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Panel: Age Discrimination Issues in Higher Education - Handout: Smith v. City of Jackson

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Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 03–1160

AZEL P. SMITH, ET AL., PETITIONERS *v.* CITY OF
JACKSON, MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[March 30, 2005]

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, and an opinion with respect to Part III, in which JUSTICE SOUTER, JUSTICE GINSBURG, AND JUSTICE BREYER join.

Petitioners, police and public safety officers employed by the city of Jackson, Mississippi (hereinafter City), contend that salary increases received in 1999 violated the Age Discrimination in Employment Act of 1967 (ADEA) because they were less generous to officers over the age of 40 than to younger officers. Their suit raises the question whether the “disparate-impact” theory of recovery announced in *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), for cases brought under Title VII of the Civil Rights Act of 1964, is cognizable under the ADEA. Despite the age of the ADEA, it is a question that we have not yet addressed. See *Hazen Paper Co. v. Biggins*, 507 U. S. 604, 610 (1993); *Markham v. Geller*, 451 U. S. 945 (1981) (REHNQUIST, J., dissenting from denial of certiorari).

I

On October 1, 1998, the City adopted a pay plan grant-

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ing raises to all City employees. The stated purpose of the plan was to “attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability.”¹ On May 1, 1999, a revision of the plan, which was motivated, at least in part, by the City’s desire to bring the starting salaries of police officers up to the regional average, granted raises to all police officers and police dispatchers. Those who had less than five years of tenure received proportionately greater raises when compared to their former pay than those with more seniority. Although some officers over the age of 40 had less than five years of service, most of the older officers had more.

Petitioners are a group of older officers who filed suit under the ADEA claiming both that the City deliberately discriminated against them because of their age (the “disparate-treatment” claim) and that they were “adversely affected” by the plan because of their age (the “disparate-impact” claim). The District Court granted summary judgment to the City on both claims. The Court of Appeals held that the ruling on the former claim was premature because petitioners were entitled to further discovery on the issue of intent, but it affirmed the dismissal of the disparate-impact claim. 351 F. 3d 183 (CA5 2003). Over one judge’s dissent, the majority concluded that disparate-impact claims are categorically unavailable under the ADEA. Both the majority and the dissent assumed that the facts alleged by petitioners would entitle them to relief under the reasoning of *Griggs*.

We granted the officers’ petition for certiorari, 541 U. S. ___ (2004), and now hold that the ADEA does authorize recovery in “disparate-impact” cases comparable to *Griggs*. Because, however, we conclude that petitioners have not

¹App. 15.

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set forth a valid disparate-impact claim, we affirm.

II

During the deliberations that preceded the enactment of the Civil Rights Act of 1964, Congress considered and rejected proposed amendments that would have included older workers among the classes protected from employment discrimination.² *General Dynamics Land Systems, Inc. v. Cline*, 540 U. S. 581, 587 (2004). Congress did, however, request the Secretary of Labor to “make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected.” §715, 78 Stat. 265. The Secretary’s report, submitted in response to Congress’ request, noted that there was little discrimination arising from dislike or intolerance of older people, but that “arbitrary” discrimination did result from certain age limits. Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 22 (June 1965), reprinted in U. S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* (1981) (hereinafter *Wirtz Report*). Moreover, the report observed that discriminatory effects resulted from “[i]nstitutional arrangements that indirectly restrict the employment of older workers.” *Id.*, at 15.

In response to that report Congress directed the Secretary to propose remedial legislation, see *Fair Labor Standards Amendments of 1966*, Pub. L. 89–601, §606, 80 Stat. 845, and then acted favorably on his proposal. As enacted in 1967, §4(a)(2) of the ADEA, now codified as 29 U. S. C. §623(a)(2), provided that it shall be unlawful for an employer “to limit, segregate, or classify his employees in any

²See 110 Cong. Rec. 2596–2599 (1964) (amendment offered by Rep. Dowdy, voted down 123 to 94); *id.*, at 9911–9913, 13490–13492 (amendment offered by Sen. Smathers, voted down 63 to 28).

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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" 81 Stat. 603. Except for substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of that provision in the ADEA is identical to that found in §703(a)(2) of the Civil Rights Act of 1964 (Title VII). Other provisions of the ADEA also parallel the earlier statute.³ Unlike Title VII, however, §4(f)(1) of the ADEA, 81 Stat. 603, contains language that significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (hereinafter RFOA provision).

III

In determining whether the ADEA authorizes disparate-impact claims, we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes. *Northcross v. Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) (*per curiam*). We have consistently applied that presumption to language in the ADEA that was "derived *in haec verba* from Title VII."

³Like Title VII with respect to all protected classes except race, the ADEA provides an affirmative defense to liability where age is "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . .," §4(f)(1), 81 Stat. 603; Cf. Civil Rights Act of 1964, §703(e), 78 Stat. 256 ("Notwithstanding any other provision of this title, . . . it shall not be [unlawful to perform any of the prohibited activities in §§703(a)-(d)] on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business enterprise . . .").

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Lorillard v. Pons, 434 U. S. 575, 584 (1978).⁴ Our unanimous interpretation of §703(a)(2) of the Title VII in *Griggs* is therefore a precedent of compelling importance.

In *Griggs*, a case decided four years after the enactment of the ADEA, we considered whether §703 of Title VII prohibited an employer “from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.” 401 U. S., at 425–426. Accepting the Court of Appeals’ conclusion that the employer had adopted the diploma and test requirements without any intent to discriminate, we held that good faith “does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.” *Id.*, at 432.

We explained that Congress had “directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.” *Ibid.* We relied on the fact that history is “filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense

⁴*Oscar Mayer & Co. v. Evans*, 441 U. S. 750, 756 (1979) (interpreting §14(b) of the ADEA in light of §706(c) of Title VII); *Western Air Lines, Inc. v. Criswell*, 472 U. S. 400, 416 (1985) (interpreting ADEA’s bona fide occupational qualification exception in light of Title VII’s BFOQ exception); *Trans World Airlines, Inc. v. Thurston*, 469 U. S. 111, 121 (1985) (interpreting the ADEA to apply to denial of privileges cases in a similar manner as under Title VII).

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proposition that they are not to become masters of reality.” *Id.*, at 433. And we noted that the Equal Employment Opportunity Commission (EEOC), which had enforcement responsibility, had issued guidelines that accorded with our view. *Id.*, at 433–434. We thus squarely held that §703(a)(2) of Title VII did not require a showing of discriminatory intent.⁵

While our opinion in *Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view, we have subsequently noted that our holding represented the better reading of the statutory text as well. See *Watson v. Fort Worth Bank & Trust*, 487 U. S. 977, 991 (1988). Neither §703(a)(2) nor the comparable language in the ADEA simply prohibits actions that “limit, segregate, or classify” persons; rather the language prohibits such actions that “deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual’s” race or age. *Ibid.* (explaining that in disparate-impact cases, “the employer’s practices may be said to

⁵The congressional purposes on which we relied in *Griggs* have a striking parallel to two important points made in the Wirtz Report. Just as the *Griggs* opinion ruled out discrimination based on racial animus as a problem in that case, the Wirtz Report concluded that there was no significant discrimination of that kind so far as older workers are concerned. Wirtz Report 23. And just as *Griggs* recognized that the high school diploma requirement, which was unrelated to job performance, had an unfair impact on African-Americans who had received inferior educational opportunities in segregated schools, 401 U. S., at 430, the Wirtz Report identified the identical obstacle to the employment of older workers. “Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers—unfairly if, despite his limited schooling, an older worker’s years of experience have given him the relevant equivalent of a high school education.” Wirtz Report 21. Thus, just as the statutory text is identical, there is a remarkable similarity between the congressional goals we cited in *Griggs* and those present in the Wirtz Report.

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‘adversely affect [an individual’s status] as an employee’” (alteration in original) (quoting 42 U. S. C. §2000e–2(a)(2)). Thus the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.⁶

Griggs, which interpreted the identical text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA.⁷ Indeed, for

⁶In reaching a contrary conclusion, JUSTICE O’CONNOR ignores key textual differences between §4(a)(1), which does not encompass disparate-impact liability, and §4(a)(2). Section (a)(1) makes it unlawful for an employer “to fail or refuse to hire . . . *any individual* . . . because of *such individual’s* age.” (Emphasis added.) The focus of the section is on the employer’s actions with respect to the targeted individual. Paragraph (a)(2), however, makes it unlawful for an employer “to limit . . . his *employees* in any way that 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.” (Emphasis added.) Unlike in paragraph (a)(2), there is thus an incongruity between the employer’s actions—which are focused on his employees generally—and the individual employee who adversely suffers because of those actions. Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee’s age—the very definition of disparate impact. JUSTICE O’CONNOR is therefore quite wrong to suggest that the textual differences between the two paragraphs are unimportant.

⁷JUSTICE O’CONNOR reaches a contrary conclusion based on the text of the statute, the legislative history, and the structure of the statute. As we explain above, n. 6, *supra*, her textual reasoning is not persuasive. Further, while Congress may have intended to remedy disparate-impact type situations through “noncoercive measures” in part, there is nothing to suggest that it intended such measures to be the sole method of achieving the desired result of remedying practices that had an adverse effect on older workers. Finally, we agree that the differences between age and the classes protected in Title VII are relevant, and that Congress might well have intended to treat the two differently. See *infra*, at 7 (O’CONNOR, J., concurring in judgment). However, Congress obviously considered those classes of individuals to be sufficiently similar to warrant enacting identical legislation, at least with respect to employment practices it sought to prohibit. While those

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over two decades after our decision in *Griggs*, the Courts of Appeal uniformly interpreted the ADEA as authorizing recovery on a “disparate-impact” theory in appropriate cases.⁸ It was only after our decision in *Hazen Paper Co. v. Biggins*, 507 U. S. 604 (1993), that some of those courts concluded that the ADEA did not authorize a disparate-impact theory of liability.⁹ Our opinion in *Hazen Paper*, however, did not address or comment on the issue we decide today. In that case, we held that an employee’s allegation that he was discharged shortly before his pension would have vested did not state a cause of action under a *disparate-treatment* theory. The motivating factor was not, we held, the employee’s age, but rather his years

differences, *coupled with a difference in the text of the statute* such as the RFOA provision, may warrant addressing disparate-impact claims in the two statutes differently, see *infra*, at 11–12, it does not justify departing from the plain text and our settled interpretation of that text.

⁸B. Lindemann & D. Kadue, *Age Discrimination in Employment Law* 416, and n. 16 (2003) (citing *Holt v. Gamewell Corp.*, 797 F. 2d 36, 37 (CA1 1986); *Maresco v. Evans Chemetics*, 964 F. 2d 106, 115 (CA2 1992); *Blum v. Witco Chemical Corp.*, 829 F. 2d 367, 372 (CA3 1987); *Wooden v. Board of Ed. of Jefferson Cty., Ky.*, 931 F. 2d 376, 379 (CA6 1991); *Monroe v. United Airlines*, 736 F. 2d 394, 404, n. 3 (CA7 1984); *Dace v. ACF Industries*, 722 F. 2d 374, 378 (CA8 1983), modified, 728 F. 2d 976 (1984) (*per curiam*); *Palmer v. United States*, 794 F. 2d 534, 536 (CA9 1986); *Faulkner v. Super Valu Stores, Inc.*, 3 F. 3d 1419 (CA10 1993) (assuming disparate-impact theory); *MacPherson v. University of Montevallo*, 922 F. 2d 766, 771 (CA11 1991); *Arnold v. United States Postal Service*, 863 F. 2d 994, 998 (CAD9 1988) (assuming disparate-impact theory)).

⁹See, e.g., *Mullin v. Raytheon Co.*, 164 F. 3d 696, 700 (CA1 1999) (“[T]ectonic plates shifted when the Court decided [*Hazen Paper*]”); *Gantt v. Wilson Sporting Goods Co.*, 143 F. 3d 1042, 1048 (CA6 1998) (“[T]here is now considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory” (internal quotation marks and citation omitted)). See also Lindemann & Kadue, at 417–418, n. 23 (collecting cases). In contrast to the First, Seventh, Tenth, and Eleventh Circuits, which have held that there is no disparate-impact theory, the Second, Eighth, and Ninth Circuits continue to recognize such a theory. *Id.*, at 417, and n. 22.

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of service, a factor that the ADEA did not prohibit an employer from considering when terminating an employee. *Id.*, at 612.¹⁰ While we noted that disparate-treatment “captures the essence of what Congress sought to prohibit in the ADEA,” *id.*, at 610, we were careful to explain that we were not deciding “whether a disparate impact theory of liability is available under the ADEA . . .” *Ibid.* In sum, there is nothing in our opinion in *Hazen Paper* that precludes an interpretation of the ADEA that parallels our holding in *Griggs*.

The Court of Appeals’ categorical rejection of disparate-impact liability, like JUSTICE O’CONNOR’s, rested primarily on the RFOA provision and the majority’s analysis of legislative history. As we have already explained, we think the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports the pre-*Hazen Paper* consensus concerning disparate-impact liability. And *Hazen Paper* itself contains the response to the concern over the RFOA provision.

The RFOA provision provides that it shall not be unlawful for an employer “to take any action otherwise prohibited under subsectio[n] (a) . . . where the differentiation is based on reasonable factors other than age discrimination . . .” 81 Stat. 603. In most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place. See *Hazen Paper*, 507 U. S., at 609 (“[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee’s age.”). In those disparate-treatment cases, such as in *Hazen Paper* itself, the RFOA provision is simply unnecessary to avoid liability under the ADEA,

¹⁰We did note, however, that the challenged conduct was actionable under §510 of the Employee Retirement Income Security Act of 1974. 507 U. S., at 612.

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since there was no prohibited action in the first place. The RFOA provision is not, as JUSTICE O’CONNOR suggests, a “safe harbor from liability,” *post*, at 5 (emphasis deleted), since there would be no liability under §4(a). See *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 254 (1981) (noting, in a Title VII case, that an employer can defeat liability by showing that the employee was rejected for “a legitimate, nondiscriminatory reason” without reference to an RFOA provision).

In disparate-impact cases, however, the allegedly “otherwise prohibited” activity is not based on age. *Ibid.* (“[C]laims that stress “disparate impact” [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . .” (quoting *Teamsters v. United States*, 431 U. S. 324, 335–336, n. 15 (1977))). It is, accordingly, in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was “reasonable.” Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion.¹¹

Finally, we note that both the Department of Labor, which initially drafted the legislation, and the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, 29 U. S. C. §628, have consistently interpreted the ADEA to authorize relief on a disparate-impact theory. The initial regulations, while not

¹¹ We note that if Congress intended to prohibit all disparate-impact claims, it certainly could have done so. For instance, in the Equal Pay Act of 1963, 29 U. S. C. §206(d)(1), Congress barred recovery if a pay differential was based “on any other factor”—reasonable or unreasonable—“other than sex.” The fact that Congress provided that employees could use only *reasonable* factors in defending a suit under the ADEA is therefore instructive.

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mentioning disparate impact by name, nevertheless permitted such claims if the employer relied on a factor that was not related to age. 29 CFR §860.103(f)(1)(i) (1970) (barring physical fitness requirements that were not “reasonably necessary for the specific work to be performed”). See also §1625.7 (2004) (setting forth the standards for a disparate-impact claim).

The text of the statute, as interpreted in *Griggs*, the RFOA provision, and the EEOC regulations all support petitioners’ view. We therefore conclude that it was error for the Court of Appeals to hold that the disparate-impact theory of liability is categorically unavailable under the ADEA.

IV

Two textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII. The first is the RFOA provision, which we have already identified. The second is the amendment to Title VII contained in the Civil Rights Act of 1991, 105 Stat. 1071. One of the purposes of that amendment was to modify the Court’s holding in *Wards Cove Packing Co. v. Atonio*, 490 U. S. 642 (1989), a case in which we narrowly construed the employer’s exposure to liability on a disparate-impact theory. See Civil Rights Act of 1991, §2, 105 Stat. 1071. While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove*’s pre-1991 interpretation of Title VII’s identical language remains applicable to the ADEA.

Congress’ decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual’s

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capacity to engage in certain types of employment. To be sure, Congress recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact. However, as Secretary Wirtz noted in his report, “certain circumstances . . . unquestionably affect older workers more strongly, as a group, than they do younger workers.” Wirtz Report 28. Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group. Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII. While the ADEA reflects Congress’ intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference.

Turning to the case before us, we initially note that petitioners have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers. As we held in *Wards Cove*, it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is “responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.” 490 U. S., at 656 (emphasis added) (quoting *Watson*, 487 U. S., at 994). Petitioners have failed to do so. Their failure to identify the specific practice being challenged is the sort of omission that could “result in employers being potentially liable for ‘the myriad of innocent causes that may lead to statistical imbalances’” 490 U. S., at 657. In this case not only did petitioners thus err by failing to identify the relevant practice, but it is also clear from the record

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that the City's plan was based on reasonable factors other than age.

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

Petitioners' evidence established two principal facts: First, almost two-thirds (66.2%) of the officers under 40 received raises of more than 10% while less than half (45.3%) of those over 40 did.¹² Second, the average percentage increase for the entire class of officers with less than five years of tenure was somewhat higher than the percentage for those with more seniority.¹³ Because older officers tended to occupy more senior positions, on average they received smaller increases when measured as a percentage of their salary. The basic explanation for the differential was the City's perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market.

Thus, the disparate impact is attributable to the City's

¹² Exhibit C, Record 1192.

¹³ App. to Pet. for Cert. 41a.

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decision to give raises based on seniority and position. Reliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities. In sum, we hold that the City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a "reasonable factor other than age" that responded to the City's legitimate goal of retaining police officers. Cf. *MacPherson v. University of Montevallo*, 922 F. 2d 766, 772 (CA11 1991).

While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.

Accordingly, while we do not agree with the Court of Appeals' holding that that the disparate-impact theory of recovery is never available under the ADEA, we affirm its judgment.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.