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Reasonable Factors Other Than Age: The Emerging Specter of Ageist Stereotypes

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REASONABLE FACTORS OTHER THAN AGE: THE EMERGING SPECTER OF AGEIST STEREOTYPES

By Judith J. Johnson*

I. Introduction

It is beyond question that ageism plays a particularly pernicious role in the workplace. Older workers face widely held societal stereotypes that they are cognitively, socially, and performatively deficient in the workplace. They are also the targets of ageist attitudes, ageist communication, and age discrimination.¹

In spite of two recent Supreme Court cases that apparently reinstated a more expansive interpretation of discrimination under the Age Discrimination in Employment Act (ADEA), the protection that the ADEA affords could still be in the same danger that threatened it before these decisions. The courts, including the Supreme Court, have been allowing the employer to interpose defenses that correlate so strongly with age that they could be used as thinly veiled covers for discrimination based on ageist stereotypes.² If the Court is serious in enforcing the purpose of the ADEA, the “reasonable factor other than age” [RFOA] defense must be interpreted to protect older employees from discrimination based on age stereotyping by requiring the employer to justify using criteria for employment decisions such as greater seniority,³ higher position⁴ or salary⁵.

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¹ Robert McCann and Howard Giles, Ageism in the Workplace: A Communication Perspective, AGEISM STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 188 (ed. Todd D. Nelson (2002)).
² See infra § V.B.2..
³ See, e.g., City of Jackson, 544 U.S. 228, 242-43 (2005).
⁴ Id.
higher healthcare costs\(^6\) proximity to retirement\(^7\) or retirement status.\(^8\) The ADEA was designed to preclude or at least require that these factors be closely scrutinized.\(^9\)

The Supreme Court has now agreed that the ADEA was designed to attack practices that have a disparate impact on older employees, unless such practices are justified by a “reasonable factor other than age.”\(^10\) The Court has also decided that RFOA\(^11\) is an affirmative defense, as to which the employer bears the burden of persuasion;\(^12\) however, the Court has indicated that RFOA will not be difficult to prove,\(^13\) and lower courts are so holding.\(^14\)

Prior to these recent Supreme Court cases, but after a case decided by the Court in 1993, *Hazen Paper v. Biggins*,\(^15\) lower courts had begun to implement unprecedented restrictions on protections previously afforded by the ADEA. Of the four common court-imposed restrictions, the first was refusing to apply the disparate impact theory to the ADEA, thus limiting proof of discrimination to disparate treatment,\(^16\) which is difficult

\(^6\) Id. It should be noted that the employer may provide less in healthcare costs for older workers. See infra note 66.
\(^9\) See infra text accompanying notes 134-52.
\(^12\) Meacham v. Knolls Atomic Power Laboratory, 128 S. Ct. 2395 (2008).
\(^13\) See infra discussion accompanying notes 129-32.
\(^14\) See infra § V.B.2.
\(^16\) See infra text accompanying notes 123-27.
for the employee to prove. 17 Second, those courts that continued to apply the disparate impact theory to the ADEA failed to recognize that the defense to disparate impact should be, not a watered-down version of business necessity, 18 but RFOA. 19 Third, most courts applying disparate impact, whatever defense they applied, assigned the burden of persuasion to the plaintiff throughout the case. 20 Fourth, factors that obviously correlated with age were no longer considered impermissible but were actually accepted as defenses to the ADEA. 21 The first three of these restrictions have been removed. Disparate impact applies to the ADEA, and the defense is RFOA, as to which the employer bears the burden of persuasion. The fourth restriction, allowing a selection criterion that correlates with age to be a defense, however, has not been resolved and could be the issue that makes these recent victories for plaintiffs fairly meaningless.


18 See infra text accompanying notes 196-99 for an explanation of Wards Cove v. Atonio, 490 U.S. 642 (1989) that modified the business necessity defense; § V.B.2 for cases that applied Wards Cove to the ADEA.

When RFOA should be interposed as a defense, other than in disparate impact cases, is beyond the scope of this article. As I discussed in two other articles on the RFOA defense, whenever the employee presents substantial proof of discrimination, such as when the employer uses age-correlated criteria, he should have to bear the burden of persuasion to show RFOA. Judith J. Johnson, Rehabilitate the Age Discrimination in Employment Act: Resuscitate the “Reasonable Factors Other Than Age” Defense and the Disparate Impact Theory, 55 HASTINGS L. J. 1399, 1430 (2004) (Hereinafter Rehabilitate); Judith J. Johnson, Semantic Cover For Age Discrimination: Twilight of the ADEA, 42 WAYNE L. REV. 1, 64-68 (1995) (Hereinafter Semantic Cover). The employer should also have to bear the burden of persuasion to prove RFOA in cases of mixed motive and cases of widespread disparate treatment similar to pattern or practice cases, as well. See Johnson, supra at 64-66. [Rehabilitate] for an explanation of these theories. Justice Thomas agrees that RFOA should function in disparate treatment cases. Meacham v. Knolls Atomic Power Laboratory, 128 S.Ct. 2395, 2407-08 (2008) (Thomas, J., concurring in part and dissenting in part).


20 See infra text accompanying note 99.

21 See infra § V.B.2.
In *Smith v. City of Jackson* the Supreme Court decided that the disparate impact theory applies to the Age Discrimination in Employment Act.\(^\text{22}\) The Court, however, went further and decided an issue that had not been presented, that RFOA would be the defense to disparate impact.\(^\text{23}\) The Court further held, however, with little analysis, that RFOA precluded liability in the *City of Jackson* case.\(^\text{24}\) Subsequently in *Meacham v. Knolls Atomic Power Laboratory*, the Court decided that RFOA is an affirmative defense, as to which the employer bears the burden of persuasion, but gratuitously noted that it may make little difference to the outcome.\(^\text{25}\) The question not answered by these cases is what does RFOA mean?

No arguments were presented in either case regarding the meaning of RFOA,\(^\text{26}\) and there was no reference to any authority on the meaning of RFOA.\(^\text{27}\) Consequently, the Court’s unexplained pronouncement in *City of Jackson* that the defendant’s justification was reasonable leaves the meaning of RFOA uncertain.\(^\text{28}\) Before *Meacham* the lower courts on the basis of *City of Jackson* generally put the burden of persuasion on the employee and required very little to establish RFOA, so that disparate impact cases under the ADEA were bound to fail.\(^\text{29}\) Even though the Court decided in *Meacham* that

\(^{22}\) 544 U.S. 228, 240 (2005).
\(^{23}\) 544 U.S. at 239.
\(^{24}\) 544 U.S. at 241-42.
\(^{25}\) See infra text accompanying notes 112-14.
\(^{26}\) See infra note 106 & text accompanying note 131.
\(^{27}\) See City of Jackson, 544 U.S. at 242-43; Meacham, 128 S.Ct. at 2403.
\(^{28}\) See infra § III. C.
\(^{29}\) See infra § V.B.2.
the employer bears the burden of persuasion to show RFOA,\textsuperscript{30} it was insinuated that RFOA would not be difficult for the employer to prove.\textsuperscript{31}

As Justice Scalia pointed out in his concurrence in \textit{City of Jackson}, this is a perfect case for deferring to the agency’s interpretation of the ADEA.\textsuperscript{32} The agencies interpreting the ADEA have always equated RFOA with factors that are shown to predict success in the job.\textsuperscript{33} All of the early interpretations of the ADEA were consistent with this interpretation\textsuperscript{34} and that factors that are "inherently time-based, such as experience, years on the job, and tenure . . . are inherently age-related and thus [could not] be considered 'factors other than age.'"\textsuperscript{35} As I pointed out in an earlier article, many superficially reasonable employer practices impact older employees and make it difficult for them to retain and/or obtain employment.\textsuperscript{36} For example, in a reduction in force, if the employer decides to cut costs by eliminating higher salaried workers, this inevitably has a negative impact on older workers who have been employed longer and benefited from raises over the years. If the older worker is then laid off, he may have difficulty obtaining new employment because he is considered overqualified and, to match his

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\textsuperscript{30} 128 S. Ct. at 2402.
\textsuperscript{31} \textit{See infra} notes 112-14 and accompanying text.
\textsuperscript{32} \textit{City of Jackson}, 544 U.S. at 243 (Scalia, J., concurring). The EEOC is currently the agency responsible for administering the ADEA. See \textit{infra} note 139
\textsuperscript{33} \textit{See infra} text accompanying notes 138-44. The Department of Labor was originally responsible for administering the ADEA. The EEOC has the current responsibility. See \textit{infra} note 139.
\textsuperscript{34} \textit{See infra} note 142.
\textsuperscript{35} Mack A. Player, \textit{Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is A Transplant Appropriate?} 14 U. Tol. L. Rev. 1261, 1278 (1983). Professor Player also thought that RFOA as here defined should be the defense to disparate impact cases under the ADEA. \textit{Id.} at 1278-83.
\textsuperscript{36} \textit{See Johnson, supra} note 18, at 1400 [\textit{Rehabilitate}]
former salary, overpaid. 37 Being able to use the disparate impact theory to prove that higher salary adversely impacts older employers and putting the burden of persuasion on the employer to show RFOA does not alleviate the problem. If the employer may interpose higher salary as an RFOA, the older worker is no better protected than he was before City of Jackson and Meacham. While saving money is clearly an RFOA, the employer should not be able to defend the disparate impact on older employees by interposing as an RFOA a method of cutting costs that obviously correlates with age, without further justifying the use of such a factor.

The ADEA was passed in 1967 because, as Congress noted, the number of unemployed older people in the workforce was becoming a serious problem and that it was caused in large part by age discrimination. 38 The legislative history of the ADEA indicates that Congress recognized that some older persons were not able to perform because of age-related problems, so employers should be able to make decisions based on an individual employee's incapacity to perform a particular job. 39 In order to make it clear that disabilities caused by the aging process that affect job performance would be a valid disqualification, Congress created the defense of "reasonable factors other than age." 40 Current research challenges the assumption that age-related incapacity is prevalent, and consequently even the Congress passing the ADEA may have been acting on incorrect assumptions regarding older people.

37 Id.
40 Id.
Therefore, after 40 years another view of age discrimination should also figure into the development of the law of RFOA. Since the ADEA was enacted in 1967, social scientists have extensively studied the phenomenon of age discrimination. They have concluded that, although old age is a category we will all arrive at if we survive, it is a category that younger people are generally prejudiced against. Older people are no longer seen as fonts of wisdom, but rather they are seen as less competent, even if endearing and warm. These prejudices lead to older people being viewed less positively in interviews and thus less likely to be hired. They are seen as less trainable, resistant to change, less promotable, and expected to perform less ably. It has been found that the origin of this prejudice against old people is in large part based on our fear of our own mortality. In addition, the authors of these studies also note that stereotypical views that older workers should retire and make way for the young fuel stereotypical attitudes and discrimination. Because the negative attitudes about older

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41 See AGEISM STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 188 (ed. Todd D. Nelson (2002)).
42 See Becca R. Levy and Mahzarin R Banaji, Implicit Ageism, AGEISM supra note 41, at 49.
43 Amy J.C. Cuddy and Susan T. Fiske, Doddering but Dear: Process, Content, and Function in Stereotyping of Older Persons, AGEISM, supra note 41, at 9-10. The authors attribute this phenomenon to modernization that has increased the size of the older population; retirement, which has removed older people from prestigious jobs; technological advances that have produced jobs that older people are not trained for; urbanization that has divided younger people from older family members and public education, which has removed the need for the wise elder to pass on the culture. Id. at 12-13.
44 Id. at 18.
45 Id. at 1. See Jeff Greenberg, Jeff Schimel and Andy Martens, Ageism: Denying the Face of the Future, AGEISM, supra note 41, at 27 for a complete discussion of this cause of age discrimination.
46 McCann and Giles supra note 1, at 176.
people are not based on a strong hatred, negative views of older people are more acceptable.\footnote{Levy & Banaji, supra note 42, at 50-51. See Joann M. Montepare and Leslie A. Zebrowitz, A Social-Developmental View of Age\textsc{ims}, AGE\textsc{ism}, supra note 41, at 77 for a discussion of how these attitudes develop.}

The surprising fact is that most generalizations about the effect of aging are unfounded. Numerous studies have found that brain activity in healthy people does not differ substantially between ages 20 and 80. The only major change in intellectual capacity is in speed and reaction time. “Nevertheless, stereotypical beliefs about the mental decrements of older individuals are ubiquitous and well-documented in the research literature.”\footnote{McCann and Giles supra note 1, at 166.} In addition “[i]n contrast to widely held stereotypes that depict older workers as chronically absent and injury prone, the research literature on absenteeism and workplace injuries suggests quite a different story.”\footnote{McCann and Giles supra note 1, at 167.}

With regard to the stereotypes that older workers are unable to cope with change, literature shows that older workers are comparable to younger workers in their ability to be re-trained.\footnote{Id. at 169. Studies have found a negative or insignificant correlation between age and absenteeism. Employers rate older employees more highly in terms of reliability and dependability. Id. at 169-70. The studies show a tradeoff in on the job accidents. Younger workers are more accident-prone, while older workers take longer to recover. Id. at 170.}

Also,
several studies show a non-existent or even a slightly positive correlation between age and job performance.\(^{51}\)

Age discrimination was not included in Title VII because it was “different.”\(^{52}\) The assumption was that some age distinctions were accurate because of failing faculties.\(^{53}\) Now that social scientists have refuted many of these assumptions, it is interesting to note that the ADEA itself was based on inaccurate stereotypes. Age discrimination has been considered less invidious,\(^{54}\) but an argument can be made that it is more insidious than other types of discrimination because it is more acceptable.\(^{55}\)

What this should mean to courts is that the common age-correlated factors being used to discriminate against older employees should be even more carefully scrutinized. In the

\(^{51}\) Id. at 172. Output of older employee has been found to be equal to younger employees; that older workers are more accurate and steadier in their performance.\(^{52}\) See City of Jackson, 544 U.S. at 241, in which the Court recognized that Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. To be sure, Congress recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact. However, as Secretary Wirtz noted in his report, “certain circumstances ... unquestionably affect older workers more strongly, as a group, than they do younger workers.” Wirtz Report 11. Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group. Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII. While the ADEA reflects Congress' intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference.

\(^{53}\) Id.
\(^{54}\) See Kaminshine supra note 39, at 306-07.
\(^{55}\) See supra text accompanying note 47.
midst of a recession with more lay-offs and retirement accounts plummeting,\textsuperscript{56} discrimination against older people will be even more devastating.

This article will examine the possible meanings of RFOA and suggest that any employment criterion that predictably correlates with age, either stereotypically or in fact, should require more proof to justify its use. Section II will briefly describe the ADEA generally; Section III will examine the recent Supreme Court cases that have addressed RFOA. Section IV will explore the possible meanings of RFOA by reviewing the hierarchy of employment discrimination defenses. Section V will fit RFOA into the hierarchy and investigate how the courts have recently been interpreting RFOA. Section VI will explain the solution I am suggesting, and Section VII will conclude.

\textbf{II. The ADEA generally}

The ADEA was passed shortly after Title VII.\textsuperscript{57} Title VII prohibits discrimination based on race, sex, religion, color and national origin.\textsuperscript{58} During the debates on Title VII, Congress had pondered including age as a prohibited basis for discrimination but decided instead to refer the issue of age discrimination to the Secretary of Labor for study.\textsuperscript{59} As a response to this referral, the Secretary issued the “Wirtz Report,” in which he noted that

\begin{footnotesize}
\begin{enumerate}
\item \textit{See 110 Cong. Rec. 2596-99; 9911-13; 13,490-92 (1964).}
\end{enumerate}
\end{footnotesize}
age discrimination was a serious problem. The result of the report was the passage of the ADEA in 1967.

The ADEA prohibits employment discrimination based on age against persons over the age of 40. The prohibitions against age discrimination in the ADEA were taken word for word from Title VII of the Civil Rights Act of 1964, so the ADEA, on its face, provides the same basic protections from discrimination based on age for people over 40 that Title VII provides based on race, sex, religion, color and national origin.

The ADEA provides:

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 individual's age.

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.


63 See City of Jackson, 544 U.S. at 233-34 (citing Lorillard, A Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 584 (1978)).

The principal differences between the two acts are in the remedial provisions and some of the defenses. As opposed to Title VII, the remedial provisions of the ADEA were drawn from the Fair Labor Standards Act and provide for liquidated damages for willful violations. Some defenses to the ADEA, such as the bona fide occupational

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, PUB. L. NO. 90-202, 8 Stat. 602 (codified as amended in scattered Sections of 29 U.S.C.) “Except for substitution of the word “age” for the words “race, color, religion, sex, or national origin,” the language of that provision in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII).” City of Jackson, 544 U.S. at 233.

AGE DISCRIMINATION IN EMPLOYMENT ACT, codified at 29 U.S.C. § 626(b) (1990). The Supreme Court has held that the violation is willful if "the employer. . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.” Trans-World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985).

65 The defenses provide in pertinent part:

It shall be unlawful for an employer, employment agency, or labor organization--
(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;
(2) to take any action otherwise prohibited under subsection (a), (b), (c) or (e) of this section--
(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual; or
(B) to observe the terms of a bona fide employee benefit plan--
(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, Title 29, Code
qualification (BFOQ) and seniority defenses, are also available under Title VII; however, Congress added other defenses to the ADEA that were not found in Title VII. These include any action that the employer takes based on "reasonable factors other than age" [RFOA] or pursuant to a bona fide benefit plan, as well as discipline or discharge for good cause.


There are defenses under Title VII that are not contained in the ADEA as well, such as action taken pursuant to a merit system or a system that measures quantity or quality of production or a professionally developed test. 42 U.S.C. § 2000e-2(h) (1988).

See infra note 66 for full text of defenses.
Although the Court has also considered differences between the Acts to be significant, because of the similarities in the statutes, Title VII has often been the source for the meaning of discrimination for the ADEA and vice versa. The Supreme Court identified two theories of discrimination under Title VII, disparate impact and disparate treatment. Disparate treatment discrimination occurs when the employer intentionally treats persons of different protected classes differently while disparate impact discrimination occurs when the employer uses an unjustified neutral employment practice that has a disparate impact on a protected class. Because of the similarity between Title VII and the ADEA, both theories were originally applied to the ADEA; however, whether the disparate impact theory developed under Title VII applied to the ADEA became controversial for some time. Further questions were (1) if disparate impact applied to the ADEA, what defense would apply, business necessity, as under Title VII, or RFOA, a defense provided under the ADEA and not under Title VII; and (2) does the

69 See City of Jackson, 540 U.S. at 240; Meacham, 128 S. Ct. at 2406.
70 See Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985); Monce v. City of San Diego, 895 F.2d 560, 561 (9th Cir. 1990); MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 517 (1988); Kaminshine, supra note 39, at 231.
75 See Johnson, supra note 18, at 1408-09. [Rehabilitate]. After Hazen Paper, the courts ceased to apply the disparate impact theory to the ADEA. See Smith v. City of Jackson, 544 U.S. at 236-37 and discussion infra accompanying notes 119-25. However, City of Jackson recognized that the theory does apply to the ADEA. See Section III. A.
76 See Johnson supra note 18, at 48-52. [Semantic Cover].
employer bear the burden of persuasion to prove the defense? The Court resolved those issues in the two cases described below.

III. Recent Supreme Court Cases

A. Smith v. City of Jackson

In Smith v. City of Jackson the Supreme Court decided that the disparate impact theory applies to the ADEA, primarily because the language of the ADEA was taken word for word from Title VII, the origin of the disparate impact theory. The Court decided, however, that the plaintiff had failed to pick out the criterion causing the disparate impact. The Court also opined with little or no analysis that the criteria used by the City were “reasonable factors other than age,” which precluded liability in any event.

The City of Jackson case involved a pay plan initiated by the City of Jackson, Mississippi. The plan resulted in police officers with less than five years of service receiving proportionately more in raises. Most of the officers in the protected class had

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77 544 U.S. at 233-34. The Court had unanimously decided that the disparate impact theory applied to Title VII, so the same language in the ADEA could not be interpreted to exclude the theory. Id. at 234. In addition the Court noted that because the defense of “reasonable factors other than age” provides additional support that Congress intended to proscribe employment criteria that had a disparate impact unless they were “reasonable.” Id. at 239. Finally the regulations promulgated by both agencies that administered the ADEA support the view that the disparate impact theory applies to the ADEA. Id. at 239-40.

The decision is a plurality decision; however, Justice Scalia concurred in the judgment that disparate impact applies to the ADEA, but based his conclusion on the reasonableness of the agency interpretation. 544 U.S. 243 (Scalia, J., concurring). In other words, five justices agreed that disparate impact applies to the ADEA. The issue is no longer in doubt because the opinion in Meacham was joined by a majority of the Court. See infra text accompanying note 95.

78 544 U.S. at 241.

79 544 U.S. at 242-43.
more than five years of service. The Court decided that although disparate impact is cognizable under the ADEA, the plaintiffs had failed to prove their case.

The Court said that there were two textual differences between the ADEA and Title VII that indicate that liability under the disparate impact theory should be narrower under the ADEA than it is under Title VII. The first was that the 1991 Civil Rights Act amended Title VII to codify the disparate impact theory and to modify *Wards Cove v. Atonio*. Because the 1991 Amendments did not apply to the ADEA in this regard,

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80 544 U.S. at 231.

The plan divided each of five basic positions—police officer, master police officer, police sergeant, police lieutenant, and deputy police chief—into a series of steps and half-steps. The wage for each range was based on a survey of comparable communities in the Southeast. Employees were then assigned a step (or half-step) within their position that corresponded to the lowest step that would still give the individual a 2% raise. Most of the officers were in the three lowest ranks; in each of those ranks there were officers under age 40 and officers over 40. In none did their age affect their compensation. The few officers in the two highest ranks are all over 40. Their raises, though higher in dollar amount than the raises give to junior officers, represented a smaller percentage of their salaries, which of course are higher than the salaries paid to their juniors. They are members of the class complaining of the “disparate impact” of the award.

Petitioners evidence established two principal facts: First, almost two-thirds (66.2%) of the officers under 40 received raises of more than 10% while less than half (45.3%) of those over 40 did. [footnote omitted] Second, the average percentage increase for the entire class of officers with less than five years of tenure was somewhat higher than the percentage for those with more seniority. [footnote omitted] Because older officers tended to occupy more senior positions, on average they received smaller increases when measured as a percentage of their salary.

*Id.*

81 *Id.*

82 544 U.S. at 240. See *infra* text accompanying notes 196-99 for an explanation of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which modified the business necessity defense and, inter alia, required the plaintiff to bear the burden of persuasion throughout the case.
*Wards Cove* applies to the ADEA. In *City of Jackson*, the plaintiffs had failed to comply with the *Wards Cove* requirement of identifying “the specific test, requirement or practice within the pay plan” that was causing the disparate impact.

The second textual difference, the existence of the defense of RFOA in the ADEA and not in Title VII, requires that RFOA be the defense to a disparate impact case. The Court said that, unlike race and the other classifications protected under Title VII, age may have relevance to a person’s ability to do the job. Thus, some criteria that adversely affect older workers more than younger workers may be used if they are reasonable. In addition to determining that the plaintiffs had failed to identify the criterion causing the disparate impact, the Court said that the City of Jackson’s reason for implementing the pay plan was an RFOA.

The basic explanation for the differential was the City’s perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market. Thus, the disparate impact is attributable to the City’s decision to give raises based on seniority and position. Reliance on seniority and rank is unquestionably reasonable given the City’s goal of raising employees’ salaries to match those in surrounding communities. In sum, we hold that the City’s decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a “reasonable factor other than age” that responded to the City’s legitimate goal of retaining police officers.

The Court then diluted the effect of disparate impact in another respect and, that is, by declaring the inapplicability of the part of the business necessity test that asks whether there are less discriminatory alternatives. The Court said that RFOA does not

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83 *Id*. See *infra* text accompanying notes 196-99 for a further discussion of *Wards Cove*.
84 544 U.S. at 241.
85 544 U.S. at 240.
86 544 U.S. at 240-41.
87 544 U.S. at 241.
88 544 U.S. at 242-43.
include such an inquiry.  

“While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable.”

Justice Scalia agreed with the plurality’s rationale but would have used it as a basis for deferring to the reasonable views of the EEOC in this regard. The ADEA gives the EEOC the authority to make rules and regulations, which it did. The regulation provides

When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a ‘factor other than’ age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity.

The concurrence noted that the regulation reflected the longstanding position of the Department of Labor, which had originally administered the Act, and that the EEOC had taken this position in several proceedings. The concurrence concluded that the EEOC’s interpretation of the statute is reasonable and entitled to deference.

Two important issues remained after City of Jackson: Who bears the burden of persuasion regarding RFOA; and what does RFOA mean? After City of Jackson, the lower courts were split on whether the employee bears the burden of persuasion throughout the case or whether RFOA is an affirmative defense, which has to be proven by the employer. The Court in the next case decided in favor of the plaintiff again.

B. Meacham v. Knolls Atomic Power Laboratory

89 Id. at 243.
90 Id.
91 Id.
92 Id. at 244 (citing 29 C.F.R. § 1625.7(d) (2004)).
93 Id.
Meacham v. Knolls Atomic Power Laboratory,\textsuperscript{95} involved a reduction in force (RIF) at an atomic power laboratory in which of the 31 salaried employees affected by the RIF, 30 were in the protected age group.\textsuperscript{96} They contended, inter alia, that the RIF had a disparate impact in violation of the ADEA.\textsuperscript{97} The employees’ statistical expert showed that some of the criteria chosen to determine who would be laid off were causing the disparate impact. The jury found for the employees on the disparate impact claim. The Court of Appeals reversed, holding that the employees had not carried the burden of persuasion to the show that the plan was not reasonable.\textsuperscript{98} The Supreme Court disagreed.\textsuperscript{99}

The Court based its decision on the text of the ADEA, pointing out that the ADEA’s prohibitions against discrimination are followed by exemptions for employer practices that would otherwise be prohibited.\textsuperscript{100} The RFOA is one of those exemptions, along with BFOQ that has always been held to be an affirmative defense, as to which the

\textsuperscript{95} Meacham, 128 S. Ct. 2395. Justice Souter wrote the opinion for the majority of six, as opposed to the City of Jackson opinion in which only four members of the Court joined. City of Jackson, 544 U.S. at 229. Only Justice Thomas dissented, still believing that disparate impact does not apply at all to the ADEA. However, he concurred that RFOA is an affirmative defense in disparate treatment cases. 128 U.S. at 2407 (Thomas, J. concurring in part and dissenting in part). Justice Scalia concurred in the judgment, 128 S. Ct. at 2407 (Scalia, J., concurring), and Justice Breyer took no part in the case. 128 S. Ct. at 2407.
\textsuperscript{96} Id. at 2398.
\textsuperscript{97} Id. at 2398-99. The employees also alleged disparate treatment, but the jury did not find for them on that claim, and they did not pursue it. Id. at 2399-2400.
\textsuperscript{98} The procedure was more complicated than this. In fact in its first opinion, the Court of Appeals affirmed the jury’s verdict. The Supreme Court vacated and remanded in light in the intervening City of Jackson decision. The Court of Appeals then reversed the jury verdict because it had been based on a showing of no business necessity, rather than no RFOA. Id. at 2400.
\textsuperscript{99} 128 S. Ct. at 2402.
\textsuperscript{100} Id.
employer bears the burden of persuasion. The Court applied the principle of statutory construction that those who claim an exception must prove it. There was no reason to believe that Congress intended otherwise.

The Court also noted that in enacting the ADEA, Congress had drawn on the Fair Labor Standards Act, especially the equal pay provisions of that act. The Court had formerly recognized the undesirability of departing from consistent interpretations of the two Acts. Thus, treating RFOA as an affirmative defense was further bolstered by the fact that the Equal Pay Act defense of “any other factor other than sex” was treated as an affirmative defense.

The employer argued that RFOA means any factor other than age, whether reasonable or not, which the Court rejected as having been resolved by City of Jackson, which decided that classifications based on non-age factors that have a disparate impact on older workers can be actionable. The question for RFOA is whether the non-age factor is reasonable. The Court noted that a reasonable factor may nevertheless lean more heavily on older workers.

101 128 S. Ct. 2401.
102 128 S. Ct. 2400.
103 128 S. Ct. 2401.
104 128 S. Ct. at 2401. The Court also noted that Congress had rejected its decision that another of the ADEA’s defenses was not an affirmative defense. Congress had legislatively overruled that case, stating that the action was necessary to restore its original intent to regard the defense of bona fide employee benefit plan as an affirmative defense. Congress then changed the introductory language to that defense to conform it to the BFOQ and RFOA defenses. 128 S. Ct. at 2401-02.
105 128 S. Ct. at 2402-03.
106 128 S. Ct. at 2403. It should be noted that the Court declined to grant certiorari on the meaning of RFOA, so this issue was never argued. 128 S. Ct.2400 n.8.
The employer argued that *City of Jackson* had applied the *Ward’s Cove* burdens of proof to the ADEA. The Court said that the employer was over-reading *City of Jackson* and that the only parts of *Ward’s Cove* that applied in *City of Jackson* to the ADEA were the existence of disparate impact liability and the application of the burden of identifying the particular practices causing the disparate impact. The Court then emphasized the requirement imposed by *City of Jackson*, relying on *Wards Cove*, that the employee must identify the particular practice causing the disparate impact, and that citing a generalized practice as the plaintiffs had in *City of Jackson*, is insufficient. Further the Court suggested that placing the burden of persuasion on the defendant will be important only in cases in which the reasonableness of the non-age factor is obscure.

The Court opined that the lower court had had no hesitation in accepting the employer’s defense in this case and said that whether putting the burden on the employer would change the outcome would be up to the lower court. The Court concluded that Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the RFOA clause into the ADEA “significantly narrow[ing] its coverage.”[citing *City of Jackson*] And as the outcome for the employer in *City of Jackson* shows, “it is not surprising that

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107 In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court, inter alia, held that the business justification defense for Title VII had to be disproved by the plaintiff. Congress later codified the business necessity defense as an affirmative defense to Title VII to specifically overrule this decision. *See infra* discussion accompanying notes 196-99.

108 128 S. Ct. at 2404-05.


111 128 S. Ct. at 2406.

112 128 S. Ct. at 2406-07.
certain employment criteria that are routinely used may be reasonable despite
their adverse impact on older workers as a group.”

Even after two Supreme Court cases applying RFOA, there is no clear answer as
to what it means. The dictum from City of Jackson and Meacham does not bode well for
a restrictive meaning of RFOA, however. Nevertheless, since the issue of the meaning
of RFOA has not been properly before the Court, there is still hope that the Court will
interpret RFOA as originally intended.

C. Where has the Supreme Court left us with regard to the meaning of RFOA?

Three Supreme Court cases have been important in the development of the RFOA
defense. Two of these cases, Hazen Paper v. Biggens, and City of Jackson, led to
confusion in the lower courts that the Court has had to correct regarding the application
of RFOA. In addition to compounding the confusion concerning application of RFOA,
both cases, along with the Meacham case, have added to the confusion about the meaning
of RFOA. Most importantly, in none of these cases was the issue of the meaning of the
RFOA presented.

113 128 S. Ct. at 2406 (citing City of Jackson).
114 See supra text accompanying notes 88-90 and 112-13.
115 See infra § IV.A.
supra note 18, at 1412-1416. [Rehabilitate]
WL 1434965, at *10-13 (2008) (Appellate Petition, Motion and Filing)
118 See Johnson supra note 18, at1433; & supra note 106.
In Meacham, 128 S. Ct. 2400 n.8 the Court noted that

Petitioners also sought certiorari as to “[w]hether respondents' practice of
conferring broad discretionary authority upon individual managers to decide
which employees to lay off during a reduction in force constituted a ‘reasonable
factor other than age’ as a matter of law.” Pet. for Cert. i. We denied certiorari on
this question and express no views on it here.
The confusion began in 1993 with *Hazen Paper v. Biggins*, in which the Court said that the defense to discrimination under the ADEA was *any* factor other than age, without referring to the RFOA defense.\(^{119}\) This could be interpreted to mean that the disparate impact theory did not apply to the ADEA, even though the Court said it was addressing intentional discrimination, not disparate impact.\(^{120}\) *Hazen Paper* was a disparate treatment case in which the plaintiff contended that being discharged to prevent his pension from vesting was intentional discrimination based on age.\(^{121}\) The Court said that pension-vesting and age, while correlated, were not perfectly correlated, so the plaintiff must prove more than that he was discharged because his pension was about to vest.\(^{122}\)

Despite the fact that the Court clearly said it was not deciding whether disparate impact applied to the ADEA,\(^{123}\) the lower courts clutched at language from *Hazen Paper* to hold that disparate impact did not apply to the ADEA.\(^{124}\) The lower courts also found further support in the concurrence to *Hazen Paper*, which opined that there were

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\(^{119}\) 507 U.S. at 611.  
Thus the ADEA commands that “employers are to evaluate [older] employees ... on their merits and not their age.” [citation omitted]. The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly. When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is.

\(^{120}\) 507 U.S. at 611.  
\(^{121}\) 507 U.S. at 609.  
\(^{122}\) 507 U.S. at 611-12.  
\(^{123}\) 507 U.S. at 610.  
\(^{124}\) See Johnson *supra* note 18, at 1416 n.101. [Rehabilitate]
substantial arguments why disparate impact did not apply to the ADEA.\(^{125}\) Neither the issue of the meaning of RFOA nor disparate impact was argued in *Hazen Paper*.\(^{126}\) Nevertheless, most lower courts held after *Hazen Paper* that the disparate impact theory did not apply to the ADEA.\(^{127}\)

In *City of Jackson* the Court decided that the disparate impact theory applies to the ADEA and that RFOA is the defense, but that the burdens of proof articulated in *Wards Cove v. Atonio*, also apply to the ADEA.\(^{128}\) From this and other loose language in *City of Jackson*, most of the lower courts that considered the issue held that the plaintiff must bear the burden of persuasion to refute RFOA\(^ {129}\) and that almost any employer justification will suffice,\(^ {130}\) even though, again, the issue of RFOA had not been presented in *City of Jackson*.\(^ {131}\)

Now, although the Court in *Meacham* has said that the employer bears the burden of persuasion, it has also implied that RFOA will not be difficult to prove,\(^ {132}\) again reaching out to foreshadow issues not argued in the case. Because of these interpretations of RFOA, lower courts have already begun to find the employer’s

\(^{125}\) 507 U.S. at 618 (Kennedy, J., concurring).
\(^{126}\) See supra note 106 & discussion accompanying notes 112-114.
\(^{127}\) See Johnson *supra* note 18, at 1416-n.101. [Rehabilitate]
\(^{128}\) *City of Jackson*, 544 U. S. at 240. See infra discussion accompanying notes 196-99 for a discussion of *Wards Cove*.
\(^{129}\) See infra § V.B.2.
\(^{130}\) Id.
\(^{131}\) “This case does not call on the Court to decide any issue beyond whether disparate impact claims are ever cognizable under the ADEA. See Pet. i. It presents no questions relating to the elements of a disparate impact claim, the defenses that might be available to employers, or the allocation of burdens of proof between the parties. The lower courts can and should address those issues in the first instance, consistent with Congress’s intent that the statute should be given a practical construction.” *Smith v. City of Jackson*, Petr.’s Brief, 2004 WL 1369172, *3 (2004).
\(^{132}\) *Meacham*, 128 S. Ct. at 2406-07.
justification reasonable, even if it is obviously correlated with age.\textsuperscript{133} The next section will explore the possible meanings of RFOA.

IV. Divining the Meaning of RFOA Using an Historical Perspective of Defenses to Employment Discrimination Claims

A. History of RFOA

Before the decision in \textit{Hazen Paper v. Biggins},\textsuperscript{134} discussed above,\textsuperscript{135} the prevailing view was that to be an RFOA, the factor could not be correlated with age.\textsuperscript{136} Thus, factors that are "inherently time-based, such as experience, years on the job, and tenure . . . are inherently age-related and thus [could not] be considered 'factors other than age.'"\textsuperscript{137} The Secretary of Labor, who reported on the necessity for the ADEA\textsuperscript{138} and who administered the ADEA in its early days,\textsuperscript{139} issued guidelines shortly after the Act

\begin{itemize}
  \item \textsuperscript{133} See infra Section V. B. 2.
  \item \textsuperscript{134} 507 U.S. 604 (1993).
  \item \textsuperscript{135} See supra discussion accompanying notes 119-26.
  \item \textsuperscript{136} See infra cases cited note 142; Player, supra note 35, at 1278.
  \item \textsuperscript{137} Player, supra note 35, at 1278. Professor Player also thought that RFOA as here defined should be the defense to disparate impact cases under the ADEA. \textit{Id.} at 1278-83. See Kaminshine \textit{supra} note 39, at n.131 for studies correlating age, seniority and compensation.
  \item \textsuperscript{138} See supra text accompanying notes 59-61.
  \item \textsuperscript{139} The EEOC took over administration of the ADEA and retained the Secretary of Labor’s interpretation of RFOA. Kaminshine, \textit{supra} note 39, at 302-03. See Howard Eglit, \textit{The Age Discrimination in Employment Act’s Forgotten Defense: The Reasonable Factors Other Than Age Exception}, 66 B.U. L. REV. 155, 195 (1986) (citing 29 C.F.R. § 860.103(e) (1985) (rescinded)).
\end{itemize}

The EEOC position before and after \textit{City of Jackson} is as follows:

Differentiations based on reasonable factors other than age.

(a) Section 4(f) (1) of the Act provides that

\begin{itemize}
  \item it shall not be unlawful for an employer, employment agency, or labor organization to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section where the differentiation
\end{itemize}
was passed. These guidelines provided that to be an RFOA, the criterion must be
"'reasonably necessary for the specific work to be performed' or 'shown to have a valid
relationship to job requirements.'"\textsuperscript{140} "[T]he Department of Labor’s contemporaneous
understanding of the newly passed statute [which] is unusually germane, given its
involvement and influence in the legislation."\textsuperscript{141} The lower courts generally followed the
Secretary’s position.\textsuperscript{142} In the absence of extensive legislative history on RFOA,\textsuperscript{143} these
early interpretations are the most relevant indications of Congressional intent.\textsuperscript{144}

\textsuperscript{140} Id.
\textsuperscript{141} Id. The EEOC, which took over responsibility for the ADEA, used the term business
necessity to describe the defense to disparate impact. \textit{See supra} note 159.
\textsuperscript{142} See, \textit{e.g.}, Taggart \textit{v.} Time, Inc., 924 F.2d 43 (2d Cir. 1991) Abbott \textit{v.} Federal Forge,
Inc., 912 F.2d 867, 875-76 (6th Cir. 1990); Jardien \textit{v.} Winston Network, Inc., 888 F. 2d
1151, 1157-58 (7th Cir. 1989); White \textit{v.} Westinghouse Electric Co., 862 F. 2d 56, 62 (3rd
Although the regulations issued by the Labor Department also made it clear that disparate impact applied to the ADEA,\textsuperscript{145} disparate impact was not often applied in the early days of the ADEA.\textsuperscript{146} A majority of courts simply assumed that an employer using criteria that correlate with age, such as over-qualification, high salary, tenure and seniority, was intentionally discriminating and thus guilty of disparate treatment.\textsuperscript{147} Many of these decisions were made shortly after the ADEA was enacted, so that this was the consensus regarding the intent and meaning of the ADEA at that time.\textsuperscript{148} It was only after *Hazen Paper*-- decided over 25 years after the enactment of the ADEA--that the consensus regarding age-correlated factors and the applicability of the disparate impact theory to the ADEA began to change.\textsuperscript{149}


\textsuperscript{143} See Kaminshine *supra* note 39, at 303.

\textsuperscript{144} See *supra* discussion accompanying notes 138-141. The Court recognized this in *City of Jackson*, 544 U.S. at 236.

\textsuperscript{145} See Johnson *supra* note 18, at 1410-11. [Rehabilitate]

\textsuperscript{146} See *supra* note 142.

\textsuperscript{147} See Johnson *supra* note 18, at 27-8 [Semantic Cover].

\textsuperscript{148} See Johnson *supra* note 18, at 30-33 [Semantic Cover]. The Supreme Court recognized this in *City of Jackson*, 544 U.S. at 236-37:

Indeed, for over two decades after our decision in *Griggs*, the Courts of Appeals uniformly interpreted the ADEA as authorizing recovery on a “disparate-impact” theory in appropriate cases. [Footnote omitted] It was only after our decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338
The courts that thought that age-correlated factors were discriminatory per se were incorrect. Congress intended for employers to retain the ability to justify decisions based on reasonable factors, even if these factors correlate with age. Otherwise employers would be forced to retain employees who could no longer perform.\textsuperscript{150} \textit{Hazen Paper} made it clear that factors that correlate with age are not per se discriminatory.\textsuperscript{151} The lower courts over-read this decision, however, and began to hold that any factor that was not facially discriminatory was a defense to an ADEA suit.\textsuperscript{152}

\textsuperscript{150} See Kaminshine \textit{supra} note 39, at 289. See Johnson \textit{supra} note 18, at 1429. [Rehabilitate].

\textsuperscript{151} 507 U.S. at 608.

\textsuperscript{152} With regard to whether the disparate impact theory applies to the ADEA, the courts held as follows: The First, Fifth, Seventh, Tenth and Eleventh said unequivocally that the theory did not apply. See Smith v. City of Jackson, 351 F.3d 183 (5\textsuperscript{th} Cir. 2003), \textit{cert. granted}, 72 U.S.L.W. 3614 (March 29, 2004); Adams v. Florida Power Corp., 255 F.3d 1322, 1325 (11th Cir. 2001), 534 U.S. 1054 (2001) (\textit{cert. granted}), 535 U.S. 228 (2002) (\textit{cert. dismissed as improvidently granted}); Mullin v. Raytheon Co., 164 F. 3d 696, 700-01 (1st Cir. 1999); Ellis v. United Airlines, 73 F.3d 999, 1006-07 (10th Cir.1996); Gehring v. Case Corp., 43 F.3d 340, 342 (7\textsuperscript{th} Cir. 1994).

The Third and the Sixth Circuits did not say that disparate impact did not apply, but expressed serious misgivings. See Dibiase v. SmithKline Beecham Corp., 48 F.3d 719, 732-35 (3d Cir. 1995); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1048 (6\textsuperscript{th} Cir. 1998).

The Second, Eighth and Ninth Circuits continued to allow disparate impact claims. See Criley v. Delta Air Lines, Inc., 119 F.3d 102, 105 (2d Cir. 1997); Frank v. United Airlines, Inc., 216 F.3d 845, 856 (9\textsuperscript{th} Cir. 2000); Lewis v. Aerospace Cmty. Credit Union, 114 F.3d 745, 750 (8\textsuperscript{th} Cir. 1997). The Eighth Circuit had indicated some doubt whether disparate impact applies, however, Allen v. Entergy, 193 F.3d 1010, 1015 n.5 (8\textsuperscript{th} Cir. 1999).

The Fourth Circuit and the D.C. Circuit had not addressed this issue. See Adams, 255 F.3d at 1325 n.5. In a case on an unrelated issue, however, the D.C. Circuit interpreted \textit{Hazen Paper} to caste doubt on the applicability of the disparate impact theory to the ADEA. Contractors’ Labor Pool, Inc. v. N.L.R.B., 323 F.3d 1051 (D.C. Cir. 2003). See Johnson \textit{supra} note 18, at 1418-22 for a complete discussion of the rationales used by the various courts. [Rehabilitate].
Now that *City of Jackson* and *Meacham* have clarified that disparate impact does apply to the ADEA, that RFOA is the defense and that the employer bears the burden of persuasion to prove it, the question of the meaning of RFOA remains. Although the use of age-correlated factors should not be treated as discriminatory per se, there is a large gap between holding that age-correlated factors are discriminatory per se and holding that such factors can be a defense to an ADEA. The middle ground is that the employer should have to justify the use of factors that obviously correlate with age. Thus the employer should not simply interpose a factor that correlates with age and denominate it as reasonable without some justification. The challenge for this article is to determine what kind of justification the employer should have to make. To put this query into perspective, it will be helpful to explore the hierarchy of defenses to discrimination cases to see where RFOA belongs. The hierarchy of defenses about to be described starts with the most difficult defense to prove, bona fide occupational qualification, and continues to the least difficult to prove, legitimate non-discriminatory reason and then fills in the gap between, which is where RFOA should fit.

B. Other Defenses

1. Statutory Defense of BFOQ in Title VII and ADEA cases

Any discussion of the meaning of defenses to discrimination cases has to begin with Title VII, the patriarch of the anti-discrimination statutes.\(^\text{153}\) Because Title VII did

not define discrimination, this task was left to the courts.\textsuperscript{154} As noted above,\textsuperscript{155} the Supreme Court identified two theories of discrimination under Title VII, disparate impact and disparate treatment\textsuperscript{156} and, because of the similarity between Title VII and the ADEA, applied both theories to the ADEA\textsuperscript{157}.

Title VII provided for only one general statutory defense to a disparate treatment case, which is also a statutory defense to an ADEA disparate treatment case, bona fide occupational qualification\textsuperscript{158}. Whenever the employer makes employment decisions based on a factor that on its face names a protected class, or a part thereof, such as a policy that denies employment to women or to persons over 40, for example, the employer is required to defend the policy using the BFOQ defense. BFOQ requires the employer to prove that the policy is essential to the business.\textsuperscript{159} The defense is strictly construed and difficult to prove under both Title VII and the ADEA.\textsuperscript{160}

BFOQ is available as a defense only when the employer has a facially discriminatory policy, consequently there is a gap in Title VII’s statutory scheme in the more common circumstance that does not involve facial discrimination. Because there are no other general defenses to discrimination under Title VII, the courts were called

\begin{itemize}
\item \textsuperscript{154} See Joel W. Friedman, The Law of Employment Discrimination 246 (6th Cir. 2007).
\item \textsuperscript{155} See supra discussion accompanying notes 69-75.
\item \textsuperscript{157} See Johnson. supra note 18, at 1409-10. [Rehabilitate] After Hazen Paper, the courts ceased to apply the disparate impact theory to the ADEA, but City of Jackson recognized that the theory does apply to the ADEA. See supra discussion accompanying note 240.
\item \textsuperscript{158} Title VII and the ADEA also have in common the bona fide seniority system defense, but it is not helpful to this discussion. See Johnson, supra note 18, at 9. [Semantic Cover].
\item \textsuperscript{159} See id. at 34.
\item \textsuperscript{160} See Johnson supra note 18, at 1423. [Rehabilitate]
\end{itemize}
upon not only to define discrimination but to create defenses to the types of
discrimination identified, disparate impact and disparate treatment.

2. Legitimate non-discriminatory reason under Title VII and the ADEA

For disparate treatment cases, the Court created the defense of “legitimate non-
discriminatory reason” in McDonnell Douglas v. Green.\textsuperscript{161} Commentators and courts
assumed for many years that “legitimate” meant “proper,” so that legitimate non-
discriminatory reason could not be just any reason that did not discriminate on its face.\textsuperscript{162}

In Hazen Paper v. Biggins,\textsuperscript{163} as noted above, the plaintiff contended that he
was fired because his pension benefits were about to vest, which violated not only
ERISA but the ADEA, according to his theory of the case.\textsuperscript{164} The Court disagreed
with the latter argument and held that discriminating based on pension benefits is not
per se discriminatory under the ADEA because the defense to disparate treatment
cases is any reason that does not discriminate on its face.\textsuperscript{165}

We do not mean to suggest that an employer lawfully could fire an employee
in order to prevent his pension benefits from vesting. Such conduct is actionable

\begin{footnotes}
\item[161] 411 U.S. 792 (1973). The Court has decided cases under the ADEA interpreting
legitimate non-discriminatory reason, but has continued to “assume without deciding”
that legitimate non-discriminatory reason applies to the ADEA. \textit{See O'Connor v.}
Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996) and St. Mary's Honor
Center v. Hicks, 509 U.S. 502, 506 n.1 (1993); \textit{but see Hazen Paper}, 507 U.S. at 612.
\item[162] \textit{See Player, supra} note 70, at 334.
\item[164] 507 U.S. at 606.
\item[165] 507 U.S. at 611.
\end{footnotes}
under § 510 of ERISA, as the Court of Appeals rightly found in affirming judgment for respondent under that statute. see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) (creating proof framework applicable to ADEA) (employer must have “legitimate, nondiscriminatory reason” for action against employee) But it would not, without more, violate the ADEA. That law requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify further characteristics that an employer must also ignore. Although some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect, [citation omitted], this reading is obviously incorrect. For example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA.  

Interpreting legitimate non-discriminatory reason to be “any reason,” regardless of how improper it is, reads out the “legitimate” part of “legitimate non-discriminatory reason” and leaves “non-discriminatory” as the only requirement for the defense. Thus, any factor that does not facially discriminate can be a legitimate non-discriminatory reason, which would make it the least difficult defense to prove in the hierarchy of defenses.  

How does an explanation of legitimate non-discriminatory reason assist with the interpretation of RFOA? The Court has now recognized in City of Jackson that RFOA does not mean the same thing as legitimate non-discriminatory reason. Applying RFOA, the Court said the employer’s justification has to be reasonable.  

There are other sources for the meaning of RFOA. As the Court noted in Meacham, Congress was not legislating in a vacuum when it adopted RFOA, referencing  

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166 507 U.S. at 612.  
167 See generally City of Jackson, 544 U.S. at 238-39. The Court said that RFOA does not mean any factor other than age in City of Jackson, and Hazen Paper said that legitimate non-discriminatory reason can mean any factor other than age. 507 U.S. at 612.  
168 City of Jackson, 544 U.S. at 238-39.
the Equal Pay Act’s defense of “any other factor other than sex.” Many courts have held that this defense requires more proof than legitimate non-discriminatory reason, so it is the next defense on the scale of difficulty to prove.

3. “Any Other Factor Other Than Sex” Under the Equal Pay Act

In Meacham the Court noted that in enacting the ADEA, Congress had drawn on the Fair Labor Standards Act, especially the equal pay provisions of that act. The Court’s decision to treat RFOA as an affirmative defense was bolstered by the fact that the Equal Pay Act defense of “any other factor other than sex” (FOTS) was also treated as an affirmative defense.

The Court in City of Jackson also referenced the defense of FOTS to support its determination that RFOA did not mean just any neutral factor, that is, any factor that is not facially discriminatory. If RFOA had meant any neutral factor, disparate impact would not apply under the ADEA, as the Court said was the case under the Equal Pay Act because of FOTS. The issue of the meaning of FOTS had not been argued in City of Jackson. In the first and only case in which the Supreme Court squarely confronted FOTS, Corning Glass Works v. Brennan, the Court said that “[w]e therefore conclude that on the facts of this case, the company's continued discrimination in base wages between night and day workers, though phrased in terms of a neutral factor other than

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169 Meacham, 128 S. Ct. at 2401.
170 See infra discussion accompanying notes 177-78.
171 Id.
172 City of Jackson, 544 U.S. at 238-39.
173 City of Jackson, 544 U.S. at 239 n.11.
174 417 U.S. 188 (1974). (The Supreme Court held that the employer violated the Equal Pay Act by paying male night inspection workers at a higher base wage than female day inspection employees and that, inter alia, the employer did not cure its violation by permitting women to work as night shift inspectors or by equalizing rates on the two shifts, but retaining “red circle” rate that perpetuated the discrimination.)
sex, nevertheless operated to perpetuate the effects of the company's prior illegal practice of paying women less than men for equal work.175 Thus the Court has indicated that “any other factor other than sex” should not include factors that perpetuate the effects of past discrimination. The courts have not been in agreement on what FOTS means after Corning Glass, however.176

Despite the Equal Pay Act’s language that "any other factor other than sex" is a defense, many courts require some business justification if the factor has historically had an adverse impact on women, based on Corning Glass.177 Even under the Equal Pay Act, then, a factor that correlates with sex is not necessarily considered just “any” factor other than sex and may not be a sufficient defense.178 The Court has recognized that FOTS

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175 417 U.S. at 209.
176 The Court denied cert in 1993, refusing to resolve the conflict in the circuits. Randolph Central School Dst. v. Aldrich, 506 U.S. 965 (1992). In a dissent to the denial of certiorari, Justice White, with two other justices agreeing, outlined the conflict in the circuits. Id. (J. White dissenting).

In County of Washington v. Gunther, 452 U.S. 161, 170-71 (1981), the Supreme Court gratuitously opined in dicta that FOTS may preclude disparate impact under the Equal Pay Act. Some courts cited Gunther for the same proposition under the ADEA because RFOA was suggested by FOTS. See, e.g., Metz v. Transit Mix, Inc., 828 F.2d 1202, 1220 (7th Cir. 1987) (J. Easterbrook, dissenting).

177 See, e.g., Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982).
178 See Player, supra note 70, at 419. “If the factor has a bona fide relationship to employer concerns, is not premised on gender considerations, and is uniformly applied, it will be a ‘factor other than sex.’”

An illustration of how courts have interpreted FOTS is in the treatment of whether the use of previous salary to determine present salary is an FOTS because past salary tends to perpetuate historical discrimination against women. In Kouba v. Allstate Insurance Co., 691 F.2d 873 (9th Cir. 1982), the court concluded that the employer cannot use such a factor "which causes a wage differential between male and female employees absent an acceptable business reason."

In Glenn v. General Motors Corp., 841 F.2d 1567, 1570 (11th Cir. 1988), the Eleventh Circuit went further and said that relying on past salary was per se not an FOTS, except in limited circumstances. The court cited Corning Glass Works v. Brennen, 417 U.S. 188, 195 (1988), in which the Court rejected the market force theory that allowed women to be paid less because this was the evil the Act was designed to eliminate.
was the model for the RFOA defense; however, the addition of the word “reasonable” indicates a Congressional concern that the RFOA be a more limited defense than FOTS. Thus, with many courts elevating the proof required for FOTS, the case for requiring an age-correlated factor to be more justified is even stronger.

After *Hazen Paper*, legitimate non-discriminatory reason does not have to be rationally related to the employer’s goals, however, FOTS may fill in this gap. In addition, the Court created another defense that requires a rational relationship to the employer’s goals, the defense of “business justification” as a defense to disparate impact. Because business justification is an interpretation of the business necessity defense, that rather elusive defense must be examined.

4. Business Justification and Business Necessity in Title VII cases

The Supreme Court developed the disparate impact theory in *Griggs v. Duke Power Co.*, holding that Title VII prohibits not just intentional discrimination, but also discrimination that has a disproportionate impact on the protected class. Disparate impact is generally associated with unintentional discrimination, in which the employer is using a neutral factor that has an incidental impact on the protected class. However, disparate impact can also detect intentional discrimination that is difficult to prove. In

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Obviously, if even a factor that correlates with sex must be justified in some way to be “any other factor other than sex,” it is even more evident that “reasonable factors other than age” must be justified.

In *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2002), the court rejected the “reasonableness” requirement, but said that the record must be carefully reviewed “for evidence that contradicts an employer’s claim of gender-neutrality.”


401 U. S. at 431.

See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (Proof of discriminatory intent does not cure the problem of workplace discrimination, which is a by-product of societal
Griggs, the Court said that if the employer uses an employment criterion that has a disparate impact on a protected class under Title VII, the employer must justify it as a business necessity.\footnote{182} Before Congress enacted the 1991 Civil Rights Act, the Court had not provided an exact meaning of business necessity.\footnote{183} Generally business necessity required the employer to prove that the criterion having the disparate impact predicted success in the job.\footnote{184} In Griggs the Court said that the practice must be “related to job performance;”\footnote{185} that it had a “manifest relationship to the employment in question.”\footnote{186}

To prove business necessity, the EEOC Selection Guidelines require the employer to validate employment criteria by one of three psychological methods,\footnote{187} an expensive discrimination, largely brought about by unconscious discrimination.); David B. Oppenheimer, *Negligent Discrimination*, 141 U. Pa. L. Rev. 899 (1993) (Professor Oppenheimer suggests that since most discrimination is unintentional, a better theory of discrimination would be based on negligence, rather than intent.). This being the case, the disparate impact theory would more effectively eradicate societal discrimination, including age discrimination. See Johnson *supra* note 18, at 58 n.251 for further discussion of this issue. [Semantic Cover]

\footnote{182} 410 U.S. at 431. “The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”


\footnote{185} Griggs, 401 U.S. at 431.

\footnote{186} *Id.*

\footnote{187} EEOC *Selection Guidelines*, 29 C.F.R. § 1607.5(A) (1994).

Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. . . . Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. . . . Evidence of validity of a test or other selection procedure through a construct validity study should consist
and difficult process.\textsuperscript{188} The Court cited the guidelines with approval in \textit{Albemarle Paper Co. v. Moody}.\textsuperscript{189}

The message of these Guidelines is the same as that of the Griggs case--that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'\textsuperscript{190}

In a later case, \textit{New York City Transit Authority v. Beazer},\textsuperscript{191} the Supreme Court allowed the city to refuse employment to methadone users in transit jobs, despite the disparate impact on minority applicants because the goals of safety and efficiency were "significantly served" and that the rule bore a "manifest relationship to the employment in question."\textsuperscript{192} Unlike the \textit{Albemarle} case, the Supreme Court did not require much in the way of proof that business necessity required the rule. This may be because of the public safety concerns in the case.\textsuperscript{193}

Even though the Supreme Court was not that clear in its definition of business necessity, until 1989 the lower courts held that the employer must prove that the employment criterion having a disparate impact was justified by business necessity and

\begin{quote}
of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated.
\end{quote}

\textit{Id.} § 1607.5(B).

\textsuperscript{188} \textit{See} \textit{SCHLEI \\& GROSSMAN supra} note 184, at 68-73.

\textsuperscript{189} 433 U.S. 321 (1975).

\textsuperscript{190} 433 U.S. at 331 n.14.

\textsuperscript{191} 440 U.S. 568 (1979).

\textsuperscript{192} 440 U.S. at 587 n.31 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

\textsuperscript{193} \textit{See} \textit{SCHLEI \\& GROSSMAN supra} note 184, at 146.
that meant that the criterion predicted success in the job. Until that point, the courts universally held that once the plaintiff demonstrated a prima facie case by showing that an employment practice had an adverse impact, the employer had to bear the burden of proof and persuasion to show that the practice was justified by business necessity.

In 1989 the Court decided *Wards Cove Packing Co. v. Atonio*, in which the Court decided that the plaintiff bore the burden of persuasion throughout the case and that the employer's burden of proving its defense was not as onerous as previously thought.

At the justification stage, . . . the dispositive issue is whether the challenged practice serves, in a significant way, the legitimate employment goals of the employer. . . . [A] mere insubstantial justification. . . . will not suffice . . . . [but] there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster . . . .

At this point if the employer met its burden of proof, the employee could still win if he could suggest an alternative selection criterion that had less of a disparate impact.

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194 *See* Friedman *supra* note 154, at 252.

Wards Cove Packing procedurally rewrote the assumption that the burden was on the employer to prove the business necessity of the device proven to have an adverse impact. It held that the employer's burden was no more than that of presenting evidence that the challenged device significantly served a legitimate employer interest. The ultimate burden was on the plaintiff to prove that the challenged device did not serve the employer's business interests. Wards Cove Packing was also seen by some as substantively diluting the content of “business necessity.” Although the Court emphasized that the employer's reasons must be business related and that these ends must be significantly served, the Court moved away from any suggestion of “necessity” and utilized language that suggested mere “legitimacy” would suffice to justify adverse impact.

Player, *supra* note 17, at 836.
197 *See* Friedman, *supra* note 154, at 252.
198 *Ward Cove*, 490 U.S. at 659 (citations omitted).
199 *Wards Cove* added another obstacle to the plaintiff’s case. He would win at this stage only if the employer refused the suggested alternative. 490 U.S. at 661. In addition
Shortly after *Wards Cove*, Congress passed the Civil Rights Act of 1991, which was principally directed at correcting *Wards Cove*'s interpretation of the protections offered by Title VII. Among other things, the 1991 Civil Rights Act codified the disparate impact test and clarified the burden of proof by providing that, once the plaintiff has shown disparate impact, the employer must bear the burden of proof and persuasion to show that the practice is "job related to the position in question and consistent with business necessity." 

*Wards Cove* made a disparate impact case more difficult to prove principally by 1) requiring the plaintiff to identify the criterion causing the disparate impact; 490 U.S. at 657-58; 2) requiring the employer simply to articulate his defense rather than to bear the burden of persuasion, and 3) requiring the employer to show only that the criterion having the disparate impact significantly serves the employer's employment goals and need not be essential to the business. 490 U.S. at 659. It also could be argued that *Wards Cove* added more to the requirement of alternative business practice: "Of course, any alternative practices which respondents offer up in this respect must be equally effective as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals. Moreover, '[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals.'" (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (O'Connor, J).)


(1) An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
Since the provisions of the 1991 Civil Rights Act that overruled *Wards Cove* for Title VII did not specifically include the ADEA, the argument was made that *Wards Cove* applied to disparate impact cases under the ADEA.\(^{202}\) In *City of Jackson* the Supreme Court agreed that *Wards Cove* does apply to the ADEA,\(^ {203}\) except that the applicable defense is not business necessity, but RFOA.\(^ {204}\) In addition, as opposed to *Wards Cove*, in an ADEA case, the plaintiff does not have an opportunity to show a less discriminatory alternative to counter the defense.\(^ {205}\) Subsequently in *Meacham* the Court clarified that *Wards Cove*’s requirement that the burden of persuasion remains on the

(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 decisionmaking process are not capable of separation for analysis, the decisionmaking process may be 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 practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the 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 subchapter.

42 U.S.C. § 2000(e) (Supp. V. 1993) defines the term demonstrate:

The term 'demonstrate' means meets the burden of production and persuasion.

\(^{202}\) See Eglit, *supra* note 195, at 1215.

\(^{203}\) *City of Jackson* 544 U.S. at 239.0

\(^{204}\) *Id.* at 238-39.

\(^{205}\) *City of Jackson*, 544 U.S. at 243.
plaintiff at all times did not apply to the ADEA because RFOA is an affirmative defense.\footnote{Meacham, 128 S. Ct. at 2402.}

Some scholars have argued that RFOA should be equated with business justification as expressed in \textit{Wards Cove},\footnote{See Eglit, \textit{supra} note 195, at 1215.} which would require that the employer prove that “the practice serves, in a significant way, the legitimate employment goals of the employer . . . .”\footnote{490 U.S. at 659.} If this means that the employer may use age-correlated criteria without any justification, RFOA cannot be equated with business justification. In addition, in both \textit{City of Jackson} and \textit{Meacham}, the Court has said that the plaintiff will not be given the opportunity to prove a less discriminatory alternative.\footnote{City of Jackson, 544 U.S. at 239. See generally Meacham 128 S. Ct. at 2405.} However, since the defendant has the burden of persuasion to prove the reasonableness of the criterion, surely part of proving the reasonableness of an obviously age-correlated criterion must be that less discriminatory alternatives were considered and rejected as not practicable.

V. Where Does RFOA Fit in the Hierarchy of Employment Discrimination Defenses?

A. Generally

Where does RFOA belong in this hierarchy of defenses to various employment discrimination claims? Obviously RFOA has to fit somewhere between BFOQ, which is the most difficult defense to prove, and legitimate non-discriminatory reason, which is the least difficult defense to prove. If the reason is facially discriminatory, then the
employer must prove BFOQ. No one is suggesting that proof of RFOA be this strict, and indeed this would conflict with the statutory scheme, which distinguishes between the two defenses. Legitimate non-discriminatory reason can be anything that on its face does not discriminate based on age. Unfortunately despite the fact that City of Jackson has said that RFOA must be reasonable and is thus not the same as legitimate non-discriminatory reason, courts are still equating the two.

B. Judicial Interpretations of RFOA

1. Supreme Court

In both Meacham and City of Jackson the Court said the RFOA could lean more heavily on the protected class and indicated that it would not be difficult to prove although in neither case was the issue of RFOA briefed or argued. In the City of

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211 Id.
212 A legitimate, non-discriminatory reason can be any reason, regardless of how improper or illegal as long as it does not violate the particular act under which the plaintiff is suing. Hazen Paper 507 U.S. at 612. "For example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA." Id.
213 544 U.S. at 538-39.
214 See supra § IV.B.2 and discussion accompanying note 212.
215 See, e.g., Whittington v. Nordam Group, Inc., 429 F.3d 986, 997 (10th Cir. 2005)(citing jury instructions that included the following: “If, however, Plaintiff persuades you by the greater weight of the evidence of these elements, then you must consider Defendant’s defense that its actions regarding Plaintiff’s employment were based upon a reasonable factor other than age discrimination. As you consider this, remember that Defendant must only articulate a legitimate, non-discriminatory reason for its actions.”); Armstrong v. Jackson, 2006 WL 2024975, *6 (D.D.C. 2006); Reese v. Potter, 2005 WL 3274052, *5 (D.D.C. 2005). Embrico v. U.S. Steel Corp., 404 F. Supp. 2d 802, 829 (E.D. Penn. 2005)(in all of which the courts equated RFOA with legitimate non-discriminatory reason.)
216 See supra discussion accompanying notes 129-131.
217 See supra discussion accompanying notes 118 & 131.
Jackson case, the Court held that the plaintiffs had not identified the part of the plan that was causing the disparate impact, so they did not prove a prima facie case.\textsuperscript{218} Nevertheless, the Court reached out and decided that, even if the plaintiffs had proven a prima facie case, RFOA should be the defense and, without further analysis, that the City of Jackson’s plan was reasonable.\textsuperscript{219} The Court said that the City of Jackson had used the factors of seniority and position, which would always be reasonable.\textsuperscript{220} This may be true, if seniority is used to grant a benefit to those with greater seniority, but surely not if used to impose a detriment. In City of Jackson the city used greater seniority and higher position to the detriment of those employees with more seniority and higher positions.\textsuperscript{221} Greater seniority and higher position correlate strongly with age and should never be reasonable unless justified.\textsuperscript{222} The Court also said that the City’s desire to attract and retain officers was a legitimate goal,\textsuperscript{223} which is certainly true; however, at this point the Court was confusing the goal with the method of achieving it. The Court provided no explanation for why the City’s decision to use greater seniority and higher position as criteria to confer a detriment was reasonable.\textsuperscript{224} Part of the employer’s burden to show  

\textsuperscript{218} 544 U.S. 241.
\textsuperscript{219} 544 U.S. at 239.
\textsuperscript{220} 544 U.S. at 242-43.
\textsuperscript{221} Id.
\textsuperscript{222} See supra § IV.A.
\textsuperscript{223} City of Jackson, 544 U.S. at 242-43.
\textsuperscript{224} This is contrary to the Court’s view in other cases, in which it has protected seniority to the detriment of other federal rights.

In US Airways, Inc. v. Barnett, 535 U.S. 391 (2002), the Court held that accommodating the plaintiff’s disability by overriding the seniority system was not a reasonable accommodation in the usual case under the Americans with Disabilities Act. “[W]hether collectively bargained or unilaterally imposed by the employer, seniority systems provide ‘important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment.’” 535 U.S. at 404-05.
reasonableness should be to show why it was necessary to use an age-correlated factor to detrimentally affect the protected class.

In *Meacham* the Court did not accept certiorari on the issue of “[w]hether respondents' practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during a reduction in force constituted a

Several factors support our conclusion that a proposed accommodation will not be reasonable in the run of cases. Analogous case law supports this conclusion, for it has recognized the importance of seniority to employee-management relations. This Court has held that, in the context of a Title VII religious discrimination case, an employer need not adapt to an employee's special worship schedule as a “reasonable accommodation” where doing so would conflict with the seniority rights of other employees. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-80, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). The lower courts have unanimously found that collectively bargained seniority trumps the need for reasonable accommodation in the context of the linguistically similar Rehabilitation Act. See *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1047-1048 (C.A.7 1996) (collecting cases); *Shea v. Tisch*, 870 F.2d 786, 790 (C.A.1 1989); *Carter v. Tisch*, 822 F.2d 465, 469 (C.A.4 1987); *Jasany v. United States Postal Service*, 755 F.2d 1244, 1251-1252 (C.A.6 1985).

Id. at 403.

Similarly, in a case under Title VII, which requires reasonable accommodation in religion cases, *TWA v. Hardison*, 432 U.S. 63 (1977), the Court said that collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. The issue is important and warrants some discussion.

432 U.S. at 84.

Furthermore, in *Inter’l Bhd. of Teamsters v. U.S.*, 431 U.S. 324 (1977). The Court upheld the exemption to Title VII for bona fide seniority systems and said that although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

431 U.S. at 352-53.
‘reasonable factor other than age’ as a matter of law.” Nevertheless, despite the fact that the Court said it was expressing no views on the issue, it gratuitously noted that putting the burden of proving RFOA on the defendant will only matter in the cases “where the reasonableness of the non-age factor is obscure for some reason . . . .”

Thus, Meacham and City of Jackson both said that RFOA could disadvantage the protected class and made pronouncements that affect the meaning of RFOA. In City of Jackson the Court said the plan was reasonable with little analysis, and in Meacham the Court commented on when RFOA would make a difference, also without analysis. Again, in neither case had the issue of RFOA been briefed or argued. The lower courts have taken these hints and found proof of RFOA to be anything but onerous.

2. Lower Courts After City of Jackson

The lower court’s opinion in the Meacham case is instructive. The case was on remand from the Supreme Court for reconsideration in light of City of Jackson. The court of appeals remanded the case to the lower court with instructions to enter judgment as a matter of law for the defendant, reversing the prior decision in favor of the plaintiff.

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225 Meacham, 128 S. Ct. at 2400 n.8.
226 128 S. Ct. at 2406.
227 Meacham, 128 S. Ct. at 2403, 2406; City of Jackson, 544 U.S. at 241.
228 City of Jackson, 544 U.S. 242-43.
229 Meacham, 128 S. Ct. 2406-07.
230 See supra discussion accompanying notes 118 & 131.
231 461 F.3d 134 (2d Cir. 2006), (on remand from the Supreme Court for reconsideration in light of Smith v. City of Jackson).
232 461 F.3d. at 137.
233 Id.
The court, applying \textit{Wards Cove}, had originally decided that the plaintiffs had established a prima facie case by demonstrating a disparate impact on older employees; that “...unaudited and heavy reliance on subjective assessments of “criticality” and “flexibility” in implementing the [layoff] supported a reasonable inference that the practice caused the ‘startlingly skewed results.’”\textsuperscript{234} The court further noted that there was sufficient evidence of a business justification and that if this justification had been unchallenged, it would have been sufficient to justify the disparate impact. The plaintiffs, however, had proven that there was a less discriminatory alternative that would not have produced the disparate impact: The employer could have designed a plan with more safeguards against subjectivity.\textsuperscript{235}

On remand the court said that the defendants only had to articulate that the plan was reasonable because \textit{City of Jackson} said that this part of the proof is no longer available in a disparate impact case under the ADEA.\textsuperscript{236} Thus the defendant’s facially legitimate business justification of reducing its workforce, while retaining employees who had skills that were critical to the operation was sufficient to absolve it of liability; the fact that there was a less discriminatory alternative, more objective evaluation, was irrelevant.\textsuperscript{237} The fact that the decisions were made almost totally subjectively using age-correlated factors did not figure into the court’s determination that the justification was reasonable.\textsuperscript{238}

\textsuperscript{234} 461 F.3d at 139.  
\textsuperscript{235} 461 F.3d at 140.  
\textsuperscript{236} \textit{Id.}  
\textsuperscript{237} \textit{Id.}.  
\textsuperscript{238} \textit{See id.}
Although the Supreme Court reversed and remanded the decision because the court of appeals had put the burden of persuasion on the plaintiffs, the Court did agree that less discriminatory alternative had no place in the proof.\textsuperscript{239} The Court also opined that putting the burden of persuasion on the defendant might not make any difference in the lower court’s decision.\textsuperscript{240}

It surely cannot be the case that a plaintiff could win under the standard of proof in \textit{Wards Cove},\textsuperscript{241} under which the defendant has no burden of persuasion, and yet lose when the burden of persuasion is placed on the defendant to show that its plan was reasonable. In situations where the impact will predictably fall on the older employees using the age-related factors, the employer is at least reckless with regard to whether he is discriminating against the protected class. In such situations, part of the showing of reasonableness must be the lack of suitable alternatives.

The lower courts are instead deciding that age-correlated factors standing alone are RFOA’s. For example, in \textit{Townsend v. Weyerhaeuser Co.}, the court opined that “[c]ertainly, an employer that decides to terminate an employee to relieve itself of the burden of that employee’s high salary or health care costs has based its decision on ‘reasonable factors’ other than the employee’s age.”\textsuperscript{242} This is exactly what the ADEA was enacted to prevent.\textsuperscript{243}

Similarly in \textit{Silver v. Leavitt},\textsuperscript{244} the court said

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\textsuperscript{239} \textit{Meacham}, 128 S. Ct. 2405 n.14.
\textsuperscript{240} See \textit{Meacham}, 128 S. Ct. 2406.
\textsuperscript{241} See supra discussion accompanying notes 196-99.
\textsuperscript{242} 2005 WL 1389197 *14 (W.D. Wis. 2005)
\textsuperscript{243} See supra § IV.A.
\textsuperscript{244} 2006 WL 626928 *14 (D.D.C. 2006)
\end{flushright}
the record shows that the defendant was validly concerned about its strained administrative budget, the costly burden of salaries and benefits, attracting new workers to the laborforce, and the likely possibility of attrition of a large number of employees. The Court cannot say that it was unreasonable for defendant to maximize its limited fiscal resources by initially recruiting candidates at the lowest level possible. Lower level employees (and, ordinarily, new employees) are paid less than higher level employees, and are less likely to retire within a short time. By recruiting workers who cost less to employ and are less likely to retire in the near future, defendant was arguably making the most of the money spent on the selection, hiring, and training of employees. Id. (emphasis added).245

Even more explicitly flaunting the purpose of the ADEA, the court in Rollins v. Clear Creek Indep. Sch. Dist.246 flatly said that retirement status was a reasonable factor other than age.247 In yet another astounding interpretation of disparate impact under the ADEA, in Aldridge v. City of Memphis, the City eliminated the position of captain of the police force to cut costs.248 The court said that because promotion to captain was automatic after 30 years of service, this assured that all of the captains were in the protected age group. The court therefore reasoned that because this statistical disparity

245 Id. at *14. In Turner v. Jewel Food Stores, Inc., 2005 WL 347788 (N.D. Ill. 2005), the court denied the defendant’s motion to dismiss for failure to state a claim, citing Smith, but did not comment on the employer’s statement that its practices that allegedly had a disparate impact were related to RFOA’s, for example, greater seniority. Id. at *3. 246 2006 WL 3302538 (S.D. Tex. 2006). 247 Id. at *5. A state statute required the school district to give hiring preference to teachers who had previously retired. Id. In order to comply with the statute, the school district developed a policy that it applied to teachers who had retired and then been rehired that required those teachers to re-apply, rather than having their contracts automatically renewed. Id. at *1. Although 100% of the contracts of the people in the protected class were not renewed, the court said the policy was not discriminatory under either disparate treatment, id. at *3, or disparate impact theories. Id. at *5. With regard to disparate treatment, the employer had acted based on a legitimate non-discriminatory reason, a trait that was analytically distinct from age, retirement. Id. at *3. In the disparate impact portion of the opinion, the court said that the employer’s desire to give preference to non-retired teachers who were not drawing a pension was an RFOA. Id. at *5. The court granted summary judgment in this obvious case of age discrimination. 248 2008 WL 2999557 (W.D. Tenn. 2008)
was expected, there could be no inference of discrimination. In other words the method of determining how to save money caused a totally predictable 100% impact on the protected class and was not considered sufficient evidence of disparate impact.

What is this but allowing blatant age discrimination to be an RFOA? Obviously allocating the burden of persuasion is irrelevant if courts are going to allow retirement, seniority and higher healthcare costs to be RFOA’s. So far the courts (and the Court) do not distinguish between those factors that correlate obviously with age and those that are just incidentally shown to have a disparate impact on older employees. The latter should be easier to justify; the former should be more difficult. The most important point here is that if the employer chooses a factor that obviously correlates with age, RFOA should require proof of justification. It should be clear that if the employer is reckless about using a factor that screens out older employees, he is very close to

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249 Id. at *7.
250 The court also accepted the defendant’s reason that it “had no need for a management level rank achieved solely by length of service” and it “was not operationally necessary” and resulted in a substantial savings. Id. at 8. Quoting City of Jackson v. Smith, the court noted that there may have been other ways for the city to accomplish its goals, but it only had to show that this one was reasonable. Id.
251 Policies that are facially discriminatory have to be defended by proof that age is a bona fide occupational qualification. See supra § IV.B.1. But see Kentucky Retirement Systems v. EEOC, 128 S. Ct. 261 (2008). In a blatant misinterpretation of the ADEA, the Court decided that a facially discriminatory disability policy was not discrimination because of age. The plan provided less in benefits for people who became disabled after they became eligible for retirement, at age 55 or after 20 years of employment, than for those who became disabled at a younger age. Although this was facially discriminatory, the Court said that there was no intent to discriminate based on age. As the dissent said: “The Court's apparent rationale is that, even when it is evident that a benefits plan discriminates on its face on the basis of age, an ADEA plaintiff still must provide additional evidence that the employer acted with an 'underlying motive,' ante, at 2368 - 2369, to treat older workers less favorably than younger workers.” 128 S. Ct. at 2373 (Kennedy, J, dissenting).
252 High position also generally correlates with age. See, e.g., Aldridge v. City of Memphis, 2008 WL 2999557 (W.D. Tenn. 2008).
intentionally discriminating, and such a factor should not be an RFOA, without further justification.

**VI. Proposed solution to the meaning of RFOA**

Business necessity may require validation and is the next most difficult defense to prove after BFOQ. RFOA probably should not require validation in the usual case, but when the criterion has a predictably disparate impact on the protected class, the employer should have to show more than that the criterion served his legitimate goal. *City of Jackson* is a perfect illustration. To justify its pay-plan, the City articulated the legitimate goal of recruiting and retaining police officers. What the Court failed to appreciate was that to achieve that goal, the employer was using obviously age-correlated factors, greater seniority and higher position. In this situation the City was at least reckless with regard to whether the criteria would screen out older employees. In such a case of reckless disregard of the impact, the employer should have to justify the criteria used to achieve the goal, not just the goal itself. In other words, any employer using criteria that obviously correlate with age should be considered reckless with regard to whether he is discriminating based on age, in which case he should have a heavier burden to prove RFOA. He should have to prove not only that the goal was legitimate but also that less discriminatory alternatives to achieve it were not feasible. Surely an employer acting recklessly with regard to whether he is discriminating could not also be declared to be reasonable, without more, as the Court did in *City of Jackson*. Under the ADEA if the

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253 See supra § IV.B.1; SCHLEI & GROSSMAN, supra note 184, at 66-75.
254 *City of Jackson*, 544 U.S. at 242-43.
255 *Id.*
256 Recklessness is already an important consideration in ADEA cases. If the employer is guilty of a reckless violation of the ADEA, he has committed a willful violation and has
employer is reckless with regard to whether he is violating the Act, he is guilty of a willful violation and has to pay liquidated damages. It is counterintuitive that an employer who would otherwise be guilty of a willful violation would be exonerated of liability because the criterion he recklessly used was an RFOA.

There may be other situations in which the employer may have acted recklessly without using obviously age-correlated factors. For example, in Meacham the employer also had a legitimate goal of cutting costs. To achieve this goal, the criteria used, “criticality” and “flexibility,” which were not as obviously age-correlated as those used in City of Jackson. The method of achieving the goal was to use subjective evaluations, however, and the criteria were shown to have a disparate impact on older employees. Such criteria could predictably be used to stereotype older employees as less flexible and less critical to the organization. In this case the employer should have to show that

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258 The inquiry is somewhat different in that recklessness for willful violations looks at the employer’s state of mind regarding violating the Act. See Johnson supra note 18, at 47-49. [Semantic Cover] With regard to liability, the employer’s state of mind relates to his state of mind regarding treating people in the protected class differently. Id. The employer may believe that he has a defense to the discrimination, for example, so that he maybe intending to treat people in the protected class differently, but he thinks that his reason is a BFOQ, for example. For the history of the standard for imposing liquidated damages under the ADEA, see Johnson supra note 18, at 86-91. [Semantic Cover] Meacham, 461 F.3d at 139.
259 See supra discussion accompanying notes 48-55.
subjectively evaluating the candidates for RIF was a reasonable method of achieving the
goal, which should require a showing that less discriminatory alternatives were not
available.

If the employer has a legitimate goal and was not reckless in the methods he used
to accomplish his goal, in other words, the criteria he used would not predictably affect
the protected class negatively, RFOA should be easier to prove. Proof akin to business
justification would be sufficient; that the selection criterion was reasonably related to his
legitimate goals.\footnote{262} For example in \textit{Walker v. City of Cabot, Arkansas},\footnote{263} the plaintiff
complained that the employer’s reduction in force disproportionately impacted the
protected class.\footnote{264} The employer’s justification was the need to eliminate redundant
positions to save money, which the court said was reasonable. In the plaintiff’s case, the
method of choosing him for the RIF involved returning his duties to the position from

\footnote{262} See \textit{Wards Cove}, 490 U.S. at 659.

\footnote{263} 2008 WL 4816617 (E.D. Ark. 2008). (The plaintiff alleged that because the majority
of employees whose jobs were eliminated were in the protected group that the RIF had a
disparate impact based on age. The court said that the plaintiff had not identified the
particular practice causing the disparate impact. Nevertheless, even if the plaintiff had
proved his case of disparate impact, the defendant’s justification was reasonable. The
defendant’s motion for summary judgment was properly granted.)

\footnote{264} \textit{Id.} at *2.
which they had been taken to create his job. In such a case neither the goal, eliminating redundant positions, nor the method of achieving the goal, reassigning job duties, appears to be correlated with age, so the employer has shown that its goal was legitimate and his method of accomplishing it was reasonable.

Thus the solution to the meaning of RFOA depends on identifying those situations in which the defendant recklessly used a factor that is likely to discriminate. If so, he should be held to a higher standard to prove RFOA. Proof of the accidental use of a factor that has a disparate impact should require less onerous proof, similar to a business justification.

When will the employer be considered reckless? What does this state of mind mean in this context? To put the states of mind required for employment discrimination in context, disparate treatment discrimination requires intentional discrimination, while disparate impact discrimination does not require proof of intentional discrimination. Disparate impact requires only statistical proof that an employment criterion adversely affects the protected class.

The meaning of intent to discriminate under the anti-discrimination acts is akin to the purposeful or intentional state of mind in criminal law. The Court has recognized

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265 Id. at *4.

The MODEL PENAL CODE § 2.02 provides in pertinent part as follows:

(2) Kinds of Culpability Defined.
that a reference to criminal states of mind is appropriate to describe recklessness in the

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

Will the Court say that this is confusing disparate impact with disparate treatment, as they have in other cases? See Raytheon v. Hernandez, 540 U.S. 44, 52 (2003). This is simply not the case. The Court has made it clear that knowledge is insufficient to prove intentional discrimination. See Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979). In addition the Court has said that the line between disparate impact and disparate treatment is not always distinct. See Watson v. Forth Worth Bank and Trust, 487 U.S. 977 (1988), in which the Court was presented with the question of whether subjective decisionmaking was subject to the disparate impact theory or could be proven only under the disparate treatment theory.

We are persuaded that our decisions in Griggs and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection practices. However one might distinguish “subjective” from “objective” criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature.

... We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices. It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct. . . . It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. . . . If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.

487 U.S. at 989-91.
discrimination context.\textsuperscript{270} In addition, the criminal states of mind cover all the

\textsuperscript{270} See Kolstad v. American Dental Ass'n, 527 U.S. 526, 536 (1999) (in which the Court equated the standard for punitive damages under Title VII with the standard for liquidated damages under the ADEA and cited a criminal standard.)

We gain an understanding of the meaning of the terms “malice” and “reckless indifference,” as used in § 1981a, from this Court's decision in \textit{Smith v. Wade}, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). The parties, as well as both the en banc majority and dissent, recognize that Congress looked to the Court's decision in \textit{Smith} in adopting this language in § 1981a. [citation omitted] Employing language similar to what later appeared in § 1981a, the Court concluded in \textit{Smith} that “a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” [citation omitted] While the \textit{Smith} Court determined that it was unnecessary to show actual malice to qualify for a punitive award, [citation omitted] its intent standard, at a minimum, required recklessness in its subjective form. The Court referred to a “subjective consciousness” of a risk of injury or illegality and a “'criminal indifference to civil obligations.'” [citation omitted] (explaining that criminal law employs a subjective form of recklessness, requiring a finding that the defendant “disregards a risk of harm of which he is aware”);[citation omitted] [emphasis supplied]

527 U.S. at 537:

Justice Stevens also invoked a criminal standard in his concurrence and dissent:

The ADEA provides for an award of liquidated damages-damages that are “punitive in nature,” \textit{Trans World Airlines, Inc. v. Thurston}, 469 U.S. 111, 125, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), when the employer “knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.”

\ldots

In \textit{Thurston}, we interpreted the ADEA's standard the same way and explained that the relevant mental distinction between intentional discrimination and “reckless disregard” for federally protected rights is essentially the same as the well-known difference between a “knowing” and a “willful” violation of a criminal law. [citation omitted] While a criminal defendant, like an employer, need not have knowledge of the law to act “knowingly” or intentionally, he must know that his acts violate the law or must “careless[ly] disregard whether or not one has the right so to act” in order to act “willfully.” [citation omitted] We interpreted the word “willfully” the same way in the civil context. [citation omitted] See \textit{McLaughlin v. Richland Shoe Co.}, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) (holding that the “plain language of the Fair Labor Standards Act's “willful” liquidated damages standard requires that “the employer either
possibilities in this context, and are capable of accurate definition. Thus, if the defendant intends to do the act that brings about the statutorily proscribed result, for example, if he intends to treat people of another race differently because of their race, then the defendant has acted with specific intent comparable to purposefulness in criminal law. The Supreme Court has said that knowing that the criterion discriminates against persons in a protected class is insufficient to prove intentional discrimination. The employer must be using the criterion with the intent to cause the discrimination. In other words, the employer must act with the purpose of discriminating. If he acts only knowingly, which is doing the act knowing that the result is practically certain to occur, he is not guilty of intentional discrimination. An employer imposing a criterion that he knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute,” without regard to the outrageousness of the conduct at issue).

527 U.S. at 548-49 (Stevens, J. concurring in part and dissenting in part.).

271 See supra Johnson note 269, at 535.


273 Id. In Feeney the Court said “[d]iscriminatory purpose,” however, implies more than intent as volition or intent as awareness of consequences. [citation omitted] It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.

442 U.S. at 279.

274 MODEL PENAL CODE § 2.02 provides in pertinent part as follows:

[(2) Kinds of Culpability Defined.]

. . . .

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
knows discriminates obviously should not escape liability by simply interposing that criterion as an RFOA, however.\textsuperscript{275}  \textit{City of Jackson} is a good example of an employer acting knowingly. The City must have known that using reverse seniority would impact the protected class.\textsuperscript{276}

Recklessness is the next less serious state of mind after knowledge. Recklessness requires a conscious disregard of a substantial risk that the statutorily proscribed result will occur.\textsuperscript{277}  \textit{Meacham} is an example of the employer acting recklessly. Although the criteria used there (flexibility and criticality) are not as obviously age-related as those used in \textit{City of Jackson}, the employer was reckless in combining those criteria with subjective evaluations. Although the employer may not be guilty of intentional

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

\textsuperscript{275} Knowledge is a more serious state of mind than recklessness. \textit{Compare} the definition of knowledge under the Model Penal Code \textit{supra} note 274 with the definition of recklessness, \textit{infra} note 277.

\textsuperscript{276} “[R]everse seniority is almost inherently tied to the age of the employee, [and] such a reason necessarily is based on age and should lack legitimacy.” Mack A. Player, \textit{Proof of Disparate Treatment Under the Age Discrimination In Employment Act: Variations On A Title VII Theme}, 17 GA. L. REV. 621, 656 (1983).

\textsuperscript{277} \textit{MODEL PENAL CODE} § 2.02 provides in pertinent part as follows:

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
discrimination in either case, recklessness\textsuperscript{278} should suffice to elevate the burden of proving RFOA.

The question of whether the defendant has been reckless should be a jury question. Again the state of mind of recklessness is not unknown under the ADEA. In order to find that the defendant is not guilty of a willful violation of the ADEA, which would foreclose the imposition of liquidated damages, the jury must find that the employer “incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision . . . .”\textsuperscript{279}

The point of this article is that if the employer is acting with a sufficiently culpable state of mind with regard to whether the criterion treats the protected class less favorably, he should not be able to interpose the criterion itself as a reasonable method of achieving his goals, without further justification. Thus, if the employer is reckless with regard to whether the criterion discriminates, he should have to justify it by evidence that there were no reasonable alternatives. If he has a less culpable state of mind, interposing

\textsuperscript{278} It could be argued that even if the employer is only grossly or criminally negligent, he should have to meet the higher standard to prove RFOA. Under the Model Penal Code, the only difference between criminal negligence and recklessness is that the employer is subjectively aware of the risk, while criminal negligence measures the risk by the reasonable person standard, as follows:

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

\textit{Model Penal Code} § 2.02.  
\textsuperscript{279} \textit{Hazen Paper Co. v. Biggins}, 506 U.S. 604, 616-17 (1993)
a defense should not require as much proof, as long as the practice serves his legitimate employment goals.\textsuperscript{280}

The Court has developed a penchant for declaring employer practices to be reasonable without analysis.\textsuperscript{281} \textit{City of Jackson} is emblematic of this problem. The Court said that the use of seniority would always be reasonable without stopping to inquire how the employer used seniority. The employer in fact used reverse seniority, which should never be considered reasonable, without some justification. This is especially troubling because in several cases the Court has referred to the traditional use of seniority--to provide more benefits for greater seniority--as one of the most important rights in employment and has protected seniority to the disadvantage of other federally protected

\textsuperscript{280} ADEA cases are tried before a jury. Decisions regarding the defendant’s state of mind are virtually always entrusted to juries in serious criminal cases. U.S. CONST. AM. VI.  
\textsuperscript{281} In a case under Title VII, which requires reasonable accommodation without undue hardship in religion cases, the Court said that the accommodation the employer offered, an unpaid leave, was reasonable and that the employer need not show that the accommodation requested by the employee was an undue hardship. Ansonia v. Philbrook, 479 U.S. 60, 70 (1986). Similarly in \textit{TWA v. Hardison}, 432 U.S. 63, 84-85 (1977), the Court decided that requiring the employer to bear more than a de minimis cost; violate the seniority system, burden other employees, or leave the employer shorthanded would all be undue hardships and thus not reasonable accommodations. 432 U.S. at 84. Under the Americans with Disabilities Act, which also requires reasonable accommodation without undue hardship, in \textit{US Airways, Inc. v. Barnett}, 535 U.S. 391, 404-05 (2002), the Court said that overriding the seniority system to accommodate the plaintiff’s disability was not reasonable in the usual case. The Court cited the standard for reasonable accommodation under the Title VII case of \textit{TWA v. Hardison}, despite the fact that Congress had clearly said it was intending to set a more stringent standard for the ADA. \textit{Id.} at 422 (Scalia, J., dissenting). Although the Court’s misinterpretation of Congressional intent has recently required Congressional action relating to the ADA, the preamble to that Act did not refer to the \textit{Barnett} case; nevertheless Congress was clearly admonishing the Court to pay attention to its prior intention of protecting disabled people. \textit{“ADA Amendments Act of 2008”} PUBLIC LAW 110–325—SEPT. 25, 2008 122 STAT. 3553. Nevertheless, to avoid Congressional action regarding the ADEA, the Court should be more careful in following Congressional intent in interpreting RFOA.
employment rights. The Court’s proclivity for declaring employer practices reasonable without analysis must not continue, or the ADEA is in serious jeopardy, along with other anti-discrimination acts.

The Court has said that the ADEA was designed to combat “inaccurate and stigmatizing stereotypes.” If obviously age-correlated factors are considered reasonable, older employees can easily be discriminated against based on these stereotypes. The courts that interpreted the ADEA shortly after its enactment almost uniformly recognized that using such criteria indicated an intention to discriminate against older employees. These courts were stating the obvious that the courts today fail to see: If an employer chooses a criterion that so obviously discriminates against older people, he must be acting based on the stereotypes that the ADEA was designed to eradicate, that older people are less competent, less trainable, resistant to change, less promotable, and expected to perform less ably. Especially in view of the fact that these myths have now been thoroughly debunked by the studies cited earlier, age-correlated criteria should be highly scrutinized, not lightly accepted as reasonable. Even the Court in Hazen Paper, the case that started the trend to restrictively interpret the ADEA, said

[w]e do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, [citation

282 See supra discussion in note 223.
283 Hazen Paper, 507 U.S. at 610-611.
284 See supra cases cited in n.142.
285 Id. at 18.
286 See supra discussion accompanying notes 41-55.
omitted], but in the sense that the employer may suppose a correlation between the two factors and act accordingly. 287

Nevertheless many courts have subsequently failed to accord any significance to age-correlated criteria.

The courts’ failure to recognize that age-correlated criteria can easily become a proxy for ageist stereotypes is reminiscent of the Court’s refusal to acknowledge that discrimination based on pregnancy is sex discrimination. The Court said that discrimination based on pregnancy is discrimination against pregnant persons, as opposed to non-pregnant persons. 288 This decision is laughable today, but the concept is similar to the courts’ current approval of factors that are inextricably related to age.

VII. Conclusion

Despite the Court’s recent decisions that have applied the disparate impact theory to the ADEA and put the burden of persuasion on the employer to prove the defense of RFOA, older employees are still in danger of losing a large measure of protection under the ADEA. Unless the defendant is required to justify the use of factors that correlate with age, older employees can still be terminated because they have too much seniority, too much experience, are close to retirement, and make too much money. These are the exact employer actions that the ADEA was enacted to prevent.

The quote that introduced this article to the effect that ageism is a pernicious problem in the workplace ends as follows, and I want to end on a hopeful note, as well:

Nevertheless, older Americans in great numbers continue to work. And as they continue to succeed in their jobs, we become increasingly hopeful for the future.

287 507 U.S. at 613.
As greater numbers of older Americans continue to break the negative stereotypes toward older individuals that exist in our society, we feel confident that societal perceptions will gradually shift, as well. After all, older Americans are not just reminders of our past; they are also our future.\textsuperscript{289}

\textsuperscript{289} See McCann and Giles, \textit{supra} note 1, at 188.