. 2002); Wexler v. White's Furniture, Inc., 2003 WL 169763, at *21 (6th Cir. 2003); Nawrot v. CPC Int'l, 277 F.3d 896, 905–06 (7th Cir. 2002); Erickson v. Farmland Indus., Inc., 271 F.3d 718, 726 (8th Cir. 2001) (applying the *McDonnell Douglas* approach); Garrett v. Hewlett Packard Co., 305 F.3d 1210, 1216 (10th Cir. 2002); Dunaway v. Int'l Bhd. of Teamsters, 310 F.3d 758, 761–62 (D.C. Cir. 2002).

88. A simple scheme that would allow a defendant to rebut the plaintiff's prima facie case would conform more completely with the text of the ADEA. Under that scheme, an

B. How the Eleventh Circuit's ADEA/Equal Pay Act Analogy Fits into this Trend

The majority in *Adams* analogized between the ADEA and the Equal Pay Act in an attempt to demonstrate that because the two provisions had similar language, and the Equal Pay Act precludes disparate impact, the ADEA must preclude disparate impact as well.[89] There is a serious flaw in that analysis, however, that further hints at a judicial tendency to dilute the ADEA's reasonable factors exception. The Equal Pay Act permits gender discrimination if based on a factor other than gender.[90] The ADEA grants a similar provision to employers with regard to age discrimination, but requires that the employer present reasonable factors other than age to justify her actions, rather than simply neutral factors.[91] The analogy likely achieves its intended result—to show that the ADEA precludes disparate impact—but it may also have another result: to dilute the meaning of the word "reasonable" as used in the ADEA. If the Equal Pay Act and the ADEA are linguistically similar, and the Equal Pay Act requires only a neutral factor, then it follows that the term "reasonable" may have little or no substantive meaning. Such an argument may at first seem speculative at best, but the text of the *Adams* opinion unfortunately bears it out.

In footnote six to its decision, pertaining to its ADEA/Equal Pay Act analogy, the Eleventh Circuit specifically recognizes the difference between the "neutral factor" and "reasonable neutral factor" language, as well as the possibility that the difference could distinguish the two provisions and render the analogy ineffective.[92] The court concludes, however, that the difference is not sufficient to preclude its analogy.[93] In making this determination, the court implicitly questions the difference between a "reasonable factor" and a mere "factor" and concludes that the difference is at least minimal enough for its analogy to proceed. If the difference between the two provisions is so minimal, then it follows that the term "reasonable,"

employer defendant would have an opportunity to rebut the plaintiff's prima facie case; if the defendant could not, she would lose, but if so, she would successfully avoid liability.

89. Adams v. Fla. Power Corp., 255 F.3d 1322, 1325 (11th Cir. 2001).

90. *See supra* note 11 for the text of the Equal Pay Act.

91. 29 U.S.C. § 623(f)(1) (2000).

92. *Adams*, 255 F.3d at 1325 n.6.

93. *Id.*

in the court's eyes, has no real substantive meaning. As such, the court has suggested an interpretation of the term "reasonable" that substantially limits its meaning and application, just like the tripartite burden-scheme. Further credence to this argument is lent by the fact that it is not unheard of for courts to dilute the term "reasonable"; indeed, as already noted, courts have a history of doing so.

Post-*Adams* cases have not relied on the Eleventh Circuit's ADEA/Equal Pay Act analogy to lessen an employer's burden of proof.[94] That analogy, however, is nevertheless troubling because it illustrates judges' willingness to dilute the reasonable factors exception through means other than the application of Title VII burden-shifting; instead of using that burden-shifting scheme, the Eleventh Circuit noted that the term "reasonable," as used in the ADEA's reasonable factors exception, has potentially less meaning than the plain language of that term suggests. The fact that that interpretation has not yet been applied in other cases does not lessen its import as an indicator of judicial willingness to marginalize that term. As noted in the following section, there are significant problems with limiting the reasonable factors exception by any method: first, the application of Title VII burden-shifting to the ADEA rests on unsound analysis; and second, diluting the reasonability requirement would severely handicap future disparate treatment plaintiffs—a result that flies in the face of Congress's intent in passing the ADEA. This section will address those points in turn.

C. Problems with Diluting the Reasonability Requirement

1. The reasoning behind applying Title VII burden-shifting is unsound

The reasoning behind applying Title VII burden-shifting is susceptible to criticism. That scheme originated in *McDonnell Douglas Corp. v. Green*,[95] which found that, in a Title VII claim, a defendant may rebut a plaintiff's prima facie case by presenting a "legitimate, nondiscriminatory reason" for the defendant's action.[96] Later, several circuit court cases held that *McDonnell Douglas*'s Title

94. Eleventh Circuit cases have instead continued to apply Title VII burden-shifting in ADEA cases. *See* Steger v. Gen. Elec. Co., 318 F.3d 1066 (11th Cir. 2003).

95. 411 U.S. 792 (1973).

96. *Id.* at 802.

VII burden-shifting rule was applicable in ADEA contexts.[97] Then, in *Reeves v. Sanderson Plumbing Products, Inc.*, [98] the Supreme Court applied Title VII burden-shifting to decide an ADEA case.[99] Numerous cases have relied on *Reeves* as a justification for applying Title VII burden shifting to ADEA cases,[100] but it should be noted, however, that in *Reeves,* the Supreme Court assumed without deciding that the burden-shifting rule in *McDonnell Douglas* applies to ADEA cases because the parties did not dispute the issue.[101] Indeed, in that case, the Court was not called upon to determine the applicability of the *McDonnell Douglas* test to the ADEA.[102] The Court never considered the legal merits of such an application. Moreover, a Title VII burden-shifting analysis is simply not transferable to the ADEA; the provision on which an employer's burden of proof should turn in an ADEA case—"reasonable factors other than age"—does not exist in Title VII.[103] The plain language of the ADEA requires a defendant employer to present evidence of *reasonable* factors other than age; because Title VII has no similar provision, the burden-shifting scheme employed in those cases does not result in the harm that it does in ADEA cases because Title VII provides no statutorily-defined standard that a defendant employer must meet in making its defense.

There is no need to criticize the Supreme Court's *Reeves* decision; the Court decided only the issue before it and made an inference, without deciding, to which the parties implicitly consented. The decisions deserving criticism were made by the circuit courts that view *Reeves* as giving legitimacy to a practice that

97. *See, e.g.*, Price v. Marathon Cheese Corp., 119 F.3d 330, 336 (5th Cir. 1997).

98. 530 U.S. 133 (2000).

99. *Id.* at 141–42.

100. *See supra* note 87 for a list of cases relying on *Reeves* to justify using the Title VII burden-shifting scheme to ADEA cases.

101. *Reeves*, 530 U.S. at 142.

102. *Id.* at 137 (noting that the issue to be resolved was "whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action"; the issue therefore deals with a plaintiff's burden of proof, not a defendant's). Note also that in *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311 (1996), Justice Scalia wrote that the Court had not yet "had occasion to decide whether [the] application of the Title VII rule to the ADEA context is correct."

103. *See infra* Part V.D.

had evidently been in place long before that case was decided.[104] Those decisions have laid the groundwork for virtually every circuit to apply Title VII burden shifting in assessing an employer's rebuttal of an ADEA plaintiff's prima facie case.[105]

2. Diluting the reasonability requirement would frustrate legitimate disparate treatment claims in contravention of congressional intent

Diluting or removing the reasonability requirement in any case would severely handicap future age discrimination plaintiffs from recovering under the ADEA. As noted, applying Title VII burden shifting to ADEA cases would, in some cases, eliminate the requirement that a defendant employer defend its actions by presenting evidence of "reasonable factors other than age."[106] In those cases, an employer could escape liability simply by raising an issue of material fact rather than actually presenting the statutorily-required reasonable factors. Similarly, under the Eleventh Circuit's view, the term "reasonable" is so diluted that an employer could escape liability simply by presenting evidence of "neutral" factors other than age.[107]

It is wise here to make a distinction in order to avoid a fatal inconsistency in this Note's argument. The reasonability required of an employer to defend itself against a claim does not bear on the kind of harm inflicted upon a plaintiff, but rather upon the level of proof the employer must submit to justify its actions. As such, any harm resulting from the dilution of the ADEA's reasonability requirement, whether that dilution is a result of the improper application of Title VII burden shifting or an improper analogy, falls on those claiming disparate treatment, not disparate impact, as the basis for their claim, for, as already noted, the ADEA does not recognize disparate impact. This distinction is necessary to avoid the obvious inconsistency of first arguing that the ADEA precludes

104. *See, e.g.*, Price v. Marathon Cheese Corp., 119 F.3d 330, 336 (5th Cir. 1997).

105. *See supra* note 87.

106. *See supra* Part IV.A.

107. For an example of how the Court's *Reeves* decision has been misinterpreted and used to complicate plaintiffs' ADEA recovery potential, see Reeves *Doesn't Help Former Employee's ADEA Case*, 17 No. 18 EMPLOYMENT ALERT at 8 (2000).

disparate impact, and in turn arguing that the Eleventh Circuit's decision unfairly limits plaintiffs' recourse for age discrimination.[108]

Making it more difficult for disparate treatment plaintiffs to prevail is inconsistent with the congressionally-stated purpose of the ADEA. Congress intended that Act "to promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment."[109] In so stating, Congress clearly intended to allow liability for the disparate treatment of workers based on age.[110] That is the rule Congress set forth, and it is subject only to the exclusion of disparate impact, defined as behavior motivated by "reasonable factors other than age." Any dilution or elimination of the term "reasonable," as used in the ADEA, therefore flies in the face of this goal. Such a dilution would lower the standard that an allegedly infringing employer would have to meet to justify its actions, making it easier for that employer to escape the very liability Congress intended to impose on discriminating employers.

V. THE ANALYSIS THE ELEVENTH CIRCUIT SHOULD HAVE APPLIED

The Eleventh Circuit could have avoided participating in the trend to dilute the reasonable factors exception by relying on the plain language of the ADEA. This section will first make the plain language argument that the court should have made. It will then demonstrate that that analysis is consistent with Supreme Court statements on the issue, the ADEA's legislative history, and the Eleventh Circuit's refusal to analogize between Title VII and the ADEA.

A. The Plain Language of the ADEA

The main point of contention in interpreting the plain language of the ADEA lies in section 623(f)(1), which permits otherwise discriminatory behavior if (1) "age is a bona fide occupational

108. It must be borne in mind that there are two kinds of age discrimination plaintiffs: one whose claims are indeed unfairly affected, and another who never had a claim at all under the ADEA.

109. 29 U.S.C. § 621(b) (2000).

110. For a more in-depth treatment of the ADEA's legislative history and purpose, including its distinction between disparate treatment and disparate impact liability, see *infra* Part V.C.

qualification reasonably necessary to the normal operation of the particular business" (the business necessity defense); (2) "where the differentiation is based on reasonable factors other than age"; or (3) "where such practices involve an employee in a workplace in a foreign country, and compliance [with the Act] would cause such employer . . . to violate the laws of the country in which such workplace is located."[111] Those that would accept disparate impact in ADEA jurisprudence hold that section 623(f)(1) is merely a codification of the recognized business necessity defense.[112] That argument "is based on the premise that Congress did not intend to prohibit age discrimination in [section] 623(a) and then approve of differentiation on the basis of age in [section] 623(f)(1)."[113] Thus, those that would admit disparate impact into ADEA jurisprudence see the business necessity exception as swallowing the reasonable factors exception, indeed, making all three exceptions "bona fide occupational qualification[s] reasonably necessary to the normal operation of the particular business"[114] and giving the "reasonable factors" exception no meaning independent from the business necessity exception.

That interpretation, however, does not stand up to accepted standards of statutory interpretation. Indeed, it is well recognized

111. 29 U.S.C. § 623(f)(1).

112. The concurrence in *Adams* is an example of this. Adams v. Fla. Power Corp., 255 F.3d 1322, 1327 (11th Cir. 2001) (Barkett, J., concurring) ("Section 623(f)(1) of the ADEA should not be interpreted as anything more than a statutory description of the business necessity defense."); *see also* Equal Employment Opportunity Comm'n v. Francis W. Parker Sch., 41 F.3d 1073, 1080 (7th Cir. 1994) (Cudahy, J., dissenting) ("[I]t seems clear . . . that § 4(f)(1) simply codifies the business necessity defense.").

Judge Cudahy's dissent in *Francis W. Parker School* is probably the seminal argument for holding that section 623(f)(1) simply codifies the business necessity defense. *See* Nathan E. Holmes, Comment, *The Age Discrimination in Employment Act of 1967: Are Disparate Impact Claims Available?*, 69 U. CIN. L. REV. 299, 311–13, 323–25 (2000) (analyzing Judge Cudahy's dissent); Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625, 641 (1996) (noting Judge Cudahy's dissent); Jacob N. Lesser, Note, *No ADEA Liability for Employment Decisions Based on Nonpretextual Factors Closely Correlated with Age:* EEOC v. Francis W. Parker School, 37 B.C. L. REV. 374, 380–81 (1996); Brendan Sweeney, Comment, *"Downsizing" the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527, 1566 (1996).

113. Sweeney, *supra* note 112, at 1548.

114. 29 U.S.C. § 623(f)(1).

that statutes ought to be construed so as to eliminate superfluities.[115] Moreover, "when 'two words or expressions are coupled together, one of which generically includes the other, it is obvious that the more general term is used in a meaning excluding the specific one.'"[116] With respect to the ADEA, therefore, the reasonable factors and the foreign law exceptions simply cannot be mere incarnations or examples of the business necessity defense; if they were, they would be superfluous. Indeed, the general term or expression—in this case, the business necessity defense—must be assigned a meaning that excludes the other two exceptions. Moreover, to avoid further superfluity, the reasonable factors exception must be interpreted so as to be distinct from the foreign law exception. Therefore, all three exceptions must be distinct and independent from one another.

That the business necessity and reasonable factors exceptions are distinguishable is borne out by the text of the provision. Section 623(f)(1) holds that discriminatory action is excusable if (a) it is based on "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business"; or (b) "where the differentiation is based on reasonable factors other than age."[117] In other words, the business necessity exception is invoked when age is a determining factor in the employer's allegedly discriminatory action, but the reasonable factors exception is invoked where age is not a determining factor in the employment practice.[118]

Given that the three exceptions listed in section 623(f)(1) must be construed so as to be distinct and independent from one another, the reasonable factors exception must be construed according to its plain language and not in relation to the other two exceptions. The plain language—that otherwise discriminatory behavior is acceptable

115. *See* TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)).

116. City of Columbus v. Ours Garage & Wrecker Service, Inc., 536 U.S. 424, 445 (2002) (Scalia, J., dissenting) (quoting GEORGE SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 266, at 349 (1891)).

117. 29 U.S.C. § 623(f)(1).

118. *See also* Querry, *supra* note 56, at 578–79 (noting that the business necessity defense is incompatible with the ADEA's "reasonable factors other than age" exception because the business necessity defense requires a showing of necessity, while the "reasonable factors" test requires only a showing of reasonableness).

"where the differentiation is based on reasonable factors other than age"—is synonymous with the definition of disparate impact already given in this Note: "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[119] Indeed, a practice cannot be neutral on its face unless it is based on "reasonable factors other than age." The "reasonable factors" exception is therefore a plain language preclusion of disparate impact from the ADEA.[120]

This plain language argument achieves what the *Adams* majority set out to do: hold that the ADEA precludes disparate impact liability. It does so without lowering defendant employers' burden of proof. As demonstrated in the following sections, this analysis is consistent with the correct points of the *Adams* rationale. While the Supreme Court has not issued any statements of precedential weight on whether disparate impact is a cognizable injury under the ADEA, and the Eleventh Circuit was therefore incorrect in relying on those statements as if they had such weight, those statements do indicate the Court's inclination to preclude disparate impact from ADEA jurisprudence. Also, the plain language analysis presented in this Note is consistent with the Eleventh Circuit's contentions that allowing the ADEA to recognize disparate impact runs contrary to

119. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Note that the definition of disparate impact from *Teamsters* adds the requirement that the practice "cannot be justified by business necessity." This construction makes the facial neutrality of the practice subordinate to business necessity. In other words, even if the practice is facially neutral, it still produces a disparate impact if it cannot be justified as a business necessity. This, at first, seems to contradict this Note's previous conclusion that section 623(f)(1)'s reasonable factors exception was distinct and independent from the business necessity defense, given that the section 623(f)(1) reasonable factors exception and the *Teamsters* definition are one and the same. It must be borne in mind, though, that *Teamsters* is a Title VII case, not an ADEA case. While *Teamsters* provides a useful, general definition of disparate impact, Title VII does not contain a "reasonable factors other than age" exception to its prohibitions. *See infra* Part V.D. As such, the fact that the *Teamsters* definition subordinates a practice's facial neutrality to business necessity is irrelevant in the present case. *See* Holmes, *supra* note 112, at 325 ("There is no good reason to equate the burden of showing that a decision was reasonable, with that of establishing that the decision was a necessity.").

120. For other opinions on why the ADEA should be interpreted to preclude disparate impact claims, see Herbert & Shelton, *supra* note 112, at 650–60 (arguing that allowing disparate impact claims under the ADEA would impermissibly produce jury trials of complicated statistical issues); Sweeney, *supra* note 112, at 1533–34 (concluding that the ADEA precludes disparate impact liability but that the ADEA should be amended to include disparate impact).

Congress's intent and that Title VII and the ADEA are really not analogous. In short, then, if the Eleventh Circuit had relied on this plain language analysis, it could have retained these valid and true points while avoiding participation in a trend that is damaging to future disparate treatment plaintiffs.

B. Supreme Court Precedent

The Supreme Court has commented on whether the ADEA permits disparate impact claims. Those statements come in the form of concurring and dissenting opinions that obviously have no precedential value. Those statements uniformly hold that the ADEA does not permit disparate impact claims, and therefore reinforce the plain language argument made in the preceding section.

In 1981, Justice Rehnquist vigorously dissented from the Supreme Court's denial of certiorari in *Markham v. Geller*, an appeal from the Second Circuit.[121] That case dealt with a fifty-five-year-old teacher with thirteen years of teaching experience who was denied a job in favor of a twenty-six-year-old teacher with three years of experience. The offending school board had enacted a policy of only recruiting teachers who would be paid below the "sixth step" on the district's pay scale, thus precluding the hiring of any teachers with more than five years of experience.[122] The Court of Appeals found in favor of the fifty-five-year-old teacher on the ground that there had not been a sufficient showing of business necessity and that the district's budgetary policy had an unfair, disproportionate impact on teachers between the ages of forty and sixty-five.[123] In arguing that the Supreme Court should grant certiorari to reverse the Court of Appeals' erroneous holding, Justice Rehnquist noted that the Court

> [had] never held that proof of discriminatory impact can establish a violation of the ADEA, and it certainly has never sanctioned a finding of a violation where the statistical evidence revealed that a policy, neutral on its face, has such a significant impact on all candidates concerned, not simply the protected age group.[124]

121. 451 U.S. 945 (1981) (Rehnquist, J., dissenting).

122. *Id.* at 945–46 (Rehnquist, J., dissenting).

123. *Id.* at 946–48 (Rehnquist, J., dissenting).

124. *Id.* at 948 (Rehnquist, J., dissenting).

Moreover, Justice Rehnquist argued that the section 623(f)(1) language allowing apparently discriminatory action "where the differentiation is based on reasonable factors other than age" indicates a Congressional intent to exclude disparate impact from ADEA jurisprudence.[125]

The majority in the *Hazen Paper* decision also weighed in on the issue of whether disparate impact liability is permissible under the ADEA. It noted that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."[126] Also, the majority explained that "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."[127] Therefore, "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears."[128] Justice Kennedy, along with the Chief Justice and Justice Thomas, concurred in the *Hazen Paper* decision. In that concurrence, those Justices noted that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[129]

Though not binding as precedent,[130] these statements bring to light key arguments against allowing disparate impact claims under

125. *Id*. at 948–49 (Rehnquist, J., dissenting) (quoting 29 U.S.C. § 623(f) (2000)).

126. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

127. *Id*.

128. *Id*. at 611.

129. *Id*. at 618 (Kennedy, J., concurring). Several cases rely on these dissenting and concurring opinions to support the proposition that disparate impact cannot form a basis for liability under the ADEA. *See* Evans v. Atwood, 38 F. Supp. 2d 25, 30 (D.D.C. 1999); Hyman v. First Union Corp., 980 F. Supp. 38, 40–41 (D.D.C. 1997); Fobian v. Storage Tech. Corp., 959 F. Supp. 742, 746 (E.D. Va. 1997); Lumpkin v. Brown, 898 F. Supp. 1263, 1270 (N.D. Ill. 1995) (referring to Justice Rehnquist's dissent in the Supreme Court's denial of certiorari in *Markham v. Geller*).

130. These statements, though helpful in determining how at least a few members of the Supreme Court would hold if presented with the *Adams* case, are not binding as precedent; reliance on these statements as anything more than an indication of the Court's leanings or a presentation of well-reasoned counterarguments is therefore inappropriate. The precedential weight of Justice Rehnquist's dissent may be disposed of quickly, for it is common knowledge that dissenting opinions carry no precedential weight. Mark C. Rahdert, Sprague v. Casey *and its Seven Deadly Sins*, 62 TEMP. L. REV. 625, 635–36 (1989) ("First year law students are

the ADEA. Though the *Adams* court was incorrect in relying on these statements as precedent, it correctly noted that the Supreme Court, if given the chance, is likely inclined to hold that disparate impact has no place in ADEA jurisprudence. Relying on a plain language argument to interpret the ADEA, as the Eleventh Circuit should have done, would have been entirely consistent with these statements, and would have allowed the Eleventh Circuit to reach the same result without reducing a defendant employer's burden of rebuttal.

C. Analysis of Congress's Intent in Enacting the ADEA

The Supreme Court has noted that statutory language is conclusive "*[a]bsent* a clearly expressed legislative intention to the contrary."[131] In other words, if Congress has expressed an intention, that intention must govern any interpretation of a statute's plain language. This rule of statutory construction seems to fly in the face of the preceding analysis of the ADEA's language because in its

taught as one of their earliest lessons that dissenting opinions are not controlling authority for anything.").

Similarly, concurring opinions should only be granted precedential weight in certain situations. Igor Kirman, Note, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083 (1995). A concurrence is a "simple concurrence" if it agrees only with the majority's result, possibly proposing an alternative rationale; a concurrence is a "concurrence in judgment" if it agrees with both the majority's result and reasoning. *Id.* at 2084–85. Concurrences in judgment merit little precedential deference. *Id.* Justice Kennedy's concurrence in *Hazen Paper* is likely a concurrence in judgment, as it adopts both the majority's rationale and its conclusion, adding only that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII." *Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring).

Finally, the majority's statements in *Hazen Paper* should not be accorded precedential authority because the majority was deciding a disparate treatment case, not a disparate impact case. In his complaint, respondent Biggins "claimed that age had been a determinative factor in [the Hazen Paper Company's] decision to fire him." *Id.* at 606. Because his claim encompassed only action taken with age as a motivating factor, his claim was one of disparate treatment, not disparate impact. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (noting that in disparate treatment situations, "[t]he employer simply treats some people less favorably than others because of their race, color, religion, [or other protected characteristics].") Justice Kennedy conceded this point when he noted that Biggins had "advanced no claim that petitioners' use of an employment practice that has a disproportionate effect on older workers violates the ADEA." *Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring). As such, the majority's statements on disparate impact are dicta.

131. Consumer Prod. Safety Comm'n v. GTE, 447 U.S. 102, 108 (1980) (emphasis added).

statement of findings incident to the purpose of the ADEA, Congress noted that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice, *and certain otherwise desirable practices may work to the disadvantage of older persons*."[132] This language seems, at first glance, to invoke the commonly accepted definition of disparate impact, which "involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[133] Implicitly, then, if Congress noted in its findings of fact that disparate impact was prevalent, it must have intended the ADEA to prohibit, rather than permit, disparate impact claims.

The problem with that analysis is that it confuses legislative findings and legislative intent. Indeed, "[w]here the language Congress chose to express its intent is clear and unambiguous," it is presumed "that Congress said what it meant and meant what it said."[134] In section 621(b) of the ADEA, Congress stated that the ADEA's purpose was "to promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment."[135] Precluding disparate impact is entirely consistent with this purpose. Indeed, the classic disparate impact situation—a neutral policy that disproportionately affects older workers—likely bears on an employee's ability rather than age and, if based on a standardized policy, is not arbitrary at all. The fact that Congress made a finding and excluded it from its statement of purpose may even indicate that Congress deliberated on whether to allow disparate impact claims, but ultimately decided against it.

Moreover, the ADEA is the result of a study performed by the Secretary of Labor on age discrimination.[136] The study distinguished

132. 29 U.S.C. § 621(a)(2) (2000) (emphasis added).

133. *Teamsters*, 431 U.S. at 336 n.15; Faillace, *supra* note 26, at 211.

134. Adams v. Fla. Power Corp., 255 F.3d 1322, 1324 (11th Cir. 2001). Note the distinction between the language of the statute and the language Congress used to express its intent in enacting the statute.

135. 29 U.S.C. § 621(b).

136. *See* Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 229–31 (1983) (detailing the production of the Secretary of Labor's THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965) [hereinafter THE AMERICAN WORKER] and explaining that "[t]he product of the process of factfinding [sic] and deliberation formally begun in 1964 was the Age Discrimination in Employment Act of 1967"); *see also* Mullin v. Raytheon Co., 164 F.3d 696, 703 (1st Cir. 1999) (noting that the

between discrimination based on stereotypes (disparate treatment) and "problems resulting from factors that 'affect older workers more strongly, as a group, than they do younger employees,' (disparate impact)."[137] Based on that distinction, the study suggested that Congress prohibit only the former type of discrimination; disparate impact was to be resolved through other measures.[138] Therefore, Congress, basing the ADEA on the Secretary's report, did not intend the ADEA to prohibit disparate impact. The *Adams* court correctly noted that distinction, and the plain language argument presented herein is consistent with that policy.[139]

D. The Inappropriateness of Analogizing Between Title VII and the ADEA

The *Adams* court also correctly noted that Title VII and the ADEA are not analogous because the ADEA allows employers to take an otherwise prohibited action so long as that action is "based on reasonable factors other than age."[140] Title VII contains no such provision.[141] To argue that the ADEA should permit disparate impact claims because Title VII does so is to ignore this fundamental difference in the language of the two provisions.

Moreover, a comparison between the two provisions misstates the real issue. The analogy between Title VII and the ADEA harks back to the Supreme Court's statement in *Lorillard v. Pons*[142] that "the prohibitions of the ADEA were derived *in haec verba* from Title VII."[143] That indeed may be true,[144] but whether the ADEA permits

Secretary's report "served as a principal impetus for the ADEA"); Ellis v. United Airlines, Inc., 73 F.3d 999, 1008 (10th Cir. 1996) (explaining that "Congress enacted the ADEA in large part" on the Secretary of Labor's report).

Note that, "[b]ecause other materials are sparse, discussions of the ADEA's legislative history usually focus on the Secretary's Report." Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act*, 1995 WIS. L. REV. 507, 512 (1995), *cited in Ellis*, 73 F.3d at 1008.

137. *Ellis*, 73 F.3d at 1008 (quoting THE AMERICAN WORKER, *supra* note 136, at 5, 11).

138. *Id.* (citing THE AMERICAN WORKER, *supra* note 136, at 21–25).

139. *See* Adams v. Fla. Power Corp., 255 F.3d 1322, 1325–26 (11th Cir. 2001).

140. *Id.* at 1325 (quoting 29 U.S.C. § 623(f)(1)).

141. Smith v. City of Des Moines, 99 F.3d 1466, 1470 n.4 (8th Cir. 1996) ("Title VII contains no provision parallel to the 'reasonable factors other than age' language in the ADEA.").

142. 434 U.S. 575 (1978).

143. *Id.* at 584.

disparate impact claims requires an analysis not of the ADEA's prohibitions, but of the exceptions to otherwise prohibited conduct listed in section 623(f) of that Act. Indeed, the issue is whether the "reasonable factors other than age" exception listed in section 623(f) precludes disparate impact suits under the ADEA; that language is listed among the exceptions to the ADEA's general policy of prohibiting age discrimination and is not incorporated into any of the ADEA's explicit prohibitions. Logically, that language could not rest among the prohibitions, for it speaks to conduct that is permitted, not prohibited. Comparing Title VII to the ADEA frames the issue as resting with the prohibitions, when the prohibitions are not in doubt; it is the exceptions that have given courts the greatest headaches.

VI. CONCLUSION

In deciding *Adams v. Florida Power Corp.*, the Eleventh Circuit got the right result in resolving the circuit split—disparate impact is not a viable theory of recovery under the ADEA—through the wrong analysis. It should have analyzed the ADEA's plain language, which is dispositive, instead of justifying its exclusion of disparate impact from the ADEA on the ground that the EPA, rather than Title VII, is analogous to the ADEA. By relying on the plain language, the court could have avoided participating in a tradition that is both poorly reasoned and severely detrimental to future age discrimination plaintiffs, while still achieving the same correct result.

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144. *See supra* note 12 for a comparison of the prohibitionary language in both provisions.