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ESSAY

ANOTHER ROAD TO LIABILITY IS PAVED WITH GOOD INTENTIONS: OBSERVATIONS ON THE SUPREME COURT'S LATEST WORD ON THE DISPARATE IMPACT THEORY OF DISCRIMINATION

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I. INTRODUCTION

God willing, all of us now enjoy or will one day enjoy the protective embrace of the Age Discrimination in Employment Act of 1967 (ADEA)[1] (unless, of course, you happen to be employed by a state government, in which case you remain bare to the predations of any "ageist" tendencies that may exist in your state's civil service system).[2] Since 1967, the primary protection offered by the ADEA has been that our jobs will be safe from the evil intentions of those who succumb to the supposedly prevalent impulse to carry out the *dead wood* to make way for the *new blood* (to use some familiar colorful phrasing). This situation illustrates the most familiar theory of discrimination known as *disparate treatment.* Disparate treatment describes situations where an employer intends to discriminate against someone because of a protected characteristic, and acts on that intent.

For the disparate treatment theory takes care of the ones who harbor evil intent for older workers, but it fails to address the warning contained in the familiar platitude that "the road to hell is paved with good intentions."[3] In other words, can an employer with good or neu-

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1. 29 U.S.C. §§ 621-634 (2006).

2. The parenthetical is a tongue-in-cheek reference to the fact that Congress did not abrogate the States' sovereign immunity when it passed the ADEA; therefore, state employees have no cause of action against their state employers under the ADEA unless the state waives its sovereign immunity. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

3. The origin of this quotation is unknown, but often attributed to Samuel Johnson.

tral intentions also find itself in hot water under the ADEA? Before 2005, the Supreme Court had held for 34 years that liability under some employment discrimination provisions could be proven in the absence of discriminatory intent. In 1971 in *Griggs v. Duke Power Company*,[4] the Supreme Court first approved the notion that Title VII of the Civil Rights Act of 1964 — which prohibits discrimination on the basis of race, color, sex, religion and national origin — authorized lawsuits and liability against employers in the absence of discriminatory intent, if their employment practices have a *disparate impact* on persons protected by Title VII. Since 1971, employers have been subject to Title VII liability, even when they meant to do nothing wrong, if a certain employment practice has a statistically significant adverse impact on a particular group — in other words, to recast the aforementioned platitude, the road to liability under Title VII could be paved with good intentions. Employment lawyers dutifully added statistical analysis to their repertoire, and dragged their preferred statisticians into the debate over equal opportunity in the workplace.[5]

The Supreme Court never extended disparate impact theory to the ADEA, however, and Justice O'Connor even stated in 1993 that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA."[6] Nevertheless, in something of an about-face, the Supreme Court held last year in *Smith v. City of Jackson*[7] — the type of divided opinion common to the last decade of the Rehnquist Court (and which may continue to characterize the Roberts Court in the near term) — that the ADEA does authorize disparate impact age discrimination actions against employers.

This essay will argue that the Supreme Court applied the disparate impact theory in the ADEA context with less justification than when it applied it in the Title VII context. Moreover, *Smith's* fragmented holding will confuse rather than resolve prevailing interpretations of the ADEA, and the availability of disparate impact age claims will have a definite and, so far, uncertain impact on employers and employees during reductions in force. Overall, *Smith* highlights several Justices' hauntingly naïve interpretation of employment statutes in a way that is unnecessarily destructive of management prerogatives and will result in a proliferation of disparate impact claims in connection

4. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

5. For typically opaque and dense discussions of the use of statistical analysis in disparate impact cases, *see* Thomas J. Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 STAN. L.R. 1299 (1984); Michael E. Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985).

6. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

7. Smith v. City of Jackson, 544 U.S. 228 (2005).

with reductions in force. This proliferation of disparate impact claims will have a chilling effect on management prerogatives during reductions in force, and will be detrimental to both management and labor.

II. *GRIGGS V. DUKE POWER CORP.*: THE ORIGINS OF THE DISPARATE IMPACT THEORY OF LIABILITY

By all standards, *Griggs* ranks as one of the most important employment discrimination decisions in history. The plaintiffs in *Griggs* were a group of African-American employees who challenged the employment practices of an employer that, prior to the effective date of Title VII, had restricted African-Americans to jobs in its lowest-paying department.[8] After the effective date of the statute, the employer instituted a new policy with two new requirements. First, those who wanted to be initially assigned to some other department had to possess a high school diploma and pass two professionally prepared aptitude tests. Second, those who wanted to transfer into higher-paying departments had to pass the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test. These new requirements continued to exclude all African-American employees and applicants from the higher-paying departments, despite the policy's seemingly race-neutral nature.[9] A unanimous Supreme Court found that utilization of these criteria violated Title VII, concluding that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[10] Thus, *Griggs* rested on the principle that disparate impact alone was sufficient to establish a prima facie case of discrimination under Title VII.

The United States District Court for the Middle District of North Carolina certified the fourteen African-American plaintiffs in *Griggs* as a class representing all African-American workers who were employed, and who would be employed, by Duke Power on or after June 19, 1967.[11] The district court issued its decision in *Griggs* on September 30, 1968,[12] holding in part, that specific intent is required in order to establish a prima facie showing of discrimination under Title VII.[13] Accordingly, the court ruled against the plaintiffs on the ground that they had not met their burden of proving that Duke Power had intentionally discriminated against them because of their race.[14]

8. *Griggs*, 401 U.S. at 426-27.
9. *Id.* at 428-29.
10. *Id.* at 431.
11. Griggs v. Duke Power Co., 292 F. Supp. 243, 244 (M.D.N.C. 1968).
12. *Id.* at 243.
13. *See id.* at 251.
14. *See id.*

In its decision, the trial court rejected the plaintiffs' *present-effects-of-past-discrimination* theory set forth in *Quarles v. Phillip Morris*[15] on essentially two grounds. First, the Court distinguished *Quarles* because Philip Morris had failed to prove a legitimate business purpose for its policy of restricting the transfer opportunities for African-American employees.[16] Second, the district court held there was a legitimate business purpose for Duke Power's high school diploma requirement[17] because the policy was crafted to help the company reach its long-term goal of improving its work force.[18] The court also found that the testing requirements did not violate Title VII because they were professionally developed within the meaning of section 703(h). However, the court conceded that the tests were not intended to measure an employee's ability to perform a particular job.[19] The court reasoned that any test, so long as it was "professionally prepared," withstands challenge under Title VII because (1) "[n]owhere does the Act require that employers . . . utilize only those tests which accurately measure the ability and skills required of a particular job or group of jobs," and (2) "[a] test which measures the level of general intelligence, but is unrelated to the job to be performed is just as reasonably a prerequisite to hiring or promotion as is a high school diploma."[20] The trial court sidestepped the plaintiffs' argument that specific intent is not required in all Title VII cases, yet implicitly rejected the same by holding that the plaintiffs failed to prove that Duke Power had intentionally discriminated against them because of their race.[21]

The plaintiffs appealed to the Fourth Circuit Court of Appeals, and the case came before Judges Herbert S. Boreman, Albert V. Bryan, and Simon E. Sobeloff.[22] In a majority opinion, the Fourth Circuit affirmed in part and reversed in part the decision of the district Court.[23] The entire panel, reversing the district court, endorsed the application of the present-effects-of-past-discrimination theory from *Quarles*.[24] The opinion, however, applied that theory to the facts of *Griggs* in a very limited way. The court of appeals held that only

15. Quarles v. Phillip Morris, 279 F. Supp. 505, 518 (D.C. Va. 1968) ("Present discrimination may be found in contractual provisions that appear fair upon their face, but which operate unfairly because of the historical discrimination that undergirds them.").
16. *Griggs*, 292 F. Supp. at 249.
17. *Id.* at 251.
18. *Id.* at 248.
19. *See id.* at 250.
20. *Id.*
21. *Id.* at 251.
22. Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970).
23. *Id.* at 1237.
24. *Id.* at 1230.

those who were hired before Duke Power adopted the high school diploma requirement were entitled to recovery.[25] This excluded all but six of the fourteen plaintiffs. Moreover, the court of appeals also found that four plaintiffs who did not have a high school education or its equivalent were not entitled to any relief.[26] The court explained that its reason for denying relief to these four plaintiffs was that even though Duke Power had engaged in intentional discrimination against all the plaintiffs before the effective date of Title VII, the evidence supported the district court holding that Duke Power had adopted the testing requirements without an intent to discriminate, and had a genuine business purpose for implementing the new policy.[27] The court of appeals also rejected the plaintiffs' argument that an employer must prove that an employment test is job related in order to successfully assert section 703(h)'s statutory defense of a professionally prepared test.[28]

Judge Sobeloff authored a powerful opinion concurring in part and dissenting in part.[29] He agreed with the Court's finding that six of the plaintiffs were entitled to relief,[30] but he reshaped the present-effects-of-past-discrimination theory to eliminate the need for a plaintiff to prove intentional discrimination in cases challenging facially neutral employment policies and practices.[31] After specifically citing the two substantive provisions of Title VII, sections 703(a)(1) and (a)(2), Judge Sobeloff wrote:

> The statute is unambiguous. Overt racial discrimination in hiring and promotion is banned. So too, the statute interdicts practices that are fair in form but discriminatory in substance. Thus it has become well settled that "objective" or "neutral" standards that favor whites but do not serve business needs are indubitably unlawful employment practices. The critical inquiry is business necessity and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end.[32]

Based on the strength of Judge Sobeloff's dissent, the plaintiffs appealed, and the Supreme Court granted certiorari.[33] In its decision, the Court unanimously adopted the position set forth by Judge Sobeloff's dissent.[34] However, the Court went even further by uncou-

25. *Id.* at 1230-31.
26. *Id.* at 1231.
27. *See id.* at 1232.
28. *Id.* at 1235.
29. *Id.* at 1237.
30. *Id.*
31. *Id.* at 1246.
32. *Id.* at 1238.
33. Griggs v. Duke Power Co., 398 U.S. 926 (1970).
34. *See Griggs*, 401 U.S. at 429-430.

pling the "present effects of past discrimination" theory from any requirement of specific intent: "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[35] With minor modification, the Supreme Court endorsed Judge Sobeloff's view that disparate treatment is not the only theory of discrimination that is embraced in Title VII: "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited."[36] The result was that the Court, for the first time in this nation's history, endorsed two theories of discrimination in civil rights law: disparate treatment, which required proof of intent to discriminate, and disparate impact, which did not.

As it does in all statutory interpretation decisions, the Supreme Court first examined *Griggs* and determined that it accurately reflected legislative intent.[37] However, both detractors and supporters of *Griggs* have opined that Congress did not intend to adopt a disparate impact analysis for Title VII.[38] Critics of *Griggs* have argued that congressional supporters of the Civil Rights Act maintained that the statute would not call for an impact analysis.[39] Even supporters of *Griggs* concede that at the time of Title VII's adoption "[d]ifferences in treatment resulting from the application of an employment policy that made no reference to race were generally thought attributable to the policy and not to race, except in the rare case where the policy was nothing more than a subterfuge for specific discriminatory intent."[40] Alfred W. Blumrosen, a supporter, acknowledges that in the years preceding and immediately after the passage of Title VII, "the prevail-

35. *Id.* at 430.

36. *Id.* at 431.

37. *Id.* at 430-31, 436.

38. One wonders how the original Congressional votes on Title VII and the ADEA may have been different or the language altered on these pieces of legislation had Congress known the Supreme Court would hold that the statutes made employers liable based on something called "disparate impact," which does not require proof of discriminatory intent. After all, the names of the various theories of liability – disparate treatment, disparate impact, etc. do not appear in the text of these statutes. That question may be a useless exercise considering Congress amended Title VII in 1991 to codify the disparate impact action after *Ward's Cove Packing Co. v. Atonio*. *See infra* note 59.

39. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 184-95 (1992); Michael E. Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 520-30 (1985).

40. George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1600 (1969).

ing view . . . [was] that discrimination required a purpose or motive to harm an individual because of his race . . . ."[41] *Griggs* clearly succeeded in turning that "prevailing" view on its head. Accordingly, despite the Supreme Court's assertion to the contrary the *Griggs* decision sent a resounding message that civil rights statutes, including Title VII, were to be liberally construed in the absence of clear legislative intent.

III. *SMITH V. CITY OF JACKSON*: DISPARATE IMPACT COMES OF AGE

The application of the disparate impact theory to age discrimination actions under the ADEA (which tracks Title VII's antidiscrimination provisions) remained an open question after *Griggs*. The Supreme Court never extended the disparate impact theory to actions under the ADEA, and indicated in 1993 in *Hazen Paper Company v. Biggins* that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA."[42] After Justice O'Connor issued her dicta in *Hazen Paper Co.*, the Courts of Appeals split on whether a disparate impact action was available under the ADEA.[43] The Supreme Court granted certiorari in 2004 in *Smith v. City of Jackson* in order to settle that question.

The Plaintiffs in *Smith* were a class of police officers over the age of 40 employed by the city of Jackson, Mississippi.[44] The plaintiffs took issue with an across-the-board pay raise plan the City implemented with the hope of attracting and retaining qualified officers, providing performance incentives, maintaining competitiveness, and ensuring equitable compensation.[45] In broad terms, the details of the plan provided that officers with less than a five-year tenure with the City would receive a greater proportional pay raise than officers who had been with the City more than five years.[46] Because most of the City's

41. Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 69 (1972).

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

43. The First, Seventh, Tenth, and Eleventh Circuits had held there was no disparate impact action available under the ADEA while the Second, Eighth, and Ninth Circuits held the exact opposite. *See* Smith v. City of Jackson, 125 S. Ct. 1536, 1543 n.9 (2005).

44. *See id.* at 1539.

45. *See id.*

46. *See id.* Of course, under the pay raise plan, a 45 year old officer with four years' experience would get a greater proportional pay increase that a fellow 45 year old officer with 20 years' experience. This fact may have accounted for the choice of the disparate impact theory – the officers could not say the City was singling out older officers for discrimination if an older officer could have been eligible for the higher raise under the pay plan. In addition to explaining why the plaintiffs chose to proceed under the disparate impact theory, this fact accentuates a problematic aspect of the disparate impact theory. The City did not single out a group of officers, and officers stood to benefit from the policy without regard to their age; nevertheless, the City

older officers (i.e., those over the age of forty and, thus, protected by the ADEA) had been with the City more than five years, they sued claiming that the City's pay raise plan had a disparate impact on officers over the age of forty.[47] The City received summary judgment from the U.S. District Court for the Southern District of Mississippi, and the Fifth Circuit affirmed.[48]

Justice Stevens, writing for the Court, affirmed the outcome but held that the ADEA does authorize recovery on a disparate impact theory comparable to *Griggs* on a five to three majority, although not all sections of his opinion garnered five votes.[49] Part II of the opinion did get five votes.[50] That section of the opinion discussed portions of the congressional history related to the ADEA, including a 1965 report by then-Secretary of Labor W. Willard Wirtz concerning age discrimination, and a recognition that the language of Title VII (which, as held in *Griggs*, supports recovery on a disparate impact theory) and the ADEA are substantially identical.[51] For instance, the ADEA denies an employer the right to "limit, segregate, or classify his employees in any way which would . . . adversely affect his status as an employee, because of such individual's age."[52] Remove "age" from that provision, substitute "race, color, religion, sex, or national origin," and you have the prohibition that appears in Section 703 of Title VII.[53] Except for the ADEA's safe harbor for differentiations based on "reasonable factors other than age" (which does not have an analogue in Title VII), the two statutes are identical.

Things became more muddled after those non-controversial, matter-of-fact observations. Part III of the opinion, which set out the meat of Justice Stevens' reasoning in support of ADEA disparate im-

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was still vulnerable to liability at the hands of enterprising, numbers-crunching plaintiffs. Furthermore, it is worthwhile to note that *Smith* reveals nothing approaching the blatantly discriminatory practices seen in *Griggs*.

47. *See Id.*

48. *See Id.* at 1540.

49. Chief Justice Rehnquist, ailing at the time, did not participate in the decision. Justice Scalia dealt a blow to the prevailing conventional wisdom peddled by Supreme Court pundits by siding with the Court's "liberal" wing to provide the fifth vote for a majority. Justices Kennedy and O'Connor, the two most often lionized as the Supreme Court's "swing voters," sided with Justice Thomas in dissent (and with Justice Scalia in refusing to join part III of the opinion). The recent appointment of Chief Justice Roberts and Justice Alito would be unlikely to change the outcome of the opinion. Chief Justice Roberts replaced Chief Justice Rehnquist, who did not participate in the decision, which garnered a five vote majority without him. Justice Alito replaced Justice O'Connor, who dissented.

50. For the portions of the opinion that did receive five votes, the majority included Justices Stevens, Souter, Ginsberg, Breyer, and Scalia.

51. *See Smith*, 125 S. Ct. at 1540-41.

52. 29 U.S.C. § 623(a)(2) (2006).

53. 42 U.S.C. § 2000e-2(a)(2) (2006).

pact claims, did not carry Justice Scalia and, therefore, lost its fifth vote and the majority.[54]

The plurality reasoning in Part III began with and relies upon the premise that *Griggs'* interpretation of Title VII should compel an equivalent reading of the ADEA since the language of the two statutes is substantially identical.[55] Accordingly, the reasoning goes, if recovery on a disparate impact theory is available under Title VII, it should be available under the ADEA as well. Otherwise, why would Congress have drafted the statutes as they did? Indeed, in between references to mere predicates like Congressional history and regulatory agency reports, Justice Stevens boldly declared that *Griggs'* interpretation of the Title VII language settled the interpretation of the ADEA! For example, "*Griggs*, which interpreted *the identical text at issue here*, thus strongly suggests that a disparate impact theory should be cognizable under the ADEA,"[56] and "it does not justify departing from the plain text and our settled interpretation of *that text*."[57] Accordingly, Justice Steven's four-vote plurality in Part III went on to conclude the disparate impact theory is available under the ADEA, and Part IV (once again picking up Justice Scalia's fifth vote)[58] set out the contours of the cause of action.[59]

What?!? The Supreme Court had never interpreted "that text" — i.e., the relevant prohibition of the ADEA. Besides, if the statutes

54. *See Smith*, 125 S. Ct. at 1541-44. Justice Scalia wrote separately concurring in the result. *See infra* note 58.

55. *Id.* at 1541.

56. *Id.* at 1542 (emphasis added).

57. *Id.* at 1543 n.7 (emphasis added).

58. Justice Scalia concurred with the majority on the grounds that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), required the Court to defer to "the reasonable views of the [EEOC]," which had long contended disparate impact action were available under the ADEA. *Smith,* 125 S. Ct. at 1546-47 (Scalia, J., concurring). Interestingly, Justice Thomas – a former EEOC Chairman – did not feel constrained to defer to his former employer. *See id.* at 1538.

59. While the Court did accept the disparate impact theory for ADEA claims, the theory is not as robust as it is under Title VII. First, Justice Stevens noted in Part IV that there is a "reasonable nonage factor" defense in the ADEA, which is much stronger than any defense available to an employer under Title VII. *Id.* at 1544. Second, the Supreme Court followed *Griggs* with *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which set an evidentiary standard that greatly weakened the disparate impact theory. Congress reacted with the Civil Rights Act of 1991 to restore the disparate impact theory to its former strength and, in effect, to overrule *Ward's Cove*. Of course, the 1991 Act only applied to Title VII. Therefore, plaintiffs pressing disparate impact claims under the ADEA must meet the high evidentiary standard of *Ward's Cove*, which requires the plaintiff to prove a "significantly disparate" impact. *Ward's Cove,* 490 U.S. at 657. Also, *Ward's Cove* also provided that employers could rebut such a showing – provided the plaintiff could even meet that standard – simply by showing their practice serves legitimate employment goals in a significant way, even if it is not indispensable. *Id.* at 659. As if to prove his point, Justice Stevens' opinion ultimately affirmed the Fifth Circuit on the grounds that the plaintiffs did not identify "any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers. *Smith*, 125 S. Ct. at 1544-45.

were so similar in goal and in reach, why didn't the ADEA just amend Title VII so that the Title VII prohibitions would extend to "race, color, religion, sex, national origin, or age"?[60] Justice O'Connor's dissent took aim at the majority/plurality's incongruity. Reasonable minds can certainly differ as to the persuasiveness of her drafting, or whether her aim was true.

One area Justice O'Connor should have emphasized is the difference between Title VII's and the ADEA's protected characteristics. Although the ADEA's language tracks Title VII, the ADEA's protected characteristic — age — is quite different from the characteristics protected by Title VII. Save for religion (and, perhaps, national origin), the Title VII characteristics — race, color, and sex — are immutable characteristics that are true from birth and carry on throughout the life of that person. At any given time, an employer can identify the number of African-American employees or female employees it has, and all things remaining the same, it can control whether those numbers grow or shrink. For instance, if an employer makes the decision to have fewer African-Americans or women in the workforce (an unlawful decision under Title VII, and the archetypical disparate treatment situation), it can terminate those employees; on the flip side, if that employer wants to increase the number of African-Americans or women in the workforce (a lawful goal, but subject to unlawful methods under Title VII), it can hire more of these individuals. Furthermore, if the employer wants to keep African-Americans or women out of the workforce but wants to be more subtle about it, it can establish "built-in headwinds"[61] or other qualifications to limit or prohibit their entry into the workforce — so sayeth *Griggs*. Hence we have the disparate impact action.

Age is a different kind of category. At any given time, of course, any employer can count the number of employees it has over the age of 40. The difference between age and say, race or sex, is that the category can grow without any action by the employer. All of us began aging the day we were born, and you have aged in the time since you began reading this essay (some have likely aged more than others). An employer who has 100 employees over age 40 (we will refer to them as "aged employees" for short) one day may, through no

60. Also interesting is the fact that no one disputes that Congress properly abrogated the States' sovereign immunity pursuant to Section 5 of the Fourteenth Amendment when it passed Title VII. On the other hand, Congress did not abrogate sovereign immunity when it passed the ADEA. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).

61. "Built-in headwinds" was Justice Burger's memorable phrase from *Griggs* used to describe the problem for which disparate impact was supposed to be the solution. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). One may find it interesting, however, to note that "built-in" implies an intentional action, while disparate impact is meant for situations where numerical disparities appear regardless of the employer's intent.

action of its own, have 101 or more aged employees the next day if some of its previously non-aged employees celebrate their fortieth birthday. Age adds the dimension of time to the discrimination framework, since efforts to sack an employee one day may be considered in a much different legal framework on the 39th year and 364th day of a person's life versus the 40th year and first day of that same person's life. Almost like Cinderella's carriage, the legal landscape for that person changes at the stroke of midnight.

Until now, disparate impact has applied with certainty only to discrimination against individuals bound together by immutable physical characteristics like race and sex. Applying the theory to a group of people with nothing in common but the passage of time is bound to produce some confusion and difficulty, especially considering the recent increase in age claims and the aging of the overall population.

IV. CONCLUDING THOUGHTS — UNFORESEEN CONSEQUENCES?

With the outcome of *Smith* being what it is, employers are now left to learn its practical impact on the day-to-day realities of their business. Employers should be especially concerned about *Smith* when they are contemplating large-scale reductions in force. Large employers commonly offer exit incentives or other types of severance benefits in connection with a mass layoff or plant closing. The purpose of these incentives is to give the employee something to cushion his job loss and to establish a *quid pro quo*. Any employer who terminates a large number of employees at one time will want to obtain a certain amount of predictability when it comes to claims it may face as a result of all the terminations. Therefore, employers commonly offer the exit incentives in force during reductions in consideration for the employees' agreement in writing to waive or release any claims against the employer, including employment discrimination claims based on race, sex, religion, age, and the like.

Waivers of age claims under the ADEA, however, must comply with the Older Workers Benefit Protection Act (OWBPA),[62] a supplemental statute to the ADEA passed in 1990. In relevant part, OWBPA amended the ADEA to require that any waiver of ADEA claims must be "knowing and voluntary." Among other things,

> A waiver may not be considered knowing and voluntary unless at a minimum . . . if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer [pursuant to time requirements set out in OWBPA] informs the individual in writing in a manner calcu-

62. Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990).

lated to be understood by the average individual eligible to participate, as to—

(i) Any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) The job titles *and ages* of all individuals eligible or selected for the program, and the *ages* of all individuals in the same job classification or organizational unit who are *not* eligible or selected for the program.[63]

In short, an employer who wants to give severance benefits to downsized employees in exchange for a waiver of ADEA claims (among others) must give those employees a list of the people eligible for the benefit along with their ages, plus a list of all employees not eligible for the program (i.e., the employees not being laid off), and their ages. Moreover, OWBPA requires that an employee being offered such an exit incentive in return for a waiver of ADEA claims must have *45 days* to consider the waiver and the required employee eligibility lists.[64] Even after the 45 days have run, the employee still has seven days after he signs the waiver to revoke it.[65]

Before *Smith*, providing this information was not a preoccupying concern because in many federal circuits disparate impact had not been available under the ADEA, and at any rate, the Supreme Court had never weighed in on the issue.[66] Now, thanks to *Smith*, employers offering exit incentives in exchange for waivers do so in an environment where disparate impact age discrimination claims are universally available, and the same employers must still comply with a statute (OWBPA) that requires them to hand over the kind of data a plaintiff's expert could use to make a prima facie case of disparate impact age discrimination. To make matters worse, the same employer is required to distribute this information and wait a month and a half for the employee to think it over — plenty of time for an enterprising statistician to work the numbers around to find a statistically significant adverse impact on older workers.

On top of that, severance benefits and reductions in force are mandatory subjects of bargaining in a unionized workforce.[67] Giving the labor side of the table a potential disparate impact action, and the data to prove it, is an enormous club for the union to wield during the

63. 29 U.S.C. § 626(f)(1)(H) (2006) (emphasis added).

64. *See* 29 U.S.C. § 626(f)(1)(F)(ii) (2006).

65. *See* 29 U.S.C. § 626(f)(1)(G) (2006). If an employee later challenges the validity of a waiver under OWBPA, the employee is not required to return the consideration as under the common law. *See also* Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998).

66. Of course, there was the EEOC's interpretation that disparate impact was available.

67. *See, e.g.*, Hilton Mobile Homes, 155 N.L.R.B. 873 (1965); *see also* Odebrecht Constructors of Cal., 324 N.L.R.B. 396 (1997).

negotiations and may fundamentally alter the balance of power between management and labor in these situations.

At bottom, *Smith*'s recognition of disparate impact age discrimination claims poses a potential threat to the fluidity of the U.S. labor force. That fluidity — the ease with which employers and employees find one another when labor is needed, and part ways with minimum disruption when it is not — contributes mightily to the edge American industry displays over other nations. *Smith* may needlessly provide downsized employees a weapon to brandish at their employers to threaten away the prospect of necessary reductions in the workforce. If employees threaten their employers with the prospect of spending large sums on legal fees to defend disparate impact actions (many of which may qualify as class actions), the economics of the employers' personnel decisions will have changed. It remains to be seen how employers may react to such threats and how such threats may alter employers' calculations when considering reductions in force. If, however, *Smith* causes the labor force to become less fluid because of the factors identified in this Essay, it will have done no one any favors.