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Are Employee Appraisals Making the Grade? A Basic Primer and Illustrative Application of Federal Private Employment Discrimination Law

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ARE EMPLOYEE APPRAISALS MAKING THE GRADE? A BASIC PRIMER AND ILLUSTRATIVE APPLICATION OF FEDERAL PRIVATE EMPLOYMENT DISCRIMINATION LAW

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"At General Electric, for example, supervisors identify the top 20 percent and bottom 10 percent of their managerial and professional employees every year. The bottom 10 percent are not likely to stay."[1]

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I. INTRODUCTION

Many icons of the corporate world including General Electric, Hewlett-Packard, Conoco, Microsoft, Cisco Systems, and Ford have dabbled, of late, with employee appraisal systems which use some form of overall "grade" for work performance.[2] Ford, for example, in 2000

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1. Reed Abelson, *Companies Turn to Grades, And Employees Go to Court*, N. Y. TIMES, Mar. 19, 2001, at Al.

2. *See generally* Abelson, N.Y. TIMES, *supra* note 1.

"adopted what it calls its performance management process"[3] under which it "gives its 18,000 managers [an] A, B or C grade."[4] In its initial year, Ford gave 10 percent of its managers an A, "80 percent a B and 10 percent a C."[5]

Under the Ford plan "[a] grade of C could lead to the loss of bonuses, raises or promotions" and "[t]wo consecutive Cs could lead to dismissal."[6] Moreover, managers performing evaluations under Ford's Performance Management Process graded employees on a mandatory curve consisting of "quotas for meting out each grade level."[7] Ford's Performance Management Process, however, became a lightening rod for employment discrimination litigation and employee discontent and settling two lawsuits over the system became a priority by Ford's new CEO, Bill Ford Jr.[8] The two cases involving hundreds of Ford's current and former employees were settled and the settlement was judicially approved on March 14, 2002.[9] "One of the lawsuits had alleged age, race and gender bias, while the other alleged only age discrimination."[10]

Similar suits have been filed against Conoco and Microsoft.[11] According to a newspaper account of the case against Microsoft which sought class-action status on behalf of African-Americans and women: "[T]he rating system 'permits managers, who are predominantly white males, to rate employees based upon their own biases rather than based upon merit.'"[12] The newspaper article described the Microsoft employee ratings system as follows: "According to the lawsuit, employees are rated on a five-point scale, with only a certain percentage permitted to receive each score. . . . [and] [e]mployees doing the same job in the same unit are also given a 'stack ranking,' from most to least valuable."[13] Moreover, those responsible for the rankings at Microsoft, again according to the newspaper article, "decide those rankings largely using what are called 'lifeboat discussions,' where they choose which employees they would want with them if stuck in a lifeboat."[14] A lawyer for the employees further alleged that the "[m]anagers had no other clear criteria" for guidance.[15] All this has led one Harvard Business School Professor to suggest that "[C]ompanies are playing their version of 'Survivor'" in

3. Abelson, N.Y. TIMES, *supra* note 1, at A12.
4. *Id.*
5. *Id.*
6. Ed Garsten, *Judge Approves $10.5 M Settlement in Ford Discrimination Suits*, The Associated Press, March 15, 2002, 2002 Law.Com <http://www.law.com> (last visited March 16, 2002) hard copy on file with author.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Abelson, N.Y. TIMES, *supra* note 1 at A12.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

reference to a popular television series.[16]

Nonetheless employers, including the large public employers already mentioned in this introduction, do need to make pay, downsizing and promotion decisions. Moreover, in the nonemployment school setting, grades and ranking of students remain a generally accepted practice. Defenders of employee grading and ranking, such as John Sullivan, a human resources professor at San Francisco State University, suggest that "anyone who gets a low grade is likely to view the process as unfair."[17] After all, "'A' students love grades'; 'F' students hate grades."[18]

The purpose of this article is to provide an overview of employee appraisals and a preliminary analysis of their use in the private sector. It does so by discussing the now settled Ford litigation as an illustrative microcosm of the subject. After an introductory discussion of the Ford litigation the article provides a basic primer on federal discrimination law in the private sector including a discussion of several recent Supreme Court opinions. The discussion includes an analysis of *Adams v. Florida Power Corp.*[19] which bears on one of the key legal issues concerning age discrimination in the *Ford* case. Again, the purpose of including the analysis of *Florida Power* is as a representative microcosm of the unsettled and dynamic nature of employment discrimination law surrounding performance appraisals. Before turning to the primer and case studies, however, different types of performance appraisals will be discussed relying on management and business literature; and by far the longest portion of the paper is the discussion of a host of major federal employment statutes which follows the business discussion of appraisals. EEOC guidance in the area will also be introduced in that section. The final part of the article will, then, return to the complaint in the Ford litigation and analyze it in the context of federal employment discrimination law. In sum, the goal of this article is to provide a general background and the preliminary legal template necessary to understand the legal issues raised by employee appraisal programs under the federal law of private employment practices. Readers desiring only an updated overview of the law need only read Part III of this article. Conversely, readers familiar with the law seeking only guidance on how it applies in the context of performance appraisals may skip Part III and read only the other parts of the article without damaging the integrity of the application.

16. *Id.*
17. *Id.*
18. *Id.*
19. Adams v. Fla. Power Corp., 255 F.3d 1322 (11th Cir. 2001), *cert. granted* 122 S.Ct. 643 (2001), *cert. dismissed* 122 S.Ct. 1290 (2002) (as "improvidently granted").

II. EMPLOYEE PERFORMANCE APPRAISAL DYNAMICS: CONNECTING LAW AND BUSINESS

A. THE COMPLAINT AGAINST FORD

In February 2001 a complaint was filed in a Michigan State Circuit Court alleging Ford Motor Company ("FMC") had discriminated against nine individual employees, individually and as representatives of a class under the state law of Michigan, in its "adoption and implementation of a performance management process (PMP)."[20] The *Second Amended Complaint* contained five counts: *Count I* alleged disparate treatment discrimination (class and individual claims);[21] *Count II* alleged disparate impact age discrimination;[22] *Count III* alleged an individual retaliation claim;[23] *Count IV* alleged an individual national origin, religious and gender discrimination claim;[24] and *Count V* alleged an individual disability discrimination claim.[25]

Although the claims in this case were state law claims based on the employment discrimination laws of Michigan, they also provide facts to which federal employment discrimination law apply and, because the federal law is the focus of this article, the facts and claims in the case will be used as factual background for the illustrative application of federal law. Nonetheless, a few selected provisions of the Michigan law are discussed for comparative purposes. The balance of the current subpart of the article briefly outlines the "performance management process"at the core of the Michigan case and describes the allegations of three individual plaintiffs in the case.

Ford Motor Company's (FMC's) Performance Management Process (PMP) was "implemented in late 1999 by former Chief Executive Jacques

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20. SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND MONEY DAMAGES AND JURY DEMAND, Harold Siegel, Charles Jerzycke, Jane Laird, James Mulligan, Ronald Robertson, Dr. Sanaa Taraman, Pamela Tucker, Ron Wojtas, John Wyrwas, Individually and as representative of all similarly-situated employees vs. Ford Motor Company, Case No. 01-102583-CL (Hon. Edward M. Thomas), April 23, 2001, <http://www.siegelclass action.com/complaint.htm> (last visited 12/5/01) (*First listed plaintiffs firm*: Pitt, Dowty, McGehee & Mirer, P.C.; 306 South Washington, Sixth Floor; Royal Oak, Michigan 48067. *First listed defense firm*: Kienbaum Opperwall Hardy & Pelton, P.L.C.; 325 S. Old Woodward Ave.; Birmingham, MI 48009), Para. No. 3.

There was another case filed making many of the same allegations. The notice of class action settlement of the *Siegel* case reflects that it was combined and certified for settlement purposes only with a portion of the other case. *See Notice of Settlement* Case No. 01-105949-CL (*Streeter et al.*) and Case No. 01-102583-CL (*Siegel et al.*), Circuit Court of Wayne County, Michigan, available at <http://www.siegelclassaction.com/complaint.htm> and <http://fordmotorsclassaction .com> (last visited May 3, 2002).

21. SECOND AMENDED COMPLAINT, SIEGEL ET AL. *supra* note 20, at ¶¶ 138-42 [hereinafter *Siegel Complaint*].

22. *Id.* at ¶¶ 143-44.

23. *Id.* at ¶¶ 145-50.

24. *Id.* at ¶¶ 151-56.

25. *Id.* at ¶¶ 157-62.

Nasser."[26] It was a "forced ranking" system that FMC adopted "after studying its effectiveness at other large companies, particularly General Electric Co., where former Chairman Jack Welch hailed it as a breakthrough human resources tool."[27] The PMP applied only to middle management level salaried employees and was used to assess approximately 18,000 managers.[28] It "was designed to help the automaker reward standouts and identify poor performers."[29]

The program graded managers on an A, B, C grading system with top performers receiving an "A" grade. According to the *Siegel* Complaint each business unit was forced to grade on a curve by ranking managers so ten percent received an A, ten percent received a C, and eighty percent received a B.[30] Further, according to the Complaint:

Senior management instructed management of each business unit to rank each employee within the "B" category as either a "B1" or "B2". A ranking of a "B2" result[ed] in the employee receiving a reduced merit increase and performance bonus. The "B2" designation also . . . [meant] that the employee is "at risk" for a "C" designation in the year 2001.[31]

The award of a "C" ranking is significant, because in addition to effecting performance based compensation bonuses, raises, stock options and promotability, "those who received Cs two years in a row faced possible termination."[32] Furthermore the plaintiffs in the *Siegel* case alleged:

Employees receiving a "C" ranking are stigmatized among their peers and superiors. The effect of the "C" designation is to publicly reflect senior management's view that the "C" ranked employee is flawed and a non-viable member of the management team, even though the employee was a high achieving long-term employee. The long-term effect of this discriminatory plan has been and will be to profoundly and irrevocably impair the morale and *espirit de corps* of those forced to suffer this indignation[.][33]

Therefore, the Complaint also requested non-economic damages for "humiliation, mental anguish, outrage . . . embarrassment and loss of reputation"[34] through what amounted to a scarlet letter like designation of C.

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26. Mark Truby, *Another Nasser policy to be scrapped at Ford*, THE DETROIT NEWS, April 23, 2002, at B1, *available at* 2002 WL 18056120 [hereinafter THE DETROIT NEWS, 4/23/2002].

27. Mark Truby, *Ford Settles Key Age Bias Suit*, THE DETROIT NEWS, March 15, 2002, at C1, *available at* 2002 WL 14871182 [hereinafter THE DETROIT NEWS, 3/15/2002].

28. *AARP: Court OKs $10.6 Million Settlement Of Ford Age Bias Case*, U.S. NEWSWIRE, Mar 14, 2002, page, *available at* 2002 WL 4575383 [hereinafter U.S. NEWSWIRE, 3/14/2002].

29. THE DETROIT NEWS, 4/23/2002, *supra* note 26.

30. *Siegel Complaint*, *supra* note 20, at ¶ 7.

31. *Id.* at ¶ 8.

32. U.S. NEWSWIRE, 3/14/2002 *supra* note 28; *Siegel Complaint*, *supra* note 20, at ¶ 8; THE DETROIT NEWS, 4/23/2002 *supra* note 26; U.S. NEWSWIRE, 3/14/2002 *supra* note 28.

33. *Siegel Complaint*, *supra* note 20, at ¶ 13 (emphasis in original).

34. *Id.* at ¶ 11.

Two other factual allegations are particularly significant before describing the specific allegations concerning three of the individual plaintiffs. *First*, the gravamen of the Complaint was probably the allegation that the PMP was part of a concerted effort by FMC to eliminate older salaried employees from the workforce and that it "was designed and implemented to carry out"[35] senior management's public remarks of its "intention to transform FMC from an environment dominated by 'old' employees to an environment reflective of the company's younger consumer base."[36] Moreover, the PMP performance criteria was alleged to be "rooted, in part, on negative stereotypical assumptions about older employees."[37] Those stereotypes, again according to the Complaint, included "that older employees are 'slow to embrace new learning opportunities and upgade skills'" and are "'reluctant to become involved in change initiatives.'"[38]

The *second* important general factual allegation consisted of two subparts and concerned the PMP process itself: (a) "Under the PMP, senior management of FMC has broad discretion to create groups of comparators in the same leadership level based on location, function, customer contacts, compensation planning, and common job skills,"[39] *and* (b) "The PMP requires management to rank comparators even though the evaluating manager is unfamiliar with the performance, experience, education or other attributes of the individuals being evaluated."[40]

This article briefly describes the individual allegations by three out of the nine named plaintiffs in the *Siegel Complaint*: Harold Siegel, Dr.

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35. *Id.* at ¶ 5.

36. *Id.* at ¶ 4. According to a newspaper article: "Many at Ford thought that Nasser's aggressive push to hire and promote women and minorities forced supervisors to give the majority of C grades to older white males." THE DETROIT NEWS, 4/23/2002 *supra* note 26. Importantly for purposes of the scope of this article there are no allegations of prototypical reverse discrimination. Thus, that issue will not be discussed herein. As an aside, however, and as a matter of introductory hornbook law, reverse discrimination is a bit of a misnomer because Title VII protects all individuals on the basis of, *inter alia*, race and gender including the white race and the male gender. The concept of reverse discrimination comes up frequently in the context of voluntary affirmative action plans whose purpose is to increase the employment of employees who possess traits that have been the subject of traditional discrimination.
In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Supreme Court addressed affirmative action plans that are required for certain government contractors under Executive Order 11246. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW, 2d ed, § 2.16 at 144-45 (West Hornbook Series, Student Edition, 1999) [hereinafter ROTHSTEIN]. According to the treatise, although Title VII does not require affirmative action it permits such action under certain circumstances. *Id.* at 145. It summarizes *Weber* as providing that "voluntary affirmative action is lawful under Title VII only if it is pursuant to a valid plan." *Id.* A valid plan must: (1) "remedy conspicuous racial imbalances in traditionally segregated job categories;" (2) "be temporary; its purpose must be to eliminate . . . racial imbalance rather than to maintain a racial balance," and; (3) "it must not unduly trammel the rights of the majority." *Id.* Neither reverse discrimination nor an affirmative action plan was at issue in the *Siegel* litigation. *See generally Siegel Complaint*, *supra* note 20.

37. *Siegel Complaint*, *supra* note 20, at ¶ 5.

38. *Id.* at ¶ 5.

39. *Id.* at ¶ 9.

40. *Id.* at ¶ 10.

Sanaa Taraman, and Pamela Tucker.[41]

Harold Siegel[42]

Mr. Siegel was approximately 69 years of age when the alleged discriminatory employment actions occurred. He had worked for FMC for approximately eleven years in the late 1950's through the late 1960s and then returned as a "product planning analyst" at the Technical Research Center in Dearborn, Michigan in 1992. In 1994 he was promoted and worked as a manager in fleet leasing and rental in Arizona and after about 18 months in that position moved back to Dearborn to be a product strategy analyst at the Electric Vehicle Facility in Dearborn. He rejected a retirement package in 1997 and his status within FMC changed to an "unstructured" employee. The status changed guaranteed his salary grade level (but not his position) for five years (until January 2002). From 1992 through 1999 Siegel's annual performance was ranked under FMC's prior employee evaluation system as "fully meeting requirements/expectations." That ranking was the second highest of four categories under that system. From January 1999 until September 2000 his manager was Barry Johnson. In September 2000 he was informed he would be ranked a C, was given a temporary assignment under a different manager, and was told "that FMC had no plans for Siegel's employment after December 31, 2000."[43] Siegel protested his C ranking and his evaluation was changed from the proposed C to a B and, ultimately, he received a B2 ranking.

Siegel claimed that Johnson did not give him "clear objectives and interim reviews" as required by the PMP.[44] He also alleged "that Johnson created a hostile work environment" expressly including being told that FMC wanted "employees over the age of 50 to leave the company"[45] and that Johnson refused to assign work requiring travel to Siegel based on an age stereotype that older workers "are incapable of traveling as effectively as younger employees." Siegel's manager the last three months of 2000 told him that there was no way for him to improve his grade in three months; that is, being graded a C for nine months created an overwhelming obstacle to an improved annual grade. Siegel claimed age discrimination.

Dr. Sanaa Taraman[46]

Dr. Taraman was approximately 53 years of age when FMC allegedly

41. *Id.* at ¶ 1.

42. *Id.* at ¶¶ 14-28 (specific citations to the *Siegel Complaint* within this section are used for spot cite purposes only).

43. *Siegel Complaint*, *supra* note 20, at ¶ 19.

44. *Id.* at ¶ 24.

45. *Id.* at ¶ 20.

46. *Siegel Complaint*, *supra* note 20, at ¶¶ 44-55 (specific citations to the *Siegel Complaint* within this section are used for spot cite purposes only).

discriminated against her. She is female, Muslim and is a native of Egypt. She "speaks with a foreign accent and wears clothing reflective of her national origin and religious beliefs."[47] Taraman, who has a Ph.D. in Industrial Engineering and Operations Research, began work at FMC in 1976 and was promoted to Principal Research Engineer Associate in 1982. Under the prior employee evaluation system she had consistently been ranked as "fully meets requirements/expectations." Moreover, "her activities over the years have received the highest recognition and several national and FMC Awards."[48] Her 1999 bonus was augmented in recognition for her Leadership Behavior Ranking and Performance. She received the bonus in March 2000.

In August 2000 her manager informed her she "was on the bubble" for receiving a C ranking. She protested and "was told by her director that if she met the objectives the rest of the year, she would be 'fine'."[49] Taraman's director announced his retirement in December after assigning Dr. Taraman a B grade. Approximately a week later her manager "advised her" that her B ranking was a typographical error and she was rated a C. She suffered an emotional breakdown and, according to the *Complaint*, in now psychiatrically disabled. Taraman claimed gender, age, religion and national origin employment discrimination.

Pamela Tucker.[50]

Tucker was approximately 47 years of age when the alleged violations of fair employment practices occurred. She began employment with FMC in 1986 and always worked in the Systems/Process Leadership Department. She was promoted three times. In 1999 she laterally transferred within the department to a position titled "Change Management Specialist." She received an augmented bonus for her performance n 1999. Throughout her career she had been "consistently rated" as "fully meets requirements/expectations" under the prior employee evaluation system.[51]

"In July 2000, Tucker informed her supervisor . . .that she believed . . . she had Multiple Sclerosis ('MS')."[52] On July 12, 2000 she took medical leave. In early August 2000 she was diagnosed with MS, and on August 3 she telephoned her supervisor to advise him of the diagnosis. In September she again called her supervisor regarding her illness and a possible extended leave. She also asked about her PMP ranking. Ultimately he told her she was at risk of being ranked a C even though he had given her a B assessment but he "could not provide her with any

47. *Siegel Complaint*, *supra* note 20, at ¶ 47.
48. *Id.* at ¶ 45.
49. *Id.* at ¶ 50.
50. *Siegel Complaint*, *supra* note 20, at ¶¶ 97-113 (specific citations to the *Siegel Complaint* within this section are used for spot cite purposes only).
51. *Siegel Complaint*, *supra* note 20, at ¶ 99.
52. *Id.* at ¶ 101.

concrete rationale for the potential 'C' ranking."[53]

On October 23, her request for a job transfer to a Finance Training Manager (in the Human Resources Department) was approved. Because she failed to meet an October 1 transfer deadline within the PMP, and even though she was still on medical leave on October 1, she was evaluated for 2000 by her prior department. She received a C even though she was not given the performance conference required by the PMP because she was on medical leave. The *Complaint* simply alleged that Tucker was discriminated against without identifying the specific type of discrimination alleged.[54]

B. EMPLOYEE PERFORMANCE APPRAISAL: "WHAT IS IT GOOD FOR?"[55]

At a very basic level the business of business is to make a profit which, in the corporate world, enhances shareholder gain.[56] Indeed one of the cases establishing the primacy of profit and shareholder wealth creation involved FMC in 1919. It was *Dodge v. Ford Motor Company*.[57]

Enhancing profit inescapably involves decisions concerning employees by employers. Text book illustrations of performance appraisals imply why employee performance is important to organizational profit and owner gain. One management textbook, for example, suggests performance appraisals be used to "provide needed input for determining both individual and organizational training and development needs" and to "encourage performance improvement."[58] Nonetheless, first and

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53. *Id.* at ¶ 108.

54. *Id.* at ¶ 113.

55. With aplologies to EDWIN STARR, WAR (Gordy Records 1970). According to Elaine Bennis, character on the television show "Seinfield," the original title Tolstoy had for his novel *War and Peace* was *War: What Is It Good For?* [uh, absolutely nuttin'! Say it Again].

56. *See, e.g.*, AMERICAN LAW INSTITUTE PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994) § 2.01 *reprinted in* CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: STATUTES, RULES, MATERIALS, AND FORMS, MELVIN ARON EISENBERG, Editor (2001) at p. 1154 ("[A] corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain").

57. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919). In that case Henry Ford, the founder and dominant force in FMC, reduced dividends precipitously in order to share profits with consumers through general price reductions in its product—cars—and to increase employment with FMC. The opinion quoted Henry Ford:

> 'My ambition,' said Mr. Ford, 'is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back in the business.'

Id. at 683. To which the court responded, instructed and broadly held:

> There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority shareholders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes.

Id. at 684.

58. LESLIE W. RUE & LLOYD L. BYARS, MANAGEMENT THEORY AND APPLICATION 421

presumably foremost, the same text opines appraisals are most commonly used "for making administrative decision relating to salary increases, promotions, transfers, and sometimes demotions or terminations."[59]

The foregoing probably does little more than restate the traditional role of the human resources department (HR) which was "administrative and professional."[60] This perspective on HR (and its appraisal function) may also fit into the second step of what one recent HR book suggests is the evolution of corporate HR models toward valuing the HR function as a strategic asset. The second step is called the "compensation perspective" and exists where "the firm uses bonuses, incentive pay, and meaningful distinctions in pay to reward high and low performers."[61] Throughout the 1990's there was, however, "a new emphasis on strategy" concerning the role of the HR in aligning HR with the larger goals of the company.[62] Performance measurement is a key component in this alignment.[63] The performance appraisal system, therefore, has come to do two things for the employer: "[I]t improves HR decision-making by helping . . . focus on those aspects of the organization that create value" and "it provides a valid and systemic justification for resource-allocation decisions."[64]

Profit and employer resource-allocation are one side of the appraisal equation. On the other side of the equation are employees and the results of performance appraisals. Employee evaluations at some level, either through carrots (incentives) or sticks (discentives), are meant to motivate employees to align their efforts with the strategy of the employer. Human motivation has been much studied and there is a wealth of literature on the issue. Even so, there is no single accepted theory. Some of the earliest research by Abraham Maslow, for example, resulted in his need hierarchy theory in which individuals moved through (though not in lock-step) a well defined hierarchy of needs including: physiological needs, safety needs,

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(5th ed. 1989) [hereinafter RUE & LLOYD].

59. *Id.* at 420. *Cf.* MARK R. FILLIP, THOMAS L. BOYER, JAMES C. CASTAGNERA, EMPLOYMENT LAW ANSWER BOOK, FIFTH EDITION pp. 3-36 thru 3-37 (2001) (Q 3:53, "should companies use performance evaluations?").

60. BRIAN E. BECKER ET. AL., THE HR SCORECARD: LINKING PEOPLE, STRATEGY AND PERFORMANCE 3 (2001) [hereinafter BECKER ET. AL.].

61. *Id.*

62. *Id.* The two highest evolutionary stages are:

> *The alignment perspective:* Senior managers see employees as strategic assets, but they don't invest in overhauling HR's capabilities. Therefore, the HR system can't leverage management's perspective.
>
> *The high-performance perspective:* HR and other executives view HR as a system embedded within the larger system of the firm's strategy implementation. The firm manages and measures the relationship between these two systems and firm performance.

Id. at 4.

63. *See, Id.* at 110-11.

64. BECKER ET. AL, *supra* note 60, at 110-11. A management textbook suggested that there are three "determinants of performance:" (1) "effort," (2) "abilities," (3) "role (or task) perceptions." RUE & BYERS supra note 58 at 421 Role perceptions "refer to the direction(s) in which individuals believe they should channel their efforts on their jobs." *Id.* at 422.

love needs, esteem needs and the need of self-actualization.[65] The research on this theory, however, gives it only limited support as "once certain primary needs are satisfied . . . any one of a wide range of motives may dominate behavior depending upon individual developmental experiences."[66]

Another theory, known as achievement motivation theory, attempts to formulate what motivates individuals once those "primary needs" are satisfied. It posits that a category of individuals exists that place striving for achievement near the top of their needs hierarchy and, further, that these individuals are "particularly responsive to certain types of work environments."[67] These environments include those "where one can attain success through one's own efforts rather than chance; where the difficulty level and risk inherent in the work is neither too great nor too small; and where there is clear feedback on results . . ."[68] It seems speculatively, perhaps, this achievement motivation theory might provide insight into understanding manager and professional staff motivation at places of employment like FMC.

Finally for purposes of this caricature of management motivation theory, one transactional approach might help in understanding the motivation of employees who are willing to litigate employment practices, generally, and performance appraisal issues, specifically. It is called the "Adams Theory" and is but one of "a number of views regarding the motivating effects of unfairness, injustice, and . . ."[69] At a nontechnical level this theory is based on the implicit exchange of work by the employee (input) and the plethora of satisfactions including compensation and achievement (outcome) that are provided the employee by the employer. The explanatory power of the theory is based on the employee's

65. JOHN B. MINER, THE PRACTICE OF MANAGEMENT 144 (1985) [hereinafter MINER]. Professor Solomon, a law professor, stated that "[s]elf-actualization represents the highest level of fulfillment that individuals can strive for; an individual who realizes self-actualization realizes his full potential." Lewis D. Solomon, *Humanistic Economics: A New Model for the Corporate Constituency Debate*, 59 U.CIN.L.REV. 321, 339 (1990). Further, "[s]elf-actualized people use their potentialities for creative results that are beneficial to themselves and to society as a whole; they surmount the dichotomy between individual development and the common good." *Id.* at 340. For a more detailed discussion of the needs as *originally* delineated by Maslow see Thomas Earl Geu & Martha S. Davis, *Work: A Legal Analysis in the Context of the Changing Transnational Political Economy*, 63 U.Cin.L.Rev. 1679, 1705-26 (1995). *See also* Thomas Earl Geu, *Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium*," 65 TENN.L.REV. 925, 979-81 (1998) (also discussing the competitiveness of modern business, business trends, and organizational structure).

66. MINER, *supra* note 65, at 144. Another approach which seems to be an alternative to Maslow's "hierarchical" approach, and using much the same approach and research as appear in the Geu articles in the previous note, is proposed in PAUL R. NORRIS, NITTEN NORAH, DRIVEN: HOW HUMAN NATURE SHAPES OUR CHOICES (2002). The book proposes that the interrelationship of four basic human "drives" explains much of human behavior. The four drives are (1) the drive to acquire, (2) the drive to bond, (3) the drive to learn, and (4) the drive to defend. DRIVEN, *supra* at 55, 75, 105, 129, respectively.

67. MINER, *supra* note 20, at 145.

68. *Id.* For more recent developments concerning the use of cognition and behavioral decision theory (including some other brain science) in performance appraisals *see* HANDBOOK OF ORGANIZATION STUDIES 315, 323-30 (Stewart R. Clegg et al. eds. 1996).

69. MINER, *supra* note 65, at 147.

perception of the fairness of what is received by other similarly situated employees. Stated in a rather clinical (but brief) way:

> If the ratio of input to outcome does not match well with the ratio perceived for some reference source (such as a coworker or the profession in general), then people experience inequity. They feel that they have gotten either too little, on occasion, too much. Either way, a desire emerges to return to equitable circumstances, and a strong motivational force arises.[70]

If valid, this theory offers a behavioral explanation for both employment litigation and a rather broad class of worker dissatisfaction. Further, it, together with the other motivational theories superficially discussed in this part of the article, seems to offer an extra-legal business reason to carefully design and implement employee performance appraisals.

There are many types of appraisals deployed in business, but they may be generally seen as falling on a continuum between two categories roughly recognized by both the business and legal literature. The categories are *objective* and *judgmental* (or subjective).[71] Objective performance appraisals are frequently quantifiable. On the individual level objective measures include such dimensions as scored tests and nonscored objective criteria. Managers in particular, however, are also assessed derivatively by the financial performance of the unit or group of which they are assigned responsibility.

Objective measures include both scored and unscored measurements. *Scored measurements* include scored tests. According to an employment discrimination treatise "[t]he nature of the [scored] tests given by private employers has changed substantially over time:"[72]

> In the private sector, fewer tests are now being given to measure factors like overall cognitive ability, especially tests of the traditional multiple-choice, paper-and-pencil kind. But more tests are being given to assess personal characteristics such as conscientiousness, responsibility, judgment, and integrity. And with increasing frequency, video technology is being used as a means of presenting issues or depicting situations about which the test taker is then questioned.[73]

Nonscored objective measures include items like educational requirements, experience requirements or measures, and licensure requirements.[74] They

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70. *Id.*

71. *Id.* at 533. *See generally*, John Edward Davidson, Note, *The Temptation of Performance Appraisal Abuse in Employment Litigation*, 81 VA.L.REV. 1605 (1995); *Cf.* MARK R. FILLIP, ET. AL. EMPLOYMENT LAW ANSWER BOOK, *supra* note 59 at p. 3-36 (Q 3:52, "What are performance evaluations?"; also stating, "Performance evaluations vary almost as much as the corporations, partnerships, and other organizations that use them").

72. *See* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 115 (ch. 5: "Scored Tests") & 173 (ch. 6: "Nonscored Objective Criteria") (3rd ed.) (1996 with 2000 Cum. Supp.). This treatise is one of the leading treatises in the area. *Cf.* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lane, 642 N.W.2d 296 (Iowa 2002) (lawyer suspended, in part, because he submitted a post-trial brief which plagiarized this treatise).

73. LINDEMANN & GROSSMAN, *supra* note 73, at 115.

74. *Id.* at 175, 178, 183.

also include criminal conviction records, references, residency requirements, drug tests and credit checks.[75] An employee's absentee record and training record are other examples of nonscored objective measures.[76] Financial measures for managers are accounting derived. Nonfinancial measures of managerial performance include productivity measures like units produced, units sold, customer complaints, voluntary and involuntary employee turnover rates, accident frequencies, and employee attitude surveys and results.[77]

Judgmental (or *subjective*) appraisals nonexclusively include assessments by the employee's immediate supervisor. "However, self evaluations, group or committee appraisals . . ." are common.[78] Specific kinds of appraisal instruments or techniques include "goal setting, or management by objectives," essay appraisals, and checklists.[79] Ranking methods are another example of subjective measurement.[80] As one general management text forthrightly states: "[T]he potential for errors in performance appraisals is great."[81] The most common sources of errors have been studied and named. One source is the halo effect which is a tendency to let a "general overall impression color" responses to individual dimensions measured by the appraisal instrument.[82] Another source of error is the constant error which occurs when different raters use different scales rendering the results from different raters noncomparable.[83] Recency errors result from a "[t]endency to base ratings on what is most easily remembered, the most recent behavior;"[84] and the central tendency error occurs, "where ratings for all or most employees are positioned in the middle of the scale."[85] Yet another error is the error of range restriction which rates "all individuals within a narrow range so that there is little difference between best and worst."[86]

Finally, the list of named errors includes personal bias which occurs when the rater completes the performance measurement "not on the basis

75. *See generally*, *id.* pp. 185-96.
76. *See generally*, MINER, *supra* note 65, at 535.
77. MINER, *supra* note 65, at 535 Exh. 15.3.
78. *Id.* at 533.
79. RUE & BYERS, *supra* note 58 at 422-23. For practical tips on better integrating employee performance and organizational goals through the appraisal process *see* Margaret Morford, *A radical new way to set performance goals*, SOUTH DAKOTA HR HERO EXTRA, April 2002 ("HR Hero Extra is a bonus supplement from M. Lee Smith Publishers LLC, which publishes SOUTH DAKOTA EMPLOYMENT LAW LETTER). It suggests asking three questions to help integrate organizational strategic planning in establishing individual employee goals: (1) "What is our organization's business/growth strategy for the next 12 months?"; (2) "What kinds of things will my department have to do to underpin that plan?"; (3) "What kinds of things will . . . [this employee] have to do to support the department's role in achieving the organization's larger goals?" *Id.*
80. RUE & BYERS, *supra* note 58 at 423.
81. *Id.*
82. MINER, *supra* note 65, at 537 Exh. 15.4.
83. *Id.*
84. *Id.*
85. RUE & BYERS, *supra* note 58 at 433.
86. MINER, *supra* note 65, at 537 Exh. 15.4.

of actual performance, but on other grounds—favors done for the rater, sex, minority status, social standing, etc."[87] Stated another way, "[m]anagers with biases or prejudices tend to look for employee behaviors that conform to their biases. Appearance, social status, dress, race, and sex have influenced many performance appraisals."[88] A recent unscientific poll of 272 HR professionals is at least interesting in that "58 percent said most supervisors consistently rate employees too high; 21 percent said most give fair evaluations; 19 percent said many supervisors play favorites; and only two percent said most supervisors consistently rate employees too low."[89] More scientifically sound academic research seems to support at least some of the results of the poll including, *inter alia*, the existence of gender and racial bias.[90]

In summary, employee performance is important to employer profitability and there are many ways of evaluating and measuring performance. Measurement, however, is also important to employees. Not only do appraisals affect compensation and other administarial aspects of work, they also affect the employees sense of self-worth and implicate senses of transactional justice and fairness. It is no wonder the *Siegel Complaint* was filed (whether or not the allegations therein are true and correct) considering research has identified bias as one of the general sources of error in employee performance appraisal systems.

The law of employment discrimination makes the use of some biases toward statutorily enumerated class unlawful. It also makes the use of appraisal techniques that result in differential treatment of these classes unlawful. Before applying this law to the *Siegel Complaint* or, more generally to the appraisal process, this article will next discuss several of the major federal discrimination laws that apply in the context of private employment. Indeed, most of the balance of this article is devoted to a basic overview of these laws.

III. AN INCOMPLETE OVERVIEW OF THE PRIMARY FEDERAL ACTS PROHIBITING DISCRIMINATION IN PRIVATE EMPLOYMENT

A. THE STATUTES

The keystones of federal discrimination law that are generally applicable to private employers are widely recognized[91] as Title VII of the

87. *Id.*

88. RUE & BYERS, *supra* note 58 at 433.

89. *Evaluations*, SOUTH DAKOTA HR HERO EXTRA, May 2002.

90. Davidson, Note, *supra* note 71 at 1611.

91. *See e.g.*, ABIGAIL COOLEY MODJESKA, EMPLOYMENT DISCRIMINATION LAW 3d ed. pp. xvi-xix (West, looseleaf with 2001 Cum. Supp.) (table of contents); HAROLD S. LEWIS & JR. ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE xv-xxiv (West Hornbook Series, 2001) (table of contents); DAVID P. TWOMEY, EMPLOYMENT DISCRIMINATION LAW: A MANAGER'S GUIDE (5th ed.) pp. xi-xii (2001) (table of contents);

Civil Rights Act of 1964,[92] the Age Discrimination in Employment Act of 1967,[93] and the Americans With Disabilities Act of 1990.[94] This article will focus on the above laws as they relate to performance appraisal. Obviously the selection of these laws is somewhat arbitrary given the number of other federal statutes governing the employment relationship. Nonetheless, their selection, together with their state law counterparts, is defensible because they probably comprise the most frequently used laws in employment litigation.[95]

1. Title VII of the Civil Rights Act

Before applying employment discrimination law to performance appraisals it may be useful to provide an overview of each Act. The first to be addressed is Title VII of the Civil Rights Act of 1964, as amended.

JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION: CASES AND MATERIALS (4th ed.) ix-xii (1997) (table of contents); PATRICK J. CIHON, JAMES OTTAVIO CASTAGNERA, EMPLOYMENT AND LABOR LAW (4th ed.) pp. xvii-xii (2002) (table of contents); MICHAEL A. WARNER & LEE E. MILLER, EMPLOYMENT DISCRIMINATION LAW (BNA) No. 40-2nd, at v. (2000) (table of contents).

92. 42 U.S.C. §§ 2000e-2000d-17.

93. 29 U.S.C. §§ 621-634.

94. 42 U.S.C. §§ 12101-12213.

95. Other federal laws that contain statutory components prohibiting employment discrimination include, *inter alia*, the Equal Pay Act of 1963, 29 U.S.C. §§ 206-219 (prohibiting different rates of pay for males and females doing the *same* job) the Rehabilitation Act of 1973, 29 U.S.C. § 701-797b(f) (dealing with disability discrimination by government contractors and, in certain circumstances, requiring government contractors to have an affirmative action plan for hiring the mentally or physically disabled); and § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

A secondary source summarizes § 1981, in part, by stating that it "guarantees all persons the same rights to make and enforce contracts as enjoyed by white persons." WARNER & MILLER, *supra* note 91 at A-1. It "has been interpreted to prohibit race discrimination in employment by private employers and provides substantive rights in race cases parallel to those of Title VII [of the Civil Rights Act]." *Id.* While parallel, § 1981 does not contain some of the restrictions of Title VII. Note that § 1981 was broadened in 1991 by Congress "by including in the term 'make and enforce contracts' the 'making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Id.* citing Civil Rights Act of 1991, Pub.L.No. 102-166, § 101, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981(b)).

One of the interesting issues that is related to this article is whether the employment-at-will relationship is a contract under § 1981 and whether the definition of contract should be supplied by state or federal law. *See* Skinner v. Maritz, 253 F.3d 337 (8th Cir., 2001).

Government contractors are also subject to Executive Orders 11,246, 30 Fed. Reg. 12,319 (1965); and, 11,375, 32 Fed. Reg. 14,303 (1967) which prohibit discrimination against minorities and women and, under some circumstances, which require an affirmative action plan. Enforcement of these Orders is by the Office of Federal Contract Compliance Programs (Dept. of Labor) and regulations issued through the Office "are published at 41 C.F.R. Chapter 60." BARBARA LINDEMANN, PAUL GROSSMAN, I EMPLOYMENT DISCRIMINATION LAW, 3 ed., p. 1082 n. 10 (ABA Section of Labor & Employ. Law, 1996 with annual supp.).

Other federal laws often listed under the general topic of employment discrimination include the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 4211-4214; the Veterans' Reemployment Rights Act, 38 U.S.C. 4301-4307; and the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324(a), (b). The Immigration Reform and Control Act's scope is broader that Title VII in that it covers employers with fewer than 15 employees. Finally, the Older Workers Benefit Protection Act, 29 U.S.C. 623, 626, 630, *inter alia*, regulates the use of employee benefit waivers which frequently occur in conjunction with early retirement programs and may, therefore, be seen as adjunct to other age discrimination laws. It is codified within and, to the extent necessary, discussed herein as part of the Age Discrimination in Employment Act.

Under its terms:

> a) Employer practices. It shall be an unlawful employment practice for an employer:
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[96]

Title VII applies to all employers "engaged in an industry affecting commerce who . . . [have] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or . . . preceding year . . . ."[97] It is worth noting that the South Dakota statute that is similar to Title VII applies to all "employers" no matter of the number of employees.[98]

Further, Title VII of the Civil Rights Act established the Equal Employment Opportunity Commission (EEOC) with its original authority was to investigate and attempt conciliation of charges of discrimination.[99] Since 1972 it has also had the statutory authority to sue on behalf of discrimination claimants if conciliation fails.[100] It has specific authorization

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96. 42 U.S.C. § 2000e-2(a).

97. 42 U.S.C. § 2000e(b). Both "employer" and "employee" are statutorily defined. An Employer "means a person." *Id.* "Person" is defined broadly as including "one or more individuals, governments, governmental agencies, political subdivision, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, United States Code, or receivers." 42 U.S.C. § 2000e(a). Importantly, the Supreme Court held that Congress had authority to override the Eleventh Amendment in providing monetary remedies against states (as well as private employers) in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The term employer, however, excludes "Indian tribes" and has a separate exception for Native American, reservation businesses under certain circumstances(42 U.S.C. § 2000e-2(i)). There are also exceptions for certain religious organizations. 42 U.S.C. §§ 2000e-1, 2000e-2(e)(2). This article does not attempt to catalogue all the exemptions or exceptions to Title VII.

98. Title VII like protections are afforded by SDCL § 20-13-10 which states:

> It is an unfair or discriminatory practice for any person, because of race, color, creed, religion, sex, ancestry, disability or national origin, to fail or refuse to hire, to discharge an employee, or to accord adverse or unequal treatment to any person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff or any other term or condition of employment.

Id. The term "employee" means "any person who performs services for any employer for compensation, whether in the form of wages or otherwise . . ." SDCL § 20-13-1(6). The term "employer" means "any person within the State of South Dakota who hires or employs any employee, and any person wherever situated who hires or employs any employee whose services are to be partially or wholly performed in the State of South Dakota." SDCL § 20-13-1(7). The definition of "person," for purposes of this section, expressly includes "the State of South Dakota and all political subdivisions and agencies thereof . . ." SDCL § 20-13-1(11). These provisions are administered by the State Commission of Human Rights. *See* SDCL § 20-13-2.1.

99. WARNER & MILLER, *supra* note 91 at A-1.

100. *Id.* citing U.S.C. §§ 2000e-5, e-6, e-8, e-9.

to issue "procedural" regulations under Title VII.[101] Title VII procedural regulations appear at 29 C.F.R. pt. 1601, and "*substantive guidelines* appear at 29 C.F.R. pts 1604 (sex), 1605 (religion), 1606 (national origin), 1607 (employee selection procedures), and 1608 (affirmative action)."[102] The EEOC does not, unlike under several other discrimination laws, have authority to issue formal substantive rules (which are sometimes called "legislative rules"). It does have the authority to issue procedural regulations, interpretive rules and general statements of policy. This is an important distinction because of the heightened deference given by courts to legislative regulations promulgated under authority delegated by Congress.[103]

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101. LINDEMANN & GROSSMAN, Vol. 2 *supra* note 72, at 1207. "The EEOC issued procedural regulations and interpretations under Title VII throughout the 1970s and early 1980s." *Id.* at 1208. For a more detailed discussion of the EEOC rule making authority *see infra* note 103.

102. *Id.* at 1208 n. 24 (emphasis added).

103. "The most important category of rules—legislative rules—have the same binding effect as statutes." KENNETH CULP DAVIS, RICHARD J. PIERCE, JR., I ADMINISTRATIVE LAW TREATISE § 6.1 p. 225 (1994, with 2000 cum. supp.). The same treatise further distinguishes legislative from interpretive rules by summary statements true only of legislative rules as follows: (1) "Legislative rules require notice and comment"; (2) "Legislative rulemaking power must be granted by Congress," and; (3) "Legislative rules can create new rights and duties." *Id.* at § 6.3 p. 234. Agencies have inherent authority to issue "interpretive" rules (regulations). *Id.* "Since interpretive rules have no power to bind members of the public, but only the potential power to persuade a court, and since their issuance provides helpful guidance to the public, courts routinely conclude that agencies have the power to issue interpretive rules when Congress says nothing about such power." *Id.* The EEOC has the authority to issue procedural regulations and policy statements under Title VII through the interplay of the following two statutory provisions: "The Commission [the EEOC] shall have authority from time to time to issue, amend, or rescind suitable *procedural* regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of [subchapter II of chapter 5 of Title 5]." 42 U.S.C.A. § 2000e-12(a) (emphasis added). "Except when notice or hearing is required by statute, this subsection [requiring notice and public comment for purposes of formal rulemaking—legislative regs.] does not apply – (A) to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; . . ."5 U.S.C.A. § 553(b).

Rather obviously the latter quoted statute (which is part of the Administrative Procedures Act, "APA") implies that general policy statements have the same limited authority as do interpretive rules. Thus: "a general statement of policy has no binding effect on members of the public or on courts." DAVIS & PIERCE, § 6.2 p. 228.

The quoted language from the APA could conceivably lead a court to conclude that different levels of deference are due even interpretive regulations depending on whether the EEOC follows the procedure outlined in the APA (notice, hearing, etc.) for legislative regulations. This particular distinction may seem to be one without difference because (a) the EEOC does or does not have formal rulemaking authority and (b) the quoted language of the APA clearly states that interpretive and procedural regulations need not go through the formal rulemaking process. Recall, however, that the EEOC has an *express* delegation to issue procedural regulations. Thus, does this *express* delegation provide a middle ground whereby the EEOC's Title VII procedural regulations can be given greater authoritative weight by going through formal rulemaking? Stated another way, does the express grant allow the EEOC to twist procedural regulations into quasi-legislative regulations? While this question seems an odd reading of the statutory scheme, the Eighth Circuit in a 1979 decision at least hints that the answer is "maybe"; at least for purposes of adding more decisional weight to the regulation. In that particular case the Court started with the premise that, "the term 'substantive' defies precise definition, [but] a substantive rule has been held to be one that affects individual rights and obligations." *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898 at 902 (8th Cir. 1979) cited in LINDEMANN & GROSSMAN p. 1207 n. 20. Even though it agreed that the interagency memorandum at issue was clearly procedural in nature and that it was not necessary for the EEOC to follow the notice and hearing procedures of the APA, it made the following suggestion in dicta:

Substantively, one of the seminal cases in Title VII jurisprudence is *Griggs v. Duke Power Company.*[104] *Griggs*[105] concerned the transfer and promotion of employees between five operating departments within the Dan River Steam Station, a power generating plant.[106] It also concerned the "initial assignment" of individuals to a specific department.[107] The five specific departments were "(1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test."[108]

In 1955 Duke Power Company began requiring a high school diploma "for initial assignment to any department except labor."[109] At the same time it began requiring a high school diploma for an employee to transfer from Coal Handling to Operations, Maintenance, and the Laboratory and Text departments.[110] Later, but before Title VII became effective in 1965, "completion of high school also was made a prerequisite to transfer from Labor to any other department."[111] At the same time Duke Power changed its policy of hiring African-Americans so that African-Americans were no longer restricted to working only in the Labor Department.[112] Thereafter, but still in 1965, Duke Power "began to permit *incumbent* employees who lacked a high school education to qualify for transfer *from* Labor or Coal Handling . . . [to any of the other departments] by passing two tests—the Wonderlic Personnel Test . . . [testing general intelligence], and the Bennett Mechanical Comprehension Test."[113] In order for *new* hires to be placed in any department except labor, however, they had to have a diploma *and* satisfactory scores on the two tests.[114]

The trial court held there was no intent to discriminate against African-Americans by the Company when it adopted the high school diploma or test standard requirements.[115] Even though the 1960 census showed three times as many whites as African-Americans graduated from high school.[116] Whites also fared much better than African-Americans on

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> We note, however, that the agencies might find it advisable to provide opportunity for interested parties to comment on proposed rules in cases in which there may be some question about whether individual rights and obligations will be affected. Such a procedure would not only assure fairness to all interested parties, but would provide an opportunity for the agencies to educate themselves as to the potential consequences of their action.

Emerson Elec. Co., 609 F.2d at 904.

104. 401 U.S. 424 (1971). *See* ROTHSTEIN, § 2.14 at 137 (describing *Griggs* as a "landmark case"); *Cf.*, HAROLD S. LEWIS & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION § 1.1 p. 3-4 (2001, Hornbook Series).

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

106. *Griggs*, 401 U.S. at 425-26.

107. *Id.* at 427.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 428.

114. *Id.* at 427.

115. *Id.* at 429.

116. *Id.* at 430 n. 6.

the other tests which substituted for a high school diploma for transfers of incumbent employees under the company policy.[117]

The issue before the Supreme Court was whether the diploma or alternative test standards were discriminatory even though those requirements were race neutral on their face.[118] In holding that the diploma requirements or test standards violative of Title VII, even in the absence of discriminatory intent, the Court stated:

> In short, the Act does not command that any person be hired [or promoted or transferred] simply because he ... is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[119]

Key to the holding was that the employment practices used by Duke Power created different results for whites and African-Americans. Further, the employer could not show the diploma or the tests bore "a demonstrable relationship to successful performance of the jobs for which ... [they were] used."[120] Indeed, the evidence showed white employees hired before the requirements were instituted, and whom met neither of the requirements, "have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used."[121]

The Court stated that "[d]iplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality."[122] Finally, "[W]hat Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance,"[123] and that the "touchstone" for adjusting the legality of such tests is "business necessity."[124]

The statement of the law in *Griggs* is circa 1971 and is not as important as its explanation of the general thrust of the meaning of Title VII and the analytical framework used by the Court. In addition, it discussed the weight that should be given interpretive guidelines promulgated by the EEOC.[125] The portion of the opinion that is its legacy,

117. *Id.* at 430.
118. *Id.* at 429 (emphasis added).
119. *Id.* at 430-31.
120. *Id.* at 431.
121. *Id.* at 431-32.
122. *Id.* at 433.
123. *Id.* at 436.
124. *Id.* at 431.
125. *Id.* at 433. The Court said that "the administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Id.* at 433-4. The subject of that deference were the "EEOC Guidelines on Employment Testing Procedures" issued in 1966 which were current when the case was filed even though new guidelines (issued in 1970) were in effect by the time

however, is the one that bifurcates Title VII discrimination into two distinct categories. The first, universally recognized before *Griggs*, is now termed "disparate treatment."[126] The second discriminatory category is now generally termed "adverse impact."[127] At the risk of oversimplification a brief description of each category is necessary to understand the application of Title VII in practice. Directly to the point, in 1977 the Supreme Court delineated the difference between the two categories in a note as follows:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some siutations be inferred. . . . Disparate or adverse impact] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.[128]

One portal to understanding disparate treatment discrimination is through its elements of proof which are case developed. In *McDonnell Douglas Corporation v. Green*, an African-American activist, Percy Green, was employed by McDonnell Douglas as a mechanic.[129] In 1964 Green was laid off in a general reduction in force and he "protested vigorously that his discharge and the general hiring practices of . . . [McDonnell Douglas] were racially motivated."[130] As part of his protest, for example, Green and others illegally blocked traffic to the plant and staged a "lock-in" by locking at least one of the plant doors from the outside to disallow egress by workers.[131]

About three weeks after the lock-in, McDonnell Douglas advertised open employment positions for qualified mechanics.[132] Green "promptly

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the Supreme Court heard the case. *Id.* at 433 n. 9. The Court quoted the 1966 Guidelines in its note. *Id.*

126. *See, e.g.*, BARBARA LINDEMANN, PAUL GROSSMAN, I EMPLOYMENT DISCRIMINATION LAW, 3rd Ed. Ch. 2 p. 9 (ABA Section of Labor and Employment Law, 1996). There are two ways to unlawfully discriminate under the category of disparate treatment. One way is to intentionally discriminate "on an ad hoc, informal basis" and the other way is to use "a formal, facially discriminatory policy" that requires disparate treatment. Hazen Paper Co. v. Briggs, 507 U.S. 604, 610 (1993). The first way seems to apply primarily to an individual as an individual and the second way seems to apply equally and intentionally to any member of a protected class whom happens to be subject to the policy or employment practice.

127. *See, e.g.*, LINDEMANN & GROSSMAN, *supra* note 72 at Ch. 4 p. 81.

128. Int'l Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335 n. 15 (1977) *quoted by* WARNER & MILLER, BNA-CPS # 40, *supra* note 91 at A-5; quoted by LINDEMANN & GROSSMAN, *supra* note 72 at p. 9 (disparate treatment paragraph quoted) and p. 81 n. 2 (disparate or adverse impact paragraph quoted). *See* MARK R. FILIPP ET AL., EMPLOYMENT LAW ANSWER BOOK, *supra* note 59 at p. 4-12 (Q 4:23, "Does an employer have to intend to break the law to be guilty of illegal discrimination?").

129. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973).

130. *Id.* at 794 (citations omitted).

131. *Id.* at 795.

132. *Id.* at 796.

applied for re-employment" and, in turn, McDonnell Douglas "turned down . . . [Green], basing its rejection on . . . [his] participation" in the protests.[133] Green then filed a complaint with the EEOC alleging, among other things, Title VII employment discrimination based on race and color. Ultimately Green received a right-to-sue letter[134] from the EEOC and Green brought a Title VII civil action McDonnell Douglas.[135] The Supreme Court stated that in the first instance Green had the initial burden "of establishing a prima facie case of racial discrimination."[136] The Court then instructed:

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[137]

Next: "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[138] It is the next and final step that the Court found lacking in the appellate court analysis even though the Supreme Court agreed that McDonnell Douglas' refusal to hire based on Green's prior "deliberate, unlawful activity against it"[139] was a legitimate nondiscriminatory reason for not rehiring Green. Thus, the Supreme Court remanded the case so that Green could "be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext."[140] That is, Green was ordered to be allowed to show that his protest activity was not the real reason for McDonnell Douglas' refusal to rehire him but that its real reason was intentional discrimination against him because of his race.

The *McDonnell Douglas* three-part test was refined by the Court in *Texas Dept. of Community Affairs v. Burdine* where it explained that the burden of persuasion, that the employer intentionally discriminated against the plaintiff, always remains on the plaintiff and the prima facie case shifts only a burden of production to the employer to produce a legally sufficient and legitimate reason for the employment action.[141] The *McDonnell Douglas-Burdine* test was ambiguous in at least one significant way that is not material for present purposes. Nonetheless the Supreme

133. *Id.* at 796.

134. For a discussion of the procedure to file a complaint with the EEOC including the right-to-sue letter see *supra* notes 101-03 and accompanying text.

135. *McDonnell Douglas*, 411 U.S. at 797.

136. *Id.* at 802.

137. *Id.* at 802.

138. *Id.* at 802.

139. *Id.* at 804.

140. *Id.* at 804.

141. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981) (the issue involved failure to promote on the basis of sex under Title VII). The Supreme Court again "revisited" the *McDonnell Douglas-Burdine*, test in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). See MARK A. ROTHSTEIN, LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS, 4th Ed, 246 (1998).

Court has recently attempted to clean-up the ambiguity so that case is noted in the margin.[142] The Supreme Court has also recently reintroduced the notion that the *McDonnell Douglas-Burdine* test is not the exclusive way to prove an employment discrimination case when it stated, "[I]f a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case."[143] The concept of "mixed-motives" is also introduced in the margin.[144]

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142. The Court again addressed the *McDonnell Douglas Products, Inc.*, 530 U.S. 137 (2000) (under the ADEA). Justice O'Connor delivered the opinion for a unanimous Court and clearly stated the issue as follows:

> This case concerns the kind and amount of evidence necessary to sustain a jury's verdict that an employer unlawfully discriminated on the basis of age. Specifically, we must resolve whether a defendant is entitled to a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the legitimate nondiscriminatory explanation for its action.

Reeves, 530 U.S. at 137.

Thus, the Court again addresses a proof permutation of the plaintiff's/claimant's ultimate burden after the articulation of legitimate reason for the employment practice. That is, has the claimant carried its ultimate burden if a prima facie case is made and the legitimate reason *produced* by the employer is rebutted but no other evidence is adduced? Before reaching its decision it emphasized that this was a disparate treatment case and, therefore, it was constrained to adjudge the case on the particular circumstances of this individual claimant. *Cf. Reeves*, 530 U.S. at 137. It also explained its decision by reiterating that: "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves*, 530 U.S. at 153.

Ultimately the Court stated that as applied in this case the "disbelief of the reasons put forward by the defendant . . . together with the elements of the prima facie case, suffice to show intentional discrimination." *Reeves*, 530 U.S. at 147 quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 at 511 (1993). This means that *disbelief* of the proffered reason *may* under certain circumstances, not only rebut the employer's burden of production but also act as indirect evidence supporting the claimant's ultimate burden of persuasion. *Reeves*, 530 U.S. at 143, 146. As a result the appellate court erred in reversing the trial court's denial of the employer's motion for judgment as a matter of law under Rule 50 (Fed. Rule Civ. Proc. 50). *See Reeves*, 530 U.S. at 149-154 (discussing Fed. Rule Civ. Proc. 50).

The Court primarily addressed the pleading standards of the *McDonnell Douglas-Burdine* test in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 (2002) (appeal of dismissal of Title VII national origin and ADEA claims). Therein the Court held that, an employment discrimination complaint need not include particular facts establishing a prima facie case under the *McDonnell Douglas-Burdine* test and instead must simply comply with the usual notice pleading standards.

143. Swiekiewicz v. Sorema N.A., 534 U.S. 506 (2002).

144. A "mixed motive" employment practice, "[b]y definition . . . involves the simultaneous presence of legitimate and illegitimate factors motivating the decision process." ROTHSTEIN ET.AL, EMPLOYMENT LAW, 2d Ed., § 2.7 p 110 (1999, West Hornbook Series, Student Edition). The hook on which the mixed motive case law hangs is the "because of" language in the statute: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . *because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(a)(1) and (a)(2) (emphasis added). In Price Waterhouse v. Hopkins, the Supreme Court decided a Title VII sex based claim and framed the issue as follows:

> On Price Waterhouse's theory, even if a plaintiff shows that her gender played a part in an employment decision, it is still her burden to show that the decision would have been different if the employer had not discriminated. In Hopkins' view, on the other hand, an employer violates the statute whenever it allows one of these attributes to play any part in an employment decision. Once a plaintiff shows that this occurred, according to Hopkins, the employer's proof that it would have made the same decision in the absence of discrimination can serve to limit equitable relief but not to avoid a finding of liability. We conclude, as often happens, the truth lies somewhere in between.

Price Waterhouse v. Hopkins, 490 U.S. 237, 237-38 (1989).

Unfortunately for purposes of certainty and clarity, *Price Waterhouse* was decided by a plurality therefore requiring a mixing and watching of the opinions written by various justices. A treatise on the matter concludes that *Price Waterhouse* held that,

There is one basic affirmative defense to disparate treatment. This defense, the "bona fide occupational qualification (BFOQ)", is for "policies or work rules that expressly or facially discriminate on the basis of gender, religion or national origin" *but not race or color* and is further limited in its application to hiring only.[145] Thus, "it does not excuse discrimination in post-hire terms and conditions of employment" such as promotion, discipline or termination.[146] The BFOQ defense is expressly provided by statute and is statutorily limited to "those certain instances where religion, sex, or national origin is . . . reasonably necessary to the normal operation of that particular business or enterprise."[147] The Supreme Court has stated it is an "extremely narrow" exception[148] and, likewise, the "EEOC has read the exception extremely narrowly."[149] A

> when an employer undertakes a challenged employment decision for more than one reason, and the reason that is unlawful under Title VII is a "motivating" or "substantially motivating" factor... liability will attach unless the employer can prove by a preponderance of the evidence that it would have reached the same decision for one or more independent, lawful reasons.

HAROLD S. LEWIS, JR. ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE, § 3.11 p. 156 (2001). The confusing disjunctive "'motivating' or 'substantially motivating'" in the quoted treatise is because only four justices agreed with "motivating" and Justice O'Connor, in concurrence, stated that the plaintiff "must show... that an illegitimate criterion was a *substantial factor* in the decision." *Price Waterhouse v. Hopkins*, 490 U.S. at 276 (O'Connor, J., concurring) cited in LEWIS & NORMAN, *supra*, p. 157 n. 4.

Congress, in the Civil Rights Act of 1991, adopted the lower "motivating" standard but "the plaintiffs damages are limited to declarative relief and attorney fees" if the employer proves that the same employment practice would have been made in absence of illegitimate reasons, WARNER & MILLER, BNA-CPS number 40, *supra* note 91 at A-6 citing 42 U.S.C. §§ 2000e-2(m), - 5(g)(2)(B).

145. LEWIS & NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE, *supra* note 144 at § 3.3 p. 123. A separate line of cases has developed under each of the separate protected traits and the EEOC has provided guidance concerning the BFOQ defense in its guidelines which are developed separately for each trait. For a comprehensive treatment of the BFOQ *see, e.g.*, LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at 393-416 (sex), 253-55 (religion), 382-83 (National origin).

146. LEWIS & NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE, *supra* note 144 at § 3.3 p. 123.

147. 42 U.S.C.A. § 2000e-2(e). In full, the statutory exemption is as follows:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if curriculum of such school, college, university, or other educational institution or institution of learning is directed for the propagation of a particular religion.

Id.

148. MODJESKA, EMPLOYMENT DISCRIMINATION LAW, *supra* note 91 at p. 2-75 quoting *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

149. WARNER & MILLER, BNA-CPS number 40, *supra* note 91 at p. A-23 (in the context of

related statutory exemption exists for "bona fide seniority or merit systems."[150] Unlike the BFOQ defense, the seniority and merit systems exemption applies to race and color as well as the other characteristics and traits protected by Title VII.[151]

"The second most frequent basis for discrimination claims is the *disparate impact* theory. Disparate impact occurs when a facially neutral policy or practice, implemented in a nondiscriminatory fashion, has a significant disproportionate effect on a protected class."[152] Rather obviously the key difference between disparate impact (or adverse impact) and disparate treatment "is that the claimant need not show that an employer had a discriminatory animus or motive to prove adverse impact."[153] Again, it is instructive in understanding the adverse impact theory of discrimination to understand the burden of proof that applies in cases under the theory. Since passage of the Civil Rights Act of 1991, which amended the Civil Rights Act of 1964, the disparate impact theory of discrimination has been statutorily governed in Title VII cases and the entire statutory provision is set forth in the margin.[154] Nonetheless the

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sex discrimination).

150. 42 U.S.C.A. § 2000e-2(h). The entire statutory exception follows:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employee if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Acts of 1938 as amended (29 U.S.C. 206(d).

Id.

151. *See generally infra* notes 177-98.

152. STEPHEN D. SHAWE, WILLIAM J. ROSENTHAL, ARTHUR M. BREWER, BRUCE S. HARRISON, EMPLOYMENT LAW DESKBOOK, § 18.01 p. 18-8 (1999), (looseleaf).

153. *Id.* at p. 18-9.

154. The statute reads ad follows:

> (1)(A) 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 and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
>
> (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process maybe analyzed as one employment practice.
>
> (ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such

legal root of disparate impact is found in *Griggs v. Duke Power Co.*[155] The *Griggs* case, recall, provided that "business necessity" was a lawful justification for employment practices that in effect protected classes adversely in a disproportionate way.[156]

The Civil Rights Act of 1991 adopted much of the *Griggs* decision as it related to the adverse impact theory of discrimination[157] including the concept of *business necessity*.[158] Disparate impact under the statute may be proven either of two ways. First, adverse impact is proven if a complainant "demonstrates" that a "particular employment practice" causes a disparate impact on one or more of a protected trait.[159] Even if such impact is shown, however, the employer may overcome the discrimination implied by the employment practice if it can "demonstrate that the challenged practice is job related for the position in and consistent with business necessity."[160]

The second way to prove adverse impact under the statute is for the claimant to "demonstrate" that there is an "alternative employment practice" that fulfills the employer's job related business needs in a way that would not result in disparate (adverse) impact.[161] Therefore there are three key concepts in disparate impact cases: (1) demonstrative disparate impact, (2) job related business necessity, and; (3) alternative employment practice. Each of the first two concepts, in turn, is briefly described or illustrated in the following paragraphs.

In order for there to be discrimination under the disparate impact theory there must be a disparate impact on a trait protected by Title VII.

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practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice.

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000e-(2)(k) ("Burden of proof in disparate impact cases").

155. 401 U.S. 424 (1977) (for discussion of the case see notes 104-24 and accompanying text). Prior to the Civil Rights Act of 1991, the Supreme Court decided *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 91989). The 1991 Act, in part, "codified the basic concepts of *Griggs* and overturned *Wards Cove Packing Co. v. Atonio* to the extent that it reduced the burden on employers." WARNER & MILLER, BNA-CPS #40, *supra* note 91 at A-7.

156. *See supra*, notes 104-24 and accompanying text.

157. *See supra* note 154 .

158. *See* 42 U.S.C.A. § 2000e-(2)(k).

159. 42 U.S.C.A. § 2000e-(2)(k)(1)(A)(i).

160. 42 U.S.C.A. § 2000e-(2)(k)(1)(A)(i). Note, however, that if the employer ("respondent") "demonstrates that a specific employment practice does not cause disparate impact, the . . . [employer] shall not be required to demonstrate that such practice is required by business necessity." 42 U.S.C.A. § 2000e-2(k)(1)(B)(ii).

161. 42 U.S.C.A. 2000e-(2)(k)(1)(A)(ii).

Further, the disproportionate impact must be caused by an *employment practice.* Issues embedded in this part of the analysis include the testing method used to determine that disparate impact exists;[162] identification of the appropriate categories of persons and jobs to compare;[163] the appropriate "rates" to be used, for example, selection or rejection rates;[164] and, where possible, the identity of the specific employment practice that causes the disparate impact.[165] The claimant carries the burden on each of these issues.[166]

Assuming the claimant carries its burden in establishing disparate impact the employer may defend, under the Civil Rights Act of 1991, by

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162. *See generally*, LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at pp. 89-95. There is no definitive mathematical threshold or test. Generally:

> The most widely used means of showing that an observed disparity in outcome is sufficiently substantial to satisfy the plaintiff's burden of proving adverse impact is to show that the disparity is sufficiently large that it is highly unlikely to have occurred at random. Tests of statistical significance are commonly used in the Social Sciences to rule out chance as the cause of observed disparities. Courts thus generally find adverse impact where the selection rate of members of the protected group is statistically significantly different from the selection rate that would have been expected in the absence of discrimination.

LINDEMANN & GROSSMAN, *supra* note 72 at p. 90 (citation omitted). For a book length treatment of the use of statistics in employment discrimination litigation see WALTER B. CONNOLLY, JR., DAVID W. PETERSON, MICHAEL J. CONNOLY, USE OF STATISTICS IN EQUAL EMPLOYMENT OPPORTUNITY LITIGATION (2001, looseleaf).

163. *See generally*, LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at 95-97. Differences in necessary job qualifications between job categories must be taken into account when comparing statistics between those categories. Thus, for example, it might not be appropriate to compare the rate of female professional health care providers (which might include all medical staff at a hospital with at least a B.S. in the allied health sciences) with the rate of female neurosurgeons to show discrimination in the selection of female neurosurgeons. Simply put, care must be taken not to compare apples to oranges and the job categories should be as reasonably similar as possible. In the foregoing categories (professional health care providers and neurosurgeons) the job qualifications might arguably be too different for a relevant comparison. Stated more generally:

> Courts . . . permit discrimination to be proved through a comparison of the employer's work force and the relevant labor force. Population/workforce statistics may involve general population data when the job classification at issue is unskilled. If the job classification involves skills which are not generally possessed or readily acquired, then qualified labor market data must be compared to the portion of the employer's work force under scrutiny.

STEPHEN D. SHAWE, WILLIAM J. ROSENTHAL, ARTHUR M. BREWER, BRUCE S. HARRISON, EMPLOYMENT LAW DESKBOOK § 18.01[2] p. 18-10 (1999, looseleaf).

164. *See generally*, LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at 97-99.

165. According to Title VII:

> [T]he complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

42 U.S.C.A. § 2000e-(2)(k)(1)(B)(i) (the entire section is reproduced in the margin *supra* note 154). This statutory section addresses what is known as the *bottom-line defense* which judicially evolved before the Civil Rights Act of 1991: "'Bottom-line' statistics look at the results of an employer's overall selection process rather than at a single component, such as a particular scored test or other selection device," LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra*, note 72 at 99.

166. These elements comprise "the plaintiff's prima facie case." LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at p. A-7.

showing a job related business necessity for the practice that results in the discriminatory impact. There has been little judicial guidance on the "business necessity/job relatedness" issue.[167] Nonetheless it *must* be important because it is the subject of an unusual statutory provision which strictly identifies and restricts the legislative history on this issue and another to a single interpretive memorandum.[168]

In relevant part the "memorandum states: "The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971) and in other Supreme Court decision prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)."[169]

In *Wards Cove*, the Supreme Court weakened the *Griggs* "business necessity" standard to a "business justification standard"[170] where "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[171] The Court also relaxed the nexus required between the employment practice or evaluation and their performance of a particular job[172] and emphasized that, "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business to pass muster."[173] As the Sixth Circuit stated:

> [T]he Act merely returns the courts to where they were just prior to *Wards Cove*, and appears to provide little guidance as to what direction they should take from there. The Courts are saddled, instead, with a rich but uncertain legislative history arising from two years of complicated political maneuvering.[174]

Nonetheless, the quoted court had little problem with finding that a union membership policy requiring sponsorship by an existing union member did not fall within the definition of business necessity. In so deciding it said:

> We approach the task of evaluating this rationale mindful that the meaning and scope of the "business necessity" concept are blurred at the edges... In the case at bar, however, such potential indeterminacy is of no consequence, for the Unions "family tradition" thesis falls hopelessly short of limning a business necessity,

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167. LINDEMANN & GROSSMAN, *supra* note 72 at 62 (2000 Cum. Supp.).

168. The Civil Rights Act of 1991 states:

> (b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/ alternative business practice.

Civil Rights Act of 1991, § 105(b), P.L. 102-166 (Nov. 21, 1991) 105 Stat. 1071.

169. Interpretive Memorandum reprinted in JOEL WM. FRIEDMAN, GEORGE M. STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION: CASES AND MATERIALS, FOURTH ED. p. 266 (1997).

170. Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L.REV. 896 (1993); *Id.* quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 at 658 (1989).

171. *Id.* (quoting *Wards Cove*, 490 U.S. at 659).

172. *Id.* (quoting *Wards Cove*, 490 U.S. at 658-59).

173. *Id.* (quoting *Wards Cove*, 490 U.S. at 659).

174. E.E.O.C. v. Steamship Clerks Union, Local 1066, 48 F.3d 594 at 607 n. 14 (1995).

and, thus, does not require us to explore *terra incognita*.[175]

Having completed a very selective overview of the disparate treatment and disparate (adverse) impact theories of Title VII, this article turns to several of the special considerations for the individual protected traits of race, color, religion, sex, and national origin.

Race or color

Race or color discrimination includes both disparate treatment and adverse impact theories of discrimination[176] and it is worth mention that "race" and "color" are both statutorily protected traits.[177] "Thus, a light-skinned African-American worker, for example, could pursue a Title VII discrimination suit for adverse actions imposed by his or her darker-skinned supervisor."[178] It also extends to ethnic discrimination.[179] Moreover, Title VII also prohibits discrimination against those who *associate* with minorities. Such associations include interracial marriages and friendships.[180]

Employment practices based on a stereotype of race or color which are applied to an individual are discriminatory so, for example, "the Eighth Circuit held that a supervisor's failure to recommend African-Americans for promotion, based upon his stereotypical belief that... [African-Americans] were not interested in being promoted, violated Title VII."[181] Relatedly, and important for application to employee appraisals later in this article, "a supervisor's failure to criticize a black employee's job performance because he did not wish 'confrontations,' was found to have deprived the employee of job counseling and the opportunity to improve and thereby violated Title VII."[182] Finally as a matter of broad overview, the disparate (adverse) impact theory applies to "immutable" race characteristics (those that are not voluntary). Thus, in addition to the example of the *Griggs* case,[183] "no-beard" policies have been held discriminatory because African-Americans have a predisposition to a painful skin condition known as psuedofolliculites which is aggravated by shaving.[184]

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175. *Id.* at 607 (emphasis in original).

176. *See generally* notes 104-62 and accompanying text.

177. 42 U.S.C.A. § 2000e-2(a).

178. LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at 343 citing, *e.g.*, HANSBOROUGH V. CITY ELKHART PARKS & RECREATION DEPT., 802 F.Supp. 199, 201 (N.D. Ind. 1992) (other citations omitted).

179. MODJESKA, EMPLOYMENT DISCRIMINATION LAW, *supra* note 91 at § 2.08 p. 2-28. Note that the line between race and national origin is somewhat fuzzy.

180. LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at 2000 Cum. Supp. p. 238.

181. LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at 344.

182. MODJESKA, EMPLOYMENT DISCRIMINATION LAW, *supra* notes 91 and accompanying text.

183. *See supra* notes 104-24 and accompanying text.

184. MODJESKA, EMPLOYMENT DISCRIMINATION LAW, *supra* note 91at § 208 p. 2-29 citing

National Origin

"Discrimination claims based on national origin can be brought under either a disparate treatment or disparate impact theory."[185] Typical disparate impact claims include "English-only" policies and "height and weight" requirements where those requirements are not shown to be a business necessity. The EEOC's *Guidelines on Discrimination Because of National Origin* on English-only rules are instructive, not only for the narrow issue of determining the lawfulness of English-only rules, but also for the general analytical framework the *Guidelines* use:

> A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also . . . result in a discriminatory work environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.[186]

The BFOQ defense is available in national origin cases, unlike in race-based cases.[187]

Religion

According to the statutory terms of Title VII:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[188]

As a result of the accommodation language in the statute, cases are generally brought for failure to make a reasonable accommodation or under conventional disparate treatment theory.[189]

Bradley v. Pizzaco of Nebraska, 7 F.3d. 795 (8th Cir. 1993). Nonetheless, not all "no-beard" policies *may* be held to be discriminatory if, for example, a respirator required to be worn for safety will not fit properly over facial hair. *Id.* citing Fitzpatrick v. Atlanta, 2 F.3d. 1112 (17th Cir. 1993). Recall that the BFOQ defense is not applicable in race based discrimination cases. Courts, therefore, seem to rely on "business necessity" theory which in some cases is a very rough jurisprudential fit.

185. WARNER & MILLER, BNA-CPS number 40 *supra* note 91 at A-34.

186. 29 C.F.R. § 1606.7(a). The next subsection, however, suggests that under certain circumstances an employer can show a rule requiring "that employees speak only English at certain times" is justified by business necessity. 29 C.F.R. § 1606.7(b).

187. 29 C.F.R. § 1606.4.

188. 42 U.S.C.A. § 2000e(j).

189. As originally adopted Title VII did not include the duty to accommodate on the basis of religion. It was added in 1972 to "mitigate the impact of facially neutral employer policies." LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at 224-25. In effect this seems to individualize the instances where religious discrimination may be claimed and, thus, makes the use any kind of "disparate impact" theory more difficult. See *id.* at 219. Nonetheless, religion is expressly included in the statutory provision concerning burden of proof

The prima facie case for discrimination based on religion consists of the following elements: (1) plaintiff had a sincere religious belief; (2) the religious belief or practice conflicts with an employment requirement; (3) the employee informed the employer of the conflict or the employer had "enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirement;"[190] and (4) the employer took adverse action against the employee because of that belief or did not reasonably accommodate the belief.[191] Each of these elements raises unique legal issues. For purposes of providing an overview, however, only two will be highlighted.

One of the elements requires the plaintiff to have a sincere religious belief and also requires that belief or the practice of the belief must conflict with a work requirement. The EEOC's *Guidelines on Discrimination Because of Religion* state that "the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are, sincerely held with the strength of traditional religious views."[192] Thus, the interpretation of religion, at least for enforcement purposes, is broad. On the other hand, there must be some connection between *religion* and the behavior in question. Thus, one court held that an employee who left work early on December 24 in order to help decorate her church hall and prepare for a children's program was engaged in social and family obligations rather than in a religious practice.[193]

Another of the requirements is that the religious beliefs or practices be reasonably accommodated unless the accommodation would cause undue hardship for the employer. In the context of discrimination based on religion, however, reasonable accommodation is of limited scope. For example, the Supreme Court held that the employer did not violate its duty to make reasonable accommodation where the employer allowed the employee and the union to attempt to find "voluntary swaps" for scheduled work times with other employees to allow for religious observances and where the employer tried to find the employee another position that would not conflict with weekend religious observances. The Court did not require the employer to pay premium wages to other

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in disparate impact cases. 42 U.S.C.A. § 2000e-2(k) (quoted in its entirely, *supra* note 54). There are few bright lines in the area of discrimination based on religion. As the chair of the employment law section of the Los Angeles Bar Association recently said: "The theme is, 'Damned if you do; damned if you don't'. Pun intended." Stephanie Francis Cahill, Religious Rites and Reason, ABA Journal E-Report, June 7, 2002, <www.abanet.org.journal/ereport /j7pill.html> (last visited 6/7/2002).

190. Heller v. Ebb Auto Co., 8 F.3d. 1433, 1439 (9th Cir. 1993).

191. For similar statements of the elements for a prima facie case see generally MODJESKA, EMPLOYMENT DISCRIMINATION LAW, *supra* note 91 at § 2,19 p, 2-81; LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at Cum. Supp. pp. 100-101; ROTHSTEIN, CRAVER ET. AL, EMPLOYMENT LAW, *supra* note 141 at § 2.34 p. 201.

192. 29 C.F.R. § 1605.1. The Guidelines then say: "This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970)." *Id.*

193. Wessling v. Kroger Co., 554 F.Supp. 548, 552 (E.D. Mich. 1982) discussed in LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at 222.

employees, however, in order to allow the individual to avoid weekend work.[194] Importantly the employment position in question was as a supply clerk in an airlines twenty-four-hour maintenance program and the employer was justified in requiring adequate staffing all day every day. Once again "the decision as to what constitutes 'reasonable accommodation' or 'undue hardship' must be made on a case-by-case basis because the decision ultimately turns on the reasonableness of the conduct of the parties under the circumstances of each case."[195] Recall that the BFOQ defense is generally available under Title VII's prohibition of discrimination under the disparate treatment theory[196] and is available in cases of discrimination based on religion.[197] Moreover, certain employers are statutorily exempt from coverage of the religious discrimination prohibition.[198]

Sex

"Generally, the same analytical framework that applies to race discrimination claims applies to sex discrimination claims under Title VII."[199] Thus, both disparate treatment and disparate (adverse) impact theories are available to prove discrimination[200] and the BFOQ defense is available to employers in disparate treatment cases.[201] It is unsurprising, therefore, that the EEOC's *Guidelines on Discrimination Because of Sex* state "It is an unlawful employment practice to classify a job as 'male' or 'female' or to maintain separate lines of progression or separate seniority list based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job."[202] The *Guidelines* further state that a line of progression classifying jobs as "heavy" and "light" will constitute "an unlawful employment practice if it operates as a disguised form of classification by sex . . ."[203] As in national origin, a rather relatively common form of discrimination on the basis of sex are minimum height and weight requirements which, when applied, have a statistically disparate impact on women.

In a prison guard case, for example, the Supreme Court held that a minimum weight requirement of 120 pounds unfairly impacted women applicants and, further, that the employer produced no evidence showing

194. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977). See *generally*, Ansoniax Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).

195. WARNER & MILLER, BNA-CPS number 40, *supra* note 91 at A-46 & A-47.

196. *See supra* notes 144-49 and accompanying text.

197. See *generally supra* notes 144-49 and accompanying text.

198. WARNER & MILLER, BNA-CPS number 40, *supra* note 91 at A-23.

199. See *supra* notes 154-68 and accompanying text (discussing treatment and impact theories). *See generally* MODJESKA, EMPLOYMENT DISCRIMINATION LAW, *supra* note 91 at 2-44 & 2-45.

200. 42 U.S.C.A. § 2000e-2(e) (reproduced in its entirety *supra* note 92).

201. 29 C.F.R. § 1604.3(a).

202. 29 C.F.R. § 1604.3(b).

203. Dothard v. Rawlinson, 433 U.S. 321, 332 (1977).

that weight was a good proxy for strength even if strength was job related.[204] Further, the Court said that even if strength was the related factor a test could be constructed to measure strength directly. According to the Court: "[S]uch a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that measure[s] the person for the job and not the person in abstract."[205] In addition to the disparate impact claim in the case, there was a disparate treatment claim based on a later-adopted express policy against hiring any women to work in the male maximum security prison. The employer claimed that being male was a BFOQ for this particular job. After acknowledging that the BFOQ exception as applied to sex was "meant to be an extremely narrow exception,"[206] the Court found that the risk posed by female guards went to the very *essence* of the job and, therefore, that the male only requirement stated a good BFOQ defense. The Court agreed with the employer that the mere presence of women would be a catalyst for broad violence and disorder posing a general threat not limited only to the safety of the female guards.[207]

Consistent with the guard case, though it predates it, the *Guideline* provides that a sex-based BFOQ is also appropriate in selecting actors for specific roles where such a distinction "is necessary for the purpose of authenticity."[208] The *textbook*[209] example of a distinction that failed because it did not reach the "essence of the job" or "authenticity" standards is *Wilson v. Southwest Airlines Co.*[210] In *Southwest Airlines* a male flight attendant and ticket agent applicant alleged that "femininity" or "female sex appeal" were not BFOQs for the positions of either flight attendant or ticket agent with the airline.[211] The airline argued those female traits were BFOQs because it catered to business fliers who were primarily male. In fact *Southwest* based its entire advertising campaign and public image on "love."[212] A footnote in the case indicates how deeply "love" was ingrained into the company image:

> Unabashed allusions to love and sex pervade all aspects of Southwest's public image. Its T.V. commercials feature attractive attendants in fitted outfits, catering to male passengers while an alluring feminine voice promises in-flight love. On board, attendants in hot-pants (skirts are now optional) serve "love bits" (toasted almonds) and "love potions" (cocktails). Even Southwest's ticketing system features a "quickie machine" to provide "instant

204. *Id.* (quoting Griggs v. Duke Power, 401 U.S. at 436). For an introductory discussion of *Griggs* see *supra* notes 104-24 and accompanying text.

205. *Dothard*, 433 U.S. at 335 (footnote omitted).

206. *Dothard*, 433 U.S. at 335-37.

207. 29 C.F.R. § 1604.2(a)(2).

208. *See, e.g.*, ROTHSTEIN & LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS, *supra* note 141 at 277 (excerpting the case).

209. 517 F. Supp. 292 (N.D.Tex. 1981).

210. *Id.* at 293.

211. *Id.* at 294.

212. *Id.*

gratification."[213]

Even given public image Southwest tried to project, the court held that sex was not the essence of Southwest's business. It reasoned that sex (gender) was the essence of "a social escort or topless dance"[214] but, "[l]ike any other airline, Southwest's primary function is to transport passengers safely and quickly from one point to another."[215] Thus, sex was not a BFOQ and the case illustrates that mere customer preferences are distinguishable from the essence of the business standard required for the defense.

One last Supreme Court case in this area bears discussion because it contains facts that established sex discrimination in the context of promotion. Caution concerning the analytical process, however, is in order because the case, *Price Waterhouse v. Hopkins*,[216] predates the mixed-motive statutory amendments contained in the Civil Rights Act of 1991 that amended Title VII.[217] *Price Waterhouse* is a disparate treatment case.

The claimant, Ann Hopkins, was a senior manager with Price Waterhouse a nationwide professional accounting partnership.[218] She was proposed for partnership in 1982.[219] The partnership promotion process at Price Waterhouse at the time required a nomination for partnership by the employee's local office. All of the other partners of the nationwide firm then had an opportunity to comment on the candidacy via a written form submitted to the Admissions Committee. The Admissions Committee, in turn, made a recommendation concerning partner status to the Policy Board. "[T]he decision of the Policy Board . . . [was] not controlled by fixed guidelines . . . ."[220] The Policy Board could advance the nomination to vote by the entire partnership, deny the candidacy partner status outright, or place the nomination on "hold." Hopkins candidacy was put on hold for possible consideration the following year.[221] "Before the time for reconsideration came, two of the partners in Hopkins' office withdrew their support for her, and the office informed her that she would not be reconsidered for partnership. Hopkins then resigned."[222]

"Thirteen of the 32 partners who had submitted comments on

213. *Id.* at 294 n. 4.
214. *Id.* at 301.
215. *Id.* at 302 (footnote omitted).
216. 490 U.S. 228 (1989).
217. In *Price Waterhouse v. Hopkins*, the Court held that, in mixed-motive cases "the employer will not be held liable if it can prove the same employment action would have occurred absent the unlawful motivation." WARNER & MILLER, BNA-CPS number 40, *supra* note 91 at A-6. The Civil Rights Act of 1991 amended Title VII to lower the liability standard such that if, in this case, sex were found to be a motivating factor liability would affix even though the same employment action would have been taken. Damages in the latter, however, would be limited to declaratory relief and attorneys fees. *Id. See* 42 U.S.C.A. § 2000e-2(m) discussed *supra* notes 92-95 and accompanying text.
218. Price Waterhouse v. Hopkins, 490 U.S. 228 at 232 (1989).
219. *Id.* at 233.
220. *Id.* at 232.
221. *Id.* at 233.
222. *Id.* at 233 n. 1.

Hopkins supported her bid for partnership. Three partners recommended that her candidacy be placed on hold, eight stated they did not have an informed opinion about her, and eight recommended that she be denied partnership."[223] Ultimately, under the pre-1991 Civil Rights Act burden of proof, the Court upheld the district court decision against Price Waterhouse finding that it unlawfully discriminated against Hopkins on the basis of sex.[224]

The import of discussing this case is the pattern of evidence used to show that the partnership decision was unlawfully motivated by sex discrimination. The Supreme Court opinion delineates that, at the time Hopkins' candidacy was placed on hold, there were 662 partners at Price Waterhouse. Seven of these partners were women.[225] It also stated that in the year Hopkins went up for partnership 88 senior managers were proposed for partnership and only Hopkins was female.[226] Although these facts were expressly included in the opinion; they were not addressed in the Court's analysis; rather, the Court focused on the comments of the individual partners who chose to complete an evaluation form or gave her advice to prepare her candidacy for reconsideration the following year.

The Court observed that "virtually all" the negative comments (from both supporters and opponents) concerned her "interpersonal skills."[227] It found the following comments to be evidence that sex was a motivating factor in the decision: She "over-compensated for being a woman" and several "criticized her use of profanity; in response one partner suggested those partners objected to her swearing only 'because it's a lady using foul language.'"[228] At the end of the process her mentor gave her advice which the Court called the "*coup de grace*": "[W]alk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[229]

The Court stated that Price Waterhouse solicited the evaluations and stated the firm relied heavily on those evaluations. Further, it stated, "some of the partners' comments were the product of stereotyping; and . . . the firm in no way disclaimed reliance on those particular comments . . ."[230] Thus, the Court held that it was not clearly erroneous for the trial court to find that sex motivated the partnership decision. The factual predicates of the holding foreshadow the more general application of all of Title VII to employee appraisals.

The *Siegel Complaint* stated a claim for relief based on the harassment

223. *Id.* at 233.
224. *Id.* at 258.
225. *Id.* at 233.
226. *Id.* at 233.
227. *Id.* at 234-35.
228. *Id.* at 235.
229. *Id.*
230. *Id.* at 256.

provision of state law.[231] Therefore, the topic of harassment is also within the scope of this article. It is mentioned here because the law of harassment has a rich case history in the specific context of sex discrimination. In that regard a leading treatise bluntly states, "Most harassment cases involve sexual harassment."[232] It suffices for textual purposes simply to emphasize the cause of action has been recognized, one way or another, not only in the context of gender (sex), but also in the contexts of race, color and national origin,[233] religion,[234] disability[235] and age.[236] Generally harassment based on traits or characteristics other than sex use the same legal machinery as sexual harassment.[237]

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231. *See supra* notes 172-98 and accompanying text.

232. LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at 745.

233. *See generally* ROTHSTEIN, CRAVER ET AL., EMPLOYMENT LAW, *supra* note 141at § 4.5 pp. 390-94. *See also* 29 C.F.R. § 1606.8 (2001) ("Guidelines on Discrimination Because of National Origin") and § 1604.11 n. 1 ("The principles involved here continue to apply to race, color, religion or national origin").

234. *See generally*, ROTHSTEIN, CRAVER, ET AL., EMPLOYMENT DISCRIMINATION LAW, *supra* note 141 at 395.

235. *Id.* at 395.

236. *Id.* at 394.

237. LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72, Cum. Supp. 475. On the other hand:

> The development of the law of harassment on grounds other than sex has been distinct from sexual harassment law. Whereas harassment on the basis of sex may be either *quid pro quo* or *hostile environment*, harassment for reasons other than sex are invariably of the hostile environment type. The essence of the action is that an *employer creates or permits* the existence of an intimidating, offensive work environment. The environment may be created by policies or practices of the employer or by failure to take action to correct the *harassing atmosphere created by other employees or customers.*

ROTHSTEIN, CRAVER ET AL., EMPLOYMENT LAW, *supra* note 141 at § 4.5 p. 390 (emphasis added).

The EEOC *Guidelines on Discrimination Because of Sex* distinguish between quid pro quo discrimination and hostile work environment discrimination without using the terms themselves. *The Guidelines* describe sexual harassment, generally, as follows:

> (a) Harassment on the basis of sex is a violation of section 703 [42 U.S.C.A. § 2000e-2] of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R § 1604.11 ("Sexual Harassment," footnote omitted). Hostile work environment discrimination is (3) in the quoted *Guideline* while (1) and (2) describe quid pro quo discrimination.

There have been several relatively recent Supreme Court decisions worthy of note. In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), the Court determined that "same-sex" harassment was prohibited under the gender provision of Title VII. It focused on the statutory language "because of . . . gender" and reasoned in reliance on prior case law that gender (sex) does not mean intercourse or related sexual activity. Thus, [a] trier of fact might find, for example, . . . [that] female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of [other] women in the workplace." *Id.* at 80-81. This is hostile discrimination based on a hostile work environment and is different than a homosexual quid pro quo harassment claim which, too, the Court indicated might be discrimination on the basis of *gender* not sexual orientation. *Id.* at 80. A similar kind of reasoning is used statutorily under the ADEA. *See infra* note 325.

The Court addressed employer liability in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and one of the better examples

As another a touchstone to reality, Count III of the *Siegel Complaint* alleges that FMC retaliated against Harold Siegel by giving him a C grade under the PMP because he complained to FMC's Human Resources department about his supervisors ageist comments.[238] While, the *Siegel Complaint* asserted only a violation of Michigan law[239] the ADEA also has a statutory provision prohibiting retaliation "because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter."[240]

As a practical matter, even though the retaliation provisions of Title VII have not been discussed in this article, the ADEA provision "tracks closely" that contained in Title VII.[241] The ADA also contains an antiretaliation provision but its statutory language is somewhat different from that found in the ADEA and Title VII though it proscribes the same general conduct.[242] The difference in statutory language, however, has

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of a factual pattern that constitutes harassment is *Harris v. Forklift Sys., Inc*, 510 U.S. 20 (1993) (hostile work environment). As a final miscellaneous matter the *Guidelines* suggest the application of the equivalent reverse discrimination for harassment: "Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for *unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit*," 29 C.F.R. § 1604.11(g).

238. For a general discussion of the allegations contained in the *Siegel Complaint* as well as citation thereto see *supra* notes 20-25 and accompanying text. Count III alleged in relevant part:

> 147. One February 21, 2000, Siegel informed Johnson [Siegel's manager] that Johnson was causing him stress because of Johnson's age discrimination against him.
>
> 148. In July of 2000, Siegel complained to a member of HR for FMC regarding Johnson's age discrimination against Siegel.
>
> 149. No corrective action was taken to correct the complaint of age discrimination.
>
> 150. Johnson retaliated against Siegel when he ranked Siegel as a proposed "C". The retaliatory action was only partially neutralized in late 2000 as a result of legal intervention. Siegel remains classified as a "B2" thereby reducing his merit pay and performance bonus opportunities.

Id.

239. *See, e.g., Siegel Complaint, supra* note 20, at ¶ 146.

240. 29 U.S.C.A. § 623(d). It states in full:

> It shall be unlawful for an employer to discriminate against *any of his employees or applicants for employment*, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, *because such individual*, member or applicant for membership has *opposed any practice* made unlawful by this section, *or because such individual*, member or applicant for membership has *made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.*

Id. (emphasis added).

241. LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at 686. *See* Fogelman v. Mercy Hosp., Inc., 283 F.3d 561, 567 (3rd Cir. 2002). Title VII provides:

> It shall be an *unlawful employment practice* for an *employer* to discriminate against any of his *employees* or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, *to discriminate against any individual*, or for a labor organization to discriminate against any member thereof or applicant for membership, *because he has opposed any practice, made an unlawful employment practice* by this title, *or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.*

42 U.S.C.A. § 2000e-3(a) (emphasis added).

242. The antiretaliation provision of the ADA states in full:

created an ambiguity concerning the identity of the persons protected. Thus, the different statutory language is a distinction with a difference even though the issue is not necessary to discuss under the alleged facts in the *Siegel Complaint*.[243] A claim for retaliation, generally proceeds in the same manner and confronts many of the same issues as other claims and litigation under the three Acts discussed in this article.[244]

Finally, although beyond both the scope and focus of this article, it is worth mentioning that the Pregnancy Discrimination Act of 1978 is codified as part of Title VII and it is very briefly noted, below.[245]

(a) Retaliation.

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful under this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this Act.

(b) Interference, Coercion, or Intimidation.

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

42 U.S.C.A. § 12203(a) and (b) (emphasis added).

243. A recent Third Circuit case, *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561 (3rd Cir. 2002), discussed the issue. The issue is whether the antiretaliation provisions of the ADEA and the ADA apply only to "prohibit retaliation against a person who himself engaged in the protected activity," or; whether the Acts also prohibit retaliatory employment actions against friends and relatives of the individual even though the friends and relatives are not engaged in any protected activity.

The basic fact pattern is a simple one. Dad and Son both worked for Mercy Hospital and Dad claimed he had been forced out of his job based on age and disability discrimination. Son, who refused to assist in the investigation of Dad's claims by the Hospital was later fired for what the Hospital asserted was an unrelated problem. Son claims he was terminated in retaliation for Dad's claim and that the unrelated problem was pretextual. *Id.* at 564-66.

The appeals court agreed with the Eighth Circuit, in Smith v. Riceland Foods, Inc., 151 F.3d 813 (8th Cir. 1998), and the Fifth Circuit, in Holt v. JTM Indus., Inc., 89 F.3d 1224 (5th Cir. 1996), that the literal language of the ADEA and of the first retaliation provision of the ADA left no room for Son's claim because he was not the "individual" to which those provisions apply. Thus, even though it agreed in sentiment with a statement by the Seventh Circuit in an NLRB case, it could not find statutory authority for expanding the scope of protection in the specific provisions of the ADEA or ADA. The Third Circuit stated: "Indeed, as the Seventh Circuit sagely observed, 'To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations.' *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987)." *Fogleman*, 283 F.3d at 561.

The court *held*, however, that the second antiretaliation provision in the ADA (42 U.S.C.A. § 12203(b)), which has no analogue in the ADEA, prohibited retaliation against friends and family not engaged in protected activities. *Id.* at 570-71. Therefore the summary judgment for the Hospital was reversed and the case remanded. *Id.* at 572.

244. *See generally*, LINDERMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at Ch. 16 ("Retaliation").

245. *See* 42 U.S.C.A. § 2000e(k) reproduced *supra* note 154. The statute specifically includes "pregnancy, childbirth, or related medical conditions" within the terms "because of sex" and "on the basis of sex." *Id.* The foregoing language would seem to simply extend the *usual* sex discrimination analysis to cases involving pregnancy. However, the statute also provides that "women effected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ." *Id.* This language seems to recognize that at some point, some pregnancies will effect work and seems to individualize the determination of what is unlawful discrimination to a case-by-case and employer-by-employer basis.

2. THE AMERICANS WITH DISABILITIES ACT (ADA)

Title I of the ADA prohibits employment discrimination based on disability in the following terms:[246]

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[247]

The same statutory section supplies a seven part nonexclusive definition of "discriminates" using many familiar terms that have been the subject of litigation. These terms include "reasonable accommodations,"[248] "undue hardship on the operation of the business,"[249] and "business necessity."[250] Of particular importance to this article is the definition of "discriminated" which includes:

> limiting, segregating, or classifying a job applicant in such a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;[251] utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability. . . .[252]
>
> and using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity . . .[253]

By its statutory terms Title I of the ADA applies only where there is "covered entity" and a "qualified individual with a disability."[254] "Covered entity" expressly includes "employer"[255] which "is a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."[256] The South Dakota statute that generally prohibits employment discrimination does not set a minimum number of employees before it is applicable to an employer.[257]

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246. 42 U.S.C.A. §§ 12111-12117. "'Titles' are codified as 'Subchapters.'" MODJESKA, EMPLOYMENT DISCRIMINATION LAW, 3rd Ed. § 4.04 p. 4-22 n. 1 (1998-2000, looseleaf). The other subchapters include "Subchapter II - Public Services" and "Subchapter III - Public Accommodations and Services Operated by Private Entities."

247. 42 U.S.C.A. § 12112(a).

248. 42 U.S.C.A. § 12112(b)(5)(A).

249. 42 U.S.C.A. § 12112(b)(6).

250. 42 U.S.C.A. § 12112(b)(6).

251. 42 U.S.C.A. § 12112(b)(1).

252. 42 U.S.C.A. § 12112(b)(3).

253. 42 U.S.C.A. § 12112(b)(6).

254. 42 U.S.C.A. § 12112(a).

255. 42 U.S.C.A. § 12111(2).

256. 42 U.S.C.A. § 12111(5)(A).

257. *See supra* note 98 (discussed in the Title VII context).

The ADA expressly authorizes the EEOC to enforce the Act[258] and the EEOC has the same authority to promulgate regulations under the employment chapter of the ADA (chapter I) as under Title VII.[259] Thus, it has authority to issue "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[260] Unlike the statutory grant of Title VII,[261] however, the ADA's grant of authority to the EEOC does not contain the limiting word "procedural."[262] Therefore the EEOC also has general statutory authority to promulgate legislative regulations under the ADA *if* it complies with the Administrative Procedures Act which sets forth publication, notice and hearing requirements for regulations to be given "legislative" weight.[263]

Nonetheless, the EEOC's grant of rule making authority is limited to "this subchapter,"[264] meaning subchapter I of Chapter 126 of Title 42 including sections 12111-12117 which address only employment discrimination.

Similar language grants authority to promulgate regulations relating to other subsections of the ADA to other governmental entities.[265] In *Sutton v. United Airlines* the United States Supreme Court said no government entity "has been delegated authority to interpret the term 'disability'" in the definitional portion of the Act that precedes the numbered subchapters.[266] Thus, the EEOC does *not* have authority to issue legislative regulations on definitional matters contained outside the

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258. 42 U.S.C. § 12117; WARNER & MILLER, BNA-CPS *supra* note 91 at A-55.

259. *See supra* notes 101-03 and accompanying text (discussing legislative and interpretive regulations).

260. 5 U.S.C.A. § 553.

261. *See supra* note 92.

262. The section covering the ADA is as follows, "Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of Chapter 5 of Title 5." 42 U.S.C.A. § 12116 (compare with 42 U.S.C.A. § 2000e-12(a) (Title VII) reproduced *supra* note 103.

263. *See supra* notes 259-61 and accompanying text.

264. 42 U.S.C.A. § 12116.

265. The Attorney General has rulemaking authority for that portion of the Act relating to public services; the Secretary of transportation has such authority for certain other non-employment sections, and; the Architectural and Transportation Barriers Compliance Board also has authority to "issue minimum guidelines" in certain substantive areas. *Sutton v. United Airlines, Inc.*, 527 U.S. 476 at 477-480 (1999) cited in LINDEMANN & GROSSMAN, *supra* note 72, 2000 Cum. Supp. 724.

266. *Sutton v. United Airlines, Inc.*, 527 U.S. 476 at 479 (1999). The decision was 7-2 *Id.* at 474. Justice Breyer in dissent from this interpretation of the EEOC's rulemaking authority stated:

> Nonetheless, the employment subchapter, *i.e.*, "*this subchapter*," includes other provisions that use the defined terms, for example a provision that forbids "discriminat[ing] against a qualified individual with a disability because of the disability because of the disability." § 12112(a). The EEOC might elaborate, through regulations, on the meaning of "disability" in this last-mentioned provision, if elaboration is needed in order to "carry out" the substantive provisions of "this subchapter." An EEOC regulation that elaborated on the meaning of this use of the word "disability" would then fall within the scope *both* of the basic definitional provisions of "*this*" later subchapter, for the word "disability" appears in both places.

Sutton v. United Airlines, 527 U.S. at 514 (Breyer, J., dissenting) (emphasis and brackets in original).

subsection in which it is expressly granted authority. Further, the Supreme Court refused to reach the question "as to the persuasive force of... interpretive guidelines" as unnecessary in *Sutton*.[267] So, in sum, the EEOC has authority to issue legislative regulations on the employment subchapter of the ADA (but not the definitional section) if it complies with the procedural requirements of the Administrative procedures Act. It also has authority to issue interpretive regulations and guidance concerning its administration and enforcement of the ADA but the Supreme Court in *Sutton* declined to decide the persuasive force of that EEOC guidance.

As previously suggested in the context of Title VII note it is worthy that the ADA, like the ADEA, does not apply to states as employers because of the Eleventh Amendment.[268] South Dakota, however, does have a state statute prohibiting employment discrimination based on disability that applies to the state as employer.[269]

A basic understanding of the definitions of "disability" and "qualified individual" are key to understanding the scope of the ADA and how it applies under the facts of a particular case or in work place situations. A person must be a "qualified individual with a disability" under the statute in order to be protected from discrimination by the ADA.[270] Indeed, the statute itself sets forth a three-pronged definition of "disability" which is: (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;"[271] (2) "a record of such an impairment;"[272] and (3) "being regarded as having such an impairment."[273] And, the EEOC has issued regulations "to implement" the ADA.[274] The

267. *Id.* at 480.

268. For a discussion of the ADEA and its application to the States see *infra* notes 327-28 and accompanying text. In *Board of Trustees of Univ. of Ala. v. Garrett*, 513 U.S. 356, 121 S.Ct. 955 (2001), the Supreme Court held that the ADA did not override the sovereign immunity of the states. As it did in Kimel v. State Bd of Regents, 528 U.S. 62 (2000) (the ADEA case), the Court stated that the authority of Congress under Article I of the U.S. Constitution (commerce) does not give it authority to override states' immunity under the Eleventh Amendment. Rather, Congress must derive its authority under the Fourteenth Amendment (equal protection) in order to abrogate States' immunity. Again the Court stated that the class, this time of mentally disabled persons, was not suspect. Therefore the States employment actions needed only to meet the rational basis test in order for them to be constitutionally protected by the Eleventh Amendment. *See Board of Trustees v. Garrett*, 121 S.Ct. at 964. Thus, the ADA provision that makes it applicable to the States exceeds Congress' authority. Importantly, this 5-4 decision said that the Eleventh Amendment applies only to states and not "to units of local governments such as cities and counties." *Id.* at 965. Further: "These entities are subject to private claims for damages under the ADA without Congress ever having to rely on § 5 of the Fourteenth Amendment to render them so." *Id.*

269. SDCL § 20-13-10 expressly includes "disability."

270. 42 U.S.C.A. § 12112(a).

271. 42 U.S.C.A. § 12102(2)(A).

272. 42 U.S.C.A. § 12102(2)(B).

273. 42 U.S.C.A. § 12102(2)(C). "The ADA's three-pronged definition is identical to the Rehabilitation Act's definition of 'disability.'" WARNER & MILLER, BNA-CPS number 40-2nd, *supra* note 91 at A-37.

274. 29 C.F.R. Ch. xiv, Part 1630 p. 341 (Rev. July 1, 2001). For a discussion of the EEOCs rulemaking authority under the ADA which effects the authority of the regulations themselves see *supra* notes 101-03 and accompanying text. The regulations as well as some new guidance

Supreme Court has, for the past four years, been active in interpreting the definition of disability. In both *Bragdon v. Abbott* and *Toyota v. Williams*, the court addressed the first prong of the statutory definition of "disability."[275] The *Bragdon* case did not involve employment discrimination but; rather was a "public accommodation" case. The same statutory definition, however, applies to both employment discrimination (title I of the ADA) and public accommodation (title II of the ADA).[276] The issue in *Bragdon* was whether a dentist could refuse to treat an asymptomatic HIV positive patient without unlawfully discriminating against a disabled person under the ADA. In analyzing whether asymptomatic HIV was a disability the Court used the following process:

> First, we consider whether respondent's HIV infection was a physical impairment. Second, we identify the life activity (reproduction and childbearing) and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited a major life activity.[277]

Concerning the first inquiry the Court held that "HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease."[278]

The only issue addressed under the second inquiry in *Bragdon* was whether reproduction was a major life activity.[279] In holding the positive the Court repudiated an argument that attempted to limit major life activities to "those aspects of a person's life which have a public, economic or daily character."[280] It stated simply: "Reproduction and the sexual

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the EEOC has recently issued to its field agents (entitled "Instructions for Field Offices: Analyzing ADA Changes After Supreme Court Decisions Addressing "Disability" and "Qualified") are briefly discussed in the notes. The primary laws, regulations, the compliance manual, enforcement guidelines and related documents and memoranda of understanding are available electronically from the EEOC website at <www.eeoc.gov/policy/index> (last visited April 15, 2002).

275. *See* Bragdon v. Abbott, 524 U.S. 624 (1998); Toyota v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

276. *See supra* notes 246-56 and accompanying text.

277. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

278. *Bragdon*, 524 U.S. at 637. The Court did not specifically address the authority of the regulations in question but certainly implied the regulations were given only interpretive authority by stating: "In Construing the Statute, we are informed by interpretations of parallel definitions in previous statutes [*e.g.*, the Rehabilitation Act] and the views of various administrative agencies which have faced this interpretive question." *Id.* at 631.
The regulatory language follows:

> (h) Physical or mental impairment means:
>
> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, *reproductive,* digestive, genito-urinary, *hemic and lymphatic*, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 CFR XIV Part 1630.2(h)(1) & (2) (emphasis in 1 added).

279. *Bragdon*, 524 U.S. at 638.

280. *Id.*

dynamics surrounding it are central to the life process itself."[281] Finally, under the third inquiry the Court determined that HIV (the impairment) substantially limited reproduction (the major life activity).[282] In understanding the ADA, however, it is important to recognize that the extent of *Bragdon* is limited by the statutory definition of disability which includes a list of exceptions. The list includes homosexuality, bisexuality[283] and the *current* use of illegal drugs.[284]

The context of *Bragdon* is important because it was a review of summary judgment. The Court also emphasized that its analysis was limited to this HIV positive claimant and, therefore, was not determining whether "HIV infection is a *per se* disability" under the ADA.[285] The Court also specifically addressed the definition of disability in the context of employment discrimination in 2002. In *Toyota v. Williams*[286] the employee plaintiff claimed she was disabled "because of her carpal tunnel syndrome and other related impairments" and sued her former employer "for failure to provide her with reasonable accommodation as required by the ADA."[287] Therein the Court reversed the Court of Appeals for the Sixth Circuit which had granted partial summary judgment on the issue of disability.[288] At issue, once again, were the statutory terms "substantially limits" and "major life activities."[289] The Court stressed the statutory words *substantially* and *major*. It stated, for example, that the "word 'substantial' . . . clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities"[290] and that, "'[m]ajor life activities' . . . refers to those activities that are of central importance to daily life."[291] It approvingly cited the EEOC regulations for the proposition that the "impairment's impact must also be permanent or long-term."[292] Therefore it was error under both the impairment prong and the major life activity prong of the definition of disability for the appellate court to focus only on whether the claimant

281. While rejecting that there was any other major life activity at issue in the case the Court did observe that it had "no doubt" that "different parties" might maintain that HIV affected different physiological systems and major life activities besides reproduction. Bradgon v. Abbott, 524 U.S. at 537. Moreover, the entire opinion is based on the state of medical knowledge and treatment at the time of the decision because the Court stated, "Given the pervasive, and invariably fatal, course of the disease . . . ." *Id.* at 637.

282. *Bragdon*, 524 U.S. at 641.

283. 42 U.S.C.A. § 12211(a). Neither does disability include a specific list of "sexual behavior disorders" (42 U.S.C.A. § 12211(b)(1)) or things like compulsive gambling (42 U.S.C.A. § 12211(b)(2)).

284. 42 U.S.C.A. § 12210(a). However, individuals undergoing drug rehabilitation but *not* currently using illegal drugs and those "erroneously regarded as engaging in . . . [illegal drug] use" may be within the definition of disabled. 42 U.S.C.A. § 12210(b).

285. *Bragdon*, 524 U.S. at 642.

286. Toyota v. Williams, 534 U.S. 184 (2002).

287. *Toyota*, 534 U.S. at 189.

288. *Id.*

289. *Id.* at 196-97.

290. *Id.* at 197.

291. *Id.*

292. *Id.* at 198.

could perform "a specific job" and not whether "the claimant is unable to perform the variety of tasks central to most people's daily lives."[293] The Court further opined that the appellate court "should not have considered... claimant's inability to do such manual work in her specialized assembly line job as sufficient proof that she was substantially limited in performing manual tasks."[294]

The holding in *Toyota v. Williams* built on *Sutton v. United Airlines.* The Court held in *Sutton* that two airline pilots whom did not meet the uncorrected vision requirements of an airline for the position of "global airline" pilot were *not* regarded as being substantially limited in a major life activity.[295] In *Sutton* the Court instructed:

> Assuming without deciding that working is a major life activity and that the EEOC regulations interpreting the term "substantial limitation" are reasonable, petitioners have failed to allege adequately that their poor eyesight is regarded as an impairment that substantially limits them in the major life activity of working... Because the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards petitioners as having a *substantially limiting* impairment.[296]

The *Sutton* case also held that whether individuals are substantially limited in a major life activity is not based on an evaluation "in their hypothetical uncorrected state"[297] but; rather, is evaluated on the basis of their "measures to correct for, or mitigate, a physical or mental impairment."[298] These twin holdings in *Sutton* significantly narrow the possible scope of the ADA in the employment setting and the *Sutton* Court cited *Bragdon* for the proposition that "disability under the ADA is an individualized inquiry."[299] Requiring an individualized inquiry increases the burden on claimants because it requires proof beyond the mere diagnosis of a standard medical condition.[300]

In summary the ADA requires a substantial impairment of a major life activity to meet the definition of disability and the disability determination is made on an individualized basis. In addition the determination of disability must take into account any measures that correct or mitigate the disability. Finally, the ADA covers not only those

293. *Id.* at 200.
294. *Id.* at 201.
295. *Sutton v. United Airlines, Inc.*, 527 U.S. 485 (1999).
296. *Sutton*, 527 U.S. at 493.
297. *Id.* at 482.
298. *Id.* at 482.
299. *Id.* at 483 (citing *Bragdon* 524 U.S. at 641-642).
300. *Accord* Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999) (mechanic not regarded as disabled just because he was regarded as not being able to meet DOT truck driving health certification requirements; must measure after mediation or correction—in this case medication to control high blood pressure); Albertson's Inc., v. Kirkingburg, 527 U.S. 580 (1999) (refusal to hire a truck driver because he was unable to meet DOT acuity standards was not discrimination even though employer refused to participate in an experimental DOT program which lowered the acuity standard; corrective measures undertaken by the body's own systems—to monocularity—must be considered in determining whether an individual is disabled).

with disabilities but those whom are regarded by the employer as having a disability.

Even if an individual is disabled, there is no discrimination unless the person is qualified for the job. The statutory term for a person qualified for the job is "qualified individual with a disability." In the words of the statute:

> The term "qualified individual with a disability" means an individual with a disability who, *with or without reasonable accommodation*, can perform the *essential functions* of the employment position that such individual holds or desires. For the purposes of this subchapter [subchapter I – discrimination in employment], consideration shall be given to the employer's judgment as to what functions of the job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.[301]

The regulatory definition of "qualified individual" is comprised of two parts. First, it "means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position."[302] Second, a qualified individual must "perform the essential functions of such position" with or without "reasonable accommodations."[303]

The regulations draw a distinction between "essential functions" and "marginal functions of the position" describing essential functions as "fundamental job duties."[304] Interpretive guidance by the EEOC suggests: "[T]he inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative . . ."[305] The initial focus is whether employees in that job actually perform that function and then moves to "whether removing that function would fundamentally alter that position."

Recall essential job functions may be performed with or without reasonable accommodation.[306] The statute requires that an employee is entitled to reasonable accommodation unless the employer "can demonstrate that the accommodation would impose an undue hardship on

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301. 42 U.S.C.A. § 12111(8) (emphasis added).

302. 29 C.F.R. § 1630.2(m) (2001).

303. *Id.* Another affirmative defense allows employers to deem as "not qualified" any individual who poses "a direct threat to the safety and health of others". 42 U.S.C. § 12113(b). The EEOC interpreted the statutory language to also include individuals who would pose a direct threat to themselves 29 C.F.R. 1630.15(b)(2). The Supreme Court recently upheld the regulation as within the scope of the EEOC's rulemaking authority under the ADA and by doing so reversed an appellate decision to the contrary. Chevron U.S.A. v. Echazabal, __ U.S. __, 122 S.Ct. 2045 (June 10, 2002). Echazabal argued because the statutory provision recognizes only threats to others by implication, it excludes threats to the worker him or her self. The job in question was at an oil refinery which Chevron's doctors said would exacerbate Echazabal's pre-existing liver condition. The Court remanded the case to determine whether Chevron's decision was based on a reasonable medical judgment.

304. 29 C.F.R. § 1630(n) (2001).

305. 29 C.F.R. Part 1630 App. § 1630.2(n) (2001).

306. 29 C.F.R. § 1630.2(m) (2001).

the operation of the business . . ."[307] Further, it lists factors to consider when determining whether the reasonable accommodation is an undue hardship.[308] The employer and the disabled individual "must make good-faith, reasonable efforts to help each other determine what specific accommodations are necessary and possible."[309] Another recent Supreme Court decision in the area addressed whether a modification of an existing seniority system reasonable accommodation and, if so, whether it constituted an undue hardship on the employer.[310] Guidance from the

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307. 42 U.S.C.A. § 12112(5)(A).

308. 42 U.S.C.A. § 12111(10)(A). The factors to be considered "include":

> (i) the nature and cost of the accommodation needed under this chapter;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C.A. § 12111(10)(B).

309. MODJESKA, *supra* note 91 at § 4.15 p. 4-79 (citation omitted).

310. U.S. Airways, Inc. v. Barnett __U.S.__, 122 S.Ct. 1516 (2002), 2002 WL 737494.

Justice Breyer, for the majority, described the tension and stated the issue as follows:

> This case, arising in the context of summary judgment, asks us how the Act [the ADA] resolves a potential conflict between: (1) the interests of a disabled worker who seeks an assignment to a particular position as a reasonable accommodation, and (2) the interests of other workers with superior rights to bid for the job under an employers seniority system. In such a case, does the accommodation demand trump the seniority system?

Id.

The Ninth Circuit had held "that the presence of a seniority system is merely a factor in the undue hardship analysis." *Id.* citing 228 f.3d 1105, 1120. Thus the statutory language being adjudged was that portion of 42 U.S.C.A. § 12112(b)(5)(A) which in relevant part provides that the failure to provide "reasonable accommodations" is discriminatory "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity."

The facts of the case aid in understanding the issue and the statutory language. An individual was a baggage handler and became disabled. The employer *temporarily* assigned him to a vacancy in the mail room pending the bidding process under the employer designed (and implemented) seniority system, i.e., the seniority system was not the subject of a collective bargaining agreement. At least two other employees with more seniority than the disabled employee bid the job and the disabled employee requested that he remain in the job as a reasonable accommodation under the statute. The employer asserted that overriding the seniority system was an undue hardship.

The Court held, analogizing the reasonable accommodation under the religious protections of Title VII and "method of accommodation" under the Rehabilitation Act, that the plaintiff "need only show that an accommodation seems reasonable on its face, i.e., ordinarily or in the run of cases." In turn, the defendant must then "show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." However: "The plaintiff . . . nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (*which the ADA may not trump in the run of cases*), the requested accommodation is reasonable on the particular facts." *Id.* (*e.g.*, the employer frequently grants exceptions to its own seniority rules) (emphasis added).

One reason seniority rules are so important, according to the Court, is "the typical seniority system provides important employee benefits by creating, and fulfilling, *employee expectations of fair, uniform treatment* . . . includ[ing] job security and an opportunity for steady *predictable advancement based on objective standards*." *Id.* (emphasis added) citing, *inter alia*, LINDEMANN

EEOC states, generally, that it is the responsibility of the individual with the disability to request a reasonable accommodation.[311] If, however, an employer is aware of the employee's disability it may be obligated to ask about the need for accommodation.[312]

Finally, the EEOC Guidance emphasizes why the ADA is relevant to employee performance evaluation, "It [the ADA] is an antidiscrimination statute that requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given. An individual who is qualified *for an employment opportunity* cannot be denied that opportunity because of the fact that individual is

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& GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 (and in *passim* in this article). Finally, the Court said in support of the importance of seniority systems is that they "include an element of due process, *limiting unfairness in personnel decisions.*" *Id.* (citation omitted, emphasis added).

This case was a 5-4 opinion with J. Breyer writing the majority opinion which was joined by C. J. Rehnquist, J. J. Stevens, O'Connor and Kennedy. Nonetheless both Stevens and O'Connor filed concurring opinions. J. Scalia dissented joined by J. Ginsburg. The pattern of opinions, therefore, is evidence of a fracture on the reasoning behind the decision as well as the holding itself.

J. J. Souter and Ginsburg would have given seniority rules far less weight than the majority opinion and J. J. Scalia and Thomas would have made the rule of the case far clearer in favoring seniority rules evidencing a fundamental difference in the meaning of the ADA's reasonable accommodation: "If the disabled employee is physically capable of performing only one task in the workplace, seniority rules may be, for him, the difference between employment and unemployment. But that does not make the seniority system a disability-related obstacle, any more than harsher impact on the more needy employee renders the salary system a disability-related obstacle." *Id.* J. Stevens simply clarified where the appellate court was wrong; that being in not giving seniority systems more weight at the initial "reasonableness" stage of the statutory test and, in effect, making it employers burden to use the seniority system in its showing for "undue hardship."

J. O'Connor, therefore, was the swing vote. She generally seemed to agree with Stevens, and the majority opinion that seniority systems were a part of the reasonable accommodation analysis rather than the undue hardship analysis. She, however, would have preferred to give only "legally enforceable" seniority systems, that the majority seems to give all the decisional weight seniority systems.

Barnett is a disparate treatment case, as such, it might be seen as evidence that the ADA's addition of reasonable accommodation is simply a confounding variable to the *McDonnell Douglas-Burdine* test and the majority's "special circumstances" for the employee to override the result in the "run of cases" seems to sound of pretext.

311. 29 C.F.R. Part 1630 App. § 1630.9 (2001).

312. MODJESKA, *supra* note 91 at § 4.15 p. 4-79. The EEOC interpretive guidance is somewhat ambiguous. It states:

> Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting f rom the disability of a qualified disability *that is known to the employer.* Thus, an employer would not be expected to accommodate disabilities of *which it is unaware.* If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation . . . *When the need for an accommodation is not obvious*, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation for the need for accommodation.

29 C.F.R. Part 1630 App. § 1630.9 (2001) (emphasis added).

The ambiguity arises because of the nonparallel language emphasized in the quote and a scenario that focuses the ambiguity is when an existing employee appears to be suffering from some sort of degenerative disease but has not asked for an accommodation. Is that disability *known* to the employer? If not *known*, is the employer nonetheless aware of the disability? Is the need for accommodation *obvious*? The statute suffers from similar ambiguity. *See* 42 U.S.C.A. § 12112(4)(A) & (B).

disabled.[313]

The theories under which ADA claimants may bring actions and prove claims are embedded, implicit, and have been selectively discussed above. As a *very* general matter it is fair to say, "[t]he procedures and burden of proof under the ADA are quite similar to that used in Title VII cases."[314] Indeed, the ADA and Title VII contain the same basic "because of" language which in the ADA provides: "No covered entity shall *discriminate* against a qualified *individual* with a disability *because of* the disability . . ."[315] Thus in disparate treatment cases courts have applied the burden-shifting approach of the *McDonnell Douglas-Burdine* standard applied in Title VII cases.[316] Courts have had more difficulty in applying the standard to mixed-motive kinds of cases under the ADA than under Title VII[317] primarily because the phrase "qualified individuals" under the ADA is defined as, and inextricably tied to, the concept of reasonable accommodation.[318] Therefore, there is another confounding variable in the burden of proof equation for ADA mixed-motive cases. Moreover, the ADA statutorily provides the burden of proof on some of the subissues by statute so the analysis must specifically account for those burdens.[319]

By including reasonable accommodation as a statutory concept an ADA case must be "individualized." This individualization strains the application of disparate (adverse) impact theory in ADA cases.[320] The ADA, nonetheless, includes the disparate impact theory of discrimination.[321]

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313. 29 CFR Pt. 1630, App. § 1630.1(a) (2001) (emphasis added).

314. ROTHSTEIN, CRAVER, ET AL., EMPLOYMENT LAW, *supra* note 141 at § 2.47 p. 249.

315. *See supra* notes 140-45 and accompanying text for a general discussion of the "because of" language of Title VII.

316. ROTHSTEIN, CRAVER, ET AL., EMPLOYMENT LAW, *supra* note 141 at § 2.47 p. 249. For a general discussion of the *McDonnell Douglas-Burdine* test see notes 127-43 and accompanying text.

317. *See* LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at 2000 Cum. Supp. p. 220.

318. 42 U.S.C.A. § 12111(8) ("qualified individual with a disability"); § 12111(9) ("reasonable accommodation").

319. Illustratively:

> In cases in which the plaintiff is seeking some accommodation on the part of the employer, and is claiming that he or she would be qualified to perform the essential functions of the job with such reasonable accommodation, the disputed issues will be whether such accommodation is reasonable, whether such accommodation would impose an undue hardship upon the employer, and/or whether the plaintiff is capable of performing the job even with suggested accommodation, each of which may also be resolved through direct, objective evidence. The . . . [ADA] provides a guide for determining the burden of proof in these cases.

42 U.S.C. § 12112(b)(5)(A) states:

> The language of this provision makes it clear that the employer has the burden of persuasion on whether an accommodation would impose an undue hardship. However, the disabled individual bears the initial burden of proposing an accommodation and showing that *that* accommodation is objectively reasonable.

Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1183 (6th Cir. 1996).

320. *See supra* notes 154-64.

321. Disparate impact theory is statutorily provided by prohibiting the following:

> (3) utilizing standards, criteria, or methods of administration –

3. *The Age Discrimination in Employment Act (ADEA)*

The EEOC has statutory authority to administer and enforce the ADEA. Like its authority under Title VII[322] the EEOC has authority to promulgate procedural regulations and substantive guidelines but does not have a general grant to enter into formal substantive rulemaking resulting in legislative regulation.[323] The federal age discrimination statutes, like many codifications are amalgamations of several separate acts.[324] Thus, the EEOC does have authority to promulgate legislative rules under a specific statute codified within the Chapter dealing with age discrimination.[325] As a result, care, like the care required in determining the EEOC's regulatory authority under other discrimination laws,[326] needs to be taken in determining the appropriate authority which individual regulations under the ADA are afforded. Although this article focuses on private employment it is worth noting the relatively recent pronouncement that the ADEA does not apply to state employees[327] and that age is not a

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(A) that have the effect of discrimination on the basis of disability;

. . .

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals . . . unless the standard, test, or other selection criteria, as used . . . is shown to be job-related for the position in question and is consistent with business necessity . . .

42 U.S.C.A § 12112(b). *See* 29 C.F.R. Part 1630, app. § 1630.10.

322. *See supra* notes 96-103.

323. *See supra* note 103. Further:

> Until 1979, the EPA [Equal Pay Act] and the ADEA had been administered and enforced by the U.S. Department of Labor in accordance with the procedures established by the Fair Labor Standards Act . . . . In 1979, the EEOC received the authority to administer and enforce these acts to go along with its authority with respect to Title VII.

WARNER & MILLER, BNA-CPS, *supra* note 91 at A-55 (citations omitted).

324. The primary statutory provisions concerning "Age Discrimination in Employment" are codified in 29 U.S.C. Ch. 14.

325. The EEOC has general authority to issue regulations under the ADEA as follows:

> In accordance with the provisions of Subchapter II of chapter 5 of Title 5 [the Administrative Procedures Act], the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate in carrying out this chapter, *and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.*

42 U.S.C.A. § 628 (emphasis added).

Further authority is as follows: "(2) In applying the retirement benefit test of paragraph (1) of this subsection, if . . . [specific conditions], such benefit shall be adjusted *in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after Consultation with the Secretary of the Treasury*, so that the benefit . . ." 29 U.S.C.A. § 631(c)(2) (emphasis added). The EEOC received this specific authority when ADEA administration was transferred from the Department of Labor. *See supra* note 103. The annotation appearing for this section in the U.S.C.A. delineates its legislative history as follows:

> "Equal Employment Opportunity Commission" was substituted for "Secretary" meaning the Secretary of Labor, in Subsec. (c)(2) pursuant to Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19807, 92 Stat. 3781, set out in Appendix 1 to Title 5, Government Organization and Employees, which transferred all functions vested in this section in the Secretary of Labor to the Equal Employment Opportunity Commission, effective Jan. 1, 1979, as provided by Section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053.

29 U.S.C.A. Labor §§ 601 to 700 p. 680 (West Publ., 1998).

326. *See, e.g., supra* notes 246-74 and accompanying text (ADA).

327. A 2000 Supreme Court decision held that the ADEA does not apply to the state. The Court quoted a prior decision stating: "Even when the Constitution vests in Congress complete

classification protected by South Dakota law for either public or private employment purposes.[328]

The ADEA's definition of "employer" is "virtually identical to the definition of employer under . . . Title VII."[329] That is, the employer must have had twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.[330] Unlike Title VII, however, there is no statutory exemption for religious institutions as employers. The determination is made on a case-by-case basis.[331]

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law making authority over a particular area the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." Kimel v. Florida Bd. of Regents, 528 U.S. 62 at 78, 120 S.Ct. 631 at 643 quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73, 116 S.Ct. 1114 (1996). That is, Congress' power over commerce under Article I of the Constitution is tempered by the Eleventh Amendment which states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. 11th Am. *quoted* in *Kimel*, 120 S.Ct. at 640.

Therefore to be a valid exercise of power Congress must find authority other than the commerce clause. "Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States' sovereign immunity [provided by the Eleventh Amendment]." *Kimel*, 120 S.Ct. at 644. Section 5 of the Fourteenth Amendment is an enabling clause stating: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* One such other "provision" in the Fourteenth Amendment is the Equal Protection Clause. Thus, if the ADEA is appropriate legislation enforcing the Equal Protection Clause it may abrogate States sovereign immunity. The Court then applied a "congruence and proportionality test." *Id.* at 645. This test compared the "substantive requirements" of the ADEA with "any unconstitutional conduct that could conceivably be targeted by the Act." *Id.*

In turn the Court stated that age is not a Constitutionally suspect class in the same way as race or gender and, therefore, it applied the lower rational basis test to the age based action taken by the States as employers at issue in the case. *Id.* As a result, the protection afforded the citizens alleging age discrimination is lower than the protections afforded race or gender classifications and, applying the congruence and proportionality test, the incursion of the ADEA on the States' Eleventh Amendment protections was found to be unconstitutional. Interestingly for the primary purpose of this article; one of the consolidated cases presented the issue of whether a College of Business "employed an evaluation system that had an adverse impact" on older employees' promotions and compensation. *Kimel*, 528 U.S. at 69.

328. South Dakota does not have a state statute prohibiting age discrimination that parallels the ADEA like it has for Title VII. *See* LYNN, JACKSON, SHULTZ & LEBRUN, P.C., *High Court Says States Can't Be Sued Under ADEA*, SOUTH DAKOTA EMPLOYMENT LAW LETTER, Jane Wipf Pfeifle & Jon C. Sogn, Vol. 5, No. 2, Mar. 2000 (M. Lee Smith Publishers). (The publishers publish a separate newsletter for each state which is edited by lawyers within each of those states, respectively).

329. LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at Cum. Supp. p. 326. *Compare* 29 U.S.C.A. § 630(b) (the ADEA) *infra* note 342 *with* 42 U.S.C.A. § 2000e(b) *supra* note 92.

330. The ADEA defines "employer" in pertinent part, "The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C.A. § 630(b).

For a more detailed discussion *see generally*, *e.g.*, LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at Ch. 16.

331. Weissman v. Congregation Shaare Emeth, 38 F.3d 1038 (8th Cir. 1994).

> Where, as here, an employee is not a member of the clergy, the application of the ADEA to a religious employer is not, as a matter of law, sufficient to pose a significant risk of infringement upon the First Amendment where none of the reasons asserted for the adverse employment action rests on religious grounds . . . If any or all of the reasons asserted for dismissal are religious, the trial court can use the case-by-case approach . . .

Id. at 1045. *See* MODJESKA, EMPLOYMENT DISCRIMINATION LAW, *supra* note 71at § 3:10 p. 3-28 (discussing *Weissman*).

The ADEA protects "individuals" from employment discrimination on the basis of age and its general operative statutory language is, again, very similar to the operative language of Title VII.[332] The primary operational provision, however, does not state any specific age floor for protection. Rather, the forty years age floor is found in a later section of the ADEA.[333] In the words of the Supreme Court: "This language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits its protection to individuals who are 40 or older."[334] This is significant in establishing a prima facie case for age discrimination under the *McDonnell Douglas-Burdine* standard of proof framework[335] because it means an individual *over* the age of 40 need *not* be replaced by an individual *under* the age of 40 to establish a prima facie case. Rather, "the prima facie case requires *evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion* . . ."[336] As a result, the individual claimant's age and discrimination motivated by that age is the focus of inquiry and, unlike Title VII, the ADEA does not establish a *protected class* of those over the age of 40.[337]

The issue of mixed-motive is present in age discrimination claims as it is under Title VII employment discrimination cases. Importantly, however, the Civil Rights Act of 1991 did *not* amend the ADEA. Thus, the *Price Waterhouse v. Hopkins* analysis is still appropriate for ADEA disparate treatment purposes.[338] Indeed, one commentary observed the "substantive prohibitions of the ADEA generally follow those of Title VII, while the ADEA's remedies generally follow the FLSA [Fair Labor Standards Act]."[339]

Like most of the protected traits of Title VII, the ADEA also has a bona fide occupational qualification (BFOQ) defense whereby it is not unlawful for an employer: "to take any action otherwise prohibited [under the ADEA] . . . where age is a bona fide occupational qualification

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332. 29 U.S.C.A. § 623(a)(1). The primary operative statute is as follows, "It shall be unlawful for an employer – (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individuals age; . . ." 29 U.S.C.A. § 623(a)(1).

333. 29 U.S.C.A. § 631(a) ("[T]he prohibitions of this chapter shall be limited to individuals who are at least 40 years of age.")

334. O'Connor v. Consolidated Coin Caterers Crop., 517 U.S. 308 (1996).

335. *See generally supra* note 141-45 and accompanying text.

336. O'Connor v. Consolidated Coin Caterers Crop., 517 U.S. 308 at 312 (1996) (emphasis and brackets in original) quoting Teamsters v. U.S., 431 U.S. 324, 358 (1977). The McDonnell Douglas - Burdine analysis has been extended to the ADEA in a line of cases including Lorillard v. Pons, 434 U.S. 575 (1978), Western Airlines v. Criswell, 472 U.S. 400 (1985), and Reeves v. Sanderson Plumbing, 530 U.S. 133 (2000).

337. *O'Connor*, 517 U.S. at 312-13.

338. For an introductory analysis of *Price Waterhouse v. Hopkins* and the Civil Rights Act of 1991 see *supra* notes 141-45 and accompanying text.

339. LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at 556 (citation omitted). The FLSA covers such things as minimum wage and hours, overtime, and child labor laws. *See generally*, ROTHSTEIN, CRAVER ET AL., *supra* note 141 §§ 3.1-3.10 pp. 260-292. The Fair Labor Standards Act of 1938 is codified at 29 U.S.C.A. §§ 201-219.

reasonably necessary to the normal operation of the particular business . . ."[340] The EEOC has issued interpretive regulations (as opposed to *Guidelines*[341]) which, among other things, address the ADEA's BFOQ for disparate treatment cases. The regulations state:

> An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, *and either* (2) that all or substantially all individuals excluded from the job are in fact disqualified, or (3) that some of the individuals excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it with less discriminatory impact.[342]

There are also statutory exceptions for bona fide seniority plans "not intended to evade the purposes of this chapter;"[343] and, in another section of the ADEA an exception for bona fide executives *or* high policy makers.[344] The exception for bona fide executives or high policy makers allows private employers to impose *mandatory* retirement on certain defined individuals. In addition to the functional test the statute also requires that the individual be "entitled to an immediate and nonforfeitable annual retirement benefit of at least $44,000 provided by the employer."[345]

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340. 29 U.S.C.A. § 623(f)(1).

341. For a discussion of the difference in authority between interpretations like guidelines, interpretive regulations and legislative regulations see generally *supra* notes 101-03 and accompanying text.

342. 29 C.F.R. § 1625.6(b) (emphasis added).

343. 29 U.S.C.A. § 623(f)(2)(A). *See* 29 C.F.R. § 1625.8 (Bona fide seniority systems).

344. 29 U.S.C.A. § 631(c).

345. LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at pp. 546-47. *See* 29 U.S.C.A. § 631(c). The regulation quotes the Conference Committee Report as explaining the meaning of "bona fide executive" as follows:

> Typically the head of a significant and substantial local or regional operation of a corporation [or other business organization] such as a major production facility or retail establishment, but not the head of a minor branch, warehouse or retail store, would be covered by the term "bona fide executive." Individuals at higher levels in the corporate organizational structure who possess comparable or greater levels of responsibility and authority as measured by established and recognized criteria would also be covered.
>
> The heads of major departments or division of corporations [or other business organizations] are usually located at corporate or regional headquarters. With respect to employees whose duties are associated with corporate headquarters operations, such as finance, marketing, legal, production and manufacturing (or in a corporation organized on a product line basis, the management of produced lines), the definition would cover employees who head those divisions . . . .

29 C.F.R. § 1625.12(d)(2) (citation to the Conf. Report omitted).

The regulation quotes the Conference Committee Report as explaining the term "high policy making position as follows:

> . . . individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof.
>
> For example, the chief economist or the chief research scientist of a corporation typically has little line authority. His duties would be primarily intellectual as opposed to executive or managerial. His responsibility would be to evaluate significant economic or

The ADEA also contains other exceptions not found in Title VII. The two that are most relevant for present purposes are (1) to take any action otherwise prohibited by... [the ADEA except] "where the differentiation is based on reasonable factors other than age; ..."[346] and, (2) to take any action otherwise prohibited by... [the ADEA except] "to discharge or otherwise discipline an individual for good cause."[347] Both exceptions seem implicit in Title VII so it is difficult to find a difference in the distinction. The first exception, however, could conceivably lull employers into the mixed-motive analysis and care needs to be exercised in analyzing any applications to avoid being unable to reach legal escape velocity from a circular analysis. Such an analysis is suggested by the following statement in the regulation: "When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable."[348] The most important point on the second exception ("good cause") is that it is in the disjunctive "or" rather than in the conjunctive. A conjunctive would require meeting the requirements of good cause termination.[349] "Good cause," of course, is a legal term of art that carries a lot of non-ADEA employment law within its definition.[350]

The basic overview of the operative discrimination prohibitions of the ADEA has thus far ignored the disparate (adverse) impact theory of discrimination. Before turning to that theory, however, a few examples of fact patterns which animate the ADEA are described. In *Hazen Paper Co. v. Higgins* the Supreme Court illustrated the definition of "age" and the specific kinds of employment practice that are prohibited by the disparate treatment theory because of age.[351] In reaching its decision the Court reiterated that disparate treatment cases require proof of discriminatory motivation[352] and may occur when an employer relies on a facially discriminatory formal policy or when "motivated by the protected trait [aga] on an ad hoc, informal basis."[353]

Hazen Paper Company was owned by two cousins. The cousins hired Biggins as the Company's technical director in 1977. He was fired in 1986 when he was 62, just a few weeks before he would have vested in the

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scientific trends and issues, to develop and recommend policy direction to the top executive officers of the corporation, and he would have a significant impact on the ultimate decision on such policies by virtue of his expertise and direct access to the decision makers. Such an employee would meet the definition of a "high policymaking" employee.

29 C.F.R. § 1625.12(e) (citation to the Conf. Report omitted).

346. 29 U.S.C.A § 623(f)(1).

347. 29 U.S.C.A. § 623(f)(3).

348. 29 C.F.R. § 1625.7(c).

349. *See* 29 U.S.C.A. § 623.

350. *See, e.g.*, ROTHSTEIN, CRAVER, ET AL., EMPLOYMENT LAW, *supra* note 141at 696 (synonymous with "just cause' or simply "cause").

351. Hazen Paper Co. v. Higgins, 507 U.S. 604 (1993).

352. *Id.* at 609.

353. *Id.* at 610.

company pension plan.[354] Biggins brought suit alleging that his termination was unlawful age discrimination under the ADEA and a violation of the Employee Retirement Income Act of 1974 (ERISA).[355] The Company defended by asserting the legitimate reason for Biggins' termination was that he breached a confidentiality agreement.[356] The jury's verdict was for Biggins. It found Biggins' termination was age discrimination *and* that the Company violated ERISA.[357]

The Company's pension plan required ten years of service before the employee would receive nonforfeitable rights to retirement income. The Court affirmed that Biggins' termination violated ERISA because of its close proximity to the ten-year service anniversary.[358] Nonetheless "age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'"[359] The Court illustrated the distinction by observing that an "employee who is younger than 40, and therefore outside the ADEA . . . may have worked for a particular employer for his entire career, while an older worker may have been newly hired."[360] Ultimately the Court remanded the case for reconsideration as to whether there was enough evidence of age motivated discrimination without using ERISA years in service as a proxy for age.[361] Stated simply, the holding in *Hazen Paper Co.*, quoting *Western Air Lines, Inc. v. Criswell*,[362] emphasized that the ADEA mandates an employer evaluate employees on their merits and not their age.[363]

In *Criswell*, the case quoted in *Hazen Paper Co.*, the issue was whether a mandatory retirement age of 60 years for flight engineers qualified as a BFOQ[364] under the ADEA.[365] "A jury concluded that . . .

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354. *Id.* at 607. The Employee Retirement Income Security Act of 1974 (ERISA) governs all major aspects, including vesting, of "covered" pension and profit sharing plans. ERISA is not part of the ADEA and it is codified separately at 29 U.S.C.A. §§ 1001-1461. "ERISA imposes minimum participation, *vesting*, and accrual requirements" in order "[t]o prevent harsh qualification and forfeiture rules and plan amendments limiting previously promised pension obligations." ROTHSTEIN, CRAVER ET AL., EMPLOYMENT LAW, *supra* note 141 at § 10.3 p. 808. The same treatise describes "vesting" in the following terms:

> An employee's right to participate in a pension plan matters only if at some point the employee vests in the plan. An accrued benefit is "vested" or "nonforfeitable," terms ERISA uses interchangeably, when the participant's claim to the benefit, either immediately or on a deferred basis, is unconditionally and legally enforceable against the plan. A benefit becomes vested when "the employee's right to the benefit would survive a termination of his employment."

Id. at 809-10 (quoting Nashman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 363-64 (1980)).

355. *Hazen Paper Co.*, 507 U.S. at 606.

356. *Id.* at 613.

357. *Id.* at 606.

358. *Id.* at 612.

359. *Id.* at 611.

360. *Id.*

361. *Id.* at 614.

362. Western Air Lines v. Criswell, 472 U.S. 400, 422 (1985).

363. *Hazen Paper Co.*, 507 U.S. at 611.

364. For a discussion of the ADEA's statutory BFOQ requirements see *supra* notes 331-40

[the Airline's] mandatory retirement rule did not qualify as a BFOQ even though it purportedly was adopted for safety reasons"[366] and the Supreme Court affirmed.[367] The Airline argued that "there existed a *rational basis in fact* for defendant to believe that the use of [flight engineers] over age 60 . . . would increase the likelihood of risk to its passengers,"[368] in part, because federal safety regulations required pilots to retire at the age of 60 and; therefore, the mandatory retirement age was a lawful BFOQ.[369]

The Court rather quickly shot down the "rational basis in fact" standard for BFOQ status proffered by the Airline stating: "The BFOQ standard adopted in the statute is one of 'reasonable necessity' [of the normal operation of the particular business], not reasonableness [of Airline's belief]."[370] It also disputed the evidentiary weight the employer argued was due the federal safety regulation for pilots.[371] It conceded, as did the claimants, "that the qualification of good health for a vital crew member is reasonably necessary to the essence of the airline's operations."[372] The Court, nonetheless, distilled the issue to whether age was an appropriate proxy for good health;[373] relied on its observation earlier in the opinion that, unlike the pilot rule, there was no required federal safety regulation related to the age of flight engineers,[374] and; contrasted the respective job specific tasks of pilots to flight engineers.[375] While the Court did not deny the mandatory retirement age for pilots was probative for determining whether age was a BFOQ for flight engineers it stated: "The extent to which the rule is probative varies with the weight of the evidence supporting its safety rationale and 'the congruity between the . . . occupations at issue.'"[376]

In 1996 the Eighth Circuit Court of Appeals decided *Smith v. City of Des Moines*.[377] The facts, at first reading, seem similar to those of *Western Air Lines v. Criswell*.[378] For example, *Criswell* involved a *uniformed* flight engineer with public safety responsibilities.[379] *Smith v. City of Des Moines*, too, involved a *uniformed* fire fighter with public safety responsibilities.[380]

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and accompanying text.

365. Western Air Lines v. Criswell, 472 U.S. 400, 402-03 (1985).

366. *Id.* at 403.

367. *Id.* at 423.

368. *Id.* at 417 (emphasis and brackets in original, footnote omitted).

369. *Id.* at 418.

370. *Id.* at 419.

371. *Id.* at 418.

372. *Id.*

373. *Id.*

374. *Id.* at 404.

375. *Id.*

376. *Id.* at 418 (quoting Johnson v. Mayor and City Council of Baltimore, 472 U.S. 353 at 371 (1985)).

377. Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996).

378. Western Air Lines v. Criswell, 472 U.S. 400 (1985) *See supra* notes 364-72 and accompanying text (discussing *Criswell*).

379. *Criswell*, 472 U.S. at 403-04.

380. *See Smith*, 99 F.3d at 1473.

The claimants in both cases had been doing their jobs for many years.[381] Respectively, the claimants were *not* in front-line positions; that is, in *Criswell* the job title involved was not pilot but flight engineer and in *Smith* the claimant's job title was not line firefighter but captain.[382] Finally, the claimants were terminated because their employers' feared that they were no longer physically able of performing their jobs without putting themselves and others at safety risk.[383] The claimants in both cases challenged the criteria used to disqualify them from the jobs as unlawful on the basis of age discrimination under the ADEA.[384]

The employer lost in *Criswell*.[385] The employer won in *Smith*.[386] One possible distinction is that *Criswell* involved a federally regulated private employer (an airline) while *Smith* involved a public employer (a fire department);[387] but, this distinction under the particular facts of *Smith* is without merit because the Eighth Circuit used a straight ADEA analysis.[388] The key distinction between the cases is the particular criteria used.

The employer in *Criswell* used an age limit of 60 years as criteria for job fitness while the employer in *Smith* used physical test criteria.[389] In *Criswell*, the theory of liability was disparate *treatment* discrimination because the policy at play clearly used age as the delimitated criteria.[390] On the other hand, the disparate (adverse) *impact* theory of liability was at issue in *Smith* because the criteria being challenged was a physical lung capacity test which was facially neutral. There was no evidence that the test was age motivated.[391] Simply, the claimant in *Smith* argued that the test effected employees over the age of 40 disproportionately[392] and, further, that the employer did not affirmatively show that this test, and

381. *Smith*, 99 F.3d at 1468; *Cf. Criswell*, 472 U.S. at 2746-47 (inferred).
382. *Criswell*, 472 U.S. at 403-04; *Smith*, 99 F.3d at 1468, 1472.
383. *See Criswell*, 472 U.S. at 406; *Smith*, 99 F.3d at 1473.
384. *Criswell*, 472 U.S. at 403; *Smith*, 99 F.3d at 1473.
385. *Criswell*, 472 U.S. at 408, 423.
386. *Smith*, 99 F.3d at 1467-68.
387. *Criswell*, 472 U.S. at 403-04; *Smith*, 99 F.3d at 1467.
388. *Smith*, 99 F.3d at 1469.
389. *Criswell*, 472 U.S. at 2746 (it implicated the BFOQ defense); *Smith*, 99 F.3d at 1473. The argument in *Smith* was that the physical lung capacity test did not measure, or was not the best measure, of a business necessity. The Court stated, "The dispute in this case is not whether firefighters must be physically fit, but how fitness can be most appropriately measured and how the city may distinguish those firefighters who are probably capable of performing the job from those firefighters who are probably not capable." *Smith*, 99 F.3d at 1473.
390. *Cf.* LEWIS & NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE, *supra* note 141 at § 3.3 pp. 127. One of the primary issues in *Criswell* was the BFOQ defense (see *supra* notes 364-72 and accompanying text) and the "BFOQ is a defense to intentional, disparate treatment discrimination [only]."
It is important to note that some commentators divide the theories of discrimination more finely. Thus, for example, one treatise divides its chapter entitled "Modes of Proof for a Title VII Claim" into the following sections: (a) "Individual Disparate Treatment—'Direct' Evidence;" (b) "Individual Disparate Treatment—Inferential Proof (incl. mixed motive);" (c) "Systemic Disparate Treatment;" and, (d) "Neutral Practices with Disproportionate Adverse Impact" LEWIS & NORMAN *supra* note 141 at p. xvii (table of contents).
391. Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996).
392. *Id.* at 1470.

what it measured, qualified as a business necessity.[393]

In *Smith* the Eighth Circuit recognized the Supreme Court's statement in *Hazen Paper Co.*[394] "that it had never decided whether a disparate impact theory is available under the ADEA"[395] and, further, the importance of the concurrence therein where three Justices stated "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."'[396] The Circuit Court also recognized the Supreme Court's opinion itself could be interpreted as a suggesting the ADEA does not permit disparate impact actions."[397] Nonetheless, the Eighth Circuit decided to continue unquestioned adherence to its prior decisions and "to [again] recognize the viability of disparate impact actions under the ADEA"[398] because the Supreme Court had given no "clear indication" that it overruled the Circuit's previous decisions.[399]

Interestingly none of the three prior Eighth Circuit cases relied upon by the Court of Appeals analyze whether the disparate (adverse) impact theory is available under the ADEA; rather, it appears the issue was not before the court and the court and litigants alike *assumed* the disparate impact theory was permitted.[400] In 1997 the Eighth Circuit again reiterated

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393. *Id.* at 1470, 1471-73.

394. Discussed *supra* notes 390-99 and accompanying text.

395. *Smith*, 99 F.3d at 1469 citing *Hazen Paper Co.*, 507 U.S. at 610.

396. *Smith*, 99 F.3d at 1469 quoting *Hazen Paper Co.*, 507 U.S. at 618 (Chief Justice Rehnquist, Justice Kennedy, Justice Thomas, concurring).

397. *Smith*, 99 F.3d at 1469 quoting *Hazen Paper Co.*, 507 U.S. at 610: "'Disparate treatment, this defined, captures the essence of what Congress sought to prohibit in the ADEA.'"

398. *Smith*, 99 F.3d at 1470.

399. *Id.* (citation omitted). The Eighth Circuit Court also delineated the current circuit split on the issue as updated after *Hazen Paper Co.*, *supra* note 396. *Smith*, 99 F.3d at 1469-70. For a circuit-by-circuit summary on the issue of whether the ADEA permits the use of the disparate impact theory see the *Appendix* appearing at the end of this article.

400. The three Eighth Circuit cases cited by the court in chronological order from oldest to most recent are: (a) Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); (b) Nolting v. Yellow Freight System Inc., 799 F.2d 1192 (8th Cir. 1986); (c) Houghton v. Sipco Inc., 38 F.3d 953 (8th Cir. 1994). *Smith*, 99 F.3d at 1469-70. Of the three only *Houghton* "post-dated" *Hazen Paper Co. Id.* at 1470.

In *Leftwich*, the first case, the court went without pause, and in the same paragraph, from "generally discussion of the operative section of the ADEA (29 U.S.C.A. § 623(a)(1) to: "The plaintiff, relying on a disparate impact theory, contends that the defendants' faculty selection plan for the 'new' state college discriminated on the basis of age n violation of the ADEA." *Leftwich*, 702 F.2d at 690. The next paragraph of the opinion then immediately started an analysis of the elements necessary to "establish a prima facie case of age discrimination under a disparate impact theory . . . ." *Id.*

In *Nolting*, the second case decided by the Eighth Circuit, the court addressed the lawfulness of an "Operator Evaluation System" under the ADEA. The system evaluated data entry operators using five factors including "non-paid absence, non-productive time, operator performance, keystrokes per hour, and cost per thousand keystrokes." *Nolting*, 799 F.2d at 1194. The Court did not even mention the disparate or adverse impact theory by name. Nonetheless it was obviously a disparate impact case because, *inter alia*, there was no claim that age was a motivating factor; the claimants case rested on statistical evidence showing a correlation between age and at least one of the factors used by the System (*id.* at 1195); one of the major issues in the case was the business necessity defense (*id.* at 1198-99); and it cited Leftwich (*id.* at 1199). Even though the decision used the disparate impact theory, the issue of whether the theory was appropriate under the ADEA was *not* at issue in the case.

The third prior case was *Houghton v. Sipco, Inc.*, 38 F.3d 953 (8th Cir. 1994) which, indeed, as

the availability of the disparate impact theory in the circuit and, again, it was handled summarily.[401] The 1997 opinion, however, reflects that the issue was put in play by the employer.[402]

The United States Supreme Court procedurally stutter-stepped on whether the disparate impact theory is available under the ADEA in 2002 by first granting and then dismissing certiorari in *Adams v. Florida Power Corp.*[403] The issue in *Florida Power* was the pure ADEA disparate impact legal issue in abstract, unadorned by facts or muddled by other legal issues, because the issue had been certified by a district court to the Eleventh Circuit Court of Appeals.[404] "The district court ruled as a matter of law that disparate impact claims cannot be brought under the ADEA."[405] The Eleventh Circuit's three judge panel affirmed the district court's holding on a two to one vote.[406]

The analytical framework of the circuit court's majority opinion in *Florida Power* is easy to follow. First, it recognized that the operative (prohibitive) sections of the ADEA and Title VII are "almost identical" and that the Supreme Court determined that the disparate impact standard is appropriate for Title VII.[407] Nonetheless, the text of the ADEA differs from that of Title VII because the ADEA contains the express exception

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stated in *Smith*, was decided after the Supreme Court decided *Hazen Paper Co.* Both ERISA and ADEA claims were present in *Houghton* and the legal issues revolved around benefit reductions and a voluntary early retirement program. *Houghton*, 38 F.3d at 956-57. Moreover, the *Houghton* opinion discussed both theories of ADEA liability: Disparate impact and disparate treatment. *Id.* at 958-59. The only issue addressed concerning disparate impact in the opinion was whether the jury instruction concerning business necessity was in error because it used the standard provided by the Civil Rights Act of 1991. The Court opined that because the cause of action accrued under pre-1991 Act law the instruction was in error and, therefore, the case was remanded for "a new trial of plaintiffs' disparate action claims." *Id.* at 959. As an aside, of course, as discussed previously in this article the Civil Rights Act of 1991 is not directly applicable to ADEA cases. *See supra* note 144 and accompanying text (in the context of the mixed motive amendments to Title VII by the 1991 Act.

Finally, the *Houghton* court did specifically mention *Hazen Paper Co.* but only in the context of the relationship between the type of evidence showing age discrimination and ERISA violations. *Id.* at 960. Neither did it analyze the appropriateness of the disparate impact theory in ADEA cases.

Because none of the three prior Eighth Circuit cases cited in *Smith* actually addressed the issue of whether disparate impact *should* be available for ADEA plaintiffs: The fairest statement concerning *Smith* is probably that the court refused to open the issue. It is certainly true that the disparate impact theory currently is available under the ADEA in the Eighth Circuit but *Smith* itself is the closest the court has come to addressing the issue with any seriousness and the precedential weight of the cases cited in *Smith* to support the viability of the impact theory in the circuit seems to be weak for lack of analytical support within those opinions themselves.

401. Lewis v. Aerospace Community Credit Union, 114 F.3d 745, 750 (8th Cir. 1997).

402. The Court stated: "Aerospace contends that disparate impact claims are not cognizable under the ADEA. We disagree. Although the Supreme Court has yet to rule on this question... our circuit continues to recognize the validity of such claims under the ADEA. *Lewis*, 114 F.3d 745, 750 (citing Smith v. City of Des Moines, 99 F.3d 1466 at 1470 (8th Cir. 1993)).

403. Adams v. Florida Power Corp., 255 F.3d 1322 (11th Cir. 2001), *cert. dism.* __ U.S. __, 122 S.Ct. 1290 (2002) (as "improvidently granted").

404. *Id.* at 1323.

405. *Id.*

406. *Id.* at 1323, 1326.

407. *Id.* at 1324 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971))

permitting an employer to "take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age."[408] This language, according to the circuit court majority, is similar to statutory language in the Equal Pay Act (EPA) which prohibits wage rate differential based on gender unless the "differential [is] based on any other factor other than sex."[409] The Supreme Court has specifically held that the EPA language prohibits disparate impact cases under the EPA.[410] As a result there is a conflict between the result suggested by the general Title VII analogy and the analogy to the EPA.

Second, the majority opinion read the legislative history of the ADEA to suggest that the wrongs proven by disparate impact theory were to be addressed in "alternative ways."[411] This history is particularly important because the Supreme Court relied on the legislative history of Title VII to "find a cause for disparate impact" in *Griggs v. Duke Power.*[412] Therefore the circuit court used the same analytical methodology as the Supreme Court—use of legislative history. Third, and finally, the majority opinion interpreted two specific statements by the Supreme Court in *Hazen Paper Co.* as inconsistent with permitting disparate impact actions even while recognizing that *Hazen Paper Co.* declined to decide the issue.[413] The strong *dissent* at the circuit level attempted to refute each of the majority opinions three points and would have given deference to the EEOC interpretive guidelines which discuss "disparate impact" as it relates to the "reasonable factors" statutory language.[414] Additionally the dissent did "not believe" that the plaintiffs "plead a disparate impact claim sufficient to qualify for class certification" and would have simply disposed of the case for that reason and saved the underlying issue for another day.[415]

The status of disparate impact under the ADEA can be summarized as follows: (1) there is a six to three circuit split which disfavors disparate impact actions under the ADEA;[416] (2) the Eighth Circuit is in the minority

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408. *Florida Power Corp.*, 255 F.3d at 1325 (citing 29 U.S.C.A. § 623(f)).

409. *Id.* (quoting 29 U.S.C.A.§ 623(f)(1)) (this section is discussed *supra* notes 346-48 and accompanying text).

410. *Florida Power*, 255 F.3d at 1325.

411. *Id.*

412. *Id.* at 1325-26 (citing Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)) (*Griggs* is discussed *supra* notes 104-24 and accompanying text).

413. *Id.* at 1326 citing Hazen Paper Co. v. Biggins, 507 U.S. 604 (*Hazen Paper Co.* is discussed *supra* note 357-63 and accompanying text.

414. *Id.* at 1328 (citing 29 C.F.R. § 1625. 7(d) (1999)).

415. *Id.* at 1326. The dissent posits that a decision like this one should be animated by facts: "The decision as to whether a disparate impact claim is available in an age discrimination case should be made on a case specific basis rather than on an overreliance on decontextualized language from the Supreme Court's decision in *Hazen Paper Co. v. Biggins* . . ." *Id.* (citation omitted).

416. The issue by circuit is: *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir. 1999) (no disparate impact under the ADA); *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980) (allows disparate impact); *DiBiase v. Smith Kline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995) (no disparate impact); *Lyon v. Ohio Educ. Ass'n and Prof'l staff Union*, 53 F.3d 135 (6th Cir. 1995) (no disparate impact); *EEOC v. Francis W. Parker School*, 41 F.3d 1073 (7th Cir. 1994) (no disparate impact); *Lewis v. Aerospace Community Credit Union*, 114 F.3d 745 (8th Cir. 1997) (allows disparate

of circuits which allow such actions even though the Eighth Circuit has not carefully vetoed the issue in any of its decisions to date;[417] and (3) three Supreme Court Justices (including the Chief Justice) joined the concurrence in *Hazen Paper Co.* which would have held that the ADEA neither provides for, nor allows the use of, the disparate impact theory.[418]

B. AN OVERVIEW OF ENFORCEMENT MECHANISMS AND ISSUES

The basic antidiscrimination law and burden of proof issues under Title VII,[419] the ADA,[420] and the ADEA[421] as they apply to private employers were discussed in some detail in the previous sections of this article. The existence of some of the other antidiscrimination laws was also briefly noted in the margin.[422] The exhaustion of administrative remedies and enforcement by the EEOC, however, has net yet been

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impact); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996) (no disparate impact); *Adams v. Florida Power Co.*, 255 F.3d 1322 (11th Cir. 2001).

417. *See supra* notes 377-402 and accompanying text.

418. *See supra* notes 355-63 and accompanying text. So what is this author's personal analysis? This issue has political as well as legal overtones (as does much of the substantive law of discrimination). Further, it concerns the greying baby-boom electorate, thus, it is far more difficult to compartmentalize as a we-them political issue.

Six circuits have determined the ADEA does not embrace the disparate impact theory. Probably the strongest and best reasoned argument *for* permitting the theory is the dissent in *Adams v. Florida Power Co.*, 255 F.3d 1322, 1326 (11th Cir. 2001). Moreover, any case decided pre-*Hazen Paper Co.*, (in 1993) is suspect because of the way most circuit courts have interpreted that opinion (against disparate impact even though the Court expressly said it did not decide the issue). The circuit trend is not recognize the cause of action. Of the three circuits permitting the disparate impact theory under the ADEA; the Second Circuit decided its case long before *Hazen Paper Co.* (13 years previously), and the Ninth Circuit decided its case almost 10 years before *Hazen Paper Co.* The Eighth Circuit has never really taken the opportunity to analyze the issue but appears rather rigidly tied to its precedence allowing disparate impact claims. Interestingly, however, one of the two-to-one judge majority in the Eleventh Circuit's *Florida Power* case which denied the impact cause of action was Judge Magill, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

At the Supreme Court level Chief Justice Rehnquist and Justices Kennedy and Thomas concurred in *Hazen Paper Co.* stating the disparate impact theory is not permitted or authorized by the ADEA. In turn, the strong statement in the majority opinion that is was not deciding the issue may have been prompted by the plainly stated concurrence. The reason for the inclusion of the statement by the majority coupled with the concurrence may be significant because they seem to cast a long interpretive shadow over the entire opinion making other statements in the opinion *seem* to favor *not* permitting disparate impact claims.

The circuit split may have reached its tipping point away from the impact theory but the law is far from as clear as the counting of the circuits makes it appear. Not in the pejorative sense, but in the analytical sense, this issue appears to have come down to quiet judicial politics inside the Supreme Court with the knowledge that politics outside the Court will make *any* Supreme Court resolution of this issue controversial. This author, therefore, would agree that the initial grant of cert. in *Florida Power Co.* was "improvident." Somewhat paradoxically this author also *guesses* that the dynamic among the circuit courts will resolve the issue oppositely from the way a five-to-four current Supreme Court might come down on this politically sensitive issue. Unless the Second or Eighth Circuit (or one of the circuits that has not decided the issue) enters the fray with a well-reasoned opinion joining the Ninth Circuit in upholding the impact theory under the ADEA the Supreme Court will simply wait until the circuits have overwhelmingly followed the trend started with *Hazen Paper Co.* to again grant cert. and then will be able to deal with the issue rather summarily. Maybe; maybe not; which is why this drivel appears in the margin.

419. For a discussion of Title VII see *supra* notes 96-104 and accompanying text.

420. For a discussion of the ADA see *supra* notes 246-74 and accompanying text.

421. For a discussion of the ADEA see *supra* notes 322-27 and accompanying text.

422. *See supra* note 95.

discussed. It is the purpose of this section of the article to provide an overview of those topics. Its goal is to provide a thumbnail sketch of the process and mechanisms that apply if an employee evaluation appraisal is challenged as discriminatory. It is not meant to be comprehensive or encyclopedic. Nonetheless a brief *introduction* of enforcement mechanisms is necessary to understand the dynamic relationship between the substantive law and employment practices as well as to appreciate the role the EEOC and its regulations, guidelines, and policies play in live controversies involving the three primary laws. Further, and at the applied level of practice, employers' corporate counsel probably draft and advise to avoid running afoul of the EEOC rather than taking a contrary position and hoping for a positive resolution after years of litigation at the Supreme Court. Litigation strategy probably changes, too, dependent on whether the litigation involves the EEOC or simply a private litigant. Any discussion of remedies is beyond the scope of this article.[423]

The Equal Employment Opportunity Commission (EEOC) was originally established by Title VII of the Civil Rights Act of 1964[424] and it now has full authority to enforce Title VII.[425] The ADA expressly adopts the same enforcement authority as the EEOC is granted under Title VII.[426] The ADEA, however, contains its own separate grant of enforcement, procedural, and remedial authority.[427] This distinction in the statutory

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423. For good general treatments of remedies available under Title VII, the ADA, and the ADEA *see, e.g.*, LINDEMANN & GROSSMAN EMPLOYMENT DISCRIMINATION LAW, *supra* note 72, Ch. 40 pp. 1741-75 ("Injunctive and Affirmative Relief"), Ch. 41 pp. 1775-59 ("Monetary Relief"), Ch. 42 pp. 1859-1915 ("Attorneys Fees"), Ch. 43 pp. 1915-47 ("Settlement"); MODJESKA, EMPLOYMENT DISCRIMINATION LAW, *supra* note 91, Ch. 12 ("Remedies" incl. reinstatement, front pay and back pay; compensatory, punitive, nominal and liquidated damages; injunctions), Ch. 13 ("Attorney's Fees"); LEWIS & NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE, *supra* note 144, Ch. 4 pp. 256-98 (Title VII remedies incl. a comparison of remedies available under Title VII and the ADEA), Ch. 10 pp. 518-19 (ADA remedies).

424. 42 U.S.C.A. § 2000e-4. It states, in pertinent part:

> There is hereby created a Commission to be known as the equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years.
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> . . .
>
> The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, . . . shall appoint . . . such officers, agents, attorneys, administrative law judges, and employees as he deems necessary to assist it in the performance of its functions . . .

42 U.S.C.A. § 2000e-4.

425. "Until 1972, its authority was limited to the investigation and attempted conciliation of charges of discrimination . . ." WARNER & MILLER, BNA-CPS number 40 *supra* note 91 at A-55 (citations omitted). Its specific authority is now codified at 42 U.S.C.A. § 2000e-5 ("Enforcement provisions"); § 2000e-6 ("Civil actions by the Attorney General" but that authority was also transferred to the EEOC in 1972, *see* § 2000e-5(b); § 2000e-8 ("Investigations"); § 2000e-9 ("Conduct of hearings and investigations . . .)."

426. 42 U.S.C.A. § 12117. Specifically: "The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission . . ." 42 U.S.C.A. § 12117(a).

427. 29 U.S.C.A. § 626. *See* MODJESKA, EMPLOYMENT DISCRIMINATION LAW, *supra* note

sources of the EEOC's enforcement authority is reflected in the structure of its regulations: Procedural regulations for the ADA and Title VII are combined in one part of the EEOC regulations[428] and procedures for ADEA enforcement are in a different part.[429]

Regardless of the bifurcated authority, however, an aggrieved employee is required to file a charge with the EEOC under and by any of the three acts.[430] Importantly, however, the EEOC has a coordination and deferral process for claims filed in locations where a state or local agency has concurrent jurisdiction over the subject matter of the charge. The time to file a claim is short, under some circumstances *less* than 180 days, so extreme care is in order on the part counsel.[431] The rather detailed deferral and timeliness issues relating to the charge are noted in the margin.[432] South Dakota has state law that prohibits employment discrimination on the basis of Title VII traits and disability.[433] Therefore, the deferral process

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91 at § 6.01 p. 6-2.

428. *See* 29 C.F.R. Part 1601 (entitled "Procedural Regulations"). The purpose section thereunder, for example, reads in part: "The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the *administration and enforcement of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990.*" 29 C.F.R. § 1601.1 (emphasis added). *Cf.* 29 C.F.R. Part 1602 ("Record keeping and Reporting Requirements Under Title VII and the ADA").

429. *See* 29 C.F.R. Part 1626 ("Procedures – Age Discrimination in Employment Act").

430. MODJESKA, EMPLOYMENT DISCRIMINATION LAW, *supra* note 91 at § 6.01 p. 6-2. There are EEOC offices in both Minneapolis and Denver but South Dakota is in the Denver district. The addresses for those two offices are: (1) Denver District Office, 303 East 17th Avenue, Suite 510, Denver, CO 80203 (303-866-1950); (2) Minneapolis Area Office, 330 South 2nd Avenue, Suite 430, Minneapolis, MN 55401 (612-335-4040).

431. *See generally* 42 U.S.C.A. § 2000e-5(e)(1) (Title VII and ADA claims); 29 C.F.R. § 1601.13 (Title VII and ADA); 29 C.F.R. § 1626.7 (ADEA, mirrors Title VII and the ADA).

432. As an introductory matter charges under the ADA and Title VII are "timely filed" if they are received by the EEOC "within 180 days from the date of the alleged violation." 29 C.F.R. § 1601.13(a)(1). If, however, the charges relate to a jurisdiction that has state or local law governing the same activity ("subject matter") the EEOC's deferral procedures apply. 29 C.F.R. § 1601.13(a)(3). Deferral simply means that the state or local agency has the exclusive right to process most "allegations" for the first 60 days after it is made unless that agency waives the exclusive right to process. 29 C.F.R. § 1601.13(3)(ii). After this exclusive 60 day period the EEOC "may" commence processing the allegation. *Id.*

The somewhat tricky part of the process is that *even if* the original allegation is lodged with the EEOC and is referred to the state agency, the EEOC may not "file" it as a charge for its purposes until the state has had its exclusive 60 day period (which may be shortened or waived by the state agency). *See* 42 U.S.C.A. § 2000e-5(c). Once the mandatory deferral to the state agency occurs the statute establishes a timeline that is different than the 180 day timeline that is applicable where no state agency has concurrent jurisdiction. The statutory language is:

> [E]xcept that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a state or local agency with authority to grant or seek relief from such practice . . . Such charge shall be filed by or on behalf of the person so aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the state or local agency has terminated the proceedings under the state or local law, whichever is earlier . . .

42 U.S.C.A. § 2000e-5(e)(1) (emphasis added). The general procedure for ADEA charges is very similar to the ones used under Title VII and the ADA. *See* 29 U.S.C.A. § 626(d).

433. *See supra* notes 328-29 and accompanying text (South Dakota protections similar to those under Title VII) *and* notes 268-69 and accompanying text (South Dakota protections similar to those of the ADA). The names of the appropriate agencies are included in the following note.

applies to claims under Title VII and the ADA. It does not have protections based on age; but, there is still (apparently) some coordination between the EEOC and the State of South Dakota under a different, and separate, ADEA provision.[434] Of course, these employee claim filing provisions spawn the entire panoply of general procedural issues common in many administrative settings.[435]

Once a charge has been filed with the EEOC by an "aggrieved person" an investigation will be conducted. The investigatory authority of the EEOC is similar under all three acts.[436] Thus, for example, the EEOC's regulations under the ADEA state that it may:

> (1) investigate and gather data; (2) enter and inspect establishments and records and make transcripts thereof; (3) interview employees; (4) impose on persons subject to the Act appropriate record keeping and reporting requirements; (5) advise employers . . . with regard to their obligations under the Act and any changes necessary in their policies, practices and procedures to assure compliance with the Act [and]; (6) subpoena witnesses and require the production of documents and other evidence . . .[437]

The primary purpose of the ADEA investigation is to gather enough information for the EEOC to determine whether there is a "reasonable basis to conclude that a violation of the Act has occurred or will occur."[438] The Commission (the EEOC) will then, as a general matter, either dismiss the charge or attempt to conciliate the parties.[439] The first step if the Commission concludes there is "a reasonable basis," is "informal conciliation, conference and persuasion."[440]

If the first step fails to result in a written agreement requiring the

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434. The ADEA regulation lists South Dakota among a list of states "to which only specified classes are referred." 29 C.F.R. § 1626.9(c). It is also possible that the South Dakota State and local agencies have entered into other work-sharing agreements with the EEOC "which authorize such agencies to receive charges and complaints . . . [under the ADEA]." 29 C.F.R. § 1626.10(b).

For purposes of the ADA and Title VII both the Sioux Falls Human Relations Commission and the South Dakota Division of Human Rights are listed in the regulations as "designated FEP [Fair Employment Practices] agencies." 29 C.F.R. § 1601.74(a) (in alphabetical order).

435. Illustratively, timeliness issues include "the 180/300—day limitations period," "deferral mistakes by charging parties; cure of such mistakes," "when has discrimination occurred?," "tolling of the charge-filing period," and timeliness of filing suit." LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at pp. xxxviii-xxxix (table of contents, Ch. 31 "Timeliness"). Two Supreme Court decisions have been released concerning EEOC filing procedure. *See*, Edelman v. Lynchburg College, __ U.S. __ 122 S.Ct. 1145 (March 19, 2002), National Railroad Passenger Corp. V. Morgan, __ U.S. __, 122 S.Ct. 2061 (June 10, 2002).

436. Under the ADEA: "The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter . . ." 29 U.S.C.A. § 626(a).

Compare, e.g., 29 C.F.R. § 1626.15 ("Commission enforcement"—ADEA), § 1626.16 ("Subpoenas"—ADEA) *with* 29 C.F.R. § 1601.16 ("Access to and production of evidence; testimony of witnesses; procedure and authority"—Title VII & ADA).

437. 29 C.F.R. § 1626.15 (ADEA regulations).

438. 29 C.F.R. § 1626.15(b). The nomenclature used for Title VII and the ADA is "reasonable cause" instead of "reasonable basis." *E.g.*, 29 C.F.R. § 1601.21 ("Reasonable cause determination: Procedure and Authority").

439. MODJESKA, EMPLOYMENT DISCRIMINATION LAW, *supra* note 91 at § 6.01 p. 6-2.

440. 29 C.F.R. § 1626.15(c) & (d) (ADEA).

employee "to eliminate the unlawful practice(s) and provide appropriate affirmative relief"[441] the "*Commission* may initiate and conduct litigation."[442] The ADEA, the ADA, and Title VII, however, all "preserve an individual's right to a private cause of action"[443] and under the ADEA enforcement scheme if conciliation fails the "charging party" is notified.[444] This notification allows "the charging party or any person aggrieved" to commence litigation if the EEOC declines to do so.[445]

The ADEA notification serves a very similar *function* as does a "letter of determination"[446] under the Title VII and ADA procedures. The letter of determination under Title VII and ADA procedures "shall inform" the charging party "of the right to sue in Federal district court within 90 days of receipt of the latter of determination."[447] Private suits may be brought individually or, *very generally*, as class actions. There are significant differences, however, concerning the availability of, and procedures applicable to, class actions under the different Acts.[448]

In addition charges may be filed by individual commissioners of the EEOC (usually on behalf of the Commission)[449] and the EEOC has authority, at least under Title VII and the ADA, to use the claim process "to investigate and act on a charge of a pattern or practice of discrimination."[450] The "pattern and practice" kind of discrimination is one

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441. 29 C.F.R. § 1626.15(c) (ADEA). The regulation for Title VII and the ADA use the term "negotiated settlement," 29 C.F.R. § 1601.20(a). It provides that the EEOC "may encourage the parties to settle the charge on terms that are mutually agreeable" and that the EEOC has authority and discretion to sign the agreement and become a party to it. *Id.* The EEOC need not sign the settlement; rather it can also act "to facilitate a settlement" between the claimant and respondent (employer). *Id.* at § 1601.20(b).

442. 29 C.F.R. § 1626.15(d).

443. WARNER & MILLER, BNA-CPS number 40, *supra* note 91 at A-57. It states: "Title VII, the EPA, the ADA, and the ADEA preserve an individual's right to a private cause of action. Despite the EEOC's authority to enforce the statutes, the vast majority of employment discrimination cases are brought by private litigants." *Id.* citing 42 U.S.C. § 2000e-5(f) (Title VII); 29 U.S.C. § 219(b) (EPA—"Equal Pay Act"); 42 U.S.C. § 12117 (ADA); 29 U.S.C. § 626(c) (ADEA) (footnotes omitted).

444. 29 C.F.R. § 1626.12.

445. *Id.*

446. 29 C.F.R. § 1601.19.

447. *Id.*

448. *E.g. compare* WARNER & MILLER, BNA-CPS number 40 *supra* note 91 at p. A-57 *et. seq* ("Title VII class actions") *with id.* at p. A-61 ("Class actions brought under the EPA and the ADEA"). *See generally* MODJESKA, EMPLOYMENT DISCRIMINATION LAW, *supra* note 91 § 6.14, p. 6-58 (Title VII class actions), p. 6-60 (ADEA class actions).

449. *See, e.g.*, 42 U.S.C.A. § 2000e-5(b) ("Whenever a charge is filed by . . . a person claiming to be aggrieved or by a member of the Commission . . ."); 29 C.F.R. § 1601.11 ("charges by members of the Commission").

450. 42 U.S.C.A. § 2000e-6(e). A prior subsection helps focus the purpose of "pattern and practice" authority:

> Whenever . . . [the Commission] has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, . . . [the Commission] may bring a civil action in the appropriate district court of the United States . . . (2) setting forth the facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice,

type of "systemic discrimination" that affects a number of individuals.[451] "These investigations are generally much more extensive and lengthy than individual investigations."[452]

The interplay between EEOC and private enforcement is more complicated than it might first appear and is illustrated by yet another recent Supreme Court case. The issue in *E.E.O.C. v. Waffle House, Inc.*, revolved around a mandatory arbitration agreement which was part of an employment application for a job at Waffle House signed by job applicant, Eric Baker.[453] Therein Baker agreed to "binding arbitration" concerning "any dispute or claim" involving his employment.[454] He was hired as a grill operator and about three weeks later he suffered a seizure at work and was discharged shortly thereafter.[455] Baker never sought to enforce the arbitration agreement "but he did file a timely charge of discrimination with the EEOC" alleging a violation of the ADA.[456] The EEOC investigated and conciliation failed. It then brought suit requesting the court to enjoin Waffle House's "past and present unlawful employment practices" and, here's the rub, "to order backpay, reinstatement, and compensatory damages" as well as "punitive damages for malicious and reckless conduct."[457]

Ultimately the Court reasoned that the EEOC's enforcement under the Act served a public purpose apart from merely "conducting litigation on behalf of private parties,"[458] that nothing in the ADA differentiated the authority of the EEOC concerning remedies available under the Act, and;

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as ... [the Commission] deems necessary to insure the full enjoyment of the rights described herein.

42 U.S.C.A. § 2000e-6(b) (bracketed material from *id.* at (c)).

The regulations provide for a public hearings procedure to further its broad investigatory and enforcement roles. *See*, 29 C.F.R. § 1601.17.

451. WARNER & MILLER, BNA-CPS number 40, *supra* note 91 at p. A-56.

452. *Id.* Relatedly, the EEOC claims intake procedure provides for a kind of *triage* of claims into three categories. The system was established in 1995 and has evolved since then. The first category includes those charges that appear, as a preliminary matter, as likely to be successful on the merits, are assigned a high priority under the national enforcement plan, and under which irreparable harm will be caused if enforcement action is not taken quickly. LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at Cum. Supp. p. 726; WARNER & MILLER, BNA-CPS number 40, *supra* note 91 at A-55. "The second category is reserved for cases where additional information is needed to determine whether the cases should be assigned to either the first or second category." LINDEMANN & GROSSMAN, *supra*, at Cum. Supp. p. 726 citing Priority Charge Handling Procedures, *reprinted in* 1 FEP Man. (BNA) 405: 7311-7314. The third category is for cases where the EEOC lacks jurisdiction, there are significant evidentiary and proof issues, or the case lacks merit for other reasons. *Id.*

Under the National Enforcement Plan, adopted by the EEOC in 1996, the highest priorities include, "cases that by their nature could have significant impact beyond the parties to the particular dispute" and "cases having the potential of promoting the development of law supporting the purposes of the statutes enforced by the EEOC." *Id.* citing National Enforcement Plan (Feb. 8, 1996), *reprinted in* DAILY LAB. REP. (BNA) at D-2 (Feb. 9, 1996).

453. *E.E.O.C. v. Waffle House, Inc.*, 543 U.S. 279, 122 S.Ct. 754 (2002).

454. *Id.* at 758.

455. *Id.*

456. *Id.*

457. *Id* at 759.

458. *Id.* at 761.

the purpose of the Federal Arbitration Act was "to place arbitration agreements on the same footing as other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'"[459] The EEOC was not a party to the arbitration agreement; therefore, it's authority to seek statutory remedies was not impaired.[460] The Court carefully stated that the issue in the case did reach "whether a settlement or arbitration judgment would affect the . . . character of relief the EEOC may seek" rather, simply, that a signed arbitration agreement to which it was not a party did not bind it.[461] *Waffle House* was a six to three decision.[462] The case, for present purposes, might also be seen as raising the topics of arbitration and waiver but those subjects are beyond the scope of this article and the narrow purpose of this part of the article is to provide a procedural context and enforcement backdrop to assess whether and when employee evaluation appraisals might be discriminatory employment practices under Title VII, the ADA, and the ADEA.[463]

IV. A RETURN TO FORD: A CORRELATIVE WHIRLWIND

This article began with a summary of the *Siegel Complaint* that alleged Ford Motor Company (FMC) unlawfully discriminated against nine individual plaintiffs.[464] The *Complaint* also requested class certification. Having completed and introductory analysis of the basic provisions of three of the primary federal legislative acts prohibiting employment discrimination it is now appropriate to return to the *Complaint.* The purpose of this part of the article is to correlate selected specific allegations contained in the *Complaint* to the appropriate provisions of federal private employment law discussed previously in this article. As such this part is more a concordance than an analysis. The purpose of analyzing the *Complaint* in this fashion is to catch a fleeting glimpse of law in application. The reason for attempting to do so is to better understand the dynamic nature of the law at an intermediate systems level somewhere between the micro level of technical legal detail and the macro level of policy analysis. This intermediate level of analysis is often lost in complexity given the astounding number of confounding technical

459. *Id.* at 764.

460. *Id.* at 766.

461. *Id.*

462. *Id.* Justice Thomas wrote a reasoned dissent with which Chief Justice Rehnquist and Justice Scalia joined.

463. The ADEA, for example, has a specific provision concerning waiver, 29 U.S.C.A. § 626(f). It requires, among other things, that the waiver be "knowing and voluntary," be in "exchange for consideration," and that the employee be given time to consider the agreement both *before* and *after* it is signed. *Id.*

The most recent case *directly* addressing the arbitration of employment contracts under the Federal Arbitration Act is *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S.Ct. 1302 (2001) (holding the phrase "or any other class of worker's engaged in foreign or interstate commerce" applies only to transportation workers for purposes of excluding such employment contracts from the Federal Arbitration Act). *See also Waffle House*, 122 S.Ct. 754.

464. *See Seigel Complaint supra* note 20 and accompanying text.

variables at one level and overwhelming policy issues at the other.

A few general matters of analytical methodology need to be reiterated. First, the *Siegel Complaint*, of course, contains only allegations and the issues raised are moot because they have been settled.[465] Second, FMC "vigorously defended" against the allegations and it "has denied all allegations of... discrimination and continues to deny the allegations."[466] Third, the *Complaint* alleges violation of the discrimination laws of the State of Michigan and did not allege violation of Title VII, the ADA, or the ADEA. Thus the *Siegel Complaint* is used hypothetically to analyze federal law almost exclusively.[467]

A natural starting point for analyzing federal employment discrimination is, paradoxically, the employment-at-will doctrine under state law. In its basic historical form both the employer and the employee are free to terminate the relationship with or without cause.[468] Its classic formulation is,

> [M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want to cause as the employer.[469]

This rule "has been uniformly recognized throughout the country"[470] and,

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465. *See supra* note 20-32 and accompanying text.

466. *Id.*

467. Some of the state statutes will be noted herein for comparative purposes. As a general matter, the law of many states not only contain protections similar to those in the federal law but do so using similar statutory language. This leads courts to try to interpret the laws consistently where possible. For example the Sixth Circuit (wherein lies Michigan) has stated that Michigan's Persons With Disabilities Civil Rights Act (PDCRA, also known as Michigan's Handicappers' Civil Rights Act or HCRA) "'essentially track' federal disability discrimination law." Hamlin v. City of Flint, 165 F.3d 426, 429 (6th Cir. 1999) citing Monette v. Electronic Data Systems Corp., 90 F.3d 1173 at 1178 n. 3 (6th Cir. 1996). In Fogelman v. Mercy Hosp. Inc., 283 F.3d 561 (2002) the Third Circuit stated:

> Because the anti-retaliation provisions of the ADA and ADEA are nearly identical, as is the anti-retaliation provision of Title VII, we have held that precedent interpreting any one of these statutes is equally relevant to the interpretation of the others... [citation omitted]. The language of the PHRA [Pennsylvania Human Rights Act] is also substantially similar to these anti-retaliation provisions, and we have held that the PHRA is to be interpreted as identical to federal anti-discrimination laws except where there is something specifically different in its language requiring it to be treated differently.

Id. at 567.

Of course, because the *Siegel Complaint* was filed under Michigan law it would require translation in the other direction (Michigan to federal as compared with federal to Michigan). Michigan precedent, again according to federal court, exists that holds, *e.g.*, "[c]ases brought pursuant to Michigan's Elliott-Larsen Civil Rights Act are analyzed under *McDonnell Douglas* framework used in Title VII cases." Terwillinger v. GMRI, Inc., 952 F.Supp. 1224 (E.D. Mich. 1997) affirmed 142 F.3d 436. Nevertheless Michigan courts are not *bound* by federal precedent. *See* Rasheed v. Chrystler Corp., 517 NW 2d 19 (Mich. 1994).

468. DAVID P. TWOMEY, EMPLOYMENT DISCRIMINATION LAW: A MANAGER'S GUIDE (5th ed) p. 201 (2002).

469. Payne v. Western & Atlantic R.R. Co., 82 Tenn. 507, 518-19 (1884); *see* Tims v. Bd. of Educ. of McNeil Ark., 452 F.2d 551, 552 (8th Cir. 1981) (employer "has the right to discharge an employee for good reason, bad reason, or no reason absent discrimination").

470. *Id.*

although it is now modified by a hand-full of narrow exceptions,[471] forms the backdrop to all analysis of employment law. In operation, the employment-at-will doctrine is the default rule unless a different specific law is determined to displace it. For purposes of this article, therefore, a working formulation would be: An employer may discharge or change the conditions relating to employment for good reason, no reason or bad reason unless that reason is unlawful discrimination under Title VII, the ADA or the ADEA.

The Siegel Complaint

It was described generally earlier in this article and, in turn, the allegations of three specific individual plaintiffs were delineated.[472] At long last this article returns to those descriptions in order to animate the legal superstructure of Title VII, the ADA, and the ADEA.

The three individual plaintiffs whose allegations will be discussed are Harold Siegel,[473] Dr. Sanaa Taraman[474] and Pamela Tucker.[475] *Count I* of the *Siegel Complaint* alleged disparate treatment discrimination on the basis of age both on their own and upon behalf of the class of similarly situated employees.[476] All three of the selected individuals joined in this

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471. *Id.* This particular source lists the evolving common law state exceptions, though in some states one or more of the exceptions are by statute, as follows:

> 1. The tort theory that a discharge violates established public policy (the so-called whistleblowing cases also are structured on public policy
> 2. The tort theory of abusive discharge
> 3. The contract theory of express or implied guarantee of continued employment except for just-cause terminations
> 4. The theory of an implied covenant of good faith and fair dealing

Id. See, ROTHSTEIN, CRAVER ET AL., EMPLOYMENT LAW *supra* note 141, Ch. 8, p. 671 *et seq.* ("Discharge").

472. *See supra* notes 41-54 and accompanying text. (Part II, A.) The three individual plaintiffs were selected by the author of this article for further discussion on the basis of the variety of individual facts alleged and because of the different claims made.

473. *See supra* notes 41-44; *Siegel Complaint*, *supra* notes 20, ¶ 14-28.

474. *See supra* notes 45-48; *Siegel Complaint*, *supra* note 20, ¶ 44-55.

475. *See supra* notes 49-53; *Siegel Complaint*, *supra* note 20, ¶ 97-113.

476. Again, this article is using the *Siegel Complaint* as a vehicle to discuss federal employment discrimination law even though it was brought under the Michigan Law. *See supra* notes 20-25 and accompany text. Age is the current topic of discussion of the text. The Michigan statute includes age as a protected trait in the Elliot-Larson Civil Rights Act which is structured more like Title VII than the ADEA. The statutory provision that includes age, *inter alia*, reads in relevant part as follows:

> Sec. 202. (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, *age*, sex, height, weight, or marital status.
>
> (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, *age*, sex, height, weight, or marital status.
>
> (2) This section shall not be construed to prohibit the establishment or implementation of a bona fide retirement policy or system that is not a subterfuge

count. It also alleged, in *Count II*, discrimination on the basis of age.[477] The general factual allegations are set forth previously.[478] Both *Count I* and *Count II* involve allegations that the PMP "was part of senior management's plan to eliminate older workers from FMC's workplace" which was reflected in senior management's public remarks.[479] The employee/claimants further alleged the performance criteria of the PMP was "rooted, in part, on negative stereotypical assumptions about older employees."[480]

More specifically, 69 year old plaintiff Harold Siegel claimed that after his refusal to accept a retirement package in 1997 he was guaranteed his grade level until January 2002 and in September 2000 he was informed he would receive a C under the PMP and forced to accept a temporary assignment. He was further told that FMC had no plans for Siegel's employment after December 31, 2000.[481] From January 1999 until September 2000 he claimed that his supervisor created a hostile work environment "by virtue of making age based jokes"[482] and repeatedly saying that the corporation wanted employees age 50 and over to leave the company. His supervisor did not assign him travel based on age stereotypes and his new manager told him that he could not improve his C ranking for 2000 during the last three months of the year. Siegel protested the ranking and in January 2001, as a result of an investigation, his ranking was upgraded to a B2. Siegel also alleged his former manager did not give him "clear objectives and interim reviews" as required by the PMP.

Analysis of Siegel's factual allegations under the ADEA begins with determining whether Siegel was covered by the Act. It is clear that FMC is an "employer" under the Act[483] and that Siegel is an employee under the Act.[484] Thus, the ADEA would cover the claims represented by the allegations. Further, he is protected by the ADEA because he was over the age of 40.[485]

Count I alleges a disparate treatment claim; thus, Siegel would have to prove intentional discrimination (animus)[486] by direct evidence[487] or under

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to evade the purposes of this section.

M.C.L.S. § 37.2202 (2001) (emphasis added). Compare M.C.L.S. § 37.2202 *with* 29 U.S.C.A. § 623 (the ADEA) discussed *supra* notes 320-49 and accompanying text; *and* 42 U.S.C.A. § 2000e-2(a) (Title VII) discussed *supra* notes 92-100 and accompanying text.

477. This article discusses only federal law even though the *Siegel Complaint* alleges unlawful employment discrimination under state law. Michigan case law allows both disparate treatment and disparate impact claims. *See, e.g.* Lytle v. Malady 579 NW 2d 908 (1998) (on rehearing).

478. *See supra* notes 41-54 and accompanying text.

479. *See Siegel Complaint*, *supra* note 20, at ¶ 14; *see generally*, the "Introduction" of this article (Part I).

480. *Siegel Complaint*, *supra* note 20, at ¶ 5.

481. *Id.* at ¶ 19.

482. *Id.* at ¶ 20.

483. *See supra* note 323 and accompanying text.

484. *See supra* note 324 and accompanying text.

485. *See supra* notes 326-29 and accompanying text.

486. *See supra* note 347.

487. *See supra* notes 141-56 and accompanying text.

the *McDonnell Douglas-Burdine* burden shifting test.[488] The comments by his supervisor from January 1999 to September 2000 were the only direct evidence of age discrimination alleged in the complaint.

Without more provable facts, which may or may not have been found in discovery, it appears that Siegel would need to avail himself to the *McDonnell Douglas-Burdine* test.[489] To establish a prima facie case, therefore, Siegel would need to produce enough evidence "to create an inference that an employment decision was based on" his age.[490] Again, the comments by Siegel's supervisor would be evidence in establishing the prima facie case. In addition the ageist comments by senior management reported in the press concerning the importance of youth and diversity would be helpful evidence for the ADEA claim. Moreover, any statistical evidence showing that the PMP disproportionately *impacted* those over 40 years of age would be relevant for the prima facie case under his individual disparate treatment then by making it more likely than not that FMC's employment action against Siegel, as an individual, was consistent with the overall *systemic* disparate treatment of older employees.[491]

Plaintiffs Taraman and Tucker would have a more difficult task to establish a prima facie case of individual disparate treatment, absent more discoverable facts, because the complaint does not allege that their raters made specific age based comments. Nonetheless, all three of these plaintiffs could use their good performance and ratings from previous years to help infer that there was something wrong with the appraisals for the year 2000.[492]

The next step in the *McDonnel Douglas-Burdine* test, assuming plaintiffs evidence would be sufficient to establish a prima facie case, would require FMC to produce evidence of a *legitimate nondiscriminatory reason* for the employment action taken. FMC would *probably* attempt to meet this burden of production by asserting that the action was taken on the basis of the PMP and, further, that the PMP was a neutral appraisal system that contained objective non-scored performance measures as well as subjective judgments by supervisors.[493] This is the juncture in the hypothetical federal case where the notion of *mixed-motive* would be analyzed using the *Price Waterhouse v. Hopkins* framework discussed previously.[494]

The burden of production would then shift back to the plaintiffs to show the PMP was a *pretext* for intentional discrimination based on age. In addition to the evidence used to establish the prima facie case, the

488. *Id.*
489. *Id.*
490. *See supra* notes 330 and accompanying text.
491. *See supra* notes 152-64.
492. *See generally* notes 41-54.
493. *See supra* notes 71-86 and accompanying text (discussing scored objective criteria, unscored objective criteria, and subjective criteria).
494. *See supra* notes 220-38 and accompanying text (discussing *Hopkins*).

plaintiffs could rely on evidence indicating the PMP allowed broad discretion in senior management to "create groups of comparators"[495] and to assign the grading task to "evaluating managers" even though "the evaluating manager [so assigned] is unfamiliar with the performance, experience, education or other attributes of the individual being evaluated." Relevant to this analysis both Siegel and Tucker allege that they were reassigned the last three months of 2000 and their performance those last three months would not count or, alternatively, could not overcome the grade for the first nine months of the year.[496] Further, it could also probably be argued that the implementation of the PMP was flawed because not all required meetings between graders and employees were held[497] and that the subjective judgments called for by the PMP allowed individual supervisor bias to infiltrate and skew the evaluation.[498]

All three of the plaintiffs being discussed would probably attempt to adduce evidence concerning the general allegation that:

> The PMP was designed and implemented to carry out this plan [to "youthenize" FMC].[499] The PMP is rooted, in part, on negative stereotypical assumptions about older employees. Examples of age based criteria are that older employees are "slow to embrace new learning opportunities and upgrade skills" or "reluctant to become involved in change initiatives."[500]

It is important, at this juncture, to avoid slipping into a disparate (adverse) impact analysis. Disparate treatment requires proof of discriminatory motive and the plaintiff's burden of persuasion is that the employer intentionally discriminated against the plaintiff.[501] Recall as well, the *McDonnell Douglas-Burdine* analysis is an *alternative* way to prove this motive in absence of a legally sufficient quantum of direct evidence to prove discriminatory motive.[502] This burden was clarified in *Reeves*, a very recent case, the Supreme Court clarified that under some circumstances the prima facie case plus disbelief of the employers preferred legitimate reasons for the action taken is sufficient to prove disparate treatment discrimination.[503] Finally the pleading in *Siegel*, although under state law, would implicate the ADEA pleading standards enunciated in *Swiekiewicz v. Sorema NA* in the hypothetical ADEA case.[504] Based on the allegations

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495. *Siegel Complaint*, *supra* note 20, at ¶ 9.
496. *See supra* notes 41-50.
497. *See, e.g.*, *supra* notes 41-54 and accompanying text.
498. *See supra* notes 71-86 and accompanying text.
499. The *Complaint*, in a separately numbered paragraph, stated:

> The PMP was part of senior management's plan to eliminate older employees from FMC's salaried workforce. Senior management, in public remarks, have expressed an intention to transform FMC from an environment dominated by "old" employees to an environment reflective of the company's younger consumer base.

Siegel Complaint, *supra* note 20, at ¶ 4.
500. *Id.* at ¶ 5.
501. *See supra* note 140.
502. *See supra* note 142.
503. Reeves v. Sanderson Plumbing Products Inc., 530 U.S. 133 (2000).
504. *See supra* notes 140-42.

in the complaint it does not *appear* that FMC could avail itself to the BFOQ defense for a number of reasons.[505] As a more general matter, age specific disparate treatment was illustrated by the discussion of *Hagen Paper Co. v. Higgins*.[506]

Count II of the complaint pled the disparate impact theory of age discrimination.[507] The complaint alleged as follows:

> Assuming that the PMP is found to be age neutral on its face, the implementation of the PMP nonetheless violates the . . . prohibition against age discrimination in that the allocation of "A," "B," and "C" rankings had a disparate impact on the evaluated employees on the basis of age. The PMP is neither job-related nor consistent with business necessity.[508]

The general discussion of disparate impact in this article was based on *Griggs v. Duke Power Co.* which was the first Supreme Court case that gave credence to the theory.[509] The disparate (adverse) impact theory of discrimination, unlike the disparate treatment theory, does not require discriminative motive or animus.[510] As previously discussed there are three key concepts at play in disparate impact cases.[511] First, as alleged in *Count II*, the employment practice must be shown to have a disparate impact on a protected trait.[512] For purposes of the current discussion the trait is age and the employment practice is the use of the PMP for a number of employment decisions (*e.g.*, promotion, merit pay[513]). Facts alleged in the complaint that would go toward proving disparate impact might include a strong statistical showing that employees over the age of 40 were treated in a negatively disproportionate way and that the PMP, for example, failed to identify appropriate categories of persons and jobs to compare.[514]

The second key concept under the disparate impact theory of discrimination concerns whether the employment practice (the PMP) meets the job related/business necessity standard. Again, this standard was discussed in the context of the discussion of *Griggs* where the high school diploma requirement was held to be an unlawful discriminatory practice.[515] The types of neutral employment practices that *might* result in disparate impact (though discussed in the context of both impact and treatment) are suggested in the comparison of *Smith v. City of Des Moines* and *Western Air Lines v. Criswell*.[516] The third, key concept associated with

505. *See generally supra* notes 141-48 and accompanying text.
506. *See supra* note 347.
507. *Siegel Complaint*, *supra* note 20, at ¶ 144; discussed generally *supra* notes 20-25 and accompanying text.
508. *Siegel Complaint*, *supra* note 20, at ¶ 144.
509. *See supra* notes 103-26 and accompanying text.
510. *See, e.g.*, *supra* note 124 and accompanying text.
511. *See supra* notes 160-75 and accompanying text.
512. *See supra* notes 161-65 and accompanying text.
513. *See generally Siegel Complaint*, *supra* note 20 at ¶ 12.
514. *See supra* note 162 and notes 104-24 and accompanying text.
515. *See supra* note 162 and accompanying text.
516. *See supra* notes 364-88 and accompanying text.

the disparate impact theory is whether there is an alternative employment practice that would not result in disproportionate impact. Many of the allegations contained in the complaint imply the second and third concepts but they are not plead with specificity. The kinds of evidence that would be the object of discovery, however, seems rather self-evident given the general discussion of disparate impact and age discrimination herein.[517]

One of the major hurdles for the three selected plaintiffs in *Siegel* under a hypothetical ADEA case is whether the ADEA allows the disparate impact theory cause of action for age discrimination. This issue was the sole issue on appeal in *Florida Power Co.*, but the Supreme Court stutter-stepped on the issue by dismissing cert.[518] Therefore, whether this theory states good grounds for recovery under the ADEA depends, in part, in the circuit in which the case would be brought.[519]

Plaintiff Harold Siegel, alone in *Count III* of the complaint, alleged that his supervisor assigned him a "C" grade in retaliation for an internal complaint Siegel made to FMC's Human Resources Department which accused the supervisor of age discrimination.[520] The statutory language of the ADEA prohibits retaliation "because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter."[521] The allegation contained in the complaint is under the first part of the language because the retaliation was alleged to be caused by information given by Siegel to FMC's Human Resources Department. *Counts IV and V* of the *Siegel Complaint* are individual claims made by Dr. Taraman and Ms. Tucker, respectively.[522] *Count IV* alleged Taraman was harassed because of her national origin, religion, and gender.[523] *Count V* alleged Tucker was discriminated against on the basis of disability.[524] Dr. Taraman was approximately 53 years of age when FMC allegedly discriminated against her. To reiterate the complaint as summarized previously; she is female (a basis for gender discrimination), Muslim (a basis for religious discrimination) and a native of Egypt (a basis for national origin discrimination) who "speaks with a foreign accent and wears clothing reflective of her national origin and religious beliefs."[525] Like the others, she had received good performance evaluations prior to the implementation of the PMP.[526] Gender, religion and national origin are

517. *See supra* notes 152-66 and 332-37 and accompanying text.
518. *See supra* note 345 and accompanying text.
519. *See supra* notes 389-413 and accompanying text.
520. *See supra* notes 461-65 and accompanying text.
521. 29 U.S.C.A. § 623(d) reproduced at *supra* note 461.
522. *See supra* notes 23-24 and accompanying text and 47-54 and accompany text.
523. *Siegel Complaint*, *supra* note 20, at ¶ 153.
524. *Id.* at ¶ 157-62.
525. *Id.* at ¶ 47; *see supra* notes 45-48.
526. *See generally*, *supra* notes 41-54 and accompanying text.

protected traits under Title VII.[527] Discrimination on the basis of age is unlawful under the ADEA.[528] The Complaint contains no additional or specific factual allegations different than those of Siegel under the age discrimination complaint.

In addition to stating a claim for employment discrimination on the basis of gender, religion, and national origin; however, Dr. Taraman also alleges "a severe and pervasive hostile work environment."[529] As in her age discrimination claim; she does not allege specific facts concerning her hostile work environment claim. Without specific factual allegations to which to apply Title VII, analysis of the claims is not possible except to note the previous general discussion the law of employment discrimination on the basis of religion, national origin and gender.[530] Dr. Taraman's harassment claim, too, is briefly mentioned in the previous discussion.[531] The only additional information provided in the complaint for present purposes is that she claimed "hostile work environment" sexual harassment and not *quid pro quo* sexual harassment.[532]

Finally, in addition to the age claims alleged with the others, Tucker alleges violation of the *Persons With Disabilities Civil Rights Act* under Michigan law.[533] She alleged that she "was a qualified individual with a disability because she had a history of a determinable physical characteristic (MS) or was regarded as having a determinable physical characteristic or had a physical condition which subsequently limited one or more of her major life activities, including walking and working."[534] Her specific allegations were outlined previously but, in a nutshell, she was on medical leave when she was told by her supervisor that she would receive a "C" rating under the PMP and as a result, she transferred to another position in FMC during the last three months of 2000.[535]

Her disability allegations closely track the definition of "disability"

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527. *See supra* note 172-98.

528. *See supra* note 322-27 (ADEA).

529. *Siegel Complaint, supra* note 20, at ¶ 153-43.

530. *See supra* notes 185-87 and accompanying text (national origin), notes 188-97 and accompanying text (religion), notes 198-237 (sex).

531. *See supra* note 231.

532. *See supra* note 237.

533. The Michigan provision prohibiting employment discrimination based on disability is as follows:

> (1) *The opportunity to obtain employment*, housing, and other real estate and full and equal utilization of public accommodations, public services, and educational facilities *without discrimination because of a disability is guaranteed by this act and is a civil right.*
>
> (2) Except as otherwise provided in article 2, *a person shall accommodate a person with a disability for purposes of employment*, public accommodation, public service, education, or housing *unless the person demonstrates that the accommodation would impose an undue hardship.*

M.C.L.S. § 37.1102 (2001) (emphasis added). The Persons With Disabilities Civil Rights Act, M.C.L.S. § 37.1101 *et. seq.*, is also known as the "Michigan Handicappers' Civil Rights Act" (*see, e.g.*, Marsh v. Department of Civil Service, 433 NW 2d 820 (Mich. App., 1988). *Siegel Complaint, supra* note 20.

534. *Id.* at ¶ 159.

535. *See supra* notes 46-52 and accompanying text.

under the ADA which defines disability as (1) "a physical or mental impairment that substantially limits one or more of the major life activities;" (2) has a "record of such impairment;" or (3) is "regarded as having such an impairment."[536] Tucker's claimed disability status under (3), immediately preceding, is echoed by her factual allegation that her supervisor told her upon his notification that she had been diagnosed with MS "that for some time he had suspected that something was physically wrong with her based on his own observations of Tucker occasionally losing her balance."[537] Of course, in the past two years the Supreme Court has decided several cases specifically addressing the definition of "disability" which are discussed in some detail in the portion of this article that introduces the ADA.[538] Assuming that Tucker could have met her burden of proof that she was "an individual with a disability;"[539] she would still need to prove that she was a "qualified individual."[540]

A qualified individual "means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[541] There is no allegation that Tucker requested an accommodation which is generally required unless an employer is aware of the employee's disability or the individual has a known disability.[542] On the other hand, Tucker implicitly alleges that she was at all times qualified for the positions because she alleges that she received a "C" rating even though she was doing her job satisfactorily.[543] Moreover, her supervisor "could not provide her with any concrete rationale" for the rating.[544] At trial under the ADA, *Count V* would have represented an interesting dialectic between the ADA and the PMP because Tucker, on one hand, would need to show that she could perform the "essential functions" of the job to be a qualified individual under the Act.[545] On the other hand, FMC could argue that the PMP evaluated her under those functions; that her rating evidenced she could not perform those functions; and that she neither requested reasonable accommodation, nor was she known to be, disabled requiring FMC to provide those accommodations without such a request. Tucker, then, might proceed to attempt to prove discrimination under a theory that the PMP was pretextual by using the *McDonnell Douglas-Burdine* analysis for indirect proof of discrimination.[546] Such a course of proof would nicely

536. *See supra* notes 265-67 and accompanying text.
537. *Siegel Complaint*, *supra* note 20, at ¶ 102.
538. *See supra* notes 239-316 and accompanying text. An example of case discussions include, *e.g.*, *Toyota v. Williams*, 534 U.S. 279 122 S.Ct. 681 (2002) *supra* note 280 *et seq.* and accompanying text.
539. *See supra* notes 246-57and accompanying text.
540. *See supra* notes 146-51and accompanying text.
541. *See supra* notes 295-304 and accompanying text.
542. *See supra* note 307.
543. *Siegel Complaint supra* note 20, at ¶ 108.
544. *Id.*
545. *See supra* notes 23, 41-54 and accompanying text.
546. *See generally*, supra notes 130-56 and accompanying text.

illustrate the complexity caused by the ADA's reasonable accommodation as a confounding variable to the *McDonnell Douglas-Burdine* test.[547] The employer's undue hardship defense[548] was not anticipated by the *Siegel Complaint*.[549] Of course, as repeatedly stated previously, FMC and the plaintiffs settled this litigation under the law of Michigan.[550] Understanding employment discrimination issues in the appraisal process requires going beyond the micro level hypothetical analysis of the *Siegel Complaint* because employment discrimination typically involves both business and policy issues. It is helpful, therefore, to view FMC's decision-making process *outside* the litigation regardless of whether its behavior was *prompted* by litigation risk, was *caused* by threatened litigation, or was taken independent of the litigation. A brief timeline pieced together from newspaper articles illustrates the interplay of all these issues. Indeed focusing on the interplay is an intermediate level of analysis separate and distinct from either a technical legal analysis or a policy analysis. This level is the environment in which business decisions are made.

FMC's PMP (performance management process) was implemented in late 1999 by CEO Jacques Nasser and "was designed to help the automakers reward standouts and identify poor performers."[551] It was modeled after personnel policies at General Electric Corp. which were championed by GE's former CEO Jack Welch."[552] The *original Siegel Complaint* was filed in *February 2001*, and amended in *April 2001*.[553] In *July 2001* "national and Detroit media reported that AARP attorneys were joining the case as co-counsel [for plaintiffs]."[554] A "few days later," according to a story on a wire service that appears to be an AARP press release, "Ford announced that it was abandoning the PMP system as it was established."[555] The "new modified system" no longer used letter grades A through C but instead used categories labeled "top achievers," "achievers," and "improvement required."[556] The announcement further stated that FMC "would no longer require managers to rank a certain percentage of employees in the lowest tier."[557]

"Many at Ford thought that Nasser's aggressive push to hire and promote women and minorities forced supervisors to give the majority of

547. *Id.*

548. *See generally, supra* notes 20-25 and accompanying text.

549. *See generally, Siegel Complaint, supra* note 20.

550. *AARP: Court OKs $10.6 Million . . .*, U.S. Newswire, *supra* note 28 (Mar. 14, 2002; 2002 WL 4575383).

551. Mark Truby, *Another Nasser policy to be scrapped at Ford*, THE DETROIT NEWS, Ap. 23, 2002, at B1, 2002 WL 18056120.

552. *Id.* The cover of *The Economist* recently showed a statute of Welch, fallen and broken. The accompanying story was entitled "Fallen idols." *Fallen idols*, THE ECONOMIST, May 4, 2002, p. 11.

553. *See* Siegel et.al. v. Ford Motor Co., No 01-102583-CL, *supra* note 20

554. *AARP: Court OKs $10.6 Million . . .*, U.S. Newswire, *supra* note 28.

555. *Id.*

556. *Id.*

557. *Id.*

C grades to order white males."[558] Bill Ford, Jr., became chair and CEO after Nasser's resignation on October 30, 2001, and Bill Ford, Jr., "promised to make settlement of the law suits a priority" shortly thereafter.[559] Settlement negotiations, however, "were under way before Nasser's resignation."[560] Joe Laymon (who joined FMC's human resources department only in early 2000) was promoted to Vice President of Human Resources when David Murphy "was fired along with Nasser in October 1999."[561] He reportedly moved "quickly to patch-up battered employee relations after a tumultuous year of discrimination lawsuits and sagging morale."[562] The parties in the *Siegel* case reached a settlement agreement in *December 2001.*

Early in 2002, CEO Bill Ford, Jr., asked Laymon "to review the . . . PMP program and recommend changes."[563] By the end of January 2002, Laymon suggested (1) the PMP name would be changed because it "has such a negative connotation;" (2) that "compensation for top managers "would no longer be tied to meeting diversity goals;" (3) that there would be no forced percentage ranking of employees; but (4) "the revised employee evaluation policy he presents to Bill Ford in the next few weeks will preserve the best of PMP, which requires supervisors to set clear objectives for employees, assess them against these goals and provide regular feedback."[564]

Two quotes from Laymon probably bear repeating as harbingers of business culture in the near term: (1) "I do have a problem with arbitrarily stating from the comforts of my office . . . that you have to have 10 percent of your employees who didn't meet your expectations. There is something fundamentally wrong with that," and; (2) "We don't have quotas here. On my watch, if you perform exceedingly well, you will do well at Ford Motor Co. Meritocracy should be the reason a person moves up in this company."[565]

In *mid-March 2002* the court granted final approval of the litigation settlement and Laymon was expected "to ask the company's policy board . . . to approve a plan that calls for scrapping the name Performance Management Process and undertaking other changes to foster better communication between managers and their supervisors." A FMC spokeswoman stated, "This comes as a result of listening to employees."[566]

Again the timeline is not meant to imply any *causation.* The

558. Truby, Another Nasser Policy To Be Scrapped, *supra* note 26.

559. Ed Garsten, *Judge Approves $10.5 Million Settlement in Ford Discrimination Suits*, The Associated Press, Mar. 15, 2002 (printed from www.law.com).

560. *Id.*

561. Truby, *V-P Tackles Evaluation Policy*, THE DETROIT NEWS, Jan. 30, 2002 (2002 WL 14870003).

562. *Id.*

563. Truby, *Another Nasser Policy To Be Scrapped, supra* note 26.

564. Truby, *V-P Tackles Evaluation Policy, supra* note 561.

565. Truby, *Another Nasser Policy Scrapped, supra* note 26.

566. *Id.*

correlation of activities within the courtroom, and outside it, however, show a far richer picture of the activity surrounding the PMP. FMC used terminology in its public statements that suggested fairness was a key component in the new employee performance appraisal system and its relationship with employees. The importance of the ability of businesses to assess employees, and make economically sound decisions with minimal litigation risk, is itself a necessity for business prosperity. The *Siegel* litigation, therefore, can be seen as much a symptom of what at root was a flawed non-legal business decision concerning employee appraisal. The appraisal process requires ongoing business decisions and those decisions are never settled like a single piece of litigation. As one of the newspaper articles reported: "Laymon's skills will be tested at Ford, which is cutting 21, 500 jobs and closing five plants as part of a restructuring plan . . . ."

V. CONCLUSION

Employee performance appraisals are valuable management tools that, when used correctly, can increase the profits of the organization through gains in efficiency and by aligning individual employee goals and organizational goals. Dependant on the type of appraisal used, performance appraisal has the potential of becoming a strategic planning tool that helps determine organizational goals through a dyadic process. At the very least, a well designed process helps assure minimum fairness in the allocation of merit compensation, bonuses, and promotion. It may also help identify weaker employees and legally protect employers by providing objective criteria for lay-offs and terminations.

The terms "employer," "employee," "individual" and "claimant" as used by the primary sources of law and in the legal and business literature are sterile clinical terms that betray the *humanness* of employment. It is this humanity that helps explain some of the litigation in the area of performance appraisals. The Adams Theory, for example, posits that a sense of justice or unfairness is a strong motivator for certain types of people who are often drawn to management positions.[567] Almost anyone who has struggled with transactional law or litigation, however, also implicitly understands that fairness is often in the eyes of the beholder. The quote from Professor Sullivan in the introduction to this article squarely hits a common sense principle which seems to be supported by management research.[568] Recall he suggested that "anyone who gets a low grade is likely to view the process as unfair;" after all, "'A' students love grades; 'F' students hate grades."[569]

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567. *See supra* note 67 and accompanying text.

568. "Research has investigated the underlying cognitive structures involved in the performance appraisal process." CLEGG, HARDY, NORD, HANDBOOK OF ORGANIZATIONAL STUDIES, *supra* note 68 at 323. A number of studies have found that "actors" (employees being reviewed) "attributed performance failures to external factors beyond their control while observers attributed failures to internal factors [under the actors' control]." *Id.* at 324.

569. *See supra* note 18 and accompanying text.

The primary purpose of this article is to provide a relatively basic discussion of Title VII, the ADEA and the ADA animated by the dynamics of the real world through the use of facts alleged in a real-world complaint[570] arising from applied business policy. Though the bulk of the article discusses the basic provisions and jargon of employment discrimination law, it is the illustrative interrelationship of the law and facts working together (or against one another) that provide its most important lessons. Moreover, there is some value added even in the rather pedestrian discussion of the law, alone, because it provides a broad overview and because it identifies of many of the most recent Supreme Court pronouncements in the private employment discrimination area.[571] If nothing else, the brief discussion of these cases illustrates the dynamic nature at the more abstract level of the law itself and *its intersection* with policy.

The purpose and design of this article, therefore, is concurrently too overinclusive and too underinclusive to result in a short doctrinal conclusion or statement. That is, part of the purpose of the article was observational research at the systemic level and the systemic level is different than, and should be distinguished from, the policy level. In that regard it is *hoped* that the article, at least by implication, raises more issues and generates more questions than it answers while providing enough law and citation for those uninitiated in employment discrimination law to begin independent research.

Notwithstanding the foregoing, certain rather unremarkable (and unoriginal) platitudes about employee performance appraisals may be induced or interpolated from the body of this article. Thus, for example, if scored tests play a role in the appraisal they should, if possible, be validated. If validation is not possible, the tests should, to the extent possible, measure only criteria that are job related.[572] Likewise, non-scored objective criteria should be reviewed for job relatedness and business

570. *See supra* parts IIA ("The Complaint Against Ford") and IV ("A Return to Ford: A Correlative Whirlwind").

571. *See e.g.*, *Reeves*, 530 U.S. at 137 (2000) (ADEA burden of proof); Swiekiewicz v. Sorema Naa, 534 U.S. 506, 122 S.Ct. 992 (2002) (pleading of particular facts not required); Sutton v. United Airlines, Inc., 527 U.S. 476 (1999) (EEOC authority to promulgate regulation; definition of disability); Board of Trustees of Univ. of Alabama, 531 U.S. 356, 121 S.Ct. 955 (2001) (state sovereign immunity and the ADA); Toyota v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002) (definition of disability); U.S. Airways, Inc. v. Barnett, __ U.S.__, No. 00-1250 (April 29, 2002), 2002 WL 737494 (reasonable accommodation) discussed supra note; Adams v. Florida Power Corp., 255 F.3d 1322 (11th Cir. 2001), *cert. granted* 122 S.Ct. 643 (2001), *cert. dismissed* 122 S.Ct. 1290 (2002) (disparate impact claims in ADEA cases).

572. *See* LINDEMANN & GROSSMANN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72, Ch. 5, pp. 115 *et seq.* A human resources newsletter suggested: (1) "Conduct a job analysis, and study each job. It's important to base performance appraisals on essential job functions;" (2) Jobs seldom (if ever) consist of more than five to eight essential functions. Essential functions are those critical to the effective execution of the job's role in the organization;" (3) Performance standard and behavior of employees should link directly with the essential functions in order for those standards to qualify clearly as 'job related.'" *10 Tips On Performance Appraisals*, IOWA EMPLOYMENT LAW LETTER, Feb. 1999.

necessity.[573] Such a review may also help align the measurement dimension (metric) with the organizational goals. So, for example, *Griggs* instructs care needs to be exercised in using diploma requirements and other educational and licensure requirements in hiring and promotion. Further, if tasks performed require physical strength, strength itself should be measured rather than using proxies or derivative measures (like height and weight) which might have a disparate impact on protected traits like gender or national origin.[574] The same general advice applies to the use of prior experience or job tenure measurement if only current performance is being assessed.

The use of subjective criteria is probably unavoidable, if not necessary, in assessing managerial and professional employees. If possible, however, the appraisal should still continue to use objective factors and measures to support subjective evaluations.[575] Such supporting information helps refute prima facie cases under both the disparate impact and disparate treatment theories of discrimination. Relatedly, the employer should attempt to use observable behaviors and performance factors and take special care to avoid the use of broad "personal traits, vague, or attitudinal terms"[576] like the express use of gender specific terms in *Price Waterhouse v. Hopkins* which were used without any attempt by management to mitigate or shape the comments into non-discriminatory terms.[577]

More positively, the existence and use of internal guidelines about the parameters of subjective judgment helps avoid many of the problems that may occur in the use of subjective criteria.[578] Such guidelines also help avoid measurement errors and help in keeping unrecognized biases to creep into the appraisal.[579] Such guidance also helps assure more consistent results across evaluators and between departments.[580] Avoiding biases like

573. *See supra* notes 74-77 and accompanying text; LINDEMANN & GROSSMANN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72, Ch. 6, pp. 173 *et seq.*

574. *See supra* notes 172-236 and accompanying text.

575. SHAWE & ROSENTHAL, EMPLOYMENT LAW DESKBOOK, *supra* note 91 at § 5.02[2] pp. 5-2; LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at Cum. Supp. p. 95.

576. LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at Cum. Supp. p. 93.

577. *See supra* notes 220-38 and accompanying text. A human resources newsletter suggested: (1) "Monitor the performance appraisal system for possible disparate impact on older workers, women, and minorities. With the use of salary ranges, ongoing company ratio analysis can spot disparate treatment instantly;" (2) "Write performance appraisals (as well as written warnings) with this question in mind: How will this appraisal look when projected on an 8' x 10' screen in front of a jury?" *10 Tips On Performance Appraisals*, *supra* note 572.

578. *See*, GROSSMAN & LINDEMANN, EMPLOYMENT DISCRIMINATION LAW, *supra* note 72 at Cum. Supp. p. 93. A human resources newsletter suggested: "Make satisfactory completion of performance appraisal responsibilities part of the appraiser's own performance review." *10 Tips On Performance Appraisals*, *supra* note 572.

579. *See supra* notes 220-38 and accompanying text.

580. *See supra* notes 71-77 and accompanying text. At least somewhat relatedly, a human resources newsletter suggested: "It is difficult to discriminate between levels of qualitative performance if you go beyond three or four levels. Complex and numerous rating levels weaken appraisal defensiblity and reduce internal consistency." *10 Tips On Performance Appraisals*,

the central bias[581] and documenting the appraisals provides good legal evidence for future employment actions like lay-off, termination or promotion,[582] but as importantly provides data to improve the business decision itself. Further, it is particularly important to "provide employees with notice of work deficiency"[583] and provide employees an opportunity with which to agree or disagree with their appraisals.[584] The latter two suggestions directly address the perception of unfairness in the process that the Adam's Theory posits is a strong motivator among managerial employees.[585] It recognizes that evaluators are humans who make mistakes and giving the employee a chance to correct those mistakes may avoid future law suits and improve the quality of the assessment reflected in the appraisal. Such an opportunity may encourage or initiate the revision of the job description to better reflect the job on which the legal analysis of job relatedness, and business necessity begins.[586] Indeed a valid job description is probably *necessary* where the employer is relying on the BFOQ defense to disparate treatment[587] and it provides valuable administrative and business strategy information to the employer. Finally, customer surveys and peer or subordinate surveys or evaluations need to be monitored for bias. For example, it was quite clear in *Southwest Airline* that customer preference alone is a defense to employment discrimination only in the narrowest of circumstances where "genuineness" is required as the essence of the business.[588]

The derivation of a check list of suggestions and platitudes concerning employee performance appraisals is not the primary purpose of this article and any checklist so derived is at best incomplete, because a basic understanding of the private federal employment discrimination law dynamic enables a much finer grain and more professional analysis than the rote use of a checklist. In that regard, almost any list generated is unremarkable and pales in comparison and importance to understanding

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supra note 572.

581. *Id.*

582. SHAWE & ROSENTHAL, EMPLOYMENT LAW DESKBOOK, *supra* note 91 at § 5.02[4] at p. 5-6.

583. *Id.* at § 5.02[1] p. 5-3.

584. *Id.* at § 5.02[5] p. 5-7.

585. *See supra* notes 67-69 and accompanying text.

586. *See generally* notes 69-70 and accompanying text. Again, somewhat relatedly, a human resources newsletter suggested: "While it is not necessary to design a form for each and every job, a single format is unlikely to fit all jobs in a larger organization—one possible exception: a narrative format." *10 Tips On Performance Appraisals*, *supra* note 572.

587. *See generally* notes 145-53 and accompanying text.

588. *See supra* notes 209-14 and accompanying text. An interesting issue relating to "customer surveys" occurs in the assessment of classroom teaching in higher education. The issue concerns the use of anonymous student surveys which purport to measure both teaching performance and course effectiveness. At many institutions such surveys are the sole criteria of teaching performance for purposes of retention, promotion, and tenure as well as being components of merit compensation awards and critical in lateral hiring. Are these surveys customer surveys? Many are not statistically validated and there is virtually no instruction given students on their use. Some very tentative suggestions were offered in "Final Report," *Ad Hoc Law School Committee (USD) on Teaching Evaluation 2001*, Tom Geu, Chair & Ed., April 2000 (avail. from USD Law School, Office of the Dean) (committee is divided on recommendations).

of the law at a deeper level.

Perhaps the biggest conclusion generated by this article is that the lawyer and the business person, in the long run, do not have conflicting policy positions in the design and implementation of the best possible performance appraisal process. The reasonable business person pursues profit through the efficient allocation of resources within the firm. The reasonable business person, therefore, seeks accurate measurement of employee performance. Aligning the performance appraisal process with the firm's strategic goals should increase profit. From the business perspective, bias and mismeasurement are inefficient and economically irrational.[589] Happily, too, a well designed employee performance process minimizes the risk of employment discrimination litigation and furthers the public policy goals which employment discrimination law attempts to implement.

589. After all, FMC changed its appraisal system. *See supra* notes 551-57 and accompanying text.