Sky Remains Intact: Why Allowing Subgroup Evidence is Consistent with the Age Discrimination in Employment Act

Sandra F. Sperino

University of Cincinnati College of Law, sandra.sperino@uc.edu

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THE SKY REMAINS INTACT: WHY ALLOWING SUBGROUP EVIDENCE IS CONSISTENT WITH THE AGE DISCRIMINATION IN EMPLOYMENT ACT

SANDRA F. SPERINO

I. INTRODUCTION

Employers' stereotypes about the effect of age on employment are not consistent across the entire group of individuals age forty and older. It is intuitive to believe that employers may view employees in their forties as being in their employment prime, while believing that employees in their sixties are not. Likewise, perceptions of age may vary dramatically depending on the age of the decision-maker. Common sense tells us that a supervisor in his or her forties may create policies that are neutral or positive toward individuals in that age range, while either intentionally or unintentionally engaging in employment practices that disadvantage employees in their fifties, sixties, or seventies. Research from the field of psychology supports these ideas.

Some may even argue that society’s perceptions of age are changing so much that many workers would not view those in their forties as being in the “older” part of the workforce. These observations are reflected in the popular media, which often touts that “40 is the new

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1. See Carole S. Slotterback & David A. Saarnio, Attitudes Toward Older Adults Reported by Young Adults: Variation Based on Attitudinal Task and Attribute Categories, 11 PSYCHOL. & AGING 563, 565, 567 (Dec. 1996) (finding that when study participants were asked to rate the cognitive abilities of individuals in certain age groups, those considered to be middle-aged (with a range from thirty-five to fifty-five years old) were rated higher than both older adults and younger adults).

2. See id. at 565–67 (finding that negative feelings about physical attributes of older adults (average age 66.2 years) were greater than those reported for individuals who were considered to be middle-aged adults or younger adults); Mary Lee Hummert et al., Using the Implicit Association Test to Measure Age Differences in Implicit Social Cognitions, 17 PSYCHOL. & AGING 482, 484 (Sept. 2002) (“[S]ome studies report that older persons judge their age group more positively than do young people, even though both age groups have generally negative attitudes toward old age.” (citations omitted)).
30. We do not often see these types of statements favorably comparing individuals in their fifties, sixties, and seventies with those younger than forty.4

Despite this reality, some courts have held that disparate impact claims under the Age Discrimination in Employment Act (ADEA) are only cognizable if all of the employees over the age of forty are negatively affected by an employment practice. More specifically, the majority of courts that have considered the question have held that plaintiffs may not prevail on an ADEA disparate impact claim if their evidence is that the employer's practice resulted in a disparate impact only on older workers within the protected class.5 Under these decisions, a plaintiff would not have a viable disparate impact claim if she alleged that a practice disparately affected employees fifty and older, as long as the practice's effect on all individuals over forty was neutral or positive.6 All three federal circuit courts that have addressed this issue have held that subgroup claims are not viable under a disparate impact theory,7 as have a majority of the district courts that have issued published decisions on the issue.8

Some of the courts that have refused to consider subgroup evidence in support of disparate impact claims have made rather alarmist claims about the effects such evidence would have on disparate impact law under the ADEA. The courts posit a hypothetical in which an eighty-year old employee sues over an employment practice that disparately affects her, but that does not have a disparate impact on a group of employees in their seventies.9 Some courts may also fear that the recognition of such claims could place employers in constant litigation

3. Deborah Geering, Prime Time; In the Dance – Not Sitting Idle, ATLANTA J.-CONST., June 14, 2006, at 1P.
4. See Slotterback, supra note 1, at 565 (finding that participants in a study considered an older adult to be 66.2 years with a response range of 50–80 years, a middle-aged adult to be 41.4 years old with a response range of 30–55 years old, and a younger adult to be 21.9 years of age with a response range of 15 to 35 years old); see also Hummert et al., supra note 2, at 483 (categorizing individuals who fell within the age range of 55–74 as “young-old”).
5. See cases cited infra Parts III.A–B.
6. See cases cited infra Parts III.A–B.
7. EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 950 (8th Cir. 1999); Smith v. Tenn. Valley Auth., No. 90-5396, 1991 WL 11271, at *4 (6th Cir. Feb. 4, 1991); Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1373 (2d Cir. 1989); see also Katz v. Regents of the Univ. of Cal., 229 F.3d 831, 835–36 (9th Cir. 2000) (indicating that it did not need to decide whether subgroup claims were viable to decide the case at hand).
8. See cases cited infra Part III.B.
9. See, e.g., Lowe, 886 F.2d at 1373.
about the effects of every employment practice and create an impossible situation where the employer is required to achieve statistical parity across an infinite number of possible age subgroups. 10

This Article argues that the decisions refusing subgroup evidence are erroneous, that subgroup disparate impact claims should be recognized under the ADEA, and that these claims are consistent with the ADEA’s statutory text, legislative history, and purposes. The alarmist consequences envisioned by the courts are not adequate reasons to declare that all subgroup claims are incognizable. Perhaps more importantly, these hypotheticals do not accurately describe the bulk of subgroup claims. As discussed in more detail below, the skepticism of the courts about the persuasiveness of statistical evidence, the cost and difficulty of compiling such evidence, and the requirement of a significant disparate effect are all practical limits on subgroup claims. 11

These courts also ignore the simple fact that participation in the workplace decreases with age. 12 For many employees, especially those in their sixties or older, it will be impossible to produce subgroup evidence in support of a disparate impact claim because there will simply be too few employees within the protected class to create a statistically significant sample. Furthermore, the Supreme Court’s recent decision in Smith v. City of Jackson, while confirming that disparate impact cases are cognizable under the ADEA, also severely restricts the practical viability of such claims. 13 Those claims that remain viable after Smith deserve consideration on the merits rather than quick dismissals based on the false premise of incognizability.

To provide necessary context for the larger discussion, Part II begins with an overview of the development of the disparate impact theory under the ADEA, with an in-depth presentation of the Smith decision. Part III discusses the cases that have rejected disparate impact subgroup claims under the ADEA, the handful of cases that have allowed subgroup cases to proceed, and the reasons underlying the courts’ decisions. Part IV demonstrates how the statutory text of the ADEA, its legislative history, and its purpose all support the argument that subgroup disparate impact claims are viable under the ADEA. It also discusses Title VII disparate impact cases and ADEA disparate treatment cases whose underlying rationales strongly suggest that such

10. See, e.g., McDonnell Douglas, 191 F.3d at 951.
11. See infra Part V.A.
12. See infra Part V.A.
claims are cognizable. Finally, Part V addresses the alarmist hypotheticals posed by the courts and demonstrates how the realities of disparate impact litigation, the current demographics of the workforce, and the recent *Smith* case make it improbable that subgroup evidence will result in the posited effects.

II. THE DEVELOPMENT OF THE DISPARATE IMPACT THEORY UNDER THE ADEA

An understanding of the development of disparate impact law under the ADEA is important background to understanding why subgroup evidence should be allowed to support such claims. This Part highlights major developments in the ADEA and disparate impact law that inform such an analysis.

A. The ADEA's Enactment

During the debate leading to the passage of Title VII of the Civil Rights Act of 1964, Congress considered adding provisions to the statute to also make it unlawful to discriminate against a person based on age.\(^\text{14}\) Instead of amending Title VII, Congress directed Secretary of Labor Willard Wirtz to report back to Congress on the causes and effects of age discrimination in the workplace and to propose remedial legislation.\(^\text{15}\)

Wirtz's report to Congress recognized that age discrimination existed and proposed that Congress take action to prohibit this type of discrimination.\(^\text{16}\) However, Wirtz also made two observations about age discrimination that are important to the development of disparate impact claims. First, Wirtz concluded that unlike discrimination based on race or other protected traits, age discrimination was typically not a result of animus or intolerance for the protected group.\(^\text{17}\) Rather, the most problematic type of discrimination facing older workers was discrimination based on unsupported general assumptions about the effect of age on ability.\(^\text{18}\) Second, Wirtz noted that many legitimate, non-discriminatory factors used to make employment decisions


\(^{15}\) 113 CONG. REC. 31254 (1967) (statement of Sen. Javits); *Smith*, 544 U.S. at 232.

\(^{16}\) *Smith*, 544 U.S. at 255–56.

\(^{17}\) *Id.* at 254.

\(^{18}\) *Id.*
correlate with age. These factors include: declining health among older workers that might make them less able or unable to perform job functions; lack of skills or educational credentials required for jobs; and an outdated skill set caused by rapid technological advances.

In 1967, Congress enacted the ADEA. In its current iteration, the ADEA makes it unlawful for an employer to do the following:

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.

As with other federal discrimination laws, the ADEA clearly provides that individuals, as opposed to groups, are protected against discrimination based on their age. Congress indicated that the purpose of the ADEA is “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.”

The ADEA’s prohibition on age discrimination is not without exception, and the statute contains several provisions defining when certain conduct will not be considered age discrimination. For example,

19. Id. at 259.
20. Id.
23. Id. § 621(b). The ADEA’s original protected class included individuals who were at least forty years of age and who were not older than sixty-five years old. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 607. Congress subsequently increased the protection of ADEA to those age forty years old to seventy years old, and in 1986 amended the ADEA to eliminate the upper age limit. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12, 92 Stat. 189, 189. In its current iteration the ADEA protects individuals who have reached age forty from unlawful discrimination. 29 U.S.C. § 631(a) (2000).
the ADEA permits compulsory retirement at the age of sixty-five for certain individuals classified as "bona fide executive[s]" or "high policymak[ers]" under specific circumstances. One provision of the statute, the so-called reasonable factors other than age (RFOA) provision, is especially important for understanding both the Supreme Court's recent analysis of disparate impact law under the ADEA and why subgroup evidence should be allowed to prove that an employment practice causes a disparate impact based on age. Under the RFOA provision, an employer is explicitly permitted to make a decision "where the differentiation is based on reasonable factors other than age," This provision explicitly recognizes that legitimate factors may correlate with age and emphasizes that the ADEA seeks to prohibit age-based practices, and not practices that are simply age-correlative.

B. The Courts' Further Refinement of Disparate Impact Law

The ADEA does not contain any specific reference to disparate impact as a way of establishing discrimination, and the development of the theory under the ADEA was originally derivative of the development of disparate impact law under Title VII. In Griggs v. Duke Power Co., the Supreme Court recognized that individuals could prevail on a Title VII claim by presenting evidence of disparate impact. In its opinion, the Court emphasized that evidence of discriminatory animus was not required to establish discrimination and noted that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Griggs thus affirmed the existence of a disparate impact theory of employment discrimination under Title VII.

In Wards Cove Packing Co. v. Atonio, the Court articulated a three-part framework for disparate impact cases. After a plaintiff establishes a prima facie case by demonstrating that a specific practice of the

24. 29 U.S.C. § 631(c)(1) (2000). An employer may also make an employment decision based on age if age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business," or to "observe the terms of a bona fide seniority system that is not intended to evade the purposes" of the ADEA, and "observe the terms of a bona fide employee benefit plan." Id. § 623(f)(1), (2)(A), (B).
25. Id. § 623(f)(1).
27. Id. at 432.
defendant has a "significantly disparate impact" on a protected group, the burden shifts to the defendant to articulate a legitimate business justification for the practice. Under this second prong, the defendant is required to set forth reasons why the challenged practice "serves, in a significant way, the legitimate employment goals of the employer." After the employer has met its burden of articulation, the Wards Cove analysis allows the plaintiff to prevail by proving that the employer's justification for its business practice did not serve the legitimate goals of the employer or by proving that "other tests or selection devices, without a similarly undesirable . . . effect, would also serve the employer's legitimate . . . interest[s]."

Congress responded to the Wards Cove decision by amending Title VII. In the Civil Rights Act of 1991, Congress expressly recognized disparate impact claims and altered the burdens of production and persuasion outlined in Wards Cove. After the Civil Rights Act of 1991, the plaintiff must still prove that a particular employment practice has a significant disparate impact on a protected class. However, once the plaintiff meets this burden, both the burdens of persuasion and production switch to the employer. The employer must then establish that the challenged business practice is related to the job in question and consistent with business necessity. If the employer meets its burden, the employee can still prevail by demonstrating that non-discriminatory

29. Id. at 658.
30. Id.
31. Id. at 659.
32. Id.
33. Id. at 660-61 (citations omitted).
34. Pub. L. No. 102-166, § 105, 105 Stat. 1074 (1991) ("An unlawful employment practice based on disparate impact is established under this title only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party [suggests an] alternative employment practice and the respondent refuses to adopt such alternative employment practice.").
36. Anderson, 406 F.3d at 265; Robinson, 267 F.3d at 160-61; City of St. Louis, 220 F.3d at 903-04.
37. Anderson, 406 F.3d at 265; Robinson, 267 F.3d at 160-61; City of St. Louis, 220 F.3d at 903-04.
alternative employment practices exist, and the employer refused to adopt the alternate employment practice.38

When Congress amended Title VII to recognize disparate impact and to provide a statutory direction regarding burdens of production and persuasion, it did not make similar amendments to the ADEA. Thus, two questions remained in the ADEA context. First, was a disparate impact claim cognizable under the ADEA? At the time of the 1991 amendments to Title VII, all of the circuits that had considered the question of whether a disparate impact claim existed under the ADEA either expressly held that such a claim existed or assumed, without deciding, that such a claim was cognizable.39 Second, if such claims did exist, what burdens of production and persuasion governed them? In other words, would the Court's decision in Wards Cove continue to have resonance in the ADEA context or did the 1991 amendments to Title VII express Congress' intent regarding how disparate impact claims should be proved under the ADEA?

In 1993, the Supreme Court issued an opinion in a disparate treatment case under the ADEA that yielded significant repercussions for disparate impact claims under the statute. In Hazen Paper Co. v. Biggins,40 Justice Kennedy wrote a concurrence that was joined by Chief Justice Rehnquist41 and Justice Thomas. In the brief concurring opinion, Justice Kennedy emphasized 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 of the Civil Rights Act of 1964. As the Court acknowledges ... we have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.42

38. Anderson, 406 F.3d at 265; Robinson, 267 F.3d at 160–61; City of St. Louis, 220 F.3d at 903–04.


42. Hazen Paper, 507 U.S. at 618 (Kennedy, J., concurring) (citations omitted).
After *Hazen Paper*, a circuit split developed among the circuit courts regarding whether disparate impact claims could be brought under the ADEA. The Second, 43 Eighth, 44 and Ninth 45 Circuit Courts of Appeals issued opinions upholding the use of the disparate impact theory under the ADEA, 46 while the First, 47 Fifth, 48 Seventh, 49 Tenth, 50 and Eleventh 51 Circuit Courts of Appeals issued opinions interpreting the ADEA to prohibit disparate impact claims, developing a circuit split that would require resolution by the Supreme Court.

C. Clarification of Disparate Impact Under the ADEA: Smith v. City of Jackson

On March 30, 2005, the Supreme Court issued its decision in *Smith v. City of Jackson*. 52 The petitioners in *Smith* were a group of police officers and police dispatchers employed by the City of Jackson, Mississippi, who challenged a pay plan adopted by their employer in which employees with fewer years of service received proportionately greater raises than employees with more years of service. 53 While the opinion recognized that disparate impact is a viable claim under the ADEA, it also clarified that major differences exist between disparate

43. *See* Smith v. Xerox Corp., 196 F.3d 358, 370 (2d Cir. 1999) (dismissing a disparate impact claim because of statistical errors, but not precluding availability of cause of action).

44. *See* Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996) (recognizing that disparate impact claims are cognizable under ADEA); Pulla v. Amoco Oil Co., 72 F.3d 648, 658 (8th Cir. 1995) (refusing to allow plaintiff to amend pleadings to add claim of disparate impact with no discussion about the viability of the cause of action); Houghton v. Sipco, Inc., 38 F.3d 953, 958–59 (8th Cir. 1994) (analyzing an ADEA claim brought under a disparate impact theory of liability).


46. In 2001, the Supreme Court granted certiorari in the case of *Adams v. Fla. Power Corp.*, which raised the issue of whether disparate impact claims were viable under the ADEA. 534 U.S. 1054 (2001). After hearing oral argument from the parties, the Court dismissed the writ of certiorari as improvidently granted. 535 U.S. 228 (2002).


49. *See* EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076, 1079 (7th Cir. 1994).

50. *See* Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996).


52. 544 U.S. 228, 230 (2005).

53. *Id.*
impact claims brought under the ADEA and those brought under Title VII.\textsuperscript{54}

The Court noted two significant differences between ADEA claims and Title VII claims. One key difference between the two statutes is the ADEA’s RFOA provision. As discussed earlier, this provision allows an employer to make an employment decision “where the differentiation is based on reasonable factors other than age” and implicitly recognizes that some legitimate job criteria will correlate with age but not be discriminatory.\textsuperscript{55} Second, Congress did not incorporate the 1991 amendments to Title VII into the ADEA.\textsuperscript{56}

Although the \textit{Smith} Court recognized disparate impact as a viable theory under the ADEA, the employees did not prevail. The Court articulated two primary arguments why the petitioners had not established a disparate impact case: (1) the litigants failed to identify a specific test, practice, or requirement that caused the alleged discrimination, and (2) the city based its decision on a “reasonable factor other than age.”\textsuperscript{57}

The Court clarified that the RFOA portion of the ADEA prevents plaintiffs from prevailing on a disparate impact claim by establishing that the defendant could have adopted other methods to achieve its goal.

\textsuperscript{54} \textit{Id.} at 231–32, 240–41. The entire opinion, which was drafted by Justice Stevens, was joined by Justices Souter, Ginsburg, and Breyer. \textit{Id.} at 230. Justice Scalia joined Parts I, II, and IV of the opinion, and submitted a concurring opinion. \textit{Id.} at 243 (Scalia, J., concurring). Justices O’Connor, Kennedy and Thomas submitted an opinion concurring in the judgment but reasoning that the ADEA does not permit a disparate impact claim. \textit{Id.} at 247–48 (O’Connor, J., concurring). Chief Justice Rehnquist did not participate in the decision. \textit{Id.} at 243 (majority opinion).


\textsuperscript{57} \textit{Smith}, 544 U.S. at 241–42. As discussed in an earlier article, it is difficult to understand the Court’s holding that the plaintiffs had “not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers.”
that did not create a disparate impact on a protected class.\textsuperscript{58} This method of proof is specifically authorized by the 1991 amendments to Title VII, but this same language is not contained within the ADEA.\textsuperscript{59} The Court noted:

> While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.\textsuperscript{60}

Although the concurring Justices believed that the ADEA does not provide for disparate impact claims, the concurring opinion went far beyond noting disagreement on the cognizability issue.\textsuperscript{61} First, the concurring Justices emphasized an important difference between ADEA and Title VII disparate impact claims.\textsuperscript{62} Under the latter statute, courts should assume that statistical evidence establishing a disparity evidences discrimination because there typically will not be any correlation between an employer’s legitimate job qualifications and protected traits such as race, gender, religion, or national origin.\textsuperscript{63} The concurrence expresses more skepticism about evidence of a statistical disparity in the ADEA context and emphasized that employers often will have reasonable, non-age-based reasons for job decisions, even if those decisions are correlative with age.\textsuperscript{64} The concurring Justices emphasized that a person’s physical ability, mental capacity, and ability or willingness to maintain proficiency with updated technology or to obtain updated educational credentials may correlate with age, but they are also are legitimate concerns for employers.\textsuperscript{65} Further, “employment

\textsuperscript{58} Smith, 544 U.S. at 242-43.


\textsuperscript{60} Smith, 544 U.S. at 243.

\textsuperscript{61} Id. at 267-68 (O’Connor, J., concurring).

\textsuperscript{62} Id. at 261-62.


\textsuperscript{64} Smith, 544 U.S at 259 (O’Connor, J., concurring).

\textsuperscript{65} Id.
benefits, such as salary, vacation time, and so forth, increase as an employee gains experience and seniority.”

Second, the concurrence emphasized that the Court’s opinion indicates that lower courts should use the defendant-friendly Wards Cove analysis when considering disparate impact claims under the ADEA. After the plaintiff establishes that a particular practice has a disparate impact, the defendant would only have the minimal burden of articulating that “its action was based on a reasonable non-age factor.” The plaintiff would then be required to prove that the action was not based on a reasonable, non-age factor. Courts evaluating subgroup evidence claims should keep in mind that the Smith case describes the framework for ultimate resolution of these claims.

III. EXAMINATION AND DISCUSSION OF THE CASES CONSIDERING SUBGROUP EVIDENCE

Few courts have considered the issue of whether subgroup evidence should be allowed to support disparate impact claims under the ADEA. Despite the paucity of cases, two distinct positions have emerged. As discussed in more detail in Part B, most of the courts that have considered the issue have held that disparate impact claims based on subgroup evidence are not cognizable under the ADEA. For convenience, I will refer to this position as the “majority position,” although it is arguable that the lack of cases limits the ability to make meaningful distinctions between minority and majority positions. The lesser held view, which I refer to as the “minority position,” is that subgroup evidence is fully consistent with the ADEA and that a blanket prohibition of such evidence is contrary to the statute.

Before discussing the current case law regarding subgroup evidence, it is important to discuss the meaning of the term. A disparate impact claim based on subgroup evidence is one in which the plaintiff tries to make the required statistical showing by establishing that a particular employment practice affected a subset of individuals within the ADEA’s protected class of individuals forty or older. For example, a plaintiff might allege that a company’s practice had a disparate impact on all individuals who have attained the age of fifty. In proving this claim, the plaintiff normally presents evidence of the policy’s effect on

66. Id.
68. Smith, 544 U.S. at 267 (O’Connor, J., concurring).
69. Id.
the subset as compared to either individuals under the age of forty or all individuals under the lowest age of the subgroup. When this Article discusses subgroup claims, it is referring to this sort of proof.

Some plaintiffs have also attempted to make what I refer to as reverse subgroup claims. In these instances, a subset of individuals on the lower end of the ADEA's protected age group will allege that a company’s policy has a disparate impact on them based on a comparison between how the policy affects these younger workers and older workers in the ADEA's protected class. For example, a plaintiff might allege that a testing procedure disparately affected individuals age forty to fifty, but did not have a similar effect on individuals over the age of fifty. When this Article discusses subgroup claims, it is not including these types of reverse subgroup claims.70

With that caveat in place, this Part continues by explaining the majority position on subgroup claims, providing a detailed analysis of the rationales underlying these holdings, and discussing the minority position on subgroup evidence and the reasons for these holdings.

A. The Origins of the Majority Position

Of the three circuit courts that have considered the issue of whether disparate impact claims based on subgroup evidence are viable under the ADEA, all three have held that such claims are not cognizable.71

70. Stronger arguments support the rejection of reverse subgroup evidence because disallowing subgroup evidence when a policy favors older workers within the protected class, but not younger workers within the class, is generally consistent with the ADEA. As the Supreme Court recently explained, the ADEA prohibits a company from favoring more junior workers, but does not prohibit favoritism toward more senior workers, even if both the junior and the senior workers fall within the protected age group. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 591–92 (2004). Thus, it is appropriate under the ADEA for a court to prohibit subgrouping when plaintiffs try to establish that a policy has a disparate impact only on a group of individuals between the ages of forty and fifty but has no effect or a positive effect on workers over the age of fifty. Employers who are discriminating against employees based on their age are not likely to create policies that disadvantage only the younger workers within the protected group.

71. See, e.g., EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 950–51 (8th Cir. 1999); Smith v. Tenn. Valley Auth., No. 90-5396, 1991 WL 11271, at *4 (6th Cir. Feb. 4, 1991); Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1304, 1373 (2d Cir. 1989); see also Katz v. Regents of the Univ. of Cal., 229 F.3d 831, 835–36 (9th Cir. 2000) (indicating that it did not need to decide whether subgroup claims were viable to decide the case at hand); Overstreet v. Siemens Energy & Automation, Inc., No. EP-03-CV-163-KC, 2005 WL 3068792, at *4 (W.D. Tex. Sept. 26, 2005) (refusing to consider subgroup evidence but ultimately holding that the subgroup evidence submitted by the plaintiff would not be significant enough to be probative of discrimination); Morrow v. City of Jacksonville, 941 F. Supp. 816, 824 (E.D. Ark. 1996) (doubting that a subgroup claim was appropriate, but declining to decide the issue because
Citing these appellate cases, the majority of district courts that have considered this issue have likewise held that such claims are not viable.

In 1989, the Second Circuit Court of Appeals considered whether subgroup evidence could support a disparate impact claim under the ADEA. The facts of Lowe v. Commack Union Free School District are fairly straightforward and provide a concrete example of a typical subgroup case.\(^7\) However, the case's factual development also demonstrates how the court could have and should have reached a decision on much narrower grounds, avoiding the broader questions about the cognizability of these types of claims.

The plaintiffs in Lowe were two former school teachers who were terminated due to declining enrollment within the school district.\(^7\) In subsequent years, the school district had a teacher shortage. The school designed two separate procedures for hiring teachers, one for teachers who had previously worked for the school district (internal candidates) and a different procedure for external candidates.\(^7\) Internal candidates desiring to be considered for positions were required to both interview and take a written test.\(^7\) Based on the interview results and test scores, the school district then decided that fourteen of the thirty-seven internal candidates would be placed on the eligibility list for the remaining positions.\(^7\) External candidates were judged by a different process that included paper screening of resumes, followed by interviews and the written test.\(^7\) Once the eligibility pool was determined, principals from the schools with vacancies were allowed to interview from the eligibility pool and make recommendations about which teachers to hire.\(^7\)

The two plaintiffs asserted that this hiring procedure had a disparate impact based on age.\(^7\) The case was tried before a jury, the jury returned a verdict in favor of the defendants, and the plaintiffs appealed.\(^8\) One of the plaintiffs' arguments on appeal was that the

\(^{72}\) Lowe, 886 F.2d at 1364.
\(^{73}\) Id. at 1366.
\(^{74}\) Id. at 1367.
\(^{75}\) Id.
\(^{76}\) Id.
\(^{77}\) Id. at 1368.
\(^{78}\) Id.
\(^{79}\) Id.
\(^{80}\) Id. at 1368–69.
district court had erred by failing to instruct the jury that the plaintiffs could prove discrimination by demonstrating disparate impact.\textsuperscript{81}

The statistical evidence presented by the plaintiffs had numerous defects, any one of which would have been an appropriate basis for the court to deny the plaintiffs relief on their disparate impact claim. First, it was not clear whether the plaintiffs were challenging the entire hiring process or only challenging the portion of the process that was used to determine who was eligible to be hired.\textsuperscript{82} If the plaintiffs were challenging the entire process, the statistical evidence presented by the plaintiffs was severely flawed. The facts established that more than 700 external applicants applied for the thirteen available jobs.\textsuperscript{83} The plaintiffs did not provide evidence regarding the ages of these applicants.\textsuperscript{84} This omission alone casts serious doubt about whether the plaintiffs submitted adequate statistical evidence to the court. Further, the court found that of the thirteen candidates hired, eight were age forty or over, even though the evidence suggested that most of the applicants were under the age of forty.\textsuperscript{85} The plaintiffs’ attempt to discredit the hiring process as a whole appears severely deficient in both the lack of evidence presented to the court and the apparent lack of persuasiveness of the evidence.

Realizing their attempts to challenge the entire process would likely not prevail, the plaintiffs appeared to claim that they were actually only challenging the portion of the process that determined who was placed on the eligibility list for the available positions and that subgroup evidence supported their claim.\textsuperscript{86} From the court’s opinion, it is not clear whether the plaintiffs were challenging only the process used for internal candidates or the processes used for internal and external candidates. The appellate court questioned whether the plaintiffs adequately identified the specific employment practice at issue, with the court noting that plaintiffs’ statistical evidence was “little more than a compilation of the results of the hiring process.”\textsuperscript{87} Although the appellate court doubted whether the plaintiffs had made the required showing, for purposes of its opinion, the court assumed that the

\textsuperscript{81} Id. at 1369.
\textsuperscript{82} Id. at 1370.
\textsuperscript{83} Id. at 1371.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 1370.
plaintiffs had identified the specific practice at issue as the eligibility determination process. The court then evaluated whether the trial court should have instructed the jury on a disparate impact theory based on the eligibility process. Unfortunately, the appellate court does not describe the statistical evidence that the plaintiffs presented in support of a subgroup claim. However, based on what the court does describe, the plaintiffs still would have had difficulty making their case. If the plaintiffs were challenging the internal candidate process, the eligibility process started with thirty-seven candidates and fourteen candidates were placed in the pool. Thus, only twenty-three individuals were adversely affected by the process. As discussed in more detail below, it is doubtful that plaintiffs could establish statistically significant data to support such a claim given the small number of people affected and the even smaller number of individuals who would fall within the subgroup.

It would have been appropriate for the Second Circuit to affirm the district court’s decision not to submit a disparate impact claim to the jury based on the apparent evidentiary and statistical deficiencies with the plaintiffs’ case. Instead, the appellate court ruled on the broader issue of whether evidence of a disparate impact on a subgroup could establish discrimination. In deciding that such claims were not cognizable, the Second Circuit issued the following oft-quoted, and alarmist, hypothetical:

Under this approach, however, any plaintiff can take his or her own age as the lower end of a “sub-protected group” and argue that said “sub-group” is disparately impacted. If appellants’ approach were to be followed, an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the “sub-group” of those age eighty-five and above, even though all those hired were in their late seventies.

88. Id. at 1371.
89. Id. at 1367.
90. Id. at 1373.
It appears that the Second Circuit faced some difficulty in reconciling its decision with *Connecticut v. Teal*, a Title VII disparate impact case that rejected a bottom-line defense to disparate impact liability. The Second Circuit did note that "our point here is not that discriminatory screening procedures applied by the School District to internal candidates are justified because eight of the thirteen available positions were ultimately filled by members of the protected group." However, it failed to provide any further justification for its decision regarding the broader question of the cognizability of subgroup claims. Instead, the court concluded its discussion of this issue by reiterating the poor quality of the plaintiffs' evidence.

In a concurrence, Judge Pierce argued that subgroup disparate impact claims should be cognizable under the ADEA. In support of this, he noted that "[s]eldom will a 60-year old be replaced by a person in [his] twenties." He argued that when companies have reduction-in-force policies that adversely affect individuals in the upper levels of the ADEA's protected class,

> the likely beneficiary . . . will be another member of the protected group, *i.e.*, a person more than 40 years of age. Thus, "if no intra-age group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience since even an employer with clear anti-age animus would rarely replace them with someone under 40."

He also noted that "[f]or those at the upper end of the protected class, however, a refusal to recognize subgroups in disparate impact analysis is tantamount to limiting the protections of the ADEA to instances where discriminatory motivation can be shown." Judge Pierce also found it persuasive that subgroup evidence was admissible to support claims of disparate treatment, and he found no reason to distinguish between

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91. 457 U.S. 440 (1982). The relationship between subgroup evidence and the underlying rationale of *Connecticut v. Teal* is discussed in more detail *infra* Part IV.
92. *Lowe*, 886 F.2d at 1374.
93. *Id.*
94. *Id.* at 1379 (Pierce, J., concurring).
95. *Id.* (citation omitted).
96. *Id.* (quoting *Maxfield v. Sinclair Int'l.*, 766 F.2d 788, 792 (3d Cir. 1985)).
97. *Id.* at 1379–80.
disparate treatment and disparate impact cases regarding subgroup evidence.88

Eight years after the Lowe decision, the Second Circuit reaffirmed that subgroup claims were not viable under a disparate impact theory.99

B. The Majority Position Affirmed: Subgroup Claims Are Not Viable

After Lowe, a small but steady stream of courts held that disparate impact subgroup claims were not cognizable under the ADEA.100 In 1991, the Sixth Circuit, with a mere citation to the Lowe case and no additional discussion, held that subgroup evidence was not permissible in ADEA disparate impact cases.101

In EEOC v. McDonnell Douglas Corp., the district court considered whether the EEOC could proceed on a disparate impact case on behalf of 431 former employees, age fifty-five and older, who were laid off during a reduction-in-force.102 In rejecting the subgroup claims, the court indicated that age “is not a discrete and immutable characteristic of an employee which separates the members of the protected group indelibly from persons outside the protected group.”103

The Eighth Circuit subsequently affirmed the district court’s decision.104 The Eighth Circuit’s opinion is interesting because it flatly refutes one of the reasons offered by the Second Circuit for disallowing subgroup claims. As discussed above, the Second Circuit posited that any plaintiff could establish a disparate impact claim merely by defining

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88. Id. at 1380.
100. See, e.g., Lewis v. Aerospace Cmty. Credit Union, 934 F. Supp. 314, 321–22 (E.D. Mo. 1996) (holding that the plaintiff could not proceed on evidence that policy affected individuals at least fifty years of age more than it affected those younger than fifty). It is interesting to note that many circuits allow subgroup evidence to be presented under a disparate treatment theory under the ADEA. See, e.g., Lowe, 886 F.3d at 1373; Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1444 (11th Cir. 1985); Douglas v. Anderson, 656 F.2d 528, 532–33 (9th Cir. 1981).
102. 969 F. Supp. 1221, 1222 (E.D. Mo. 1997), aff’d, 191 F.3d 948 (8th Cir. 1999).
103. Id. at 1223 (citations omitted); see also Mullin v. Raytheon Co., 2 F. Supp. 2d 165, 174 (1998), aff’d, 171 F.3d 710 (1999) (expressing skepticism about whether the plaintiff could proceed with an ADEA subgroup claim, but deciding the case on other grounds); Leidig v. Honeywell, Inc., 850 F. Supp. 796, 803 (D. Minn. 1994) (same).
104. EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999); see also Cooney v. Union Pac. R.R., 258 F.3d 731, 733–34 (8th Cir. 2001) (following precedent by refusing to allow plaintiffs to proceed on claim that a buyout program adversely affected employees who fell between the ages of fifty-eight and sixty-three).
the affected subclass with the plaintiff's age as the lower limit. The Eighth Circuit pointed out that the realities of establishing the required statistical evidence would prohibit many plaintiffs from prevailing on such claims. The court continued:

Even if it were true that in many or even most cases statistically significant evidence might support the claim of a disparate impact on some subgroup, we see no reason why that should preclude disparate-impact claims on behalf of subgroups. The fact that a particular interpretation of a statute might spawn lawsuits is not a reason to reject that interpretation. Instead, the Eighth Circuit found two arguments compelling. Without any citation to authority, the court posited that Congress did not intend for a company to face disparate impact liability under the ADEA when a policy had a positive effect on the entire ADEA protected class, even if disparate impact for a subclass could be established. The court also indicated that the practical result of such a policy would be to require employers to achieve statistical parity among every conceivable age group, which "might well be impossible." Although not essential to the question of whether subgroup claims were viable, the court also noted that it did not believe Congress intended to create liability for employers who made their decisions based on the criteria at issue in the case—retirement eligibility, salary, or seniority. Later, in EEOC v. City of Independence, the United States District Court for the Western District of Missouri followed the Eighth Circuit precedent and refused to allow the EEOC to proceed on a claim alleging that the City's Leave Donation Program had a disparate impact on individuals age sixty and older.

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105. McDonnell Douglas, 191 F.3d at 950 ("[W]e think that in any case it is important to note that not every plaintiff would be successful: We can certainly envision cases that would involve an age distribution in the relevant work force that would not support a claim of disparate impact on behalf of any subgroup of the protected class.").
106. Id. at 950–51.
107. Id. at 951.
108. Id.
109. Id.
In Frank v. Capital Cities Communications, Inc., the United States District Court for the Southern District of New York held that plaintiffs could not challenge a compensation system based on evidence that the system had a disparate impact on individuals over fifty years old. The district addressed the subgroup issue again in Naftchi v. New York University. Citing Criley and Lowe, the district court held that the plaintiff could not prevail on his disparate impact claim because he could not prove that all individuals over the age of forty were disparately impacted by the employment practice. Indeed, it would have been impossible for the plaintiff to make such a showing because all of the individuals within the plaintiff's department were over forty and thus within the ADEA's protected class.

C. Unpacking the Majority Position

To better understand the majority position on subgroup claims, it is helpful to dissect the various rationales that are used to prohibit subgroup evidence. There appear to be three distinct rationales for such holdings.

The first concern is related to the fact that age is not a binary characteristic, but rather falls along a continuum. Consider the context of gender discrimination. When a court is asked to determine whether a policy has a disparate impact on women, the court is looking at a binary trait. An employee is either a woman or a man, and that protected trait is unlikely to change over the course of the employee's relationship with the company. To determine whether the policy has a disparate impact, the court compares the impact of the policy on men and women. However, when determining whether a policy creates a disparate impact based on age, the court is not faced with a binary

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113. Id. at 489.
114. Id.
116. Even when a court is considering a disparate impact claim based on race, it is typically comparing a policy's impact on two groups. See, e.g., Connecticut v. Teal, 457 U.S. 440, 442 (1982) (comparing promotion criteria as applied between white and African-American candidates); Lee v. Fla., Dep't of Children & Family Servs., 135 F. App'x. 202, 204–05 (11th Cir. 2005) (arguing that qualifications for early retirement program favored white employees over black employees).
choice. Individuals can fall within an entire spectrum of ages protected by the ADEA.

Two different concerns appear to stem from this rationale. First, the courts are worried that plaintiffs and their attorneys can manipulate the data provided by companies regarding the effects of a particular employment decision and concoct a disparate impact claim by finding discrete groups affected by the practice. As one court indicated, "A plaintiff is not allowed to skew the statistics in a manner designed to achieve a favorable result." Underlying this rationale is a belief that almost every employment decision is going to have a disparate impact on some group of employees over the age of forty.

A second concern is that it will be difficult for employers to predict whether their policies create an unlawful disparate impact. Although discussing age disparate impact claims in general, an amicus brief in the Smith case succinctly demonstrates this concern, albeit with a flair for the dramatic. The brief stated:

Consequently, a rule making employers liable for unintended consequences of employment practices that fall more heavily on an older group would effectively require employers to engage in constant monitoring and to make endless statistical comparisons of the impact of virtually every conceivable criterion and practice on employees of every age, and no employer could ever be certain of being in compliance for more than a day at a time.

The Eighth Circuit Court of Appeals recently noted a similar concern:

[I]f disparate-impact claims on behalf of subgroups were cognizable under the ADEA, the consequence would be to require an employer engaging in [a reduction-in-force] to attempt what might well be impossible: to achieve

118. See McDonnell Douglas, 969 F. Supp. at 1223 ("It is conceivable that every employment decision could have a disparate impact on someone or some group of employees.").
statistical parity among the virtually infinite number of age subgroups in its workforce. Adoption of such a theory, moreover, might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute prescribes.... We have held that employment decisions motivated by factors other than age (such as retirement eligibility, salary, or seniority), even when such factors correlate with age, do not constitute age discrimination. We certainly do not think that Congress intended to impose liability on employers who rely on such criteria just because their use had a disparate impact on a subgroup.

Courts also are concerned that allowing subgroup claims will "force[] employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute prescribes."120

As discussed in further detail in Part V below, this concern is belied by several characteristics of disparate impact litigation that make it difficult for plaintiffs to establish the required statistical evidence. As the cases discussed above demonstrate, the typical subgroup claim is not attempting to create strange subgroups, like those envisioned in the hypotheticals described by the courts. The typical attempted subclass does not appear to have random starting and ending points—for example, individuals at least fifty-seven-and-a-half years of age but younger than sixty-two years old. Instead, typical subclass evidence seeks to demonstrate that individuals over the age of fifty or fifty-five were disparately impacted by a practice.122 Further, Cline's holding that policies that favor older workers within the protected subgroup are not discriminatory lessens the universe of possible subgroup claims.123

The second rationale for disallowing subgroup claims is that "a policy based... on reasonable factors may nonetheless subject the

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120. EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 951 (8th Cir. 1999) (citation omitted).
121. Id.
122. See, e.g., McDonnell Douglas, 969 F. Supp. at 1222 (seeking to pursue claims on behalf of individuals age fifty-five and older); but see Cooney v. Union Pac. R.R., 258 F.3d 731, 733 (8th Cir. 2001) (arguing that a buyout program adversely affected employees who fell between the ages of fifty-eight and sixty-three).
employer to liability in direct contravention of the . . . ADEA." 124 However, this same problem exists in ADEA disparate impact claims that are not based on subgroup evidence. While there may be reasons to be skeptical that subgroup evidence could merely reflect non-discriminatory correlation between age and other legitimate characteristics, this is not a reason to prohibit all subgroup claims. As discussed below, the Supreme Court's recent articulation of the disparate impact theory in the Smith case lessens the concern that employers will be held liable when their policies are based on reasonable, non-age factors.

A third, and rather minor, claim made by some courts that disallow subgroup evidence is that subgroup evidence is problematic in the disparate impact context because "a prima facie case . . . is based almost exclusively upon statistical evidence." 125 There appears to be a concern that statistics cannot be trusted in the subgroup context.

Like the other rationales, this one also has problems. Most importantly, courts already rely on statistics for other types of disparate impact claims. While it may be important to scrutinize statistics closely in the subgroup context, it is not credible to argue that all such statistics that might be offered are suspect to such a degree that no such claims should be viable. This skepticism also reflects a growing unease in the courts regarding the theoretical underpinnings of disparate impact claims. Over the years commentators have struggled to articulate a coherent justification for the disparate impact theory. 126 Disparate impact has been justified as a form of strict liability for employers who have implemented practices that create barriers for protected groups, as a method of ferreting out unconscious discrimination, and as another method of proving intentional discrimination. 127 However, each of these theoretical models has proven difficult for both courts and litigants. This unease is only highlighted in the age discrimination context, where courts have other reasons to question the relationship between any statistical disparity and discrimination.

125. Id.
127. See Perry, supra note 126, at 526–27.
D. The Minority Position: Allowing Subgroup Claims to Proceed

Few cases have allowed challenged subgroup evidence to proceed. In *Graffam v. Scott Paper Co.*, the plaintiffs challenged a reduction-in-force, in which employees were chosen for termination based on subjective evaluations of their skills, performance, and potential. Plaintiffs presented evidence that the selection process resulted in a 61.5% retention rate for employees over the age of fifty and a 91.5% rate for employees under the age of fifty. The defendants argued that this evidence was insufficient evidence of disparate impact because the only appropriate comparison was between all individuals over the age of forty and the individuals not within the ADEA’s protected class.

In denying the defendants’ motion for summary judgment, the district court explained that the plaintiffs’ subgroup evidence could permit the fact finder to determine that age played a role in the reduction-in-force. The district court noted the “very real possibility” that if such evidence were not permitted, the purposes of the ADEA would be undermined. The court was concerned that companies could insulate their discriminatory policies from review by having policies that favor younger individuals within the protected class to balance out discrimination happening against older members within the class. In *Finch v. Hercules, Inc.*, the district court relied on the reasoning in *Graffam* to allow the plaintiffs to use statistical evidence showing that employees in their fifties and older were disparately impacted by a reduction in force.

128. In other instances, it appears subgroup evidence was allowed, without objection by the defendant. See, e.g., *Caron v. Scott Paper Co.*, 834 F. Supp. 33, 39 (D. Me. 1993) (allowing claims to proceed; although defendant objected to statistical evidence, it did not appear to do so on the basis that the evidence was subgroup evidence); *Klein v. Sec’y of Transp.*, 807 F. Supp. 1517, 1524 (E.D. Wash. 1992) (finding that plaintiff had established that hiring practices had a disparate impact on individuals age fifty and over with no discussion about the viability of subgroup claims); *EEOC v. Borden’s, Inc.*, 551 F. Supp. 1095, 1098–99 (D. Ariz. 1982) (indicating that plaintiffs had established a severance plan that was discriminatory toward a group of individuals age fifty and older).


130. *Id.*

131. *Id.* at 3.

132. *Id.* at 5.

133. *Id.* at 4.

134. *Id.*

IV. WHY REFUSING TO ALLOW SUBGROUP EVIDENCE IS INCONSISTENT WITH THE ADEA

The courts that have disallowed subgroup evidence claims have done so largely based on concerns about the practical effects of recognizing the cause of action. The opinions engage in surprisingly little analysis regarding the statute itself and whether it would support such claims. While it is important to consider the practical consequences of allowing subgroup claims under the ADEA, such a discussion should follow and not precede the primary discussion about whether the statute can be read as allowing such claims.

As discussed earlier, the statutory text of the ADEA prohibits discrimination against individuals.\textsuperscript{136} The courts that disallow subgroup claims seem to forget about this concept of individual discrimination. Instead, the courts implicitly argue that if the specific employment practice does not disparately impact the entire group, then it is impossible that age-based discrimination has occurred. The courts are thus ignoring the real question at issue in disparate impact cases. When an individual or a group of individuals asserts disparate impact claims, the main question a court is trying to answer is whether a particular employment practice caused the plaintiffs to be discriminated against. In disparate impact cases, one of the methods of establishing this discrimination is through the use of statistical evidence regarding how the practice affected individuals similar to the plaintiff as compared to other individuals.

What is especially surprising about the courts' disallowance of subgroup claims is that the Supreme Court has addressed other analytically similar issues under the ADEA and Title VII. Each time, the Supreme Court has emphasized that the federal discrimination statutes prohibit discrimination against individuals. Thus, even when the evidence establishes that the employer did not discriminate against others in the protected class, a plaintiff can still try to prove that discriminatory action was taken against the individual plaintiff.

The reasoning underlying the Supreme Court's decision in \textit{O'Connor v. Consolidated Coin Caterers Corp.}\textsuperscript{137} demonstrates why courts that disallow subgroup claims are incorrect. In \textit{O'Connor}, a fifty-six-year old plaintiff was terminated from his job and replaced with a

\textsuperscript{136} 29 U.S.C § 623 (a)(1), (2) (2000).
\textsuperscript{137} 517 U.S. 308 (1996).
forty-year old. The court of appeals affirmed the district court's granting of summary judgment in the employer's favor, finding that the plaintiff could not prevail because he could not establish that he was replaced by someone outside of his protected class. The Supreme Court held that it was inappropriate to require an ADEA plaintiff to establish that he was replaced by someone outside of the protected class.

In reaching this decision, the Court indicated that the language of the ADEA "does not ban discrimination against employees because they are aged 40 or older." Rather, the ADEA "bans discrimination against employees because of their age, but limits the protected class to those who are forty or older." Importantly, for the present discussion, the Court emphasized the following: "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age."

Significantly, the Court went on to address problems that might arise by allowing plaintiffs to proceed on such claims. The Court first queried whether courts had adopted the requirement of replacement outside the protected class to "avoid creating a prima facie case on the basis of very thin evidence—for example, the replacement of a 68-year old by a 65-year old." The Court then indicated that the appropriate way to deal with insufficient evidence was not to make the prima facie case exceedingly difficult for all ADEA litigants. Rather, "the proper solution to the problem lies not in making an utterly irrelevant factor an element of the prima facie case, but rather in recognizing that the prima facie case requires 'evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion.'"

Courts disallowing subgroup claims have tried to distinguish O'Connor by saying that its holding is limited to the disparate treatment context. However, the courts do not provide any rationale for such a limitation other than to say that the reasoning makes "little sense" in

138. Id. at 309–10.
139. Id. at 310.
140. Id. at 310.
141. Id. at 312.
142. Id.
143. Id.
144. Id.
cases where a showing of intent is not required. While it is true that O'Connor was a disparate treatment case, there is nothing within the opinion to suggest that its underlying rationale would not apply with equal force to disparate impact claims. Indeed, the Court indicated that it was concerned with interpreting the ADEA in a manner to ensure that employers did not use "illegal discriminatory criteri[a]."\textsuperscript{146} Allowing subgroup evidence of disparate impact is a way to determine whether an employer is using such discriminatory criteria. The statutory language of the ADEA clearly prevents discrimination against individuals, not just the statutory group.\textsuperscript{147}

Also instructive to this issue is the reasoning in City of Los Angeles Department of Water and Power v. Manhart, in which the Court considered whether a city could require female workers to make larger contributions to a pension plan.\textsuperscript{148} The defendant argued that the reason the increased pension contributions were imposed on women was based on the fact that women as a group have longer lifespans than men.\textsuperscript{149} In rejecting this argument, the Court noted:

\begin{quote}
It is equally true, however, that all individuals in the respective classes do not share the characteristic that differentiates the average class representatives. Many women do not live as long as the average man and many men outlive the average woman. The question, therefore, is whether the existence or nonexistence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics.\textsuperscript{150}
\end{quote}

\textsuperscript{146} O'Connor, 517 U.S. at 312 (citations omitted).

\textsuperscript{147} Additional support for this argument can be found in the waiver provisions of the Older Workers Benefit Protection Act. In reduction-in-force cases where employees are asked to waive ADEA claims in return for participation in a severance package, the statute recognizes that the actual age of individuals affected by the action is relevant, not just the individuals' membership in the protected class. The Older Workers Benefit Protection Act requires that employers seeking such a waiver inform affected employees of the actual ages of individuals who are eligible and ineligible for the offered package. 29 U.S.C. § 626(f)(1)(H) (2000). If the ADEA were only concerned with group discrimination in the reduction-in-force context, it would seem more appropriate to only require disclosure of the number of individuals within and outside of the protected class, rather than the more detailed disclosure currently required.

\textsuperscript{148} 435 U.S. 702, 708 (1978).

\textsuperscript{149} Id.

\textsuperscript{150} Id.
The Court held that the city's practice was discriminatory because it treated women differently than men.\textsuperscript{151}

When a court rejects subgroup evidence claims, it makes the same mistake that was made by the defendant in \textit{Manhart}—it assumes that rights that are being vindicated by the federal employment laws are group rights rather than individual ones. In essence, what a plaintiff is trying to prove in a disparate impact claim is that the individual is being discriminated against based on a protected trait. In disparate impact cases, the plaintiff is trying to establish an inference of discrimination through the use of statistics demonstrating how the employer treated individuals like the plaintiff. By requiring disparate impact plaintiffs to proceed with evidence that the entire protected group was affected, courts ignore that all individuals over the age of forty are not similarly situated when it comes to age discrimination.

By not allowing plaintiffs to proceed as a subgroup, the courts are essentially condoning a situation in which companies could develop policies designed to more harshly impact their oldest employees, as long as they treated younger employees in the protected class favorably enough to avoid a statistical disparity. Such a result is not consistent with the purposes of the ADEA. Further, as the Court noted in \textit{O'Connor}, the way to deal with the potential adverse effects of allowing such claims is not to find that the claims are not cognizable, but rather to deal directly with the particular problems that might arise from such claims.\textsuperscript{152} As discussed in Part V, many of the so-called problems with allowing subgroup evidence are alarmist and do not reflect the reality of disparate impact litigation. Other, more realistic concerns, can be dealt with by courts, depending on the particular situation at hand.

What is perhaps most frustrating about the reasoning underlying the majority position on subgroup evidence is that it also contradicts the Supreme Court's 1982 decision in \textit{Connecticut v. Teal.}\textsuperscript{153} In \textit{Teal}, African-American employees of a state agency sued the agency over discriminatory multi-tiered promotion requirements.\textsuperscript{154} In step one of the process, employees were required to pass a written exam. Individuals who passed the exam were placed on an eligibility list for promotions, and individuals were then chosen for promotion based on

\textsuperscript{151} \textit{Id.} at 711.
\textsuperscript{153} 457 U.S. 440 (1982).
\textsuperscript{154} \textit{Id.} at 442-44.
past work performance, supervisor recommendations, and seniority. The plaintiffs established that a large statistical disparity existed between the number of black candidates and the number of white candidates who passed the written exam. The district court held that although the plaintiffs had established a large statistical disparity relating to the written exam, the plaintiffs could not prevail on a disparate impact claim because the overall results of the two-tiered promotion system did not disparately impact a protected class.

In rejecting the so-called "bottom-line" argument, the district court indicated that Title VII had never been read as requiring a focus "on the overall number of minority or female applicants actually hired or promoted." The Court emphasized that Title VII

[P]rohibits practices that would deprive or tend to deprive "any individual of employment opportunities." The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee.

The Court continued by holding that "[i]t is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." As the Court indicated:

Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory.

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155. Id. at 443-44.
156. Id. at 443 (discussing plaintiff's evidence that the passage rate for African-American applicants was sixty-eight percent of the passing rate for the white candidates).
157. Id. at 444-45.
158. Id. at 445.
159. Id. at 450.
160. Id. at 453-54 (citation omitted).
161. Id. at 455.
162. Id.
The rejection of subgroup evidence in the ADEA context has strong parallels to the bottom-line defense rejected by the Supreme Court in Teal. For either of these theories to prevail, it is necessary to believe that an individual is not discriminated against based on a protected trait, as long as the employer corrects any statistical anomalies by hiring other individuals with the protected trait.

This argument may at first have some appeal in other contexts where the protected trait at issue is binary. For example, it might seem reasonable to believe that if one part of a qualification process results in a disparate impact against women, the employer can correct the problem by later favoring women in the process. Although this argument was rejected by the Supreme Court in Teal, it has some rational appeal.

However, this same rational appeal does not necessarily exist in the age context because the “protected class” is defined quite broadly and would include individuals who are not viewed the same in the workplace. It is illogical to argue that if an employer implements a facially neutral policy that significantly impacts sixty-year olds, the employer should be able to fix the statistical anomaly by favoring forty-year olds.

This can be shown through a relatively simple hypothetical. Assume that an employer decides to implement a strength-testing requirement for its employees.163 As with many discrimination cases, there probably would be little or no evidence that the policy was created to discriminate against older employees, and even if such evidence existed, the defendant is likely to argue that all such expressions should be disregarded by the court as falling within the stray remarks doctrine.164

It is reasonable to believe that the arbitrary strength testing may have relatively no impact on younger employees within the protected class, while having a large impact on older workers. Even after Smith, if there is not a reasonable basis for the imposition of these types of requirements and they result in a disparate impact, an employer should not be allowed to continue such practices simply because the younger

163. This hypothetical only addresses the problems that might arise under the ADEA, while recognizing that such a testing procedure may also implicate federal and state disability discrimination statutes.

164. See, e.g., Hollander v. Am. Cynamid Co., 895 F.2d 80, 85 (2d Cir. 1990) (stating that there is rarely evidence of discriminatory intent in age discrimination cases); see also Holzman v. Jaymar-Ruby Inc., 916 F.2d 1298, 1303 (7th Cir. 1990) (same).
employees within the protected class are not affected by the requirements.

The legislative history of the ADEA supports the conclusion that subgroup claims should be allowed under the statute. Senator Javits addressed a similar hypothetical when he argued:

Section 4 of the bill specifically prohibits discrimination against any "individual" because of his age. It does not say that the discrimination must be in favor of someone younger than age 40. In other words, if two individuals ages 52 and 42 apply for the same job, and the employer selected the man age 42 solely . . . because he is younger than the man 52, then he will have violated the act.\(^{165}\)

Senator Yarborough echoed this interpretation of the statute by indicating that "[i]f two men applied for employment under the terms of this law, and one was 42 and one was 52, . . . [the employer] could not turn either one down on the basis of the age factor."\(^{166}\) Likewise, an employer should not be able to engage in unreasonable, facially neutral employment practices that accomplish this same result.

From a policy perspective, rejecting subgroup claims would also deny some employees the ability to prove their cases via disparate impact evidence. Consider a job classification in which all or almost all of the employees fall within the protected class. It is not difficult to imagine that many mid- to upper-level management positions or other jobs requiring a certain level of experience would meet this set of facts. Indeed, this was the set of facts the court was faced with in *Naftchi v. New York University*, where all of the professors similarly situated to the plaintiff fell within the ADEA's protected class.\(^{167}\) As demonstrated by *Naftchi*, without allowance for subgroup claims, these individuals cannot proceed on a disparate impact claim, even though, as shown in earlier hypotheticals, it is entirely possible for an employer to have a policy that discriminates against a particular subset of employees because of their age.

\(^{165}\) 113 Cong. Rec. 31255 (1967). The author recognizes that referring to legislative history may be considered to be an inappropriate method of statutory construction. Reference to legislative history is not intended as an endorsement of this method of construction. Indeed, such an endorsement is unnecessary because the text and purpose of the ADEA also support the same interpretation of the statute.

\(^{166}\) Id.

Additionally, disallowing subgroup claims for these types of positions ignores the functional realities of the workplace. As the EEOC noted in its amicus brief in the O'Connor case, "[b]ecause of the value of experience, rarely are sixty-year-olds replaced by those under forty." In certain job categories, it is entirely possible that an employer would prefer younger, experienced employees, but would be unlikely to hire individuals under the age of forty for these positions based on the younger individuals' lack of the required experience. If little or no admissible evidence of intent is present and subgroup claims are disallowed, the affected individuals have no remedy under the ADEA.

In sum, the Supreme Court cases regarding the ADEA and disparate impact law support the allowance of subgroup claims under that statute. Likewise, legislative history and public policy also support such an interpretation.

V. REBUTTING ALARMIST AND NON-ALARMIST CLAIMS ABOUT SUBGROUP EVIDENCE

The refusal to allow subgroup evidence has stemmed largely from a fear that allowing such claims will embroil companies in endless litigation every time they enact an employment practice that does not achieve exact statistical parity among the older members of the company's workforce. To support this rationale, some defendants and courts have taken a rather alarmist view on the potential dangers of subgrouping evidence.

Initially, it seems suspect that the correct answer to dealing with potential abuse is to ban the cause of action altogether. Rather, the proper course would be to recognize the cause of action and then provide courts with the tools to identify and ferret out improper claims. And while it is certainly possible that some plaintiffs' attorneys may attempt to concoct discrimination claims by carefully crafting subgroup claims, courts have ignored that the essential characteristics of disparate impact litigation already work to prohibit the type of manipulation posited in the alarmist hypotheticals.

My favorite extreme hypothetical about potential abuses with subgrouping evidence is recounted in Lowe v. Commack Union Free

In Lowe, the court indicated that subgrouping evidence should not be allowed because to do so would allow an "85 year old plaintiff . . . to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the 'sub-group' of those age 85 and above, even though all those hired were in their late seventies." Another similar fear, although a more realistic one, is that companies will not be able to determine, prior to legal action, whether their policies are creating a disparate impact because it is impossible for an employer to achieve statistical parity among all potential subgroups of individuals over the age of forty.

This Part posits that even prior to Smith, the costs and evidentiary hurdles inherent in proving disparate impact claims lessened the likelihood that courthouses would be flooded with disparate impact claims every time a corporation engaged in an employment practice that negatively affected some employees. After Smith, the incentives for pursuing disparate impact claims under the ADEA are even further diminished, as the standards articulated in Smith make it more difficult for plaintiffs to prevail on disparate impact claims under the ADEA than those brought pursuant to Title VII. In particular, the holding in Smith makes it even less likely that bogus subgroup claims will survive summary judgment, let alone create the victories or settlement opportunities that might encourage plaintiffs' attorneys to fabricate claims based purely on statistical anomalies.

A. Obstacles in Existence Prior to Smith

Even prior to Smith, the alarmist hypotheticals failed to fully consider the reality of disparate impact claims. Both the upfront costs inherent in pursuing a disparate impact claim and the rigorous requirements of statistical evidence made disparate impact claims in general into a disfavored form. Disparate impact claims make up a small percentage of employment discrimination claims, amounting to just one employment discrimination claim in fifty, and have been

170. Lowe, 886 F.2d at 1373.
172. John J. Donohue & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 STAN. L. REV. 983, 998 n.57 (1991). The lack of disparate impact cases also may increase the difficulty for attorneys trying to bring these claims. Because courts have dealt with fewer disparate impact cases than disparate treatment cases,
described as a "relatively less vital tool, compared with theories of intentional discrimination." As discussed below, these obstacles are only magnified in the subgroup context.

Both before and after Smith, a plaintiff may proceed with a disparate impact case only after establishing that a particular employment practice creates a disparate impact on a protected group. The primary way of making this showing is through the use of statistical evidence. The costs inherent in hiring a statistical expert and in obtaining all of the data that the expert needs in order to prepare an adequate opinion about statistical disparities introduces significant costs with proceeding on a disparate impact claim that are not inherently present in other types of discrimination suits. In addition, the parties may require the assistance of other experts, such as vocational experts, to provide comparative statistics for a particular geographic area. These costs are magnified by the inevitable discovery disputes that arise when plaintiffs seek large amounts of information about a large group of employees.

The incentives to incur these upfront costs are diminished in the ADEA context, where prevailing plaintiffs may not be awarded punitive damages or compensatory damages for emotional distress or for pain there are more areas of the law that remain unexplored. This makes it more difficult and more expensive to proceed on such a claim. As one commentator noted, "[d]isparate impact analysis is not a heavily litigated theory of discrimination, and thus many questions remain relatively unsettled regarding the nature of the plaintiff's proof." Elaine W. Shoben, Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?, 42 BRANDEIS L.J. 597, 607 (2004).

173. Shoben, supra note 172, at 597.
175. See, e.g., Lewis v. Del. Dep't of Pub. Instruction, 948 F. Supp. 352, 363 (D. Del. 1996) (dismissing disparate impact claim because the plaintiff did not provide a refined statistical analysis and an expert opinion to rebut statistics presented by the defendant); Sims v. Montgomery County Comm'n, 766 F. Supp. 1052, 1101 (M.D. Ala. 1990) (refusing to consider class claims of disparate impact because the plaintiff failed to provide statistical experts and did not provide a detailed statistical analysis)
The ADEA provides that prevailing plaintiffs may obtain reinstatement or front pay, back pay, payment of wages owed, injunctive relief, declaratory judgment, attorney's fees, and costs. Although ADEA plaintiffs may obtain liquidated damages in an amount equal to the back pay owed to the plaintiff if the violation is willful, it may be difficult as a matter of proof to establish the required willfulness in a disparate impact case, where a violation can be proven without establishing an intent to discriminate.

Not only is it often difficult and expensive to gather the statistical information necessary to proceed under a disparate impact theory, it also is difficult to establish the required level of statistical disparity to create an inference of discrimination. To establish a prima facie case, plaintiffs "must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." In other words, "evidence of statistical significance is necessary to show that a statistical disparity is not attributable merely to random chance." Creating the required statistical disparity is likely to be more difficult in a case where the evidence is based on subgroup statistics, as compared to cases based on the entire class protected by the ADEA. This is so because of the fact that the number of individuals in the workforce diminishes with age.

For example, in 2005, the United States' civilian work force consisted of 149,320,000 individuals who were at least sixteen years old. Out of this work force, 77,565,000 individuals, or almost 52% of the working population, fell within the group of individuals protected by the

179. 29 U.S.C. § 626(b) (2000); Villescas v. Abraham, 311 F.3d 1253, 1257 (10th Cir. 2002).
180. 29 U.S.C. § 626(b) (2000); Villescas, 311 F.3d at 1257.
182. Lewis v. Aerospace Cmty. Credit Union, 114 F.3d 745, 750 (8th Cir. 1997) (citations omitted).
ADEA.\textsuperscript{184} Individuals age forty to forty-nine constituted approximately 25\% of the total work force, with the percentages decreasing to 18.8\% for the fifty to fifty-nine year age range, 6.4\% for the sixty to sixty-nine year age range, and 1.2\% for the seventy and older range.

In many instances, it will be impossible to create a statistically significant subgroup that would support a disparate impact claim. Consider a hypothetical employer with 500 employees, the age of whose workforce correlates with those found in the national statistics. In this situation, the employer would employ approximately 125 people between the ages of forty and forty-nine, about 94 individuals in their fifties, 32 individuals in their sixties and 6 individuals in their seventies or older. Assume the employer decides to cut its workforce by 10\% and implements a subjective evaluation system to determine which employees will be terminated.

Given the small size of the group of employees in their seventies or older, it is unlikely that these employees will be able to demonstrate a large enough group size to be statistically significant. Unless almost all of the people in their sixties and seventies were disparately affected by the employment practice, it would be difficult to convince a court that the size of the affected group—at most thirty-eight employees—would be statistically significant. Indeed, it is unlikely that all of the employees affected by the reduction-in-force would come from a narrow band of ages within these ranges. Many courts have held that plaintiffs’ claims fail as a matter of law when the group of employees affected by an employment decision is too small to be statistically significant.\textsuperscript{185}

Therefore, in most cases there will be a practical limit regarding subgroup claims based on the upper ranges of the protected class. This phenomenon is demonstrated in at least one case in the subgroup context where the court rejected disparate impact claims based on a group of employees age fifty and older because the number of


\textsuperscript{185} See, e.g., Lewis, 114 F.3d at 750 (finding that a group of three affected employees was not large enough to be statistically significant); Pasco v. Arco Alaska, Inc., No. 94-36142, 1996 WL 118521, at *3 (9th Cir. Feb. 9, 1996) (holding that the plaintiff has not established an inference of discrimination by showing that 72\% of the twenty-five employees who were affected by employment decision were at least forty years old); Lander v. Montgomery County Bd. of Comm’rs, 159 F. Supp. 2d 1044, 1061 (S.D. Ohio 2001) (total labor pool of twenty employees was not sufficient to establish a statistically significant disparity).
employees affected was statistically insignificant. 186 Because the number of individuals within the workforce decreases with age, it is likely that most employers do not have significant numbers of employees in the older age demographics.

The likelihood of creating a statistically significant group is even further reduced if employment decisions are not company-wide, but affect only particular employees within a company. Because plaintiffs must establish a particular employment practice that resulted in the disparate impact, the employees used to create the statistical disparity must be subjected to the same employment decision. Thus, in cases where reductions-in-force are handled differently in different departments or where employees in different job classifications are treated differently, it is more difficult to create a statistically significant group of adversely affected employees—let alone a subset of employees within the ADEA's protected class.

Indeed, based on this hypothetical, the only "subgroup" claim that makes statistical sense is one that alleges the group of individuals age fifty and older were disparately affected. Not surprisingly, when we look at the reported subgroup cases, plaintiffs are frequently alleging subgroups with a lower age limit of fifty or fifty-five. 187 This simple hypothetical demonstrates that in many instances, the fear that plaintiffs can invoke an unlimited number of subgroups to prove a disparate impact case would not comport with the normal statistical requirements placed on plaintiffs in making these types of claims.

Further, some of the courts that disallowed subgroup evidence appear to have forgotten that disparate impact cases cannot be based on small statistical anomalies. One court supported its decision to disallow subgroup evidence by indicating that there is nothing within the ADEA that requires an employer to achieve "statistical parity" among its workforce. 188 This articulation misrepresents the type of statistical evidence that must be shown to establish a disparate impact claim. A plaintiff cannot prevail on a disparate impact claim merely by establishing minor statistical differences of the effects of a certain

employment policy. Rather, the plaintiff must first establish "either a gross statistical disparity, or a statistically significant adverse impact coupled with other evidence of discrimination." 189

Courts appear to be highly skeptical of statistical evidence, especially in disparate impact cases based on age. 190 This skepticism results in rigorous examination of statistical evidence, first by defendants' counsel and then by the court. The rigorous requirements for statistical evidence that are applied in disparate impact cases in general limit abuse of this type of evidence in the subgroup context.

In the age context, there is a further possible limitation on subgroup claims. Under O'Connor, an employee can establish a case of disparate treatment if the employee was replaced by someone "substantially younger" than the plaintiff. 191 To state the converse, if a fifty-year old employee is replaced by a forty-nine-year old employee, in most cases an inference of discrimination would not be raised. Transferring this concept to the disparate impact context, courts must examine subgroup statistical evidence to ensure that an inference of discrimination reasonably results from the evidence. If the evidence establishes that a subgroup of individuals age fifty to fifty-five years old was disparately affected by an employment policy, the employer may be able to argue that the policy positively affected those within the forty-five to forty-nine age range. If this is the case, a plausible argument exists that the disparate impact was not the result of age discrimination because the individuals who benefited from the policy were not substantially younger than the impacted group.

Further, despite all of the hand-wringing about subgroup evidence, this evidence is allowed to bolster claims in disparate treatment cases made under the ADEA. 192 To the extent that cases involving claims of disparate impact also involve disparate treatment claims, courts must already engage the statistics to determine whether they are appropriate for consideration by the jury.


190. See, e.g., EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1078 (7th Cir. 1994).


192. See, e.g., Sheerin v. N.Y. State Div. of Substance Abuse Servs., 844 F. Supp. 909, 916 (N.D.N.Y. 1994) ("Although the ADEA makes it unlawful to discriminate against those employees forty years of age or older, there is no absolute bar to subdivide the protected age group in a disparate treatment case.").
All of these factors act in concert to diminish the likelihood that plaintiffs will be able to prevail in manufacturing subgroup evidence or that every employment practice will come under scrutiny for failure to meet statistical parity within a particular subset of individuals. The truth of this assertion is bolstered, in part, by the concurrence in the *Lowe* case. The concurrence noted that even if the court had allowed the plaintiffs to proceed with a subgroup claim, the plaintiffs would not have prevailed on such a claim because they presented inadequate statistical evidence.

**B. Smith Reduces the Likelihood that Plaintiffs Will Prevail on Subgroup Claims**

However, even if one were to assume for the sake of argument that these limitations were not substantial enough to deter the filing of frivolous disparate impact claims, the *Smith* case provides further limitations on plaintiffs' ability to prevail on all ADEA disparate claims, especially those brought with subgroup evidence.

As discussed earlier, courts are already extraordinarily skeptical of subgroup evidence. A reading of the *Smith* case suggests that courts can, and perhaps should, look at all statistical evidence in disparate impact cases based on age with a certain amount of skepticism. In race or gender cases, the normal assumption is that there should be little correlation between employment practices and the protected trait. However, in *Smith*, the Supreme Court informs the judiciary that such an assumption is not warranted in the age context. The *Smith* case provides a framework within which courts faced with disparate impact claims based on age should be skeptical of the ability of statistical evidence to create an inference of discrimination. Both the majority opinion and the concurrence in *Smith* emphasized that age would often correlate with legitimate factors for making employment decisions.

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194. *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005); see also Brief for California Employment Law Council as Amicus Curiae Supporting Respondents, *Smith v. City of Jackson*, 544 U.S. 228 (2005) (No. 03-1160), 2004 WL 1905737, at *12-13 ("The burden this sort of [disparate impact] analysis imposes on employers is ameliorated by the very rarity with which racial or gender disparities ought to occur."); *Id.* at *15 ("Unlike with Title VII, where racial, religious, or gender disparities are presumed to be both few and inherently suspicious, age-correlated disparities in the workplace are almost certain to be both innocent and commonplace.").

Even if the plaintiff can establish the required statistical disparity, the employer faces only a minimal burden to articulate a reasonable basis for its decision. And, unlike in the Title VII context, the plaintiff cannot rebut this articulation simply by demonstrating that another practice would not have resulted in a disparate impact. The opinion itself recognizes that if a decision is based on salary considerations that also correlate with age, then the plaintiffs cannot prevail on a disparate impact theory. Indeed, in most ADEA cases, even if a disparate impact results, it appears likely that the plaintiff will not be able to prevail because the defendant will be able to articulate that another reasonable factor caused the statistical disparity and not age, per se.

VI. CONCLUSION

Despite the alarmist claims made by courts, allowing subgroup claims to proceed under an ADEA disparate impact theory would not cause the sky to fall. To the contrary, the functional realities of disparate impact litigation in general work even more severely in the subgroup context, making it difficult for plaintiffs to establish the required statistical disparities and sample size to obtain an inference that discrimination may have occurred. Most importantly, because participation in the workforce declines with age, in most instances employees in their sixties or older will find it impossible to create the required statistical evidence. These realities, when combined with the narrow approach taken to ADEA disparate impact claims in Smith, significantly limit the instances where subgroup evidence could result in an inference of discrimination.

Even if these forces were not at work to limit the practical viability of subgroup claims, a fear that some plaintiffs might abuse a particular avenue of evidence is not a reason to bar all such claims. As demonstrated earlier, allowing subgroup evidence comports with the language, legislative history, and purpose of the ADEA and is consistent with the Supreme Court's interpretations of the ADEA and the disparate impact theory. Given the restrictions placed on ADEA disparate impact claims by the Smith decision, it is difficult to predict whether plaintiffs will continue to utilize this manner of proof to establish age discrimination. However, it is clear that plaintiffs who do

196. Id. at 242–43.
197. Id. at 243.
198. Id. at 242.
choose to proceed on a disparate impact theory should be allowed to use subgroup evidence to support their claims.