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Phased Retirement and the Age Discrimination in Employment Act: Legal Standards and Risks

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I. Overview

Under current law there is no definition of “phased retirement.” However, employers currently devise a variety of ways in which to implement such programs -- by either allowing critical employees to reduce their schedules rather than retire or by allowing retired employees to return as independent contractors. In either case, employers who implement either formal or informal phased retirement programs must make sure that such programs comply with the Age Discrimination in Employment Act (ADEA).

ADEA prohibits an employer from refusing to hire, from discharging, or from otherwise discriminating against an individual based on age with respect to compensation, terms, conditions, or privileges of employment. 29 U.S.C. § 623(a)(1). The term “compensation, terms, conditions, or privileges of employment” as used in Section 623(a) includes “all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.” 29 U.S.C. § 630(1).

In addition, under ADEA, an employer may not “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.” 29 U.S.C. § 623(a)(2).

ADEA contains various exceptions. For purposes of this memorandum, the most important exception is the “reasonable factor other than age” exception (RFOA). Specifically, ADEA allows employment practices “where the differentiation is based on reasonable factors other than age.” 29 U.S.C. § 623(f). However, where an employment practice uses age as a limiting criterion, the RFOA defense is unavailable. 29 C.F.R. § 1625.7(c). Whether the differentiation is an RFOA must be decided “on the basis of all the particular facts and circumstances surrounding each individual situation.” 29 C.F.R. § 1625.7(b). In addition, under the EEOC regulations, a differentiation based on the average cost of employing older employees as a group is unlawful except with respect to the very limited exception for certain employee benefit plans. 29 C.F.R. § 1625.7(f).

ADEA claims are either brought under a theory of disparate treatment (under 29 U.S.C. § 623(a)(1)) or disparate impact (under 29 U.S.C. § 623(a)(2)).

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1 ADEA also prohibits an employer from retaliating against an employee for enforcing the employee’s ADEA rights. 29 U.S.C. § 623(d). This memorandum does not address retaliation claims in detail.
This memorandum first outlines the legal requirements for each type of claim. It then discusses how these requirements might apply to a phased retirement program and the possible implications for both employers and employees.

**II. Claims Under the ADEA**

**A. Disparate Treatment**

1. **Legal Standard**

Under ADEA, an employer is prohibited from refusing to hire, from discharging, or from otherwise discriminating against an individual based on age with respect to compensation, terms, conditions, or privileges of employment. 29 U.S.C. § 623(a)(1). When an individual brings a disparate treatment claim, “liability depends on whether the protected trait (under ADEA, age) actually motivated the employer’s decision.” Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141 (2000) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)). An employee may prove a disparate treatment claim either by direct evidence or through indirect or circumstantial evidence of discrimination. Direct evidence of discrimination is “so revealing of discriminatory animus that it is not necessary to rely on any presumption from the prima facie case to shift the burden of production.” Embrico v. United States Steel Corp., 404 F.Supp. 2d 802, 818 (E.D. Penn. 2005) (citing Connors v. Chrysler Fin. Corp., 160 F.3d 971, 976 (3d Cir. 1998)).

The Courts of Appeals “have employed some variant of the framework articulated in McDonnell Douglas to analyze ADEA claims that are based principally on circumstantial evidence.” Reeves, 530 U.S. at 141. The McDonnell Douglas framework establishes an allocation of the burden of production and an order for the presentation of proof in . . . discriminatory-treatment cases.” Reeves, 530 U.S. at 142 (citations omitted). Although the Supreme Court has not squarely addressed whether this is the applicable standard to use in analyzing circumstantial evidence in ADEA cases, the Supreme Court in Reeves assumed (without deciding) that the McDonnell Douglas framework would apply and used it in that case. Reeves, 530 U.S. at 142.

Under McDonnell Douglas a plaintiff must first establish a prima facie case of discrimination. Id. To establish a prima facie case, the plaintiff must show that:

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2 See also Clansman v. Metro Mgmt. Corp., 391 F.3d 506, 512 (3d Cir. 2004) (holding that an employer’s inquiry about the plaintiff's retirement plans did not constitute direct evidence of age discrimination, whereas a comment by a possible decision-maker that the plaintiff should be replaced by a "young chippie" did); Martin v. Bayland Inc., 181 Fed. Appx. 422, 423-24 (5th Cir. 2006) (finding that a supervisor’s remark that “I think it’s time to hang it up and for you – for you to retire” does not constitute direct evidence because although there is a link between retirement and age, it is not a necessary one).

1) the plaintiff was a member of the class protected by ADEA (i.e. at least 40 years of age);

2) the plaintiff was otherwise qualified for the position;

3) the plaintiff suffered an adverse employment action; and

4) the defendant hired a younger individual for the position or treated the plaintiff adversely relative to a younger employee.4

Embrico, 404 F.Supp 2d at 818 (citing Anderson v. CONRAIL, 297 F.3d 242, 249-50 (3d Cir. 2002)).

Obviously, the legal standard under the first prong is fairly straightforward. A plaintiff either is or is not age 40 or over.

The second prong requires the plaintiff to present evidence demonstrating that he or she is qualified for the position in question. To do so, the plaintiff needs to show that he or she “possesses the basic skills necessary for performance of the job. Gregory v. Daly, 243 F.3d 687, 696 (2d Cir. 2001).5

In determining whether a plaintiff has established a prima facie case of discrimination, a court must “consider a plaintiff’s qualifications independent of the reasons offered by the employer for an adverse employment action.” Rufo v. Dave & Buster, Inc., No. 1:04-CV-698, 2005 WL 3454231 (S.D. Ohio Dec. 16, 2005) (quoting Cicero v. Borg-Warner Automotive, Inc., 280 F.3d 579, 585 (6th Cir. 2002)). In other words, an employer may actually have been unhappy with an employee’s performance and may bring forward evidence of that fact as the non-discriminatory reason for its adverse action against the employee. But such evidence may not be used to rebut the plaintiff’s prima facie case if the plaintiff has presented other evidence (such as consistent evaluations stating satisfactory performance on a job) to show that he or she was qualified for the job. As the 6th Circuit noted in Cicero, “a court must be careful not to conflate the distinct stages of the McDonnell Douglas test.” Cicero, 280 F.3d at 585. In that case, the court concluded that “when viewed independently of [the employer’s] proffered reason, Cicero offers sufficient evidence for a reasonable jury to find that he was qualified for his position.” Id. In that case, the evidence consisted of Cicero’s positive evaluations and his receipt of merit bonuses. Id. at 585-587.

4 In General Dynamics Land Systems Inc. v. Cline, 540 U.S. 581 (2004) the employee claimed that the employer violated the ADEA when it terminated health care benefits for workers under age 50 but not for those over age 50. The Supreme Court found that discrimination against the relatively young (even though covered by ADEA) vis-à-vis older workers in the protected class is outside of the scope of the ADEA.

5 Gregory is a Title VII case. But as the Second Circuit noted in Galaby v. New York City Board of Educ., 202 F.3d 636 (2d Cir. 2000), ADEA and Title VII disparate treatment claims are analyzed under the same legal framework.
The third prong of the prima facie case requires a plaintiff to prove that he or she has suffered an “adverse employment action.” An adverse employment action need not be some “ultimate” action (i.e., firing, failing to promote, etc.), nor is it limited to simply monetary losses in the form of wages or benefits. Rather, courts take a case–by-case approach, examining the particular factors relevant to the situation at hand. As the Seventh Circuit has observed:

[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Using case-by-case analyses, the following are some examples of actions that have been held to be adverse employment actions in disparate treatment claims under the ADEA:

- Failure to train.\(^8\)
- Change in status from division manager to sales manager position (even with the same salary and benefits).\(^9\)
- Transfer, even with the same pay, to a dead-end job that effectively was eliminated before the transfer.\(^10\)
- A gradual demotion by taking away job responsibilities.\(^11\)
- Downgrade in evaluations.\(^12\)

Again using such case-by-case analyses, the following are some examples of actions that have been held not to be adverse employment actions in disparate treatment claims under the ADEA:

- Negative performance evaluations, standing alone.\(^13\)

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\(^7\) Crady v. Liberty National Bank & Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993). Some courts require that the action be a “materially adverse change,” while other do not use that specific term.

\(^8\) Embrico, 404 F.Supp. 2d at 820-21.


\(^10\) Torre v. Casio, Inc., 42 F.3d 825, 831 n. 7 (3d Cir. 1994).


\(^13\) Johnson, 2000 WL 148480 at *10. See also DeWalt v. Meredith Corp., No. 05-2544-JWL, 2007 WL 1310184,*8 (D. Kan. May 4, 2007)(finding no adverse employment actions where negative
Regulating the length and time of bathroom breaks.\textsuperscript{14}  
Absent changes in salary or the number of hours of work, scheduling matters.\textsuperscript{15}  
Work reassignments without a change in salary or work hours.\textsuperscript{16}  
Lateral transfers.\textsuperscript{17}  
Not receiving preferred vacation time.\textsuperscript{18}

Some plaintiffs attempt to show an adverse employment action through a constructive discharge claim, including a claim of involuntary retirement. “Constructive discharge occurs when an employer deliberately makes or allows the employee’s working conditions to become so intolerable that the employee has no other choice but to quit.” \textit{DeWalt v. Meredith Corporation}, 2007 WL 1310184 at *9 (quoting \textit{MacKenzie v. City & County of Denver}, 414 F.3d 1266, 1281 (10\textsuperscript{th} Cir. 2005)).

The requirement that an employee must have had “no other choice but to quit” is a high standard. For example, in \textit{DeWalt}, the district court concluded that a “rational trier of fact could not conclude, based on the summary judgment record, that a reasonable employee in plaintiff’s position would have felt that he had no other choice but to quit.” \textit{Id.} at *10.

In \textit{DeWalt}, as the court observed, the plaintiff noted that he “saw many individuals in the protected class harassed, terminated, and generally treated discriminatorily; that he was transferred to the overnight shift, an entry-level position, because of his age; that he began receiving write-ups and threatened termination for petty issues such as failing to clean up after the day shift; and that his health began to suffer such that both his wife and psychologist recommended that he quit.” \textit{Id.} While this evidence, according to the court, reflected the fact that during the last two years of the plaintiff’s employment “working conditions for older workers deteriorated to the point that they were difficult and unpleasant,” the sole relevant issue was “whether the employer allowed the employee the opportunity to make a free choice regarding his employment relationship.” \textit{Id.} at 10 (citing \textit{Exum v. U.S. Olympic Comm.}, 389 F.3d 1130, 1135 (10\textsuperscript{th} Cir. 2004)). According to the court, the plaintiff “could have continued to work at the station, even though that option may not have been very appealing to him.” \textit{Id.}

The key here is the “objective” standard of reasonableness that a court will apply. As the \textit{DeWalt} court noted in the beginning of its analysis: “The employees’ subjective views of the situation are irrelevant,” (citing \textit{MacKenzie v. City &

\textsuperscript{14}Johnston, 2000 WL 148480 at *11.  
\textsuperscript{16}Id.  
\textsuperscript{17}McNealy, 121 Fed.Appx. at 33-34.  
\textsuperscript{18}Brooks v. City of San Mateo, 229 F.3d 917, 930 (9\textsuperscript{th} Cir. 2000).
County of Denver, 414 F.3d at 1281), “as are the employer's subjective intentions toward the employee.” (citing Baca v. Sklar, 398 F.3d 1210, 1216 (10th Cir.2005). Id. at *9. Thus, as the court concluded at the end of its analysis, “the fact that a plaintiff subjectively considers his or her workplace stressful and may have suffered personal health problems as a result is not an objective criterion used to determine if a reasonable employee would have been compelled to resign.” Id. at *10 (citing Exum, 389 F.3d at 1136 n. 7).

The case of Embrico v. United States Steel Corp., 404 F.Supp. 2d 802 (E.D. Penn. 2005) is also instructive on the facts necessary to demonstrate involuntary retirement for purposes of the prima facie case. In Embrico, four plaintiffs were faced with either retiring under their employer’s voluntary early retirement program or possibly losing their jobs as a result of a plant closing and its reconfiguration as a different enterprise.

The court analyzed the fact situations with regard to the four plaintiffs in significant detail. The court observed that three of the plaintiffs admitted that none of the senior management gave them an indication either way whether they would be terminated; rather, they merely believed they would be. The court found that while the facts showed “uncertainty” about whether their jobs would be eliminated, that was not enough to show involuntary retirement. Id. at 819-820. As the court noted, while the facts showed that “a reasonable person in Embrico’s position might view resignation as ‘the wisest or best decision,’ they [did] not show that termination was objectively so certain that he had no choice but retire.” Id. at 820.

Although the court found the fact situation with regard to the fourth plaintiff to be “close to the line,” id. at 822, it concluded that this plaintiff could make out a prima facie case of involuntary retirement. The specific testimony cited by the court was that “younger employees were given trainings from which [this plaintiff] was excluded; [this plaintiff’s] latest evaluation had been lowered two points unexpectedly; his immediate supervisor . . . directly recommended to him that he accept the [early retirement plan]; and that when he directly confronted [a manager] about his imminent termination, [the manager] was silent in such a way that it could reasonably be interpreted as an affirmation.” Id. at 821. Given these facts, this plaintiff met the prong of demonstrating an adverse employment action for purposes of the prima facie case.

The final prong of the McDonell Douglas framework requires a showing that the complaining employee was treated adversely in favor of a younger employee. The younger employee need not be outside the protected class, provided that the individual is “substantially younger” than the complaining employee. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996). Although the Supreme Court indicated in O'Connor that a three year difference provided only thin evidence of discrimination and a sixteen year difference was much more probative, the Court did not further elucidate the standard for determining what
constitutes a substantial age difference. Id. at 312. The circuits are split on this question, and the age difference requirement ranges from three to ten years.\footnote{See Carter v. DecisionOne Corp., 122 F.3d 997, 1003 (11th Cir.1997)(a three year age difference is sufficient to make out prima facie case); Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir.1981) (a five year age difference combined with evidence that the plaintiff was qualified for the position was sufficient to make out a prima facie case); Schiltz v. Burlington Northern Railroad, 115 F.3d 1407, 1413 (8th Cir.1997) (a five year age gap is insufficient to give rise to a presumption of discrimination); Barber v. CSX Distribution Services, 68 F.3d 694, 699 (3rd Cir.1995) (an eight year age difference satisfied a “sufficiently younger” test); Adkins v. Safeway, Inc., 985 F.2d 1101, 1104 (D.C.Cir.1993) (an eight year age difference was not sufficient to make out a prima facie case of age discrimination); Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 893 (7th Cir. 1997) (a ten year difference in age is presumptively significant, and a plaintiff may make out a prima facie case with a lesser age gap if the plaintiff can prove that the employer considered the difference in age to be significant).}

Once a plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the defendant to “produce[e] evidence that the plaintiff was rejected or someone else was preferred, for a legitimate, nondiscriminatory reason.” Reeves v. Sanderson Plumbing Company, 530 U.S. 133, 142 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)). This is not a particularly heavy burden. It is “one of production, not persuasion; it ‘can involve no credibility assessment.’” Id. (quoting St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 509 (1993)). An employer meets the burden by simply proffering some explanation for the adverse employment action that was not motivated by age.

The fact that a criterion used by an employer may empirically correlate with age will not make that criterion, on its own, an invalid proxy for age. As the Supreme Court ruled in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), a factor that is closely correlated with age (in that case, being close to vesting in a pension) is still \textit{distinct} from age itself. Id. at 611-612. Thus, an employer who makes an adverse employment decision on the grounds that an employee is close to vesting is not basing its decision on invalid stereotypes about age – but rather, on perhaps accurate assessments of the costs of employees who are close to vesting. Id. at 612.\footnote{The Court noted that an employer who fired an employee in order to prevent his or her pension benefits from vesting would be liable under §510 of ERISA, but not, without more, under the ADEA. Hazen Paper Co., 507 U.S. at 612 (1993).}

Once an employer meets its burden of producing a legitimate reason other than age, the ultimate burden of persuasion rests with the plaintiff to demonstrate that age was the reason for the discrimination. Reeves, 530 U.S. at 143 (citing Burdine, 450 U.S. at 253). To do so, the plaintiff “must be afforded the ‘opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.’” Id. The plaintiff can do so by demonstrating that the employer’s explanation is not worthy of credence. The plaintiff may also draw on all the evidence that established his or her prima facie case and any inferences that
might properly be drawn from such evidence. Id. at 143-144. Thus, for example, in the case of Reeves, once the plaintiff sufficiently called into question the credibility of the employer’s reasons for his termination (i.e., his failure to properly keep attendance records), the jury was permitted to find that the employer had improperly fired the plaintiff for age discrimination – even though the plaintiff had included no additional evidence beyond the evidence that had established his prima facie case.

Of course, carrying the burden of persuasion that an employer’s stated non-discriminatory reason is not credible and is merely a pretext for discrimination is not an easy one to meet. For example, the only plaintiff in Embrico who was found to have stated a prima facie case of discrimination was unable to prove that the employer’s non-discriminatory reason was pretextual. The employer in that case claimed that decisions about which employees to retain were made based on the employees’ technical backgrounds, and not based on their age. Embrico, 404 F.Supp.2d at 824. The court found the plaintiff’s argument that this objective on the part of the employer was merely a pretext for age discrimination to be unpersuasive. Id. at 824-827.

2. Disparate Treatment Standard Applied to Phased Retirement Programs

Employers today are implementing phased retirement arrangements in a variety of ways. For example, an employer may permit an individual to reduce his or her hours worked or to reduce his or her responsibilities. Such an individual may or may not have access to a portion of his or her pension or retirement benefits based on the reduction of hours. As an alternative, an employer may implement a phased retirement program by rehiring select retirees.

Regardless of the form that a phased retirement arrangement may take, surveys of employers indicate that the reason employers are interested in exploring and implementing such programs is to retain critical talent based on the employer’s business needs.21 At the same time, there may presumably be a number of

21 According to a recent Society for Human Resource Management and AARP report, employers will need to implement “flexible retirement arrangements,” including phased retirement, for the following reasons:

- Maintaining continuity of essential business operations by retaining key workers whose positions may be difficult to fill;
- Enhancing productivity by addressing the need for work/life balance;
- Reducing costs associated with hiring and training new employees;
- Increasing organizational flexibility by tapping retirees as consultants or contractors; and
- Forecasting future workforce needs and employee benefit costs.

employees who may wish to take advantage of a phased retirement arrangement, if an employer makes such arrangements available to some and if the laws are otherwise crafted to make such arrangements financially and logistically easy to take advantage of. The employer, of course, may not have a business need to retain all such employees.

For purposes of analyzing how a disparate treatment claim might arise under ADEA against an employer who has implemented a phased retirement program, consider the following hypothetical:

Employee A has worked for Company Z for thirty years. He is 63 years old and is eligible for full retirement based on his age and years of service. Company Z has entered into phased retirement arrangements with six other employees in employee A’s division of fifty employees. All six of the employees who have been granted such arrangements are between the ages of 50 and 54.

Employee A wants to reduce his full-time schedule by one-third so that he can care for his sick wife. He does not want to fully retire because he wants to maintain employer provided health care coverage for his wife and because he needs to earn income to help support his family.

Employee A requests a phased retirement arrangement from Company Z. The Company denies his request, stating that its business needs would not be met by Employee A working a 2/3 schedule. Employee A subsequently retires because he claims he cannot work a full-time schedule and care for his wife. He then brings suit under the ADEA claiming that Company Z refused his request for a phased retirement arrangement solely because of his age.

Based on current case law, Employee A will face two hurdles in establishing a prima facie case of discrimination.

Obviously, Employee A will not have a difficult time proving that he is a member of the protected class (i.e. age 40 or over). Furthermore, given that Company Z has allowed “younger” workers to participate in the phased retirement program, Employee A will also probably not have difficulty proving the fourth prong of the prima facie case.

Under the second prong of the prima facie case, however, Employee A must prove that he is qualified to work a reduced schedule. Given the lack of case law directly on point, we can only speculate as to what courts might require under this prong of the prima facie case. One can probably expect, however, that

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plaintiff and management lawyers will differ significantly on what such evidence must include.

For example, plaintiff lawyers may argue that the sole evidence necessary to demonstrate that a plaintiff is “qualified” to participate in a phased retirement program is that the plaintiff’s position is amenable to a reduced hours schedule and that the plaintiff is qualified to receive such a schedule. As part of such evidence, the plaintiff may point to his or her generally good evaluations, including evidence that there is nothing in the plaintiff’s record that would call into doubt his or her ability to meet deadlines, manage time, etc.

Conversely, management lawyers may argue that to be “qualified” to participate in a phased retirement program, the plaintiff must be similarly situated to other individuals who were allowed to participate in the phased retirement program in all respects. In other words, the plaintiff would have to show that she or he has similar critical skills that the employer wishes to retain, and that allowing the plaintiff to work a part-time schedule would advance the employer’s business needs. Under this definition of “qualified,” Employee A would need to show that allowing him to work a reduced schedule satisfies the business needs of the employer. Presumably, given the facts in this example, Employee A would be unable to do so.

Even if Employee A satisfied the second prong, he would still need to satisfy the third prong of a prima facie case. Thus, he would have to show that Company Z’s denial of his request to work a part-time schedule was an “adverse employment action.” Again, there is no case law on this issue, but we presume that plaintiff and management lawyers would differ on whether denial of an opportunity to work part-time constitutes an adverse employment action.

Plaintiff lawyers most likely would argue that a change from working full-time to part-time – where an employee’s income, hours at work, and workload and responsibilities will differ -- is clearly a material change in the “compensation, terms, conditions, or privileges of employment.” For example, most people would probably agree that requiring an employee to reduce his or her hours would be an adverse employment action. Plaintiff lawyers might argue that denying an employee the opportunity to reduce his or her hours is similarly an adverse action in certain circumstances.

Management lawyers, however, would presumably argue that a request to work part-time is merely a request for a change in schedule, and that in general, scheduling matters are not “adverse employment actions.” But the case-by-

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23 See Banks, 386 F.Supp.2d at 927. See also Johnson v. UPS, 117 Fed.Appx. 444, 450 (6th Cir. 2004) (“Case law indicates that, absent changes in salary or the number of hours of work, scheduling matters would not normally classify as potential adverse employment actions.”) As this quotation shows, adverse employment action generally also includes a reduction in compensation by the employer. An employee requesting a part-time rather than full-time
case analysis used to determine whether a particular employment action is sufficiently adverse could become relevant in such cases. That is, a plaintiff might respond that although scheduling changes might not normally constitute adverse employment actions, the denial of the right to work part-time in certain unique circumstances does amount to a materially adverse employment action.

For example, the Supreme Court explained in dicta in Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405 (2006), a Title VII retaliation case, that “[a] schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.” Id. at 2415. The Court approvingly cited Washington v. Illinois Dept. of Revenue, 420 F.3d 658, 662 (7th Circuit 2005), in which the Seventh Circuit held that changing a flex-time schedule for an employee with a disabled child is a materially adverse change. 24

Thus, if Employee A ultimately feels obliged to retire, he could argue that he or she has been subjected to involuntary retirement. Even if he ultimately did not retire, he could still argue that – given his or her unique circumstances – the denial of the part-time schedule was an adverse employment action.

If Employee A is able to establish a prima facie case of discrimination, Company Z need only present a legitimate, non-discriminatory reason for its denial. In almost all cases, it will presumably be easy for an employer to claim that the particular skill set offered by the plaintiff was not one that the employer felt was essential to its business needs. Thus, the nondiscriminatory reason for denial of participation in the phased retirement program will be some factor specific to the employee, other than the employee’s age. Employee A would then bear the ultimate burden of persuasion that the employer’s stated reason was pretextual and that Company Z’s refusal to allow Employee A to work a part-time schedule was, indeed, based on Employee A’s age.

schedule, which by its very nature would be a reduction in compensation, does not fit squarely into the “adverse employment action” jurisprudence for disparate treatment claims. Such claims normally focus on an employer’s actions that reduce compensation, not on an employee’s request to reduce his or her compensation.

24 See also Ray v. Henderson, 217 F.3d 1234, 1244 (9th Cir. 2000) (not allowing employees a flexible work schedule regarding starting times was an adverse employment action under a Title VII retaliation claim). Of course, Burlington Northern made clear that the scope of an adverse employment action in a retaliation claim is broader than a substantive claim of discrimination, in that retaliation claims can reach “beyond workplace-related or employment-related retaliatory acts and harms.” Burlington Northern, 126 S. Ct. at 2414. But plaintiff lawyers could argue that denial of the opportunity to work part-time is in fact a workplace- or employment-related act, and that the requirement to consider a plaintiff’s unique circumstances is equally applicable to disparate treatment claims.
B. Disparate Impact

1. Legal Standard

Under a disparate impact claim, a plaintiff challenges a facially neutral employment practice that has a disproportionate impact on the protected class.\(^{25}\) Disparate impact claims are cognizable under the ADEA, just as they are under Title VII. Smith v. City of Jackson, 544 U.S. 228 (2005) (hereinafter City of Jackson).\(^{26}\) ADEA disparate impact claims, however, are more strictly circumscribed—first, by the requirement that “a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack,” Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 657 (1989),\(^{27}\) and second, by ADEA’s specific exemption for “otherwise prohibited” actions that are based on “reasonable factors other than age” (RFOA). 29 U.S.C. § 623(f)(1).

City of Jackson is the seminal case regarding the scope of ADEA disparate impact liability. In City of Jackson, the Supreme Court held that its decision in Wards Cove (which interpreted the scope of disparate impact liability under Title VII) applies to ADEA claims, even though Congress had specifically modified the Court’s holding in Wards Cove by amending Title VII in the Civil Rights Act of 1991.\(^{28}\) Thus, to make a prima facie disparate impact claim, a plaintiff in an ADEA case must point to a “specific test, requirement, or practice” that has an adverse impact on older workers. City of Jackson, at 241. As the Court in City of Jackson explained:

As we held in Wards Cove, it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is “‘responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.’” Id. at 241 (quoting Wards Cove and Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988)).

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\(^{26}\) Following passage of the ADEA, most Courts of Appeal had permitted disparate impact claims under the law. City of Jackson, 544 U.S. at 236-37 (2005). After the Supreme Court’s decision in Hazen Paper, however, in which the Court noted in passing that it had no need to decide whether disparate impact claims were permissible under ADEA, some Courts of Appeal concluded that the ADEA did not authorize disparate impact claims. Id. at 237. In City of Jackson, the Supreme Court clarified that disparate impact claims were, in fact, permissible under the Act. Id., at 232-241.
\(^{27}\) As explained infra, City of Jackson held that ADEA disparate impact claims are governed by the standards set forth in Wards Cove. City of Jackson, 544 U.S. at 240.
\(^{28}\) As amended, Title VII provides 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.” 42 U.S.C. § 2000e-2(k)(1)(B)(i). In City of Jackson, the Court explained that it chose not to apply this standard because “[w]hile the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination.” City of Jackson, 544 U.S. at 240.
City of Jackson also held that under ADEA’s RFOA exemption, if an employer uses reasonable employment criteria other than age, those criteria will not be invalidated under the ADEA, even if they have an adverse impact on older employees or applicants. \textit{Id.} at 241. The Court distinguished the ADEA “reasonable factor” test from the Title VII “business necessity” test, explaining: “Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.” \textit{Id.} at 242-243. \textit{See also id.} at 267 (O’Connor, J., dissenting) (“[The RFOA] exemption requires only that the challenged employment practice be based on a “reasonable” nonage fact – that is, one that is rationally related to some legitimate business objective.”)

Applying these two requirements for disparate impact claims, the Court denied relief to the City of Jackson plaintiffs. The City of Jackson had granted raises to all police officers and dispatchers based on the City’s desire to “bring the starting salaries of police officers up to the regional average.” \textit{Id.} at 231. Under the plan, those with less than five years of tenure received proportionally greater raises when compared to their former pay than those with more seniority. Most of the officers age 40 and over had more than 5 years of service. \textit{Id.} at 231.

The Court found fault with the plaintiffs’ claim on two grounds. First, the Court observed that the plaintiffs had “done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers.” \textit{Id.} at 241.

Second, even if the plaintiffs had been able to point to a specific test, requirement or practice that had an adverse impact on older workers, the Court concluded that the City’s decision was based on an RFOA. Specifically, the Court determined that the City had used seniority and rank to determine how much of a percentage increase to grant because of “the City’s perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market.” \textit{Id.} at 242. The Court concluded that reliance on seniority and rank was “unquestionably reasonable given the City’s goal of raising employees’ salaries to match those in surrounding communities,” and was “a ‘reasonable factor other than age’ that responded to the City’s legitimate goal of retaining police officers.” \textit{Id.} As the Court explained, “[w]hile there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable.” \textit{Id.} at 243.

Thus, in order to establish a prima facie case in an ADEA disparate impact claim after City of Jackson, a plaintiff must first “point to both a significant disparate impact and to a particular policy or practice that caused the disparity.” Pippin v. Burlington Resources Oil and Gas Co., 440 F.3d 1186, 1200 (10th Cir. 2006).
After the plaintiff establishes a prima facie case, the burden of production shifts to the defendant to “assert that its neutral policy is based on a reasonable factor other than age.” Id. The burden then shifts to the employee who, to prevail, must “persuade the factfinder that the employer’s asserted basis for the neutral policy is unreasonable. The test is not whether there were other more narrowly tailored ways for the employer to achieve its legitimate business goals. Instead, the employee must show that the method selected was unreasonable.” Id. (citations omitted).

Since City of Jackson, a number of Courts have decided ADEA disparate impact claims. All but one of them have been decided in favor of the defendants. The vast majority of favorable decisions for defendants rest upon the fact that the employer was able to provide a RFOA for the employment action. The following are various RFOAs that courts have accepted as legitimate under ADEA, even if they might have had a disparate impact on older employees:

- Retirement status;\(^{29}\)
- Employee performance, flexibility (whether the employee’s skills could be used in other assignments), and criticality of skills;\(^{30}\)
- Corporate restructuring, performance-based evaluations, retention decisions based on needed skills and recruiting concerns;\(^{31}\)
- Technical background;\(^{32}\)
- Reducing cost by reducing employees with high salaries and high health care costs;\(^{33}\) and
- Seniority.\(^{34}\)

To date, only one lower court has found that an ADEA disparate impact case could not be resolved at the summary judgment stage in favor of the employer.\(^{35}\)


\(^{30}\) Meacham v. Knolls Atomic Power Laboratory, 461 F.3d 134, 144-145 (2d Cir. 2006).

\(^{31}\) Pippin v. Burlington Resources Oil and Gas Co., 440 F.3d 1186, 1201 (10th Cir. 2006) (summary judgment affirmed).

\(^{32}\) Embrico, 404 F.Supp. 2d at 830-31 (decided on summary judgment).


\(^{35}\) EEOC v. Allstate Ins. Co., 458 F. Supp. 2d 980 (E.D. Mo. 2006). In Meacham v. Knolls Atomic Power Lab., see supra n. 30, a jury had found for the plaintiffs on a disparate-impact theory of liability. Meacham v. Knolls Atomic Power Lab., 185 F.Supp.2d 193 (N.D.N.Y.2002). The Second Circuit Court of Appeals upheld the jury verdict, concluding that “(i) the plaintiffs had established a prima facie case under the ADEA by demonstrating the disparate impact on older workers of the subjective decision-making involved in the IRIF [involuntary reduction-in-force]; and (ii) notwithstanding defendants’ facially legitimate business justification for the IRIF and its constituent parts, there was sufficient evidence of an equally effective alternative to the subjective components of the IRIF to support liability.” Meacham, 461 F.3d at 137, citing Meacham v. Knolls Atomic Power Lab., 381 F.3d 56, 71-76 (2d Cir.2004). The Supreme Court vacated the Second Circuit’s judgment and remanded for reconsideration in light of City of Jackson. A divided panel
In EEOC v. Allstate Ins. Co., 458 F. Supp. 2d 980 (E.D. Mo. 2006), defendant, Allstate Insurance Co., instituted a reorganization plan on June 30, 2000, under which it terminated the employment contracts of 6,300 employee-agents. Upon termination of the contracts, each individual was given one of four options: The first two options allowed an individual to become an independent contractor, the third allowed for enhanced severance pay on the condition of signing a release of claims, and the fourth option allowed for basic severance payments without signing a release. After the reorganization plan was implemented, in September 2000, defendant implemented a new rehire policy, which provided that former employee-agents could not apply for rehire for a period of one year after their termination or after they had received all severance benefits, which precluded former employee-agents from being rehired in a nonagent position for between one to two years. Some terminated employees had been rehired before the implementation of the new rehire policy.

Plaintiffs brought a claim of disparate impact under the ADEA. The district court found that the plaintiffs had established a prima facie case of disparate impact discrimination by showing that 90% of the employees who were subject to the reorganization plan and subsequently barred from rehire were over the age of 40. Id. at 992. Furthermore, plaintiffs showed that out of the total number of Allstate employees that were affected by the new rehire policy, 23 percent were over age 40, compared with 2.7 percent of those not within the protected group. Id. at 993. Finally, the court found it persuasive that the average age of employees subject to the rehire policy was 51.1 as compared with the average age of Allstate’s entire workforce which was 39.4. Id.

Allstate provided the following non-age related reasons for its rehire policy:

- Avoiding customer confusion and conflict;
- Encouraging former employee-agents to participate in an independent contractor arrangement;
- Preventing individuals from receiving severance pay and actual pay (namely, double-dipping);
- Preventing individuals who decided not to continue to work for the entity from working with those who had; and
- Implementing consistent rehiring policies.

Id. at 993.

In response, the plaintiff asserted the following information from the deposition of the Allstate employee who had developed and implemented the rehire policy to show that each of these reasons was unreasonable.

of the Second Circuit vacated the judgment of the district court and remanded with instructions to enter judgment as a matter of law in favor of defendants.
The individual could not recall involving anyone else in the decision making process other than in-house counsel before implementing the policy.

The employee could not recall whether any of the concerns she had with rehiring former employee-agents (reasons one-four) had actually occurred during the period between the agents’ termination and implementation of the rehire plan.

The employee did not research whether the rehire policy would be beneficial to Allstate, she did not review any of the reorganization documents, and she did not make any effort to determine the age demographics of former employee-agents who would be subject to the rehire policy.

With respect to encouraging employee-agents to become independent contractors, the plaintiff showed that such individuals had to decide whether to become independent contractors three month before the implementation of the rehire policy.

With respect to “double-dipping”, the plaintiff showed that Allstate already had a policy in place before the rehire policy to prevent double-dipping.

Id. at 993-94.

The court concluded that the employer had provided evidence on the non-age related factors it had considered in implementing the rehire policy; that the plaintiffs had provided evidence that contested either the veracity of those reasons or the reasonableness of those reasons; and that a reasonable jury could find that the reasons proffered by the employer for the rehire policy were not reasonable. The district court thus denied summary judgment for Allstate.  

2. Application to Phased Retirement Programs

To demonstrate how a disparate impact claim regarding a phased retirement programs might be analyzed, consider the following hypothetical:

Employer X is a chemical engineering company. Employer X has evaluated its workforce and has realized it is suffering and will continue to suffer a shortage of qualified chemical engineers. This shortage is due to the difficulty in finding qualified engineers for entry-level positions and to the fact that the majority of the company’s engineers are nearing retirement age.

To try to retain the engineers who are nearing retirement age, Employer X establishes a phased retirement program for its chemical engineering job.

category. Under this program, employees may work reduced schedules, but maintain eligibility for all employee benefits as if the employee were a full-time employee. Individuals in the program also have access to certain of their retirement funds.

To participate in the phased retirement program an individual must satisfy the following criteria:

1) have at least 20 years of service;
2) be an engineer with skills critical to Employer X’s mission and success;
3) have received at least satisfactory performance evaluations for the past five years; and
4) have approval from his or her manager and the manager’s direct supervisor to enter into the program.

Three years after implementing the program, 10 of the company’s 30 chemical engineers who have at least 20 years of service are participating in the phased retirement program. Of the 10 individuals, all but one are under age 60.

Employees A and B both apply to enter into the phased retirement program. Both their applications are denied, based on their lack of critical skills and past performance evaluations.

Employee A is 65 and employee B is 66. Employees A and B file suit claiming that the phased retirement program has a disparate impact on individuals over age 60, based on the fact that nine out of the ten employees in the program are under age 60 and those denied participation in the program are all over age 60.

The first hurdle that plaintiffs in such a case would face is identifying the “specific test, requirement, or practice” within the phased retirement plan that has the adverse impact on older workers. After City of Jackson, an assertion that the phased retirement program, as a whole, has an adverse impact on older workers, would be insufficient. Presumably, plaintiffs would argue that the neutral policy of having “skills critical to Employer X’s mission and success” adversely impacts older workers in that older workers may not have received sufficient training to have acquired those skills.

It is unclear whether this argument would satisfy the “specific test, requirement, or practice” requirement. But even if it did, Employer X could still argue that it used RFOAs – here, skills critical to its mission and success and satisfactory performance evaluations – to determine who could participate in its phased retirement program. And as discussed above, courts have held that factors such
as criticality of skills,\textsuperscript{37} performance-based evaluations,\textsuperscript{38} and technical background\textsuperscript{39} satisfy the RFOA exemption. Employees A and B would then have the very high burden of persuasion of disproving Employer X’s assertion that it used an RFOA. Indeed, given that retention of critical talent is almost always the underlying reason for establishing a phased retirement program, it is difficult to imagine a situation where an employer could not assert that it used the RFOA of critical skills in determining who could enter its phased retirement program.

### III. Conclusion

In light of changing demographics and labor force patterns, many employers may begin to expand their efforts to entice employees with critical skills and talent to remain at their jobs beyond ordinary retirement age. One method for doing so might be the development and expansion of phased retirement arrangements, in which older employees reduce their hours of working and are provided some access to their retirement funds.

The criteria for entering a phased retirement arrangement will presumably be the employer’s business needs for a particular employee to remain with the employer and the suitability of the employee’s position for reduced hours. This memo, however, postulates two scenarios in which employees believe the criterion for receiving permission to enter a phased retirement arrangement was that of age.

As this memo demonstrates, current case law under the ADEA will not make it easy for an employee to prevail in challenging a denial of access to a phased retirement arrangement. An employee challenging such a denial under a disparate treatment framework will face three hurdles. The first two will occur in establishing the prima facie case. The plaintiff must demonstrate that he or she was “qualified” to enter the phased retirement arrangement and that an employer’s denial of such a request was an “adverse employment action.” Assuming a plaintiff makes out a prima facie case, an employer will presumably argue that the basis for receiving permission to enter a phased retirement arrangement was not age, but rather whether the plaintiff’s skills were of a kind that merited the phased retirement arrangement in light of the employer’s business needs. The plaintiff would bear the ultimate burden of persuasion that the employer’s proffered reason was simply a pretext for age discrimination.

An employee challenging his or her denial of entry into a phased retirement arrangement under a disparate impact framework will face two hurdles. First, the plaintiff will need to identify a specific practice within the phased retirement plan that has an adverse impact on older workers. Second, if the plaintiff is able to do so, an employer may offer a “reasonable” factor other than age on which the neutral policy is based. In order to prevail, the plaintiff must persuade the

\textsuperscript{37} Meacham \textit{v.} Knolls Atomic Power Laboratory, 461 F.3d 134, 144-45 (2d Cir. 2006).
\textsuperscript{38} Pippin \textit{v.} Burlington Resources Oil and Gas Co., 440 F.3d 1186, 1201 (10\textsuperscript{th} Cir. 2006).
\textsuperscript{39} Embrico, 404 F.Supp. 2d at 830-31.
factfinder that the employer’s asserted basis for the neutral policy was unreasonable. The fact that there might have been more narrowly tailored ways for the employer to have achieved its legitimate business goals will not be relevant in this analysis.

Although employees might find it difficult to challenge successfully their denial of access into phased retirement arrangements, such challenges may nonetheless be brought if employees believe that such denials have been based on age. Thus, it is possible that fear of ADEA liability – if not ADEA liability itself – might become a barrier to widespread implementation of phased retirement arrangements.