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ADEA Disparate-Impact Claims: How the Third Circuit Age-Proofed Comparators

Stephanie Vilella
American University Washington College of Law

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ADEA DISPARATE-IMPACT CLAIMS: HOW THE THIRD CIRCUIT AGE-PROOFED COMPARATORS

STEPHANIE VILELLA*

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I. INTRODUCTION

Today, Americans age sixty-five and older continue to join the workforce.1 According to the Pew Research Center, as of 2016, more than

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* Associate Managing Editor, American University Business Law Review, Volume 7; J.D. Candidate, American University Washington College of Law, 2018; B.A., Political Communication, The George Washington University, 2015. The author would like to thank Professor Susan Carle and the American University Business Law Review for their guidance in completing this Note, and her parents, Debbie and Salvador, for their love and support throughout this process.

1. Drew Desilver, More Older Americans Are Working and Working More, Than They Used To, PEW RES. CTR. (June 20, 2016), http://www.pewresearch.org/fact-tank/2016/06/20/more-older-americans-are-working-and-working-more-than-they-used-to/.
eighteen percent of this age group was employed. Although they are known as the “Baby Boomer generation,” older workers nevertheless seem reluctant to retire. This generation is still dealing with the ramifications from the economic crisis, and many Baby Boomers want to make more money before they retire. On the one hand, businesses benefit from the experience that older workers can provide them. As AARP’s Senior Vice President Jean Setzfand noted, “older workers frequently bring traits that are highly sought after in the workplace: experience, maturity, professionalism, a strong work ethic, loyalty, reliability, knowledge, strong communication skills and the ability to serve as mentors.” Nonetheless, more businesses are laying off older workers. For instance, Fidelity Investments recently bought-out 3,000 employees, all of whom were at least fifty-five years old. The company, however, is not the only one to take this action, and it is likely that more employers will also buyout older employees.

Although states have enacted employment discrimination laws, federal laws also address workforce discrimination. The Age Discrimination in Employment Act (“ADEA”) currently protects employees forty years old or older from discriminatory employment policies. Employees can challenge these policies on the basis of two different theories: disparate-treatment and/or disparate-impact. For purposes of disparate-treatment claims, the
United States Supreme Court has said that “the fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age.”13 In Karlo v. Pittsburgh Glass Works, LLC, the U.S. Court of Appeals for the Third Circuit found that employees may use subgroup comparators14 for ADEA disparate-impact claims.15 Should Pittsburgh Glass Works (“PGW”) appeal, the Third Circuit’s decision, which created a conspicuous circuit split, provides an opportunity for the Court to clarify its ADEA disparate-impact jurisprudence.16

This Comment argues that, if PGW appeals the Third Circuit’s decision in Karlo to the Supreme Court, the Court will likely affirm the Third Circuit’s decision.17 This Comment will first discuss disparate-impact jurisprudence, including the theory’s scope under the ADEA.18 Specifically, it will focus on disparate-impact theory under Title VII of the Civil Rights Act, its extension to the ADEA by way of Supreme Court jurisprudence, and the Court’s interpretation of the ADEA itself.19 Next, this Comment will analyze the ways in which U.S. circuit courts interpret disparate-impact theory and the ADEA, thereby demonstrating why the Third Circuit’s reasoning prevails.20 It further recommends that the Court resolve the circuit split by

69 (3d Cir. 2017).
14. See generally Patrick Dorrian, Olden Workers Can Sue for Age Bias Even If Comparators Are 40-Plus, BLOOMBERG L. (Jan. 11, 2017), https://www.bna.com/older-workers-sue-n73014449636/ (defining comparator as a term used for the group you are using to compare the subgroup with).
15. Karlo, 849 F.3d at 67-68.
16. See id. at 69 (allowing ADEA subgroup disparate-impact claims, “so long as that evidence meets the usual standards for admissibility”); see also Dorrian, supra note 14 (noting reactions on the likelihood of Pittsburgh Glass Works appealing the Third Circuit’s decision to the Supreme Court).
17. See Karlo, 849 F.3d at 68.
20. See generally Karlo, 849 F.3d 61 n.7 (justifying it’s “compelling basis” for creating this circuit split by highlighting three factors: “(1) the Second Circuit and Sixth Circuit cases predate ... O’Connor and Smith; (2) the Sixth Circuit case is non-precedential; and (3) the Eighth Circuit case predates Smith”); EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999); Smith v. TVA, 924 F.2d 1059 (6th Cir.
upholding the Third Circuit’s interpretation of ADEA sections 623(a)(1) and 623(a)(2). Lastly, it concludes that the Third Circuit’s ruling is indeed consistent with the ADEA, and that, if PGW appeals to the Supreme Court, the Court will likely uphold the Third Circuit’s decision on subgroup disparate-impact claims.

II. THE RISE OF AGE DISCRIMINATION JURISPRUDENCE AND THE DISPARATE-IMPACT THEORY

Discrimination claims ordinarily contend that a plaintiff has suffered disparate-treatment and/or disparate-impact. Intentional discriminatory acts against an employee constitute disparate-treatment. Conversely, disparate-impact claims challenge policies lacking discriminatory intent, but nonetheless benefit a particular group.

A. Supreme Court Title VII Case Law

In Griggs v. Duke Power Co., African American employees challenged Duke Power Company’s standardized testing employment policy under Title VII of the Civil Rights Act, which provides that:

- it shall be an unlawful employment practice for an employer -
  (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
  (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color,
religion, sex, or national origin.27

The Court used this case to establish the disparate-impact theory for claims under Title VII of the Civil Rights Act.28 Notably, the Court stated that “[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”29 The Court further explained that Title VII does not require employers to hire individuals because they may fall under a protected class, but rather, that employers refrain from engaging in discriminatory policies that favor a particular group.30 Thereafter, the disparate-impact analysis has encompassed challenges to “practices that are fair in form, but discriminatory in operation.”31 However, whether the employer intended for the policy to be discriminatory is irrelevant.32

Following its decision in Griggs, the Court applied a similar reasoning in McDonnell Douglas Corp. v. Green.33 In this case, the McDonnell Douglass Corporation terminated an employee as part of a reduction-in-force.34 The Court reaffirmed the notion that under Title VII, employers cannot engage in discriminatory practices.35 As such, if a plaintiff wishes to challenge an employer’s policy under Title VII disparate-treatment grounds, the plaintiff must meet the prima facie elements from McDonnell.36 The Court declared:

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.37

28. See Griggs, 401 U.S. at 430-31; Karlo, 849 F.2d at 69.
30. Id. at 430-31.
31. Id. at 431.
32. See id. at 430-32 (“[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”); see also Watson v. Fort Worth Bank and Tr., 487 U.S. 977, 987 (1988) (justifying the disparate-impact theory on grounds that an employer may discriminate against an employee even where the employer did not intend to do so).
34. Id. at 794.
35. See id. at 802.
36. See id.
37. Id. at 802.
Once the plaintiff demonstrates a prima facie case for discrimination, the employer will only prevail if the policy was based on a “legitimate, nondiscriminatory reason.”\textsuperscript{38} In contrast, a prima facie case for disparate-impact claims require “isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.”\textsuperscript{39} The distinctions indicated above reveal that lacking intent does not negate a finding of discrimination.\textsuperscript{40}

In \textit{Connecticut v. Teal},\textsuperscript{41} the Court assessed an employer’s “bottom-line” defense to a Title VII disparate-impact claim.\textsuperscript{42} The State of Connecticut carried out a hiring process among employees seeking positions as permanent supervisors, and as such, the State required said employees to take a written exam.\textsuperscript{43} The process disparately impacted four employees; however, a year after the examination, petitioners promoted over twenty percent of the African American candidates and more than thirteen percent of its white candidates.\textsuperscript{44} In highlighting the supposed balance, Connecticut attempted to justify a policy that disparately impacted certain employees, because “the ‘bottom-line’ result of the promotional process [achieved] an appropriate racial balance.”\textsuperscript{45} The Court rejected Connecticut’s justification, noting that the disparate-impact analysis prohibits practices that affect an individual’s employment regardless of potential positive results or outcomes of specific employment practices.\textsuperscript{46}

Then in \textit{Watson v. Fort Worth Bank and Trust},\textsuperscript{47} the Court noted that a prima facie case for disparate-impact requires that the plaintiff show “causation” with respect to the new employment practice.\textsuperscript{48} In doing so, the Court acknowledged that a plaintiff meets this requirement if he or she can

\textsuperscript{38} See id.; see also Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 69-70 (3d Cir. 2017) (distinguishing the “business necessity” defense for Title VII claims from the “reasonable factor other than age” defense for ADEA claims).


\textsuperscript{40} See \textit{Watson}, 487 U.S. at 987 (rejecting that disparate-treatment and disparate-impact involve different “legal issues”).

\textsuperscript{41} 457 U.S. 440, 442 (1982).

\textsuperscript{42} Id.

\textsuperscript{43} Id. at 442-43.

\textsuperscript{44} See id. at 443-44 (noting that more white candidates passed the written exam compared to African American candidates).

\textsuperscript{45} See \textit{id}. at 442-44 (highlighting Connecticut’s defense that they ultimately hired more African American candidates).

\textsuperscript{46} See id. at 450.


\textsuperscript{48} Id.
show that the employment practice disparately impacted him or her because the person falls under the protected class.\textsuperscript{49}

\textbf{B. The Age Discrimination in Employment Act of 1967}

As stated above, the ADEA precludes employers from engaging in discriminatory measures against employees forty years old or older.\textsuperscript{50} Specifically, the Act provides that:

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.\textsuperscript{51}

Disparate-impact claims fall under section 623(a)(2) of the ADEA.\textsuperscript{52} For a plaintiff to succeed under section 623(a)(2), the plaintiff must meet the Court’s causation standard established in \textit{Watson}.\textsuperscript{53} To do so, “the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.”\textsuperscript{54} Nonetheless, pursuant to the ADEA, an employer may ultimately prevail if an employer can successfully show that its determination involved a “reasonable factor other than age.”\textsuperscript{55} For instance, in \textit{Smith v. City of Jackson},\textsuperscript{56} the Court evaluated whether a group of ADEA-covered employees could bring a disparate-impact claim pursuant to the ADEA to

\textsuperscript{49} See \textit{id.} ("[T]he plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership of a protected class.").

\textsuperscript{50} 29 U.S.C. § 621 (2012).


\textsuperscript{54} \textit{Watson}, 487 U.S. at 994.

\textsuperscript{55} See \textit{29 U.S.C. § 623(f)(1)} (noting that considering “reasonable factors other than age” would justify practices that would be “otherwise prohibited”); see also \textit{Karlo}, 849 F.3d at 80 (describing this requirement as a “light burden”).

\textsuperscript{56} 544 U.S. at 228.
challenge the city’s pay raise plan. 57 Specifically, the Court found that the city could lawfully give its police officers a higher raise. 58 In recognizing disparate-impact claims under the ADEA, Smith extended the concept of the disparate-impact prima facie case, as described in Watson, to ADEA claims. 59

Furthermore, in Smith, the Court said that “when Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.” 60 Consequently, the Court found that both the ADEA and Title VII provide for disparate-impact claims because (1) the language in the statutes only differs in its protected classes, and (2) they both proscribe discrimination in the workforce. 61 Moreover, the Court compared the ADEA’s applicability in disparate-treatment and disparate-impact, specifically finding that the discriminatory policies trigger the ADEA. 62 Where the employer’s policy is not related to the employee’s age, the employer is not liable for disparate-treatment. 63

However, in Meacham v. Knolls Atomic Power Laboratory, 64 the Court clarified that if an employer invokes section 623(f)(1) of the ADEA as an affirmative defense to an ADEA disparate-impact claim, the employer “must not only produce evidence raising the defense, but also persuade the factfinder of its merit.” 65 The Court noted that section 623(f)(1) serves as a defense to disparate-impact claims because but for the fact that an employer may prove the policy was based on a “reasonable factor other than age,” the employer would be liable for discriminating against ADEA-covered employees. 66

Finally, disparate-treatment claims fall under section 623(a)(1). 67 The

57. Id. at 230-31.
58. See id. at 242 (“Reliance on seniority and rank is unquestionably reasonable given the City’s goal of raising employees’ salaries to match those in surrounding communities.”); see also 29 U.S.C. § 623(f)(2)(A) (allowing employers to implement “seniority systems”).
59. See Smith, 544 U.S. at 241 (noting that merely challenging the city’s plan did not suffice to allege disparate-impact); see also Watson, 487 U.S. at 994.
60. See Smith, 544 U.S. at 233 (citation omitted).
63. Id. at 238.
64. 554 U.S. 84 (2008).
65. Id. at 87, 96.
66. See id. at 94-95 (explaining that ADEA “refers to an excuse or justification for behavior that, standing alone, violates the statute’s prohibition”).
Court examined a *prima facie* case for ADEA disparate-treatment claims in *O’Connor v. Consolidated Coin Caterers Corp.* 68 Specifically, O’Connor sued his former employer after the employer terminated him when he was fifty-six years old and replaced him with a forty-year-old. 69 The Court held that whether the plaintiff was replaced by an employee not covered by the ADEA is “utterly irrelevant” 70 to a *prima facie* case of discrimination under the ADEA. 71 Consequently, the Court recognized that “the fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost because of his age.” 72 Rather than focusing on whether the newly hired employee is also covered by the ADEA, the Court said an assessment of age discrimination claims must instead consider the age gap between the plaintiff discriminated against and the newly hired employee. 73

C. The Karlo Decision

The Third Circuit’s recent holding in *Karlo*, namely that employees may bring subgroup disparate-impact claims, stands in stark contrast to that of its sister courts. 74 The 2008 automobile industry crisis affected PGW, a Pennsylvania-based automotive glass manufacturing company, especially with sales. 75 PGW ultimately implemented reductions-in-force, and in the process, gave its directors permission to fire employees in their respective divisions. 76 PGW eventually fired about 100 employees. 77 Seven of the terminated employees, all fifty years old or older, filed charges against PGW before the Equal Employment Opportunity Commission (“EEOC”), but their attempt to challenge PGW’s reductions-in-force failed. 78 The group also filed a class action in the U.S. District Court for the Western District of Pennsylvania, alleging age discrimination on disparate-impact and disparate-

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68. *Id.* at 312.
69. *Id.* at 309-10.
70. *Id.*
71. *Id.* at 311-12.
72. *Id.*
73. See *id.* at 313 (recognizing the probative value of a plaintiff showing that the newly hired employee is “substantially younger” as opposed to showing that the ADEA does not extend to the newly hired employee).
75. *Id.* at 66.
76. *Id.*
77. *Id.*
78. See *id.*
treatment grounds. The Third Circuit found ADEA subgroup disparate-impact evidence permissible, "so long as that evidence meets the usual standards for admissibility." According to the Third Circuit, holding otherwise would prevent challenges to policies contemplated by the ADEA.

i. Circuit Split Jurisprudential History

The U.S. Court of Appeals for the Second Circuit addressed subgroup claims in *Lowe v. Commack Union Free School District*. In *Lowe*, most of appellee’s newly hired employees were over forty years old even though most of the applicant pool was comprised of candidates under forty years old. The court determined that if a policy resulted in more employees being covered by the ADEA, getting hired could not be considered a claim of disparate-impact. Thus, the court found that the Commack Union Free School District failed to establish a *prima facie* case for disparate-impact because their statistical evidence did not show that their employer’s actions benefitted employees under forty years old. In other words, in the Second Circuit, a plaintiff alleging disparate-impact must show that the employer’s policy disparately impacted the plaintiff because the plaintiff is a member of the ADEA’s class of employees ages forty-and-over.

The Second Circuit recognized that employees may bring disparate-treatment and/or disparate-impact claims pursuant to the ADEA precisely because of the similarities in the texts of Title VII and the ADEA. However, the court relied on *Watson* to explain that the Supreme Court assessed disparate-impact discrimination claims on the extent to which employer’s policy affected the employee’s protected class. In doing so, the

79. *Id.* at 66-67.
80. *Id.* at 68-69.
81. *See id.* at 69 (“A contrary rule would ignore significant age-based disparities. Where such disparities exist, they must be justified pursuant to the ADEA’s relatively broad defenses.”).
82. 886 F.2d 1364, 1370-71 (2d Cir. 1989).
83. *See id.* at 1371 (finding that this policy gave preference for ADEA covered employees).
84. *See id.* (noting that two-thirds of the candidates that the appellee hired were covered by the ADEA).
85. *Id.*
86. *See id.* at 1370-71 (quoting *Watson v. Fort Worth Bank and Tr.*, 487 U.S. 977, 994 (1988)) (“Lowe and Delisi failed to demonstrate that any of defendants’ hiring practices ‘caused the exclusion of applicants for jobs . . . because of their membership in a protected group.’”).
87. *See id.* at 1369 (citation omitted).
88. *See id.* at 1371, 1373 (citing *Watson*, 487 U.S. at 997).
Second Circuit views Watson to say that plaintiffs can only recover under the ADEA where the evidence shows that the employer discriminated against them for being a part of the ADEA’s class.\footnote{See id. at 1370-71 (ruling against the plaintiffs because they failed to meet the Watson standard).}

Further, the Second Circuit reasoned that because the ADEA considers employees forty-and-over a protected group, for plaintiffs to meet the disparate-impact \textit{prima facie} standard, plaintiffs have to show statistics that the policy favored employees not protected by the ADEA.\footnote{See id. at 1371.} Consequently, the Second Circuit rejects disparate-impact where employers ultimately hire more forty-and-older employees.\footnote{Id.} Notably, the Second Circuit distinguished the plaintiff’s age discrimination claim from Teal, even though Teal explicitly rejected the “bottom-line” defense.\footnote{See id. at 1371; see also Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 76 (3d Cir. 2017) (applying the Teal standard in the ADEA subgroup context).} Thus, in rejecting subgroup disparate-impact claims, the court noted that holding otherwise would mean that “any plaintiff can take his or her own age as the lower end of a ‘sub-protected group’ and argue that said ‘sub-group’ is disparately impacted.”\footnote{Lowe, 886 F.2d at 1373.} However, the court upheld disparate-treatment subgroup claims.\footnote{See id. at 1374.}

Comparatively, the U.S. Court of Appeals for the Sixth Circuit has addressed disparate-impact subgroup claims twice. First, in \textit{Barnes v. GenCorp}, the court recognized that “an employer violates [the] ADEA when preference is given to a younger employee even if the younger employee is within the protected class of persons age forty-and-over.”\footnote{896 F.2d 1457, 1466 (6th Cir. 1990) (quoting McCorstin v. U.S. Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980)).} However, the court further found that such reasoning simply does not extend to disparate-impact claims.\footnote{Id. at 1467 n.12.} Additionally, the court held that subgroup comparators enable courts to presume that discrimination occurred.\footnote{See id. at 1466 (rejecting “that the only valid statistics would necessarily divide the employees into groups age 40-and-over and those under 40”).} To this end, the Sixth Circuit noted that policies benefiting younger employees covered by the ADEA can trigger ADEA liability.\footnote{Id.} The court’s reasoning focused on the probative value of statistical evidence, and as such, the court explained that where the evidence shows a tendency to terminate older individuals,
such evidence would demonstrate disparate-treatment.\footnote{99 See id. at 1467.}

The Sixth Circuit revisited subgroup disparate-impact claims in Smith v. Tennessee Valley Authority.\footnote{100 See generally No. 90-5396, 1991 U.S. App. LEXIS 1754 (6th Cir. Feb. 4, 1991).} In this case, the court held that a plaintiff meets the \textit{prima facie} case on a disparate-impact claim where the employer’s actions allow the employer to hire more employees thirty-nine-and-under.\footnote{101 See id. at *11 (citing Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1371 (2d Cir. 1989)).} The court aligned with the employer,\footnote{102 Id. at *11-12.} finding no applicable disparate-impact because the defendant had retained employees aged forty-and-over.\footnote{103 See id. at *12 (“A plaintiff cannot succeed under a disparate impact theory by showing that younger members of the protected class were preferred over older members of the protected class.”).}

In \textit{Smith}, the Sixth Circuit relied on the Second Circuit’s reasoning in \textit{Lowe},\footnote{104 See id. at *11-12.} noting that the plaintiff failed to show a \textit{prima facie} disparate-impact case because “the fact that all six terminated employees were within the protected range does not support a finding of disparate impact when four of the six retained employees as ACSs were also within the protected age group.”\footnote{105 See id at *12 (citing Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1371 (2d Cir. 1989)).} Consequently, the Sixth Circuit reasoned that where the evidence shows that other ADEA covered employees benefitted from the employer’s policy, the plaintiff cannot meet the \textit{prima facie} case for disparate-impact.\footnote{106 See id. But see Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 78 (3d Cir. 2017) (“Teal held that a plaintiff \textit{can} succeed under a disparate-impact theory if other members of the protected class were preferred . . . .”).}

Like the Second Circuit, the U.S. Court of Appeals for the Eighth Circuit requires plaintiffs to be discriminated against “because of their membership in a protected group” to demonstrate disparate-impact.\footnote{107 See EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 950 (8th Cir. 1999) (quoting Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994 (1988)).} In \textit{EEOC v. McDonnell Douglas Corp.},\footnote{108 See id. at 950-51 (“The Court in \textit{O’Connor} did not address disparate-impact claims under the ADEA, and thus we do not think that \textit{O’Connor} has any relevance to our analysis here.”).} the court precluded disparate-impact subgroup claims and opined that because the \textit{O’Connor} Court addressed the \textit{prima facie} case for disparate-treatment claims, the Court’s rationale did not extend to disparate-impact claims. The Eighth Circuit relies on \textit{Watson} in similar cases, noting that plaintiffs can only show disparate-impact where the evidence reveals that they were discriminated against as protected employees.
under the ADEA.\textsuperscript{109} Although the Eighth Circuit rejected subgroup claims, the court recognized that allowing subgroup claims would not ordinarily mean that all plaintiffs would be able to show that the employers’ policy disparately impacted them.\textsuperscript{110} Rather, the Eighth Circuit noted that disparate-impact subgroup claims are impermissible because (1) employers would be liable for reductions-in-force disparately impacting its employees even when they benefit other employees covered by the ADEA, and (2) recognizing subgroup evidence means that age would become a factor in deciding whether to terminate an employee.\textsuperscript{111}

III. WHY \textit{KARLO} HAS PAVED THE WAY FOR ADEA SUBGROUP DISPARATE-IMPACT CLAIMS

The Third Circuit’s decision in \textit{Karlo} created a circuit split with respect to subgroup disparate-impact claims.\textsuperscript{112} The court specifically found that subgroup claims constituted a “compelling basis” to create a circuit split.\textsuperscript{113} The court acknowledged that while the employees indeed showed disparate-impact, requiring them to compare effects of PGW’s firing policies on the employees with its effects on employees forty-and-over would disregard the disparate impact suffered by the plaintiffs.\textsuperscript{114}

\textit{A. The Third Circuit’s Reading of Section 623 of the ADEA}

The Third Circuit’s interpretation of sections 623(a)(1) and 623(a)(2) of the ADEA is the most important factor in considering subgroup claims under section 623(a)(2).\textsuperscript{115} \textit{Karlo} recognizes that these subsections refer to different theories of discrimination.\textsuperscript{116} Despite their differences, the court

\textsuperscript{109} See id. at 950 (precluding ADEA disparate-impact subgroup evidence).

\textsuperscript{110} See id. (rejecting the lower court’s finding that plaintiffs would always succeed in ADEA subgroup disparate-impact claims).

\textsuperscript{111} Id. at 951.

\textsuperscript{112} See Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 75 (3d Cir. 2017) (rejecting the other circuit court decisions because “they are contradicted by O’Connor and Teal, confuse evidentiary concerns with statutory interpretation, and incorrectly assume that recognizing subgroups will proliferate liability for reasonable employment practices”).

\textsuperscript{113} See id. at 75 n.7 (citing Wagner v. PennWest Farm Credit, ACA, 109 F.3d 909, 912 (3d Cir. 1997)) (noting the court’s reluctance to create circuit splits absent a ‘compelling basis’ to do so).

\textsuperscript{114} See id. at 68, 72 (identifying this as the result of the policy prioritizing ADEA covered employees under fifty years of age).

\textsuperscript{115} See id. at 69 (“Disparate treatment is governed by § 623(a)(1); disparate impact is governed by § 623(a)(2).”).

\textsuperscript{116} Id. at 71. (explaining that the similarities between each subsection mandated that the “interpretation of [the disparate-impact subsection]... be consistent with our
reasoned that the subsections were analogous because they prohibit discrimination “because of [an] individual’s age.” The court noted that the language in these subsections shows that the challenger’s age, rather than the ADEA’s protected class, is indicative of disparate impact.

The Third Circuit’s explanation of the ADEA should bewilder no one considering the Court’s understanding of Title VII and the ADEA in both O’Connor and Smith. In O’Connor, the Court first had to determine whether the prima facie case in McDonnell, a Title VII case, also applied to ADEA discrimination claims—the Court answered affirmatively. While the Third Circuit merely cited Smith to compare the language in Title VII, the ADEA, and to explain the employer’s burden under section 631(a), the Court’s interpretation of the ADEA and Title VII in that case confirmed that Title VII principles indeed apply to the ADEA.

The Third Circuit’s interpretation of sections 623(a)(1) and 623(a)(2) of the ADEA further demonstrates that the court correctly applied O’Connor in deciding for Karlo. In O’Connor, the Court explained that a prima facie case permits courts to assume that employers discriminated against employees. However, the Court also held that requiring employees to prove that they were replaced with someone not covered by the ADEA would not necessarily prove discrimination.

The Third Circuit specifically relied on Watson to justify O’Connor’s scope in disparate-impact subgroup claims. Recall that in Watson, the Court reasoned that although disparate-impact and disparate-treatment have

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117. Id. (“Thus, ‘adversely affect . . . because of such individual’s age’ must mean adversely affect based on age, not adversely affect based on forty-and-older status.”).

118. See id. (“Thus, ‘adversely affect . . . because of such individual’s age’ must mean adversely affect based on age, not adversely affect based on forty-and-older status.”).


120. See O’Connor, 517 U.S. at 311 (“We have never had the occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it.”).

121. See Smith, 544 U.S. at 240 (explaining that disparate-impact theory, under Title VII, is not “categorically unavailable under the ADEA”).

122. See Karlo, 849 F.3d at 71.

123. See O’Connor, 517 U.S. at 311-12 (assuming that Title VII principles apply in the ADEA context).

124. See id. at 312 (“[T]here can be no greater inference of age discrimination (as opposed to ‘40 and over’ discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.”).

125. See Karlo, 849 F.3d at 69.
two different *prima facie* requirements, the “ultimate legal issue” remains the same and that the disparate-impact theory recognizes that employment practices can be discriminatory even where they lack intent. Accordingly, the fact that *O’Connor* focuses on disparate-treatment, as acknowledged by the Third Circuit, does not matter as section 623(a)(1) and section 623(a)(2) of the ADEA require courts to determine whether an employer is liable for age discrimination. The Third Circuit’s interpretation of the ADEA is thus consistent with *Watson*’s reasoning of the disparate-impact theory.

Finally, the underlying reasoning behind the disparate-impact theory also applies to the Third Circuit’s reasoning. In *Griggs*, the Court recognized the disparate-impact theory because the Court found that Congress wanted employers to refrain from practices that would otherwise allow them to discriminate against their employees. The Court also vehemently noted that Title VII is a safeguard against policies that favor a particular group. Furthermore, the Court noted that Title VII required employers to show that their practices are indeed employment related. But most importantly, the Court said that “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.” Therefore, as the Third Circuit found, subgroup evidence can still show disparate-impact.

**B. ADEA: Protected Class or the Challenger?**

While anyone falling under any of Title VII’s protected classes can allege disparate-impact or disparate-treatment, the ADEA only protects those who are forty years old or older. In *Watson*, the Court acknowledged that

126. See *Watson v. Fort Worth Bank and Tr.*, 487 U.S. 977, 987 (1988) (noting that “distinguishing features of factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used”).

127. See *id*.

128. See *Karlo*, 849 F.3d at 69-70.

129. See *id.* at 71-72 (quoting *Watson*, 487 U.S. at 987) (noting that “a disparate impact ‘may in operation be functionally equivalent to intentional discrimination’”).


131. See *id.* at 429-30. (explaining that Title VII requires employers to not engage in discriminatory practices).

132. See *id.* (noting that in enacting Title VII, Congress intended “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees”).

133. See *id.* at 429-31 (requiring the employer to demonstrate a nexus between its practice and job performance, i.e., job-relatedness).

134. *Id.* at 432 (emphasis added).


136. See *id.* at 71 (“[T]he ADEA protects a class of individuals at least forty years old
disparate-impact recovery also depended on the extent to which the alleged disparate-impact itself relates to the fact that the employee is entitled to Title VII protection. The Third Circuit, however, found that the ADEA, rather than protecting a particular class, protects the individuals in the forty-and-over class contemplated by the ADEA.

The Third Circuit’s reasoning follows from the Court’s decision in O’Connor. In O’Connor, the Court said that the ADEA contemplates a forty-plus class because discrimination under the ADEA is related to the employer’s age requirements, not the fact that the employee falls under the ADEA. That the ADEA happens to embrace an age requirement merely limits whom is entitled to ADEA protection.

The Third Circuit also relied on Teal to find that section 623(a)(2) refers to the employee’s rights. Moreover, the Third Circuit’s opinion also proscribed a “bottom-line defense” to disparate-impact claims in the ADEA context. In Teal, the Court interpreted section 703(a)(2) to relate to the effects of the employment practice at issue on the individual. This analysis ultimately led the Court to reject the “bottom-line defense.” Specifically, the Court found that in enacting Title VII, Congress certainly did not want employers to be able to justify discriminating against their employees by showing that their policies benefitted the employee’s protected trait.

. . . ”). Compare 42 U.S.C. § 2000e-2(a)(1)-(2) (2012) (prohibiting discrimination “because of such individual’s race, color, religion, sex, or national origin”), with 29 U.S.C. § 631(a) (2012) (“The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.”).

137. See Watson v. Fort Worth Bank and Tr., 487 U.S. 977, 994 (1988) (explaining that upon establishing a discriminatory practice, the plaintiff must further demonstrate that the practice “has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group”).

138. Karlo, 849 F.3d at 71 (noting that the ADEA contemplates age, not a distinct protected class).

139. See id. (deriving a “key insight” from O’Connor).


141. See Karlo, 849 F.3d at 74.

142. See id. at 71 (“The key insight from O’Connor is that the forty-and-older line drawn by [section] 631(a) constrains the ADEA’s general scope . . . .”).

143. See id. at 72 (noting that bottom-line statistical arguments cannot overcome inherently discriminatory practices).

144. See Connecticut v. Teal, 457 U.S. 440, 450-51 (1982) (rejecting the “bottom-line” defense by finding that employees must be able to “compete equally” under Title VII).

145. See id. at 451 (explaining that Title VII precludes policies that discriminate against individuals).

146. See id. at 455 (“It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because
Third Circuit applied the facts in *Teal* to *Karlo* to find for the plaintiffs.147 Specifically, the court said that like the “bottom-line defense,” which allows plaintiffs to recover for disparate-impact, subgroup evidence also serves this purpose.148 Therefore, whether other employees covered by the ADEA benefited from this employer’s policy should not be dispositive of subgroup claims.149

### C. PGW’s Probable Appeal

Much speculation revolves around the nature of the Third Circuit’s decision in *Karlo*, namely whether PGW will take this issue to the Court.150 As such, if PGW does appeal, presumably highlighting the aforementioned circuit split, the Court will likely affirm the Third Circuit’s decision in *Karlo*.151 Specifically, the Court should interpret section 623(a)(2) as analogous to section 623(a)(1).152 Indeed, as the Court previously recognized, age discrimination will always involve employers terminating employees because of the notion that an employee’s age will affect performance.153 Thus, the ADEA is, and should continue to be a safeguard for the specific employee challenging the employer’s putative discriminatory policy.154 The Court noted in *Smith* that the correlation between age and productivity could be used to explain why Congress limited the ADEA’s scope to individuals forty and older.155 Therefore, the Court might also take into account the underlying notion that the ADEA protects those employees...

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147. See *Karlo*, 849 F.3d at 72 (explaining that an employer’s policy might favor younger members of the ADEA-protected group is irrelevant in determining whether the employer’s oldest employees were disparately affected due to their age).
148. See id.
149. See id. at 73.
151. See generally *Karlo*, 849 F.3d at 68-86 (ruling in favor of ADEA subgroup disparate-impact claims).
152. See 29 U.S.C. § 623(a)(1)-(2) (2012); see also *Karlo*, 849 F.3d at 71 (comparing the language in both § 623(a)(1) and § 623(a)(2) in determining that “adversely affect . . . because of such individual’s age” must mean adversely affected based on *age*, not adversely affect based on forty-and-older status”).
153. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (“It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.”); see also *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005).
154. See *Karlo*, 849 F.3d at 72-73 (concluding that courts can allow subgroup evidence and still find disparate-impact).
155. See *Smith*, 544 U.S. at 240 (noting that “Congress’ decision to limit the coverage of the ADEA . . . is consistent with the fact that age . . . not uncommonly has relevance to an individual’s capacity to engage in certain types of employment”).
whom, at some point in their careers, were in a better position because of their experience.\textsuperscript{156}

Nonetheless, the Third Circuit’s decision also shows that even if this circuit split is resolved by allowing subgroup claims, the ADEA will continue to side with businesses that indeed identify a reasonable justification for terminating employees.\textsuperscript{157} Therefore, permitting subgroup claims does not affect the employer’s burden of proof under section 623(f)(1).\textsuperscript{158}

IV. ADEA DISPARATE-IMPACT CLAIMS IN THE MIDST OF A CIRCUIT SPLIT

The Supreme Court gave the lower courts “the proper solution” to assess ADEA claims and the probative value of the challenger’s evidence.\textsuperscript{159} O’Connor explains that to determine whether the employer discriminated against the employee, courts should compare the age difference between the former employee and the newly hired employee, rather than the extent to which the newly hired employee falls under the ADEA’s protected class.\textsuperscript{160} Therefore, the Court should uphold the Third Circuit’s position.\textsuperscript{161}

A. What Businesses Should Consider Before Laying off Employees

With more businesses undergoing reductions, it is imperative that the business community becomes more aware of the ADEA’s requirements.\textsuperscript{162} The reality is that businesses have, and will continue, to undergo

\textsuperscript{156} See GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 208 (3d ed. 2010); see also Karlo, 849 F.3d at 74 (illustrating how precluding subgroup claims would limit the older workers’ chances of bringing disparate-impact claims compared to younger individuals).

\textsuperscript{157} See Karlo, 849 F.3d at 80.

\textsuperscript{158} See 29 U.S.C. § 623(f)(1) (2012); see also Karlo, 849 F.3d at 69 (explaining that employers can rebut a \textit{prima facie} case by “arguing that the challenged practice was based on ‘reasonable factors other than age’”). \textit{But see} Dorrian, \textit{supra} note 14 (noting a concern that allowing subgroup claims will result in “statistical manipulation”).

\textsuperscript{159} O’Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) (quoting Teamsters v. United States, 431 U.S. 324, 358 (1977)) (recognizing that a \textit{prima facie} case “requires ‘evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion’”).

\textsuperscript{160} See O’Connor, 517 U.S. at 312-13 (noting that courts use different approaches in assessing statistical evidence, but finding that “the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class”).

\textsuperscript{161} See also Karlo, 849 F.3d at 68 (holding that subgroup disparate-impact claims are “cognizable under the ADEA”).

\textsuperscript{162} See 29 U.S.C. §§ 621-34; see also Eisenberg, \textit{supra} note 5 (noting that more businesses could undergo voluntary terminations).
employment reductions to compensate for issues such as financial crises and/or operational costs. Typically, businesses terminate employees to lower the costs of their employees’ salaries and benefits. Once businesses undergo employment reductions, they can simply eliminate those positions occupied by their former employees. Most importantly, at least in the ADEA context, older employees generally garner higher wages than younger employees. While employers should disregard any plan to terminate older employees simply because hiring younger employees would cut down costs, the Third Circuit’s opinion certainly recognizes that employment practices may always impact certain employees disparately.

V. CONCLUSION

Although PGW has yet to appeal its case, the company will likely do so given the current circuit split. The Second, Sixth, and Eighth Circuits all precluded ADEA subgroup disparate-impact claims; nonetheless, the Third Circuit’s thorough overview of the ADEA and Title VII makes Karlo the most persuasive decision among the circuit courts. The Third Circuit’s decision in Karlo is indeed the most consistent with the Court’s interpretation of the ADEA. As the Third Circuit noted, the jurisprudence should not focus on whether subgroup claims may lead to more litigation. Rather, disparate-impact jurisprudence must recognize that precluding subgroup claims would limit a plaintiff’s ability to challenge discriminatory policies pursuant to ADEA. Thus, if PGW appeals to the Court, the Court should uphold the Third Circuit’s decision in Karlo and rule in favor of subgroup claims.

163. See generally Eisenberg, supra note 5.


165. See Barnes v. GenCorp, 896 F.2d 1457, 1465 (6th Cir. 1990) (“A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company.”).

166. RUTHERGLEN, supra note 156, at 214.

167. See Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 79 (3d Cir. 2017); see also RUTHERGLEN, supra note 156, at 214 (“Instead of allowing age-based discharges because of the higher pay generally received by older workers, the ADEA allow employers to take account of the declining productivity of such workers through an exception for voluntary retirement plans.”).
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