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Age Discrimination in Reduction-in-Force: The Metamorphosis of McDonnell Douglas Continues

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This article considers the effects of the Age Discrimination in Employment Act of 1967 (ADEA) upon the plight of the older worker in reduction-in-force cases. The article begins with a brief overview of the ADEA and proceeds with a discussion of the methods of proving an ADEA case. Since, for the most part, the courts have applied standards drawn from the history of Title VII litigation, the article discusses the standards advanced by Title VII decisions and compare them to ADEA cases. Finally, the article considers the problems particular to ADEA cases which arise as the result of reduction-in-force terminations.

INTRODUCTION

The 1974 Arab oil embargo highlighted a decade during which public and private organizations had to cope with difficult economic conditions. Periods of double-digit inflation, high interest rates, increased foreign competition in industries such as auto and steel, and decreased agricultural exports forced organizations to seek ways of reducing costs in an effort to survive. Not infrequently, the actions taken included reductions in the size of the work force through reorganization, retirement or layoff.¹

One difference between the personnel reductions during this period

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¹ Unlike the situation in which an employee is fired for poor performance, termination through reduction-in-force, which in this article is used to include termination due to reorganization, programs of forced early retirement, and layoff, does not suggest that the employee is, or will be, replaced; instead the employee’s job line or perhaps the entire unit to which the individual is assigned is eliminated.
DISCRIMINATION IN LAYOFF and other recessions since the Great Depression is the number of salaried employees affected. This difference is significant since problems associated with the reduction of the number of salaried employees are more complex than problems associated with the layoff of hourly workers. Whereas procedures for the layoff of hourly, unionized employees are usually specified in seniority provisions of the contract, relatively few salaried employees are covered by collective bargaining agreements. Even if there is no union, most organizations rely heavily on seniority to select those hourly employees to be laid off or terminated, a procedure which tends to protect the senior, and generally older, employee. On the other hand, in the case of salaried employees, many organizations are unwilling to accept seniority as the sole criterion to govern the selection of those to be terminated. Hence, organizations have sought other criteria upon which to base reduction in the number of salaried employees. Frequently, these have involved some assessment of the value of the individual to the organization. In many organizations the reductions based on these assessments seriously affected the senior, older employee.

Loss of a job, while obviously difficult for any employee, can be particularly problematic for the older worker. Unlike their younger counterparts, older workers may find that when seeking new employment, particularly if retraining is involved, they confront several barriers. Such barriers are often the direct result of their age and of the apparent presumption in American society that older workers have antiquated skills which are no longer useful or necessary. Furthermore, older workers are often considered poor candidates for retraining because of assumptions about the shorter period of time they will remain in the work force and their decreased career aspirations. Consequently, locating new employment, or transferring within the same company, are options which may not be viable for the older employee. In spite of the 1967 passage of the Age Discrimination in Employment Act (ADEA), which was intended to remove barriers to employment for older workers, there is evidence that such discrimination persists. Recent surveys show that the majority of employees believe that older workers are discriminated against in employment.

This article considers the effects of the ADEA upon the plight of the older worker in reduction-in-force cases. The article begins with a brief overview of the ADEA and proceeds with a discussion of the methods of proving an ADEA case. Since, for the most part, the courts have applied

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standards drawn from the history of Title VII litigation, the article will consider the standards advanced by Title VII decisions and compare the same to ADEA cases. Finally, the article will consider the problems particular to ADEA cases which arise as the result of reduction-in-force terminations.

I

THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Recognizing the plight of the older worker, President Lyndon Johnson called upon Congress in 1967 to remedy the “serious and senseless loss to a nation on the move.”4 The loss Johnson referred to was the loss of the older worker. Partly in response to the concerns expressed in Johnson’s plea and partly to a 1965 Labor Department study estimating that as many as fifty percent of all persons seeking employment in the private sector were frustrated by age discrimination,5 Congress passed the Age Discrimination in Employment Act of 1967.6 In so doing, Congress noted both the existence and effect of age discrimination when it stated in Section 621(a) of the Act that:

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.7

Essentially, the ADEA provides the same scope of protection on the basis of an employee’s age that Title VII provides on the basis of race, sex, and national origin. The ADEA prohibits employment discrimination on the basis of age against persons who are between the ages of forty and seventy years old.8 Like Title VII, the ADEA applies to employer

4. 1 PUB. PAPERS 32, 37 (1968).
decisions in recruitment, hiring, placement, selections, retention, promotion, demotion, layoff, recall, compensation, employment conditions and privileges, discharge, and retirement. According to the ADEA:

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; or
(3) to reduce the wage rate of any employee in order to comply with this Chapter.  

These prohibitions are applicable to both public and private employers (persons having twenty or more employees), labor unions, and employment agencies.

The ADEA does provide three exceptions to the prohibitions set forth above. In Section 623(f) of the Act, Congress provides that:

It shall not be unlawful for an employer . . .
(1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
(2) to observe the terms of a bona fide seniority system or any bona fide employee plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by Section 631(a) of this title because of the age of such individual; or
(3) to discharge or otherwise discipline an individual for good cause.

The ADEA reflects the attempt by Congress to confront the problem of age discrimination in a fairly comprehensive fashion. In addition to the broad purpose clause set out above, the specific prohibitions contained in section 623, and the exceptions thereto, the ADEA provides for both private and governmental enforcement. The drafters of the Act carefully controlled for possible overlap of this federal statute and state statutes which offer similar protection against age discrimination. The ADEA specifies that any action based on the federal act shall defer to

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10. The Act does not include the federal government within its definition of "employer." 29 U.S.C. § 630(b). However, the Act mandates that the personnel actions of the federal government be "free from any discrimination based on age." 29 U.S.C. § 633a(a) (1982).
12. 29 U.S.C. § 626(b) and (c) (1982).
similar state action for at least sixty days after the commencement of a state action.\(^\text{13}\)

Moreover, to ensure that the Act is understood both in practice and theory, the ADEA mandates public education in the area of employment of older protected workers.\(^\text{14}\) Presumably such education might minimize the occurrence of age discrimination and promote employment and retention of older workers not only by alerting employers to the specific mandates in the ADEA, but by effecting an attitudinal change. Obviously, to the degree that such discrimination is minimized, enforcement of the ADEA will also be minimized.\(^\text{15}\)

II

TITLE VII PRECEDENT

In light of the similarity of purpose, if not of the protected class, of Title VII and the ADEA, and in view of the vast amount of Title VII litigation and the availability of the teachings of those cases, it seems reasonable that much of the ADEA litigation reflects Title VII precedent. Indeed, review of the relevant case law demonstrates that ADEA cases have drawn extensively on Title VII precedent. The adaptation of the Title VII ordering of proof articulated in \textit{McDonnell Douglas Corp. v. Green}\(^\text{16}\) and \textit{Texas Department of Community Affairs v. Burdine}\(^\text{17}\) has been particularly important in ADEA cases.

A. The McDonnell Douglas Framework

The \textit{McDonnell Douglas} framework essentially creates a general model for use in consideration of discrimination cases:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an 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.\(^\text{18}\)

Furthermore, when the \textit{Burdine} court reflected on the \textit{McDonnell Douglas} framework, it added that "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the

\begin{itemize}
  \item \text{13. 29 U.S.C. § 633(b) (1982).}
  \item \text{14. 29 U.S.C. § 622 (1982).}
  \item \text{16. 411 U.S. 792 (1973).}
  \item \text{17. 450 U.S. 248 (1981).}
  \item \text{18. \textit{Id.} at 252-53 (citations omitted) (quoting \textit{McDonnell Douglas}, 411 U.S. 792, 802 (1973)).}
\end{itemize}
plaintiff remains at all times with the plaintiff."¹⁹

When this framework is applied in age discrimination cases, the plaintiff does not need to prove that age was "the sole factor motivating defendant to act" but only that age "was the 'determining factor' . . . in the same sense that 'but for' [the] employer's motive to discriminate against [the plaintiff] because of age, [plaintiff] would not have been [adversely affected]."²⁰ This position has been adopted by all of the circuits.²¹

The First Circuit was among the first to adopt the McDonnell Douglas framework for purposes of ADEA litigation. In essence, the First Circuit saw "no inherent reason why [McDonnell Douglas] is any less a 'sensible, orderly way to evaluate the evidence' in an age discrimination case than in any other."²² Two years later, the Ninth Circuit joined the other circuits which had adopted the McDonnell Douglas framework for allocation of the burdens and ordering of proof in ADEA suits. Like the First Circuit, the Ninth Circuit found that "The adoption of the McDonnell Douglas Title VII guidelines as to the ordering of proof in age discrimination cases follows logically from the similar purposes and structures of Title VII and ADEA. The statutes share similar aims and substantive prohibitions—the elimination of arbitrary discrimination in the work place."²³

In ADEA cases, like Title VII, a plaintiff may establish a prima facie case under either of two distinct legal theories: disparate treatment or adverse impact. Under a disparate treatment theory, the plaintiff may allege that he or she is an individual victim of intentional discrimination.²⁴ Conversely, the adverse impact theory of Griggs v. Duke Power Co.²⁵ applies when facially neutral criteria are alleged to have disproportionate impact on members of a protected class. This article will first examine the application of these two theories, disparate treatment and adverse impact, to ADEA cases in general and then discuss each with specific emphasis on reduction-in-force cases.

B. Establishing a Prima Facie Case Based on Disparate Treatment

Most of the ADEA cases have been based on a disparate treatment theory and nearly all circuits utilize standards set forth in McDonnell Douglas as a model by which to evaluate the adequacy of the prima facie case. In the McDonnell Douglas model, the plaintiff must show: "(i) that

¹⁹. Id. at 253 (citations omitted).
²². Loeb, 600 F.2d at 1015.
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."

While nearly all circuits have accepted, at least in principle, the McDonnell Douglas standard, one court has been reluctant to do so. The Sixth Circuit, while not rejecting the McDonnell Douglas prongs, "has declined to adopt rigid guidelines exclusively establishing a method for proving a prima facie case in age discrimination actions." This reluctance appears to stem from the court's conviction "that Congress intended the Age Discrimination Act to be applied on a case-by-case basis, rather than adopting formalistic approaches." This position was further explained in Ackerman v. Diamond Shamrock Corp., in which the court said, "A mechanical application of the McDonnell Douglas guidelines might bar the suit of a worthy ADEA claimant. In other cases, an overly mechanical application could supply an ADEA plaintiff with a triable claim where none exists."

The objections proffered by the Sixth Circuit may be illusory; the other circuits have not, in fact, applied the McDonnell Douglas model in a rigid, ritualistic manner. Indeed, other courts have followed the lead of the Supreme Court in recognizing that the standard set forth in McDonnell Douglas "is not inflexible, as '[t]he facts will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations.' " In Loeb v. Textron, for example, the First Circuit explicitly cautioned that "[the McDonnell Douglas formula] should not be used inflexibly as a vehicle for organizing evidence or presenting a case to a jury. Above all, it should not be viewed as providing a format into which all cases of discrimination must somehow fit." Notably, while expressing the foregoing caution, the First Circuit did apply the McDonnell Douglas standard, reasoning that plaintiff would have "had to prove that he was in the protected age group, that he was performing his job at a level that met his employer's legitimate expectations, that he nevertheless was fired, and that [the employer] sought someone to perform the same

30. 670 F.2d 66 (6th Cir. 1982).
31. Id. at 70.
33. Loeb, 600 F.2d at 1017.
work after he left”34 in order to establish a prima facie case under the circumstances surrounding the case.

A major modification of the fourth prong of the McDonnell Douglas standard has been necessitated by the difficulty in assessing the age qualification of the plaintiff's replacement. The difficulty arises because it is not clear from either the Act or the legislative history thereof how much younger the employee who replaced the plaintiff must be in order for the plaintiff’s claim to survive. Is it enough, for instance, that a replacement be one year younger than the plaintiff? Or five years? Must the replacement be outside of the protected class (forty to seventy years) for the claim to stand? Unlike the criteria of sex or race for which absolute differences exist (i.e., male or female, white or black), age is a relative difference.

For example, the Fourth Circuit held that “[A]n ADEA claim involving replacement by another does not require as a matter of law proof that the other was outside the protected age group. But absolute and relative ages of the claimant and his replacement have obvious relevance in assessing whether a factual inference of discrimination is permissible.”35 Similarly, in Douglas v. Anderson,36 the plaintiff was replaced by a person five years younger than he, but still within the parameters of the protected age group. In Douglas, the Ninth Circuit phrased the fourth prong as “was replaced by a substantially younger employee with equal or inferior qualifications.”37 The court explained, “If the replacement is only slightly younger than the plaintiff, then it is less likely that an inference of discrimination can be drawn. However, replacement by even an older employee will not necessarily foreclose prima facie proof if other direct or circumstantial evidence supports an inference of discrimination.”38

A related issue involving the fourth prong of the McDonnell Douglas standard concerned the question of whether proof was required that the employer not only replaced a discharged employee with someone outside the protected age group but actively sought to replace the employee with a younger worker. Such a requirement is obviously more stringent than a standard which only requires proof of replacement. The difference would appear to be one of intent: that is, that it was not merely a matter of happenstance that the plaintiff was replaced by a person outside the protected age group, but that instead the employer intended and actively fostered such a conclusion.

The issue was implicitly raised by a 1980 case in which the Fifth

34. *Id.* at 1014.
36. 656 F.2d 528 (9th Cir. 1981).
37. *Id.* at 533.
38. *Id.*
Circuit stated that "A plaintiff suing under the Age Discrimination in Employment Act 'makes out a prima facie case by showing [1] that he was within the statutorily protected age group, [2] that he was discharged, [3] that the employer sought to replace him with a younger person and [4] that he was replaced with a younger person outside the protected group.'" Simmons involved the termination of a fifty-one year old nursing home administrator. Simmons demonstrated the third factor, "... employer sought to replace him ..." by introducing a statement by one of the stockholders who fired him to the effect that "we want a younger man this time." Ultimately the court determined that Simmons' termination resulted from strained personal relations with three stockholders—his former wife and two former sisters-in-law. The Simmons opinion is quite brief and the court neither stressed nor explained its inclusion of the third factor.

Indeed, it would appear that the Fifth Circuit either recanted or ignored the factors it set out in Marshall and later reiterated in Simmons, since later in the same year, it listed the four prongs necessary for prima facie proof as requiring membership in the protected age group, discharge, qualifications for the position, and replacement by one outside the protected class. Notably, the reference to an employer's seeking such replacement was eliminated. The Fifth Circuit reaffirmed this replacement-only requirement in Haring v. CPC International, Inc., when it stated, somewhat absentmindedly, "Our cases have consistently held, however, that simple proof of replacement with a person outside of the protected age group satisfies this prong of a prima facie case under ADEA."

The omission of the qualifications requirement from the standards for a prima facie case cited by the Fifth Circuit in Simmons was noted and explained by the Eleventh Circuit in Pace v. Southern Railway System. Pace involved a claim by a fifty-one year old employee who asserted that his demotion was a result of age discrimination. In affirming the district court's grant of summary judgment in favor of the employer, the appellate court distinguished between cases involving demotion or firing, and cases in which a claimant was not hired or promoted. In so doing, the court limited the need for affirmative proof of qualification to cases involving hiring or promotion. The court reasoned that:

\[ I \]n discharge or demotion cases, where a plaintiff has held a position for

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40. Simmons, 619 F.2d at 371 (although not explicitly designated as the "third factor").
42. 664 F.2d 1234 (5th Cir. 1981).
43. Id. at 1238 (emphasis added).
44. 701 F.2d 1383 (11th Cir. 1983), cert. denied, 104 S. Ct. 549 (1983).
a significant period of time, qualification for that position, sufficient to satisfy the test of a prima facie case can be inferred. However, where the position sought has not been held previously there is no basis for an inference of qualification.\textsuperscript{45}

Notably, the Eleventh Circuit did not comment on the Fifth Circuit's one-time (Simmons) inclusion of an “employer sought to replace employee with younger person” standard and the omission of the qualification requirement.

C. Prima Facie Cases Based on Adverse Impact

There are very few ADEA cases which utilize the adverse impact theory. It may be that the absence of such cases is simply the result of the fact situations under which age discrimination cases generally evolve. That is, the effect of alleged age discrimination is more often directed towards one person than towards a class of persons. As a result, disparate treatment is more commonly the issue.

Nonetheless, adverse impact has been argued under the ADEA. Precedent for the use of adverse impact theory in age discrimination cases was established in a Second Circuit case, \textit{Geller v. Markham}.\textsuperscript{46} In this hiring case, a fifty-five year old teacher had been selected on a temporary basis to fill a vacant position for which she had applied on a permanent basis. Shortly after she took the position, she was replaced by a twenty-five year old. At issue was a policy to hire teachers with no more than five years of experience. The plaintiff presented statistical evidence that the application of this policy had an adverse impact on members of the protected age group. She established that 92.6 percent of teachers in the state had five or more years of experience and that only 62 percent of those under forty had five or more years of experience.\textsuperscript{47} Conversely, the defendant claimed that the younger teacher was better qualified for the position, that the policy at issue had not significantly affected the number of teacher-employees over age forty, and, finally, that even if the hiring policy had been applied in a discriminatory manner, it would have been justified as a necessary cost reduction measure in view of declining enrollments.

The district court ruled that the hiring policy resulted in an adverse impact on members of the protected age group and was therefore discriminatory. On appeal, the Second Circuit rejected the defendant's argument that adverse impact principles from Title VII cases should not be applied to age discrimination cases. The court concluded "that Ms. Geller established disparate [adverse] impact by proving that she was sub-

\textsuperscript{45} Id. at 1386 n.7.

\textsuperscript{46} 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981).

\textsuperscript{47} Id. at 1030.
jected to a facially neutral policy disproportionately disadvantaging her as a member of a protected class.”

III

PRIMA FACIE CASES IN REDUCTION-IN-FORCE

All of the foregoing concerns come into sharp focus in reduction-in-force cases. Reduction-in-force prima facie cases based on disparate treatment have been established both by circumstantial evidence using appropriate modifications of the McDonnell Douglas criteria, and by direct evidence of discrimination. Statistical evidence has been used to establish the prima facie cases based on adverse impact.

A. Disparate Treatment—Circumstantial Evidence

Two Fifth Circuit cases have been especially influential in determining standards for prima facie cases based on disparate treatment in reduction-in-force cases. The first case was McCorstin v. United States Steel Corp. McCorstin involved a 1971 reduction in the number of exempt salaried employees at one of U.S. Steel's operations. Ten employees of the metallurgy department were negatively affected; four were retired, five were demoted to non-exempt positions, and one, McCorstin, age fifty-one, was laid off pending early retirement. According to the company, McCorstin was selected for layoff based on the following factors: (1) his present assignment had essentially ended, (2) he had turned down the only other job for which he had any appreciable experience, (3) he had relatively low performance evaluations, and (4) he had limited experience in other aspects of the department. The district court denied McCorstin's motion for a jury trial and rendered a directed verdict against him on the ground that a prima facie case of age discrimination had not been demonstrated. Based on the McDonnell Douglas standard previously discussed, the court determined that McCorstin had failed to satisfy the fourth prong of the test: replacement by someone outside the protected class.

On appeal, McCorstin argued that this fourth prong should not have been applied since "age is not a discrete and immutable characteristic such as sex or race, but rather is a continuum." He further distinguished the reduction-in-force case from "routine discharge involving

48. Id. at 1034.
49. 621 F.2d 749 (5th Cir. 1980).
50. Id. at 751.
51. Id. at 750.
52. Id. at 753.
53. Id.
one-to-one substitutions."\(^{54}\) In its analysis of his claim, the Fifth Circuit stated "[T]hat the employee be in the protected age group and has been discharged, are no more than standing requirements under the statute. That is, discharge constitutes the cognizable injury and being a member of the protected class satisfies the requirement of being within the zone of interests protected by the statute."\(^ {55}\) The court continued and reasoned "that the fourth factor [replacement by someone outside of the protected class] only was intended to demonstrate discrimination, that is, unequal treatment, by the relatively objective evidence of replacement by a member of a nonprotected class."\(^ {56}\)

The court concluded that it had been an error to apply the *McDonnell Douglas* test. In its opinion, the court found two reasons in support of its conclusion:

First, because there was a reduction-in-force, that is, a shrinking of the work force, even the threshold requirement of McCorstin's being replaced is inappropriate. Second, because the discrimination involves age, rather than sex or race, a requirement that the replacement be from a nonprotected group fails to take the reality of the working place into account. Because of the value of experience rarely are sixty-year-olds replaced by those under forty. The replacement process is more subtle but just as injurious to the worker who has been discharged.\(^ {57}\)

Unfortunately, the court did not include a statement indicative of what would have constituted a prima facie case.

But the Fifth Circuit did not ignore its omission of standards for long. Within slightly more than a year, the court set out the requirements for a prima facie case in reduction-in-force age discrimination cases, in the case of *Williams v. General Motors Corp.*\(^ {58}\) Plaintiffs in *Williams* were victims of a massive layoff of salaried employees at two General Motors plants in the Atlanta area. The district court had ruled in favor of the defendant,\(^ {59}\) and the appellate court concluded that the plaintiffs had failed to establish a prima facie case of age discrimination.\(^ {60}\) In discussion, the court stated that the plaintiffs could have established a prima facie case by:

1. satisfying the "standing requirements under the statute," showing that he is within the protected age group and that he has been adversely affected—discharged or demoted—by defendant's employment decision;
2. showing that he was qualified to assume another position at the time of discharge or demotion; and

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54. *Id.*
55. *Id.*
56. *Id.* (citations omitted).
57. *Id.* at 754.
59. *Id.* at 125.
60. *Id.* at 130.
producing evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.61

The court went on to explain that the evidentiary requirement of the foregoing third factor:

simply insists that a plaintiff produce some evidence that an employer has not treated age neutrally, but has instead discriminated based upon it. Specifically, the evidence must lead the factfinder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) defendant regarded age as a negative factor in such consideration.62

The Williams criteria have subsequently been cited with approval by other circuits as a standard for reduction-in-force prima facie cases.63

B. Disparate Treatment—Direct Evidence

One month after Williams, the Fifth Circuit ruled on another case involving a reduction-in-force, Hedrick v. Hercules, Inc.64 In this subsequent case, the court reiterated its earlier opinion in McCorstin v. United States Steel Corp.65 which modified the fourth McDonnell Douglas element (replacement by someone outside the protected group) to require only a showing that age was a determinative factor in the decision to discharge the plaintiff.66 In Hedrick, the court determined that the plaintiff had introduced sufficient evidence, such as comments indicating an age bias and a company-initiated survey which showed that the company had the highest average employee age, to show that age was a determinative factor in the decision to terminate his employment and hence to establish a prima facie case.67 The plaintiff suggested, and the court accepted the suggestion, that the defendant-employer’s survey had indicated an unusually high number of older employees in the defendant’s workforce. Presumably, an older workforce suggested a stagnating workforce and an unhealthy organizational structure. Based on such assumptions, the plaintiff contended that the defendant-employer sought to terminate the older workers.68

Direct evidence that age was a determinative factor has been used to establish prima facie cases in other reduction-in-force cases. In

61. Id. at 129 (citations omitted).
62. Id. at 130.
63. See, e.g., Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1983); Baldwin v. Sears, Roebuck & Co., 667 F.2d 458 (5th Cir. 1982); EEOC v. Western Elec. Co., 713 F.2d 1011 (4th Cir. 1983); Allison v. Western Union, 680 F.2d 1318 (11th Cir. 1982); Coker v. Amoco Oil Co., 709 F.2d 1433 (11th Cir. 1983).
64. 658 F.2d 1088 (5th Cir. 1981).
65. 621 F.2d 749 (5th Cir. 1980).
66. Hedrick, 658 F.2d at 1094 (citing McCorstin, 621 F.2d at 753-54 (5th Cir. 1980)).
67. Hedrick, 658 F.2d at 1094.
68. Id.
Hagelthorn v. Kennecott Corp., the plaintiff made out a prima facie case by presenting evidence that he had been told that he would be terminated because of his age. The Second Circuit did not require him to prove that he was qualified or that he was replaced or that the job continued to exist after reorganization. Similarly, in a Sixth Circuit case, Rose v. NCR Corp., in order to establish a prima facie case of age discrimination the plaintiff needed only to establish that the company wanted to promote a younger image and that a superior had informed him that he had no future with the company because of his age.

C. Adverse Impact

Adverse impact has also been the basis of prima facie cases in reduction-in-force situations. As noted in the earlier discussion of adverse impact, this theory is less frequently utilized in ADEA cases generally. In an early case, EEOC v. Sandia Corp., a prima facie case was established through statistical evidence which proved that a 1973 reduction in the number of salaried employees had a disproportionate impact on individuals fifty-two to sixty-four years of age. In another layoff case, Kelley v. American Standard, Inc., the Ninth Circuit ruled that "A plaintiff can rely on statistical evidence alone to establish the discriminatory impact of an employer's selection criteria." Similarly, in Leftwich v. Harris-Stowe State College, the Eighth Circuit accepted a prima facie case based on statistics which showed that the preference given to non-tenured faculty in an academic reorganization and staff reduction had an adverse impact on individuals within the protected age group.

IV
REBUTTAL AND PRETEXT

As detailed above, a plaintiff may make out a prima facie case of age discrimination under either the disparate treatment or the adverse impact theory. Once a plaintiff establishes a prima facie case, the burden of proof shifts to the employer. When the suit is based on disparate treatment, the defendant's burden "is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the discrimination."
proffered reason."\textsuperscript{76} If, on the other hand, the plaintiff's case has been established by adverse impact, "the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question' in order to avoid a finding of discrimination."\textsuperscript{77}

Under either theory, the plaintiff retains the burden of proving that the practice used by the employer was merely a pretext for discrimination. Of course, should the defendant fail to suggest a legitimate reason for the action, a directed verdict will issue for the plaintiff.\textsuperscript{78} The focus of the following section is on the various employment practices which have been suggested as "legitimate, nondiscriminatory reasons" in age discrimination cases, particularly in those cases resulting from a reduction-in-force.

\textbf{A. Unsuccessful Rebuttal/Pretext Shown}

In general, employers have found it difficult to rebut a preferential treatment case based on direct evidence of discrimination. Even if the defendant-employer can show that factors other than, or in addition to, age dictated an adverse decision regarding the plaintiff, the presence of age as a material factor is usually enough to prove the prohibited discrimination.

In \textit{Hagelthorn v. Kennecott Corp.},\textsuperscript{79} the plaintiff, Hagelthorn, was terminated during a reorganization and relocation of the corporate headquarters resulting in the elimination of his position. Hagelthorn successfully made out a prima facie case based, in large measure, on an alleged remark by a superior manager to the effect that Hagelthorn would not be transferred to the new headquarters because of his age.\textsuperscript{80} Kennecott rebutted the prima facie case by offering evidence that the decision was based on Hagelthorn's performance, not age. In support of its position, Kennecott managers testified that nine critical tasks had been identified in Hagelthorn's job, that Hagelthorn had been informed of these tasks, and that he understood his retention was contingent upon his performance.\textsuperscript{81} In the company's opinion, these nine critical tasks had not been performed satisfactorily; hence, Hagelthorn was forced to take early retirement in lieu of discharge. The company also introduced other evidence of poor performance, such as an incident of insubordination and complaints about Hagelthorn's attitude and performance, in support of their decision. Finally, Kennecott introduced statistical evidence to

\textsuperscript{76} Burdine, 450 U.S. at 254 (emphasis added).
\textsuperscript{78} See, e.g., Connecticut v. Teal, 457 U.S. 447; Burdine, 450 U.S. at 254.
\textsuperscript{79} 710 F.2d 76 (2d Cir. 1983).
\textsuperscript{80} \textit{Id.} at 80.
\textsuperscript{81} \textit{Id.} at 79.
show that termination decisions during the reorganization did not have an adverse impact on older employees.82

Hagelthorn did not agree that Kennecott was dissatisfied with his performance. He contended that he and his department were scapegoats for office frustration and that it was the norm for office service managers to be disliked.83 At the district court level, the jury found in favor of Hagelthorn.84 On appeal, the Second Circuit affirmed, finding that "Hagelthorn made out a prima facie case by offering direct proof that, after twenty years on the job, he was terminated on the basis of age, and because in this case the jury could have inferred from Hagelthorn’s evidence that Kennecott’s explanation was a pretext."85

In a similar case, Hedrick v. Hercules, Inc.,86 a company reorganization resulted in the elimination of the plaintiff’s job. The company had prepared a detailed plan for the reorganization including specific written instructions cautioning managers to avoid considering age or pension eligibility in reorganization decisions. At trial, the company presented evidence of poor performance by Hedrick.87 Still, the defendant-employer Hercules was unable to rebut Hedrick’s prima facie case based on his thirty-seven years of service, on a remark by the director of operations stating the company would “get rid of the good ‘ole Joes and get some younger folks in,” and on evidence that the company had conducted a survey which showed it had the highest average age of employees compared to six other large chemical companies.88

Alleging the employee’s poor performance as a reason for termination in reduction-in-force cases seems fraught with problems. In addition to the possibility of the plaintiff’s suggestion that the use of performance was pretextual or even that the conclusion about his performance was erroneous, the method of performance evaluation is also subject to challenge. Indeed, in several ADEA cases, it was the method of performance evaluation itself that was shown to be age-biased. A 1972 layoff of salaried employees at the Sandia Corporation illustrated this.89 A prima facie case of age discrimination had been established by statistical evidence of adverse impact and supplemented by other evidence of age discrimination.90 In its defense, Sandia claimed that termination decisions had been based on performance. Furthermore, the termination decisions resulted from a multi-step process which relied, in part, on past performance eval-

82. Id. at 83.
83. Id. at 82.
84. Id. at 77.
85. Id. at 82.
86. 658 F.2d 1088 (5th Cir. 1981).
87. Id. at 1092.
88. Id. at 1091-92.
89. EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980).
90. Id. at 623.
uations. Although the evaluations had been intended primarily for salary administration, the results of those evaluations were also considered in selecting those to be terminated. Two methods of evaluation had been used. In the first, employees were ranked within their age group. In the second, supervisors compared employees to others in the same job, and rated them according to five major categories from Outstanding to Unsatisfactory.91

Several problems with the performance evaluation system were noted by the trial court. First, analyses by Sandia's statistician showed that employees under the age of forty tended to receive higher ratings than those over age forty. It was his contention, however, that this finding was due to a positive correlation between level of formal education and performance, and the generally higher educational level of younger employees. In addition, the trial court found the system to be extremely subjective and unvalidated.92 Moreover, the court said, "The evaluations were based on [the] best judgment and opinion of the evaluators, but were not based on any definite identifiable criteria based on quality or quantity of work or specific performance that were supported by some kind of record."93 The trial court also noted that although some of Sandia's policies which appeared to have an age bias might not have violated the ADEA, the policies and underlying concerns about the advanced age of employees could easily be reflected in the subjective performance evaluations.94 On appeal, the Tenth Circuit strongly agreed with the trial court's conclusion that "Sandia's evidence did not show that its actions were non-discriminatory toward the protected age group, that its policies were necessary to the safe and efficient operation of its business, or that the performance rating system was necessary throughout all of its employee classifications."95

Selection of those to be terminated in reduction-in-force cases on the basis of seniority or similar factors related to age cannot be defended. For example, in Leftwich v. Harris-Stowe State College,96 the district court found that the reservation of certain positions for non-tenured faculty during a college reorganization and reduction-in-force was a violation of ADEA. The court ruled that such reservation had an adverse impact on tenured faculty who were generally older than non-tenured faculty, and further that the policy could not be justified as a necessary cost reduction measure.97

91. Id. at 612-13.
92. Id. at 614.
93. Id.
94. Id.
95. Id. at 615.
96. 702 F.2d 686 (8th Cir. 1983).
97. Id. at 691-92.
B. Successful Employer Defenses

Employers have been able to defend reduction-in-force prima facie cases successfully when they have shown a business necessity for the reduction, have established policy and procedure for the reduction, have based decisions on performance, and have demonstrated an absence of discriminatory impact. One of the most concise summaries of these points is contained in Coburn v. Pan Am World Airways. The circuit court stated:

In the face of Coburn's prima facie showing we now turn to the question of Pan Am's articulated nondiscriminatory reason for firing Coburn. Pan Am's evidence demonstrated a company in serious financial straits seeking to cut costs in an attempt to survive. The reduction-in-force was instituted to reduce what Pan Am viewed as a surplus of management personnel. The guidelines called for termination of the 'least productive' employee in a designated peer group. Pan Am, using a numerical ranking system, evaluated its Reservation Supervisors on the basis of qualifications, abilities, productivity, and length of service. Additional credit was given to employees over forty years of age. Coburn was terminated when he was evaluated the least productive. We find that Pan Am carried its burden of proffering a legitimate, nondiscriminatory reason for terminating Coburn by instituting a written policy, following it to the letter, and making an employment decision on its results.

Coburn's efforts to prove that Pan Am's stated reason for his discharge as a pretext were unsuccessful. Although Coburn noted that both employees terminated in his division were over forty years of age, Pan Am successfully pointed out that employees older than Coburn and the one other individual terminated were retained. Coburn also questioned Pan Am's efforts to induce managers over fifty-five years of age to take early retirement, but the court accepted Pan Am's actions as legitimate. Similarly, the court approved Pan Am's separate treatment of younger individuals who were employed as trainers—an action which Coburn had challenged. Finally, Coburn contended that there were inconsistencies between prior Pan Am ratings of his performance and those he received under the special reduction-in-force evaluation. The court, however, accepted the special evaluation.

Several issues identified in Coburn have also been addressed in other successful defenses of age discrimination charges in reduction-in-force cases. In Smith v. Farah Manufacturing Co., for example, the Fifth

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98. 711 F.2d 339 (D.C. Cir. 1983).
99. Id. at 343.
100. Id. at 344.
101. Id.
102. Id.
103. Id.
104. 650 F.2d 64 (5th Cir. 1981).
Circuit specifically noted that there was no doubt about the financial crisis faced by Farah and the existence of a well-documented plan for the reorganization.105

In a later case, Allison v. Western Union,106 a criterion as subjective as "choose the person you will miss the least" was accepted by the Eleventh Circuit. The court reasoned, "An employer's decision may properly be based on subjective factors. Such criteria is not in and of itself violative of ADEA. It is only when such criteria result in discriminatory impact that a violation occurs." Similarly, the Fourth Circuit approved of a reduction-in-force evaluation of ability, performance, potentiality, term of employment, and the needs of the business, noting that even though the evaluations were subjective, they were not necessarily illegal.107 Even a secret rating system, in which salaried employees were evaluated on the bases of potential, promotability, and job performance, and which was different from the official personnel rating of employees, was deemed acceptable when it was shown that older employees were more likely to be retained based on the evaluation results.108

V

PROBLEMS IN REDUCTION-IN-FORCE CASES

When termination results from a reduction-in-force, the employee seeking to advance her ADEA claim may, in some sense, face a heavier burden. Unlike the case where the employee is either not hired or is fired and the position is filled by a person younger than the plaintiff,111 reduction-in-force would seem to imply that no new employee is hired to replace the older worker.112

Unlike the employer who passes over a qualified minority applicant, the employer who fires a qualified older employee as part of a reduction-in-force does nothing inherently suspicious... In the reduction-in-force case, the employer often must discharge qualified employees. The nondiscriminating employer will choose whom to discharge on the basis of their relative contributions to the business. That the one chosen happens to be older by itself raises no fair inference of discrimination—those

105. Id. at 68.
106. 680 F.2d 1318 (11th Cir. 1982).
107. Id. at 1322.
108. Id. at 1322 (citations omitted).
111. It is not clear, however, how much younger than plaintiff the replacement employee must be. See, e.g., Anderson v. Savage Labs., Inc., 675 F.2d 1221 (11th Cir. 1982); Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982).
112. Interestingly, in Williams, 656 F.2d 120, General Motors argued, unsuccessfully, that even in a layoff case the court should look for replacement as a necessary element.
who remain may be more productive. The age discrimination plaintiff in this type of case must show more.¹¹³

In addition to the possible problems of proving discrimination without the replacement factor, both the plaintiff and the defendant may be hampered by confusion as to the test the court will apply to a reduction-in-force situation. Indeed, at least two circuits have effectively abandoned the *McDonnell Douglas* standard in reduction-in-force cases. As noted earlier in this article, both the Fifth and Eleventh Circuits appear to redefine the elements of a prima facie case in such cases, creating a new set of problems for the ADEA plaintiff. These circuits require a complainant to show that she (1) was in the protected age group and was negatively affected by the reduction-in-force, (2) was qualified to assume a different position in employer's company, and (3) can present evidence that the termination was premised by employer's discriminatory motive.¹¹⁴ In order to prove the employer's motive, a complainant must show that age was an adverse factor in the employer's decision or that the employer never considered placing the employee in a different job position because of the complainant's age.¹¹⁵ Neither circuit has evidenced a willingness to accept as proof of discriminatory motive the fact that employees younger than complainant but otherwise similarly situated (in terms of the type of job held and effectiveness in such job) were retained. Consequently, short of a situation involving an employer who makes blatant derogatory comments about an employee's age or perhaps about older workers in general, how can an employee prove an employer's discriminatory intent? In addition, since age discrimination tends to affect individual employees rather than classes of the same, statistical evidence of discrimination may be similarly hard to garner.¹¹⁶

The heavier burden for the plaintiff in reduction-in-force cases may also stem in part from the court's consideration of the reasons, or presumed reasons, which underlie the termination decision.¹¹⁷ If a court accepts or assumes that the reduction-in-force was motivated by an employer's economic woes, and not necessarily by dissatisfaction with the particular employee, it might be more inclined to lend a sympathetic ear to the employer. Indeed, several of the cases noted earlier suggest that

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¹¹⁵ Id.

¹¹⁶ Id. at 639.

¹¹⁷ For a brief discussion of the use of what the authors term a "reasonable factor other than age" (RFOA), including economic justification, see Rosenblum and Biles, *The Aging of Age Discrimination—Evolving ADEA Interpretations and Employee Relations Policies*, 8 EMPLOYEE RELATIONS L.J. 22 (Summer 1982).
courts are willing to accept an employer’s suggestion of worsening economic conditions as a justification for termination.

Clearly, the need to balance the interests of the various litigants is crucial in reduction-in-force cases. In many, perhaps even most, of these situations employers are facing serious financial hardships or at least economic dilemmas which require cost reducing measures. When the cost of doing business can be eliminated by reducing the workforce, obviously some employees are bound to suffer. To the extent that older workers are less productive or less skilled or less aware of technological developments in a given field, termination of the older employee may seem the most viable and practical solution. The purpose of the ADEA is not to prohibit termination of older workers under all circumstances. Rather, the ADEA seeks to remove what in most cases is an irrelevant employment factor—age. It is the essential purpose of the ADEA to halt automatic terminations of older employees, whether due to a reduction-in-force, or to an employer’s blanket attribution of negative characteristics to all older workers. Whether or not it is or should be an employer’s responsibility to retrain older employees or even to assume affirmative responsibility for their knowledge of current techniques is arguable. Similarly, questions about whether the length of an employee’s service creates or should create an expectation of continued employment seems speculative, and does not lend itself to a generalized conclusion. Neither, however, should generalizations about older employees be proffered, much less serve as the basis for termination of any individual employee.

VI
CONCLUSION

Although Title VII cases, and *McDonnell Douglas* in particular, have provided a basic reference for ADEA litigation, courts continue to modify the Title VII framework as appropriate. In many cases, the modifications are simply dictated by the obvious variances between cases involving sex or race discrimination and those in which age is the relevant factor. For the most part, the standard of proof which will be required is clearly set forth and the elements of a prima facie case can be established without a great deal of difficulty.

Reduction-in-force cases, however, continue to pose special evidentiary problems for plaintiffs and require courts to balance the interests of companies with those of their employees. Clearly, employers can legally opt to reduce their workforce as a cost cutting device. They may use evaluation systems which are already in place or may instead develop evaluation methods designed especially for the purpose of determining which employee(s) will be laid off or terminated. The central question appears to be whether or not an employer’s decision to terminate can be
justified in the absence of employee age as a determinative factor. The purpose of the ADEA is not to ignore or aggravate the worsening economic plight of an employer; instead, the ADEA attempts to insure that the burden of any remedial attempts does not fall exclusively or even primarily on the shoulders of America's older workers.