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West Virginia University v. Decker: The Future of Age Discrimination in West Virginia

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WEST VIRGINIA UNIVERSITY v. DECKER:
THE FUTURE OF AGE DISCRIMINATION IN WEST VIRGINIA

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I. INTRODUCTION

In 1967, both the United States Congress and the West Virginia Legislature moved to outlaw discrimination on the basis of age. At the federal level, Congress was responding to President Lyndon Johnson’s 1964 Executive Order declaring age discrimination in employment to be a violation of public policy. The Age Discrimination in Employment Act (ADEA) was subsequently enacted to “promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.” The ADEA sought to balance the right of older workers to be protected from age discrimination against the prerogative of employers to control managerial decisions. The law prohibited the use of arbitrary age limits and advocated that employment decisions regarding older employees be based on an individual assessment of each worker’s potential or ability.

The West Virginia Legislature responded to the 1964 passage of Title VII of the Civil Rights Act in 1967. Aware that age discrimi-

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1. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-34 (1994)). “(a) 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; . . . .” 29 U.S.C. § 623. “The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.” 29 U.S.C. § 631(a).

2. The West Virginia Human Rights Act, W. VA. CODE §§ 5-11-1 to -19 (1994) [hereinafter The Human Rights Act]. House Bill Number 821 was passed on March 11, 1967 by the 58th Legislature of West Virginia (Regular Session), and went into effect on July 1, 1967. “Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or handicap.” W. VA. CODE § 5-11-2 (1994) (as amended). “The term ‘age’ means the age of forty or above; . . . .” W. VA. CODE § 5-11-3(k) (1994 & Supp. 1995) (as amended).

5. SPECIAL COM. ON AGING, DEVELOPMENTS IN AGING: 1993-VOLUME 1, S. REP. No. 403, 103d Cong., 2d Sess. 90 (1994).
6. Id.
7. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII §§ 701-
ination was being addressed at the federal level, the Legislature incorporated "age" as a protected class under the West Virginia Human Rights Act (Human Rights Act). The Human Rights Act mandates that it is the public policy of West Virginia to provide equal opportunity in the areas of employment, public accommodation, housing accommodation and real property transactions, without regard to race, religion, color, national origin, ancestry, sex, age, blindness, or handicap. The denial of equal opportunity rights is "contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." Thus, from its initial passage in 1967, the Human Rights Act has included age, along with other protected classes. In contrast, the ADEA is part of the Fair Labor Standards Act, and not part of Title VII of the Civil Rights Act. This asymmetry between federal and state law has practical implications for age discrimination litigation in West Virginia.

Age discrimination litigation is currently in a state of flux. Serious questions have been raised as to the philosophical underpinnings of the

8. Telephone Interview with H. Laban White, Jr., Speaker of the West Virginia House of Delegates in 1967 and sponsor of The Human Rights Act (Jan. 2, 1996). Given the nature of political assemblies, the decision to include age was not as clear cut as suggested. As those both within and without the legislature researched civil rights issues, they became aware of local age discrimination issues and this helped to push through the Senate's amendment to add sex and age. Accord Telephone Interview with the Honorable Robert C. Halbritter, Judge of the Eighteenth Judicial Circuit and former member of the House of Delegates, representing Preston County, West Virginia in 1967 (Dec. 28, 1995).
11. Id.
12. Human Rights Act, ch. 89, 1967 W. Va. Acts 422 (codified at W. VA. CODE § 5-11-1 (1967)). At the time of passage the protected classes were limited to race, religion, color, national origin, age, sex and ancestry.
15. See West Virginia Univ./West Virginia Bd. of Regents v. Decker, 447 S.E.2d 259, 265 n.8 (W. Va. 1994) (holding that, in disparate treatment cases, the Human Rights Act treats each of the enumerated protected classes equally).
use of age to define a protected class. Some scholars have argued that age discrimination litigation has more in common with wrongful discharge litigation than civil rights litigation. Unlike race, age is not a suspect class and there is little consistency or certainty in the standards that are applied to age-based claims. For example, courts are currently split as to whether a Title VII plaintiff may even base an age-discrimination claim upon a disparate impact theory of discrimination, or whether such a plaintiff is confined solely to a disparate treatment theory under the ADEA.

Furthermore, there has been a dramatic increase in the willingness of the judiciary to accept cost justification as an employer defense to alleged age discrimination. In the early 1980s, the judiciary refused to tolerate the replacement of older, higher salaried employees by younger, less costly workers. However by the late 1980s the case law had become more opaque. In 1993, Justice O'Connor's opinion in Hazen Paper Co. v. Biggins marked a watershed in federal age discrimination litigation under the ADEA. In Hazen Paper the Court

16. See George Rutherglen, From Race To Age: The Expanding Scope Of Employment Discrimination Law, 24 J. LEGAL STUD. 491 (1995) [hereinafter Rutherglen]. "In constitutional law, there is no need to protect the old from the rest of the population, most of whom will live to the same age." Id. at 499.


18. See infra note 97 and accompanying text.

19. The Supreme Court left this issue unresolved in its landmark ADEA case, Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993). See generally infra note 96 (listing some recent cases have held that the analysis in Hazen Paper means that disparate impact analysis is unavailable under the ADEA). Prior to Hazen Paper many courts had simply assumed that the disparate impact model was available to ADEA plaintiffs. See infra note 65.


21. Peter H. Harris, Age Discrimination, Wages, And Economics: What Judicial Standard? 13 HARv. J.L. & PUB. POL'Y 715, 723 (1990) [hereinafter Harris] ("What appears to be the general, albeit unsettled, rule for discharges or other practices excluding persons from employment is that evidence of economic considerations is not sufficient to justify differential treatment of older workers.").

rejected the view that facially neutral cost-saving policies, which happened to be age-correlated, were tantamount to unlawful discrimination, absent a showing that the employer was motivated by age animus.\textsuperscript{23}

Against this backdrop, this Comment seeks to place the Supreme Court of Appeals of West Virginia's decision in \textit{West Virginia University v. Decker}\textsuperscript{24} into perspective by examining the status of age discrimination litigation in West Virginia. In \textit{Decker}, the Supreme Court of Appeals of West Virginia unanimously accepted the defendant University's cost-justification defense to the charge of age discrimination under the Human Rights Act made by the plaintiff, Professor Decker. Decker's claim arose out of the University's dual compensation system for faculty.\textsuperscript{25} The University used a market-based system to determine the starting salaries of new faculty hires, whereas existing faculty salaries were dependent upon the largesse of the West Virginia Legislature.\textsuperscript{26} Decker argued that this facially neutral policy of determining salaries had a disparate effect upon older faculty members, such as himself, because younger, more inexperienced, new faculty were routinely paid salaries at or above the level of the older faculty.\textsuperscript{27}

This Comment will argue that the Supreme Court of Appeals of West Virginia's decision, while consistent with other faculty compensation cases nationwide, sounds a warning note to age-discrimination plaintiffs. The Supreme Court of Appeals of West Virginia has now accepted the validity of at least some cost-justification defenses to claims of age discrimination based on salary differentials. The court must now tread carefully in establishing the parameters of cost-justification defenses to the Human Rights Act or risk diluting the protection that the Act offers to all discrimination victims, not just age-discrimination plaintiffs.

Part two of this Comment examines the development of age discrimination law under the ADEA. First, it studies the nature of age as a protected class and then tracks the development of the disparate treat-

\textsuperscript{23} \textit{Id.}
\textsuperscript{24} 447 S.E.2d 259 (W. Va. 1994).
\textsuperscript{25} \textit{Decker}, 447 S.E.2d at 261.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.} at 262.
ment and disparate impact analyses for Title VII discrimination claims. Finally it looks at the increasing divergence between the legislative and judicial developments of Title VII and the ADEA.

Part three details the court’s decision in Decker, looking both at the factual background and the rationale of the Supreme Court of Appeals of West Virginia in finding for the University. In part four, the court’s decision is analyzed. The decision is first compared to other faculty compensation cases. Secondly, Decker’s newly articulated disparate impact model is considered, as it follows on the heels of the passage of the Civil Rights Act of 1991. Finally, this Comment will address the challenge to the Supreme Court of Appeals of West Virginia posed by the Decker decision.

II. BACKGROUND OF THE LAW

A. Age as a Protected Class

At the federal level, discrimination on the basis of age has been distinguished from other types of employment discrimination by the passage of the ADEA. The Supreme Court has held that age-based classifications do not constitute a suspect class for equal protection purposes.28

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a “history of purposeful unequal treatment” or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.29

ADEA claims are typically brought by white males, with relatively high status and high paying jobs.30 These “victims” are the very class


29. Murgia, 427 U.S. at 313.

30. See Rutherglen, supra note 16, at 491. See also Michael Schuster & Christopher S. Miller, An Empirical Assessment Of The Age Discrimination In Employment Act, 38 INDUS. & LAB. REL. REV. 64, 68 (1984) (reporting that 80.6% of ADEA claims surveyed
of employees who have historically benefited from traditional discrimination against minorities and women. Consequentaly, the ADEA cannot be justified doctrinally or empirically because it protects a disfavored or traditionally powerless minority group from discrimination. Moreover, age is not an immutable characteristic, nor does it define an insular and discrete minority. In addition, unlike race or sex, age does bear some correlation with decreased performance and productivity in the workplace. Therefore, the ADEA must be justified on other grounds. One such justification, supporting the argument for protecting employees from dismissal without good cause late in their careers is the lifecycle theory of earnings. According to this

were filed by men; 54.4% of claims were brought by professional or managerial employees).


32. See Rutherljen, supra note 16, at 491. See also RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (arguing that the federal government should not mandate the consumption of considerable resources for the purpose of defining and complying with antidiscrimination laws that lack a compelling theoretical justification).

33. See Harris, supra note 21, at 732 (stating that older employees have not faced lifelong bias).

34. “Although the timing varies significantly from individual to individual, at some point in almost everyone’s life, age affects the ability to work. . . . In 1986, the coverage of the Act was expanded for most covered employees to include all ages greater than or equal to forty. Because of this expanded coverage, the ADEA continues to prohibit employment discrimination even after age has affected the ability to work for most people.” Harris, supra note 21, at 716-17. See also Rutherljen, supra note 16, at 499 (disputing the prohibition against generalizations about age because: (a) everyone’s physical and mental abilities decline at some point with age; (b) “the countervailing benefits of age, such as experience and judgment, do not invariably outweigh the loss of these abilities”; (c) “the period over which older workers can gain and utilize new skills is necessarily shorter than for younger workers”; and (d) the cost of individualized testing may outweigh the gain in accuracy); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 329 (4th ed. 1992) (stating that the power of a specialized worker is “apt to decline with age”).

35. See Rutherljen, supra note 16, at 500. In essence, the theory holds that at various stages during an employee’s working “lifecycle,” the employee’s productivity may exceed or fall below his compensation. For example, when first hired, an employee’s compensation may exceed his or her productivity while receiving on the job training. Then the employer profits from this training as the employee’s productivity exceeds his or her compensation. The situation reverses once again in the employee’s later working years. Without statutory protection, such as the ADEA, the danger is that an employer will opportunistically terminate older employees, thereby destroying their expectation of recompensation for the years that they were under-compensated. For judicial endorsement of this theory, see Metz v.
theory, age discrimination statutes protect employees from employers who breach implied employment contracts that discharge will be for good cause only, which have arisen from the employment relationship itself.\textsuperscript{36}

Consequently, the justification for protecting older workers appears to have more in common with recognizing claims for wrongful discharge than with those classes protected by Title VII, despite the striking resemblance in the statutory language of both Title VII and the ADEA.\textsuperscript{37}

Transit Mix, Inc., 828 F.2d 1202, 1220-21 (7th Cir. 1987) (Easterbrook, J., dissenting). "For many years employees add to their skills and as a result do better work; eventually the tables turn, as mental and motor skills slip away." Id. at 1212. See also Note, Employer Opportunism and the Need for a Just Cause Standard, 103 HARV. L. REV. 510, 512 (1989) ("rational employers may well have an economic motive for engaging in 'opportunistic discharges'").

36. John J. Donohue III, Advocacy Versus Analysis in Assessing Employment Discrimination Laws, 44 STAN. L. REV. 1583, 1586 n.14 (1992) (noting that although this theory would provide a justification for protection of long-tenured workers, the ADEA is extended to all workers over forty).

37. For example, section 2000e-2(a) of Title VII states:

- It shall be an unlawful employment practice 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 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.


Section 623(a) of ADEA, in comparison, states:

- 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 . . . .

B. Analyzing Employment Discrimination Claims

Traditionally, age-based claims have been subject to the same judicially created analytical framework as Title VII claims. Anti-discrimination law involves two distinct analytical theories: disparate treatment and disparate impact. The essential differences between the two theories was captured by the Supreme Court in *International Brotherhood of Teamsters v. United States.* The Court noted:

"Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter 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 and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.39

The evidentiary framework for proving disparate treatment was first articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green.* The *McDonnell Douglas* analysis was later refined in *Texas Department of Community Affairs v. Burdine* and *St. Mary's Honor Center v. Hicks.*

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39. *International Bhd. of Teamsters,* 431 U.S. at 335-36 n.15.
40. 411 U.S. 792, 802 (1973) (holding that a plaintiff's prima facie case may be met by showing the following four elements: "(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 with complainant's qualifications"). The elements of the prima facie case will vary as the factual situation varies. *Id.* at 802 n.13.
41. 450 U.S. 248 (1981) (holding that the burden of persuasion never shifts to the defendant but the burden of production does shift to the defendant to articulate a non-discriminatory reason for making the adverse employment decision. The burden of production then shifts back to the plaintiff to show that the articulated reason is pretextual.).
42. 113 S. Ct. 2742 (1993) (holding that an employee who discredits all of an employer's articulated legitimate nondiscriminatory reasons for an employment decision is not
The disparate impact theory of discrimination was laid out by the Supreme Court in *Griggs v. Duke Power Co.* The Court recognized that if Title VII was limited to prohibiting only overt discrimination, employers would be able to adopt more subtle forms of discrimination through the use of facially non-discriminatory practices and policies which discriminated against those in the protected classes. In *Griggs*, the Court found that the defendant’s transfer policy had a disparate impact upon the African-American employees. The policy required that employees have a high school diploma or a minimum test score before employees could transfer internally to coveted positions. Specifically, the Court found a nexus between the history of societal discrimination and the poor test scores registered by African-Americans. The usual method of proof for establishing a presumption of discrimination in a disparate impact case is through the use of statistical disparities as opposed to focusing on specific incidents of misconduct.

Eighteen years after the landmark *Griggs* decision, the Supreme Court’s new conservative majority changed the disparate impact analysis in its decision in *Wards Cove Packing Co. v. Atonio*. Justice White’s opinion in *Wards Cove* sought to increase the plaintiff’s burden in a disparate impact situation. Congress passed the Civil automatically entitled to judgment). *See also* Teresa C. Postle, Comment, *St. Mary’s Honor Center v. Hicks: Interpretation of Title VII Takes A Wrong Turn*, 96 W. VA. L. REV. 217 (1993) (analyzing the Supreme Court’s decision in *Hicks*).

43. 401 U.S. 424 (1971).
46. *Id.* at 428.
47. *Id.* at 430.
48. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988). *See also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (“our cases make it unmistakably clear that ‘[s]tatistical analyses have served and will continue to serve an important role’ in cases in which the existence of discrimination is a disputed issue”) (citations omitted).
49. *See* Charles A. Shanor & Samuel A. Marcossan, *Battleground For A Divided Court: Employment Discrimination In The Supreme Court*, 6 LAB. L. 145, 146 (1990) (commenting that to a large degree, employment discrimination was the battleground upon which the sometimes bitterly divided justices waged war among themselves during the 1988-89 term).
51. *Id.* In *Wards Cove*, the majority increased the burden on the plaintiff in a dispa-
Rights Act of 1991,\textsuperscript{52} in response to congressional opposition to \textit{Wards Cove} and other recent Supreme Court decisions.\textsuperscript{53} The passage of the Civil Rights Act of 1991 codified the litigants' burdens in a disparate impact case.\textsuperscript{54} An employee must still identify which particu-


\textsuperscript{54} Title VII, 42 U.S.C. § 2000e-2(k)(1) (emphasis added). Specifically the statute provides:

(A) An unlawful employment practice based on disparate impact is established under this subchapter only if— (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party makes the demonstration . . . with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice. (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of the respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice. (ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.
lar employment practice caused the disparate impact but, if such practices are impossible to disentangle, courts may now analyze the decision-making as a single practice. Also, Congress has required the employer to show that the challenged practice is both job-related, for the particular job at issue, and consistent with business necessity. The burden of persuasion in proving business necessity now rests with the employer.

C. The Changing Landscape of Age Discrimination Analysis

Against this changing backdrop of Title VII litigation, courts have been divided on two particular issues, both of which have had a considerable impact on the development of age discrimination law. The first issue is whether employers may justify their employment decisions by showing the economic impact that such decisions have or would have on their financial health. The second issue is whether traditional Title VII disparate treatment and disparate impact analysis may be transplanted into the ADEA. These judicial developments post-date the passage of the ADEA and thus Congress cannot be said to have intended to incorporate them into the Act at the time of its passage.

In Geller v. Markham, a fifty-five year old substitute teacher brought suit alleging that the Board of Education’s policy of hiring teachers with less than five years experience had a disparate impact on teachers over forty years of age. The Second Circuit held that Geller had succeeded in proving that the Board’s policy had a disparate impact upon a protected class. The Second Circuit struck down the

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55. Id.
56. Id.
59. Id. at 1029-30.
Board’s defense that its policy was justified as a necessary cost cutting measure in the face of tight budgetary constraints.\textsuperscript{60} The court held:

This cost justification must fail, however, because of the clear rule that “a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.”\textsuperscript{61}

Similarly, in \textit{Leftwich v. Harris-Stowe State College},\textsuperscript{62} the Eighth Circuit rejected the defendant college’s justification that an employee selection plan, which had a disparate impact on older, tenured faculty, was adopted as a cost saving measure.\textsuperscript{63} Thus, in both \textit{Geller} and \textit{Leftwich}, the courts rejected cost containment as a “reasonable factor other than age”\textsuperscript{64} defense and set the stage for the use of the disparate impact theory in ADEA cases.\textsuperscript{65} The parameters of the “reasonable

\begin{footnotes}
\item[60.] \textit{Id.} at 1034.
\item[61.] \textit{Id.} at 1034 (quoting 29 C.F.R. § 860.103(h) (1979)).
\item[62.] 702 F.2d 686 (8th Cir. 1983) (holding that the school administration discriminated on the basis of age when tenured faculty were eliminated because their salaries were generally greater than those of non-tenured faculty).
\item[63.] \textit{Leftwich}, 702 F.2d at 691. The court reasoned as follows: Here, the defendant’s selection plan was based on tenure status rather than explicitly on age. Nonetheless, because of the close relationship between tenure status and age, the plain intent and effect of the defendant’s practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts. If the existence of such higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated.
\item[64.] \textit{Id.} at 691.
\item[65.] 29 U.S.C. § 623(f)(1).
\item[66.] \textit{See} Harris, supra note 21, at 733-34. \textit{But cf.} Michael C. Sloan, Comment, \textit{Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?}, 1995 Wis. L. REV. 507, 530 n.127 (1995) (Noting that \textit{Geller} and \textit{Leftwich} are the only cases which have affirmed an ADEA judgment for a plaintiff based on disparate impact. However, many courts, while finding for the defendant-employer, have stated that it
\end{footnotes}
factor other than age” defense was addressed in **EEOC v. Chrysler Corp.** In **Chrysler Corp.**, the Seventh Circuit described two tests that an employer must meet to establish cost savings as a “reasonable factor other than age” defense and effectively limited its availability to situations of imminent bankruptcy.67

Although the Supreme Court denied certiorari in **Markham v. Geller**, Justice Rehnquist’s dissent is noteworthy for its hint of the Court’s future rulings.68 Justice Rehnquist pointed out that the Board’s policy made no reference to age and had, in practice, a significant impact on teachers outside, as well as within, the protected class.69 While not denying the fact that the policy would likely have a greater statistical impact on teachers over age 40,70 he argued that the differential impact was based upon experience and not age itself.71 Consequently, Rehnquist did not believe that Congress intended to restrain the decision-making processes of local governments in this way.72

The trend established by **Geller** and **Leftwich** continued with the Seventh Circuit’s decision in **Metz v. Transit Mix, Inc.**73 In **Metz**, the court held that it was age discrimination for an employer to discharge an older employee, whose twenty-seven years of employment had resulted in him receiving a relatively high salary,74 and to replace him

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was assumed that such theory was available for ADEA plaintiffs.). See, e.g., Davidson v. Board of Governors of State Colleges & Univ. for W. Illinois Univ., 920 F.2d 441, 444 (7th Cir. 1990) (Posner, J.) (“Although a number of courts have ruled that disparate impact is a weapon in the arsenal of the discrimination plaintiff, . . . this court . . . has merely assumed that it is. . . . We need not resolve the issue here, since whatever the resolution our decision must be the same; so we shall assume that disparate impact is a permissible approach in age discrimination cases; but it is just an assumption.”) (citations omitted).

67. Id. at 1186 (“First, the necessity for drastic cost reduction obviously must be real . . . . Second, the forced early retirements must be the least-detrimental-alternative means available to reduce costs.”).
69. Id.
70. Id. at 948.
71. Id. at 949.
72. Id. at 948-49.
73. 828 F.2d 1202 (7th Cir. 1987).
74. Id. at 1203.
with a younger employee in order to reduce salary costs.\textsuperscript{75} The major-
ity used the reasoning behind the disparate impact analysis in \textit{Leftwich}
 to argue that the goals of the ADEA would be undermined if cost-
cutting was permitted as a nondiscriminatory justification for an em-
ployment decision in a disparate treatment case.\textsuperscript{76} In performing a
disparate treatment analysis, the majority used salary as a "proxy" for
age, claiming that age and seniority are strongly correlated.\textsuperscript{77}

Despite the lack of judicial sympathy for the cost-justification
defense in the 1980s, a warning note was sounded by Justice
Easterbrook in his prescient dissent in \textit{Metz}.\textsuperscript{78} Justice Easterbrook ar-
gued that nothing in the ADEA prohibited consideration of the rela-
tionship between an employee’s productivity and his salary, and that a
firm may lay off or fire employees of any age when economic condi-
tions so require.\textsuperscript{79} He stated:

\begin{quote}
Wage discrimination is age discrimination only when wage depends direct-
ly on age, so that the use of one is a pretext for the other; high
covariance is not sufficient, and employers should always be entitled to
consider the relation between a particular employee’s wage and his produc-
tivity. . . . A natural reading [of the ADEA] is that an employer may take
into account wages, which are factors other than age.\textsuperscript{80}
\end{quote}

Justice Easterbrook declares that the purpose of the ADEA is to pro-
hibit adverse employment decisions being made on the basis of myths,
stereotypes, group averages or laziness but not to prevent workers from
being fired when their wage is no longer justified by their level of

\textsuperscript{75} Id. at 1207.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 1208. \textit{See also} Robert J. Gregory, \textit{There Is Life In That Old (I Mean More
"Senior") Dog Yet: The Age-Proxy Theory After Hazen Paper Co. v. Biggins, 11 Hofstra
Lab. L.J. 391, 393 n.14 (1994) ("Age-proxy theory" refers to a method of proof that per-
mits a finding of age discrimination to be based on an employer’s reliance on an age-related
factor. As so defined, the proxy theory is a device for proving a disparate treatment
claim. . . . The thrust of the proxy theory is that the age-related factor is a stand-in for
age itself.").
\textsuperscript{78} \textit{Metz}, 828 F.2d at 1211.
\textsuperscript{79} Id. at 1212.
\textsuperscript{80} Id. at 1212 (emphasis added).
productivity.\textsuperscript{81} \textit{Griggs} does not condemn all tests or practices which have a disparate impact, but only those that are not job-related or supported by strong business reasons.\textsuperscript{82} Justice Easterbrook posits that "[i]t is hard to imagine how the use of wages [in making employment considerations] could not be valid; wages correspond precisely to the cost of doing business, and hence to profitability."\textsuperscript{83} Furthermore, Justice Easterbrook was particularly critical of his colleagues' fusion of the rules for disparate treatment and disparate impact — each of which has a separate method of proof and is built on a different premise.\textsuperscript{84}

It was into this twilight world of age discrimination, where cost justification defenses were disfavored and disparate impact analysis of claims was tolerated, that the Supreme Court's decision in \textit{Hazen Paper} v. \textit{Biggins} came down in 1993.\textsuperscript{85} Despite being a landmark case, the \textit{Hazen Paper} decision has been less than a guiding light as it has neither clarified whether disparate impact analysis is available to the ADEA plaintiff, nor established workable guidelines for handling employers' cost justification defenses to their discriminatory employment practices. Justice O'Connor stated in her opinion that "[t]he disparate treatment theory is of course available under the ADEA, as the language of the statute makes clear . . . . By contrast, we have never decided whether a disparate impact theory of liability is available under the ADEA . . . and we need not do so here."\textsuperscript{86} Most courts had simply assumed to this point that the disparate impact theory was available to age discrimination litigants,\textsuperscript{87} but Justice O'Connor's statement cast doubt on the validity of this assumption.

\textsuperscript{81} \textit{Id.} at 1213.
\textsuperscript{82} \textit{Id.} at 1219.
\textsuperscript{83} \textit{Metz}, 828 F.2d at 1219.
\textsuperscript{84} \textit{Id.} at 1215-16. "The melding of the two strands of discrimination law effectively relieved Metz of his burden — indeed has allowed him to prevail even though the employer advanced, and the trier of fact credited, a sufficient reason utterly unrelated to his age. This unfortunate outcome is the wages of conceptual confusion." \textit{Id.} at 1216.
\textsuperscript{85} 113 S. Ct. 1701 (1993).
\textsuperscript{86} \textit{Hazen Paper}, 113 S. Ct. at 1706.
\textsuperscript{87} \textit{Metz}, 828 F.2d at 1211 n.* (Easterbrook, J., dissenting). ("[L]ike the majority I assume that the principles established by other antidiscrimination statutes apply to cases under the ADEA.").
In *Hazen Paper*, the plaintiff brought an ADEA disparate treatment claim, alleging that he had been fired for an age-determinative reason as his pension was on the threshold of vesting.\(^8\) The Court granted certiorari to determine, amongst other things, "whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age."\(^9\) The Supreme Court held that a plaintiff could not succeed in proving a disparate treatment charge if the employer's adverse employment decision was motivated by factors other than age, even if the motivating factors happened to be correlated with age, such as pension status.\(^9\) "Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age-based.'"\(^9\) In order to succeed therefore, a plaintiff must establish that an age-correlated factor, such as years of service or pension status, was being used as a proxy for intentional age discrimination or that the decision was taken on the basis of an "inaccurate and stigmatizing stereotype."\(^9\)

The response to *Hazen Paper* was swift. Many courts held that the rationale used in *Hazen Paper* applied with equal force to age-discrimination cases where employees alleged that adverse employment decisions occurred as a result of salary considerations.\(^93\) Compensation is

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9. Id. at 1705.
10. Id. at 1706.
11. Id. at 1707.
12. Id. at 1706. "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome. Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. 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." *Hazen Paper*, 113 S. Ct. at 1706.
93. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125 (7th Cir. 1994) (overruling *Metz v. Transit Mix, Inc.* and hailing *Hazen Paper* as a vindication of Justice Easterbrook's dissent). See also Bialas v. Greyhound Lines, Inc., 59 F.3d 759, 763 (8th Cir. 1995) (concluding that even if employer terminated plaintiffs because of their status as higher-paid employees, this did not in itself support an inference of age discrimination); Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 152 (5th Cir. 1995) (holding that the
typically correlated with age, just as pension benefits are, but such correlation is not perfect. Consequently, post-\textit{Hazen Paper}, an employee cannot prove age discrimination under the ADEA, based on salary considerations alone, even if such employee was discharged purely to save salary costs. Several courts have even gone so far as to hold that \textit{Hazen Paper} means that disparate impact analysis is now unavailable under the ADEA, despite Justice O’Connor’s statement that the matter was still undecided. Against this changing federal legal landscape, the Supreme Court of Appeals of West Virginia was faced with a defendant’s cost-justification defense to an age discrimination claim in the comparatively placid surroundings of the Human Rights Act, in \textit{West Virginia University v. Decker}. 

\begin{itemize}
  \item ADEA prohibits discrimination on basis of age, not salary or seniority; Allen v. Diebold, Inc., 33 F.3d 674, 676 (6th Cir. 1994) (stating that in \textit{Hazen Paper} the Supreme Court held that the ADEA prohibits only actions actually motivated by age, and not those based on pension, status, seniority or wage rate); Shumacher v. North Dakota Hosp. Ass’n, 528 N.W.2d 374, 382 (N.D. 1995) (holding that a jury instruction that a finding of age discrimination could be based on a finding that plaintiffs were paid more than their younger colleagues had no basis in law); Shore v. A.W. Hargrove Ins. Agency, Inc., 873 F. Supp. 992, 997 (E.D. Va. 1995) (holding that economic considerations in decision to discharge plaintiff were not probative of age discrimination).
  \item \textit{Anderson}, 13 F.3d at 1126. \footnote{94}
  \item Id. See also \textit{Bay v. Times Mirror Magazines, Inc.}, 936 F.2d 112, 117 (2d Cir. 1991) (“\textit{[T]here is nothing in the ADEA which prohibits an employer from making employment decisions that relate an employee’s salary to contemporaneous market conditions and the responsibilities entailed in particular positions and concluding that a particular employee’s salary is too high.”). \footnote{95}
  \item \textit{DiBiase v. SmithKline Beecham Corp.}, 48 F.3d 719 (3d Cir. 1995), \textit{cert. denied}, 116 S. Ct. 306 (1995) (holding that disparate impact is unavailable because an employer’s decision is, by definition, wholly motivated by factors other than age); EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994) (stating that decisions based on criteria which merely tend to affect workers over the age of forty more than those under forty are not prohibited); Martinic v. Urban Redevelopment Auth., 844 F. Supp. 1073 (W.D. Pa. 1994), aff’d without opn., 43 F.3d 1461 (3d Cir. 1994) (post-\textit{Hazen Paper} there is no disparate impact liability available under the ADEA); \textit{Hiatt v. Union Pac. R.R.}, 859 F. Supp. 1416 (D. Wyo. 1994) (incorporating the disparate impact theory of discrimination enunciated in \textit{Griggs} into the ADEA is inappropriate). \footnote{96}
  \item \textit{Hazen Paper}, 113 S. Ct. at 1706. \footnote{97}
  \item 447 S.E.2d 259 (W. Va. 1994). \footnote{98}
\end{itemize}
III. STATEMENT OF THE CASE

A. Background Facts

Robert L. Decker, a tenured professor at West Virginia University (University), filed a complaint with the Human Rights Commission on November 25, 1987 alleging age discrimination by the University with respect to his salary. At the time of filing, Decker, a white male, was sixty-one years old. He had joined the University faculty in 1955 in the psychology department of the College of Arts and Sciences. During his stint in the psychology department, Decker was awarded tenure. In 1977, Decker accepted a position in the industrial labor relations department and transferred to the University's College of Business and Economics, where he was promoted to full professor in 1979. As of 1987, Decker was one of only two members in this department and no new faculty had been hired into his department since its creation in 1977. Decker alleged in his complaint that the University had denied him an equitable raise in 1987, and that the University routinely gave its newly hired faculty in the College of Business and Economics salaries at or above the level of his own.

B. West Virginia University's Compensation System

The University had a dual compensation system for determining faculty salaries. The funding for salaries came from the West Vir-
Salary adjustments for existing faculty were determined by across the board increases initiated by either the Legislature or the University’s Board of Trustees. Faculty also received increases when they were promoted or changed rank. On the other hand, starting salaries were based not on the availability of funding from the Legislature, but rather on a median market rate. This rate was calculated from a survey conducted by the American Assembly of Collegiate Schools of Business (AACSB). The College of Business and Economics, along with other comparable institutions, would report to the AACSB what salaries it was paying to new faculty. The AACSB would then collate these figures into an annual report to show average salaries for specific academic disciplines. The University used the median salary range, plus five percent, to set the salary for a new hire in a particular discipline. This dual compensation system caused compression and inversion with respect to incumbent faculty salaries, resulting in junior faculty occasionally receiving higher salaries than their more senior colleagues.

108. Decker, 447 S.E.2d at 261.
109. Id.
110. Id.
111. Id.
112. Id.
113. Decker, 447 S.E.2d at 261.
114. Id. at 262.
115. Id.
116. Compression is defined as occurring “when salaries offered to new hires increase more rapidly than the average salary increase for experienced, existing faculty.” Decker, 447 S.E.2d at 262. “Pay compression results when two groups of employees whose salaries are determined according to an established differential receive pay increases of unequal percentage rates.” Averi v. United States, 23 Cl. Ct. 127, 130 n.5 (1991).
117. Inversion is defined as occurring “when the salaries offered to new faculty, based on the competitive value in the academic marketplace, are higher than the salaries for existing faculty.” Decker, 447 S.E.2d at 262. “Pay inversion results when the pay of the subordinate group actually exceeds that of the supervisory group which has more responsibility and authority.” Averi, 23 Cl. Ct. at 130 n.5.
118. Decker, 447 S.E.2d at 262.
C. Procedural History

Decker filed his age discrimination complaint with the West Virginia Human Rights Commission in November 1987. In April 1993, a hearing examiner for the Commission held that the University's dual compensation system did adversely affect incumbent faculty members in the protected class, but that Decker himself had suffered no compensable injury because no new faculty had even been hired in his department, let alone new faculty with a higher salary than his. Decker appealed the examiner's finding that he had suffered no injury. The University appealed the holding that its compensation policy was discriminatory. In October 1993, the Commission entered a final order holding that not only was the University's policy discriminatory, but that Decker had also suffered a compensable injury. Decker was awarded back pay with incidental damages for humiliation, embarrassment, loss of personal dignity, a cease and desist order, and reimbursement of expenses. The University then appealed the case to the Supreme Court of Appeals of West Virginia.

D. The Issues Presented

The key issue in Decker was whether the University's dual compensation system, which undisputedly had a disparate impact on older faculty members, was violative of the Human Rights Act, under either

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120. Decker, 447 S.E.2d at 262.
121. W. VA. CODE § 5-11-3(k) (1994) (defining those aged forty and above as being in the protected class for "age").
122. Decker, 447 S.E.2d at 262.
123. Id.
124. Id.
125. Id.
126. Id. "From any final order of the commission, an application for review may be prosecuted by either party to the supreme court of appeals within thirty days from the receipt thereof . . . ." W. VA. CODE § 5-11-11(a) (1994).
a disparate treatment or disparate impact theory of discrimination.\textsuperscript{127} First, the court had to decide whether a disparate impact theory of discrimination was even available to an age-discrimination plaintiff under the Human Rights Act\textsuperscript{128} and second, if it was, what the appropriate standard should be for proving such a claim.\textsuperscript{129} Assuming that such a theory was available, the court then had to decide whether the University’s defense of business necessity justified it distinguishing between new hires, who received competitive market rate salaries, and incumbent faculty, whose compensation was largely determined by the Legislature.\textsuperscript{130}

E. The Holding of the Case

The court rejected Decker’s assertion that he had a disparate treatment claim, and reaffirmed what was required to articulate a prima facie case of disparate treatment on the basis of age under the Human Rights Act.\textsuperscript{131} The West Virginia standard was originally derived from \textit{McDonnell Douglas v. Green},\textsuperscript{132} and is set forth in the West Virginia case of \textit{Conaway v. Eastern Associated Coal Corp.}\textsuperscript{133} The court then went on to hold that, under the Human Rights Act, a plaintiff such as Decker, may posit a disparate impact theory of discrimina-

\begin{itemize}
  \item \textsuperscript{127} \textit{Decker}, 447 S.E.2d at 266 n.13.
  \item \textsuperscript{128} \textit{Id.} at 264.
  \item \textsuperscript{129} \textit{Id.} at 266.
  \item \textsuperscript{130} \textit{Id.} at 266-68.
  \item \textsuperscript{131} \textit{Id.} at 262.
  \item \textsuperscript{132} 411 U.S. 792 (1973).
  \item \textsuperscript{133} 358 S.E.2d 423 (W. Va. 1986). “In order to make a prima facie case of employment discrimination, the plaintiff must prove: (1) That the plaintiff is a member of a protected class. (2) That the employer made an adverse decision concerning the plaintiff. (3) But for the plaintiff’s protected status, the adverse decision would not have been made.” \textit{Id.} at 429. \textit{See also} Barefoot v. Sundale Nursing Home, 457 S.E.2d 152 (W. Va. 1995). Justice Cleckley clarified \textit{Conaway}’s articulation of a prima facie case. “Use of the ‘but for’ language in that test may have been unfortunate, at least if it connotes that a plaintiff must establish anything more than an inference of discrimination to make out a prima facie case. . . . To further clarify, we now hold that the ‘but for’ test of discriminatory motive in \textit{Conaway} is merely a threshold inquiry, requiring only that a plaintiff show an inference of discrimination.” \textit{Id.} at 161.
tion in an age case. The court updated the West Virginia standard for proving a disparate impact case to match that codified in Title VII, following the passage of the Civil Rights Act of 1991.

Although Decker presented a prima facie case of age discrimination, the court found that the University’s market based salary scale for new hires was justified by business necessity. The court accepted the University’s testimony that without the use of such a salary scale for new hires, the University would be unable to attract well-qualified faculty, which would in turn decrease the University’s productivity and would place the College of Business and Economics’ accreditation in jeopardy. Thus, the court held that “[s]etting starting salaries in reference to the determined market rates is a business necessity if accreditation and current standards of competence are to be maintained.

F. The Court’s Rationale

The court rejected Decker’s disparate treatment claim finding that Decker was unable to prove intentional discrimination on the part of the University, as required by the disparate treatment model. Specifically, Decker could not prove that the University intentionally discriminated against older faculty through its practice of offering competitive market rate salaries to attract the best new faculty.

In a decision predating Decker, Guyan Valley Hospital, Inc. v. West Virginia Human Rights Commission, the court had held that the disparate impact theory was available under the Human Rights Act.

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134. Decker, 447 S.E.2d at 265.
135. Id. at 266 n.11 (citing Title VII, 42 U.S.C. § 2000e-2(k)(1)(A) (1991)). The court noted that Title VII contains no explicit reference to age because the ADEA is distinct and apart from Title VII. Id. at 265 n.7.
136. Decker, 447 S.E.2d at 267.
137. Id.
138. Id.
139. Id. at 263. See also supra note 133.
140. Decker, 447 S.E.2d at 263.
The disparate impact theory articulated in Guyan, was updated in Decker to be in harmony with the Civil Rights Act of 1991. In Decker, the court declined to distinguish treatment of age-based claims from claims based on other protected categories under the Human Rights Act. This decision was based on the plain language of the Human Rights Act and the legislative purpose behind its passage. The court considered itself bound by the language of the Act, given that the West Virginia Legislature had not chosen to fashion a distinction between age and other protected classes.

In accepting the University’s business necessity defense, the Decker decision was consistent with other faculty compensation cases out of the Seventh and Eleventh Circuits. The Supreme Court of Appeals of West Virginia here reasoned that the application of the disparate impact theory should be limited to that category of jobs where the workload is essentially identical and workers interchangeable, as on an assembly line or in entry level positions. For the managerial and professional classes, other factors such as job security, job stress, flexibility of schedule, the nature of daily work and prestige associated with the position, should also be taken into consideration when faced with an age-discrimination claim. An employer should then be able to take into account the different credentials and qualifications of each employee when making salary adjustments. Greater managerial autonomy, in making decision which affect employees above entry level, is justified. The court reasoned that to hold otherwise would en-

142. Decker, 447 S.E.2d at 264 (citing Guyan Valley, 382 S.E.2d at 90).
143. Decker, 447 S.E.2d at 266.
144. Id. at 265.
145. Id. at 265.
146. Id.
147. Davidson v. Board of Governors of State Colleges & Univ. for W. Illinois Univ., 920 F.2d 441 (7th Cir. 1990) and MacPherson v. University of Montevallo, 922 F.2d 766 (11th Cir. 1991).
148. Decker, 447 S.E.2d at 267. But see Hanlon v. Chambers 464 S.E.2d 741, 749 n.6 (W. Va. 1995) (Cleckley, J.) (“[A] civil rights law could not be effective if it protected from discrimination only people at the bottom of the ladder.”).
149. Decker, 447 S.E.2d at 268.
150. Id.
151. Id.
courage employers to avoid potential lawsuits and governmental control over their business decisions by simply not hiring members of protected classes in the first place. 152

In essence, the court reasoned that Decker's actual compensation included not only his salary but also the benefits associated with tenure. 153 In contrast, young professors have greater job stress because they do not have tenure and they face the possibility that they may never attain such long-term job security. 154 Therefore, they receive relatively higher salaries in the short-term to compensate for such insecurity regarding their professional futures. 155

IV. ANALYSIS OF THE CASE

A. Faculty Compensation Cases

1. Disparate Treatment and Salary Differentials

The court in Decker was notably silent about another West Virginia faculty compensation case — West Virginia Institute of Technology v. West Virginia Human Rights Commission. 156 In West Virginia Institute of Technology, an Iranian economics professor filed a disparate treatment claim against the Institute alleging discrimination on the basis of national origin. Professor Hassan Zavareei alleged that there was a disparity in the level of his compensation, despite his superior academic qualifications and teaching experience, compared with that of other non-Iranian professors. 157 The Institute advanced a job market value defense and one of its witnesses testified that "quite often we have had international people take salaries [offered to them] that we could not get other people for." 158 The court responded by stating that

152. Id.
153. Id.
154. Decker, 447 S.E.2d at 268.
155. Id.
157. West Virginia Inst. of Technology, 383 S.E.2d at 492-93.
158. Id. at 495. In this statement, the Institute was acknowledging that it paid non-Americans lower salaries than Americans because some non-Americans were willing to work
a so-called "job market value" reason advanced by an employer is not recognized as a legitimate defense to compensation disparity when such value is premised solely upon an impermissible discrimination, such as pay distinctions between the sexes, races, respective ethnic backgrounds or other protected classes. One of the fundamental purposes of antidiscrimination legislation is to forbid such distinctions.\footnote{159}

The Institute's facially legitimate and nondiscriminatory reason for the wage disparity was that Zavareei's salary, like that of other professors, was established at the time of his hire and that no money was available to adjust his salary subsequently.\footnote{160} The plaintiffs, Zavareei and the Human Rights Commission, were able to establish that this reason was pretextual by showing that the Institute gave a discretionary $3,000 salary raise to a non-Iranian professor while failing to use such discretion on Zavareei's behalf.\footnote{161}

The court found that the Institute had intentionally discriminated against Zavareei by basing its criteria for determining compensation upon an unlawful criteria (national origin).\footnote{162} In other words, an employer is not required to compensate all employees equally so long as the differences in compensation are \textit{not} based upon an unlawful criteria. But, for example, "if the difference in labor value of a white printer and a black printer stems from the market place putting a different value on race, Title VII is violated."\footnote{163} It does not matter if an employer merely paid the lower going rate for an "international person" in good faith, Title VII would be violated absent a legitimate nondiscriminatory reason for the distinction in market rate.\footnote{164}

\footnote{159}{\textit{Id.} at 496.}
\footnote{160}{\textit{Id.}}
\footnote{161}{\textit{Id.} at 497.}
\footnote{162}{\textit{West Virginia Inst. of Technology}, 383 S.E.2d at 498.}
\footnote{163}{\textit{Pittman v. Hattiesburg Mun. Separate Sch. Dist.}, 644 F.2d 1071, 1074 (5th Cir. 1981).}
\footnote{164}{\textit{See Davidson}, 920 F.2d at 445-46 ("It is true that an employer cannot defend a discriminatory wage pattern by pointing to the fact that, as a result of discrimination by other employers, blacks or women or members of some other statutorily protected group command lower wages, and it is therefore rational for him to pay them less than he pays white males. . . . But if he does not discriminate on racial or other forbidden grounds but merely pays each worker what that worker is worth in the market, he is not guilty of dis-}
2. Disparate Impact and Salary Differentials

The court's ultimate decision in *Decker* was the correct one. Given the financial constraints on both the West Virginia Legislature and on West Virginia University,\(^{165}\) the court had little choice, as a practical matter, but to find for the University. Unlike the *West Virginia Institute of Technology* case, which dealt with one Iranian professor alleging salary discrimination on the basis of national origin, the repercussions of a decision against the University in *Decker* would likely have had devastating financial repercussions for the State of West Virginia. Although the *Decker* court's opinion does not directly address the issue, doubtless the court had to have been conscious of the amount of money at stake.\(^{166}\)

Furthermore, the decision is perfectly consistent with other disparate impact faculty compensation cases nationwide.\(^{167}\) Such a factual situation, where more experienced, senior employees bring suit alleging age discrimination on the basis of wage differentials because they are lower paid than their more youthful colleagues is atypical. Outside

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*crime*...than white, or female less than male. Otherwise comparable worth would be required by Title VII, and we have held that it is not.\(^{13}\) (citations omitted).

\(^{165}\) *Decker*, 447 S.E.2d at 262.

\(^{166}\) Precise figures are unavailable but one estimate posits that four out of five tenured faculty at West Virginia University may be over the age of forty. The financial ramifications of giving all tenured faculty over the age of forty "market rate" wages would clearly be crippling both for West Virginia and the University.

\(^{167}\) Rosen v. Columbia Univ., No. 92 Civ. 6330, 1995 WL 464991 (S.D.N.Y. Aug. 7, 1995) (holding that a university's system of determining existing faculty salaries on the basis of performance and market forces while offering new faculty the salary necessary to meet and exceed offers made by competing institutions, did not constitute age discrimination under the ADEA); MacPherson v. University of Montevallo, 922 F.2d 766 (11th Cir. 1991) (holding that a university's desire to attract and hire good new faculty members was a legitimate business reason for its practice of paying market rates to newly hired faculty and did not constitute age discrimination against older faculty members under the ADEA); Davidson v. Board of Governors of State Colleges & Univ. for W. Illinois Univ., 920 F.2d 441 (7th Cir. 1990) (finding that a University's compensation scheme, under which existing faculty could obtain an individual raise only by producing a bona fide job offer from another employer, while new faculty were not subject to such a limitation, did not discriminate against older faculty on the basis of age under the ADEA).
academia such an inversion in wages is highly unusual. The more usual age-discrimination scenario, dealing with wage differentials, occurs when employers seek to discharge senior, expensive employees and replace them with more junior, less expensive workers as a cost-savings measure.\textsuperscript{168}

Economists have sought to explain the reason for this curious flipflop in the academic labor market.\textsuperscript{169} Various theories have been postulated,\textsuperscript{170} but the bottom line is that this inverted compensation pattern is unlikely to disappear soon. Although the court in \textit{Decker} stated that there were additional, hidden benefits to attaining seniority in academia,\textsuperscript{171} economists have found that nonmonetary forms of compensation at universities are also probably much less tied to seniority than in a typical workplace.\textsuperscript{172}

Regardless of the equities, university professors are unlikely to succeed in their age discrimination claims against their institutional employers, on the grounds of wage differentials, in the present legal climate.\textsuperscript{173} Courts have made clear their willingness to accept that

\begin{itemize}
\item \textsuperscript{168} Holstein v. Norandex, Inc., 461 S.E.2d 473 (W. Va. 1995) (accepting employer defense that firing of 63 year old employee was a cost cutting measure); Diamantopoulos v. Brookside Corp., 683 F. Supp. 322 (D. Conn. 1988) (accepting employer's defense that younger applicant for supervisory position was chosen because he was willing to accept a lower annual salary than the older applicant).
\item \textsuperscript{169} Michael R. Ransom, \textit{Seniority and Monopsony In The Academic Labor Market}, 83 AM. ECON. REV. 221 (1993) [hereinafter Ransom] (stating that in a 1990 survey by the American Council on Education, more than half of the institutions surveyed responded that they had some departments in which new, junior faculty members had been hired at salaries above those of some of the senior faculty members in the same department).
\item \textsuperscript{170} See Ransom, supra note 169, at 232 (Citing data showing a negative correlation between seniority and salary even after adjusting for other variables. Findings are consistent with a heterogeneity model derived from monopsonistic salary discrimination by universities). The Harris-Holstrom model (1982) holds that faculty are being paid their market value — the best professors can find employment anywhere but the less able have to stay where they are. Id. at 229. See also Howard P. Tuckman et al., \textit{Faculty Skills and The Salary Structure In Academe: A Market Perspective}, 67 AM. ECON. REV. 692 (1977) (arguing that the salaries of faculty members are determined to a substantial degree by market valuation of their skills).
\item \textsuperscript{171} \textit{Decker}, 447 S.E.2d at 268.
\item \textsuperscript{172} See Ransom, supra note 169, at 229 (stating that, for example, the availability of paid leave is similar for most professors of all levels, whereas, within the workplace at large, paid leave is traditionally tied to seniority).
\item \textsuperscript{173} Columbia University, 1995 WL 464991 at *8 ("While this pattern may seem, and
universities have a legitimate nondiscriminatory reason to pay market rates to attract and hire high quality, new faculty, thereby permitting the use of dual compensation systems.

B. The Updated Disparate Impact Analysis of Decker

The Supreme Court of Appeals of West Virginia's decision in Decker is significant primarily for its endorsement of the use of the disparate impact theory to prove an age discrimination case in West Virginia under the Human Rights Act. This is in sharp contrast to the uncertainty of the theory's use at the federal level under the ADEA.

In Decker, the court drew heavily on the language of Title VII in its analysis of Decker's age discrimination claim. Significantly, the court changed the disparate impact model articulated in Guyan Valley® to adopt the statutory modifications of the Civil Rights Act of 1991. Justice Cleckley, in his opinion in Barefoot v. Sundale Nurs-

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174. University of Montevallo, 922 F.2d at 773.
175. The court's statement that "the majority of circuits considering this issue have decided to apply disparate impact analysis to claims arising under the ADEA," is somewhat disingenuous. Decker, 447 S.E.2d at 264. All but one of the six cited authorities supporting this position were decided pre-Hazen Paper (1993), whereas the single contra authority was decided in 1994. Decker, 447 S.E.2d at 264 n.6. As Decker brought his claim under the West Virginia Human Rights Act, which recognizes the availability of disparate impact analysis for all plaintiffs, it was not necessary for the West Virginia Supreme Court of Appeals to consider the availability of the disparate impact model under the ADEA, so although misleading this statement is of little practical import.
176. The three concurring justices in Hazen Paper (Kennedy, Rehnquist and Thomas) agreed that there were substantial arguments for not extending Title VII disparate impact to the ADEA. This, coupled with the trend of recent case law, indicates that the availability of disparate impact analysis under the ADEA looks bleak. See supra note 96 (listing cases which hold that disparate impact analysis is unavailable under the ADEA).
177. Decker, 447 S.E.2d at 264, 266 nn.11-12.
179. Decker, 447 S.E.2d at 266.
ing Home," summarized Decker's updated model for presenting disparate impact discrimination claims under the Human Rights Act.\textsuperscript{181}

In analyzing Decker's claim of age discrimination, the court found the University's reliance on the average salary figures in the AACSB survey to be clearly \textit{job related} in the context of hiring highly specialized faculty.\textsuperscript{182} It further found that setting starting salaries according to market rates is a \textit{business necessity} if the University's stated goals of attracting qualified new faculty and maintaining its accreditation are to be maintained.\textsuperscript{183} The court did not explain or clarify the meaning of either term.\textsuperscript{184} The court rejected the alternative business practice suggested by the Human Rights Commission.\textsuperscript{185} The Commission had suggested that the University could pay its new faculty hires below market rate without sacrificing its academic standards, arguing that it would then be able to pay its existing faculty more and eliminate the wage disparity.\textsuperscript{186}

\textsuperscript{180} Barefoot v. Sundale Nursing Home, 457 S.E.2d 152 (W. Va. 1995).
\textsuperscript{181} Justice Cleckley stated:
In proving a prima facie case of disparate impact under the Human Rights Act, . . . the plaintiff bears the burden of (1) demonstrating that the employer uses a particular employment practice or policy and (2) establishing that such particular employment practice or policy causes a disparate impact on a class protected by the Human Rights Act. The employer then must prove that the practice is "job related" and "consistent with business necessity." If the employer proves business necessity, the plaintiff may rebut the employer's defense by showing that a less burdensome alternative practice exists which the employer refuses to adopt. Such a showing would be evidence that employer's policy is a "pretext" for discrimination. \textit{Id.} at 165-66.
\textsuperscript{182} Decker, 447 S.E.2d at 266 (emphasis added).
\textsuperscript{183} Decker, 447 S.E.2d at 267 (emphasis added).
\textsuperscript{184} Justice Cleckley defined the meaning of "business necessity" in his opinion in \textit{Barefoot}. "A defendant can sustain the business necessity defense only by bearing the burden of proving through evidence (and not merely judicial intuition) that its challenged employment practice is not only related to its employee's ability to do the job in question, but also is necessary to achieve an important employer objective." \textit{Barefoot}, 457 S.E.2d at 166 n.21. \textit{See also} Graffam v. Scott Paper Co., 870 F. Supp. 389, 400 (D. Maine 1994) ("In an attempt to capture the essence of these two terms, this Court has made a logical definitional distinction between them. That is, \textit{business necessity} inquires whether the job criteria arises out of a manifest business need and the \textit{job related} standard inquires whether there is a correlation between the criteria used and successful job performance.") (emphasis added).
\textsuperscript{185} Decker, 447 S.E.2d at 267.
\textsuperscript{186} \textit{Id.}
In addition to refining the disparate impact inquiry, the court also continued its policy\textsuperscript{187} of applying current law to employment discrimination claims regardless of when the claims accrued.\textsuperscript{188} No policy reason for this approach was articulated.

C. The Challenge Before the Supreme Court of Appeals of West Virginia

1. Title VII and the ADEA

The Decker opinion makes clear that Title VII is the role model for the Human Rights Act and, it is therefore to Title VII that the court will look for inspiration when developing Human Rights Act case law.\textsuperscript{189} This should logically foreclose relying on ADEA case law, on those occasions that it diverges from Title VII case law, when dealing with an alleged violation of the Human Rights Act in an age discrimination case.\textsuperscript{190} To confuse the two federal statutes would risk diluting

\begin{itemize}
\item \textsuperscript{187} The Supreme Court of Appeals of West Virginia has had a policy of examining discrimination claims in the light of current employment discrimination law as opposed to the law in effect at the time the cause of action allegedly accrued. See Guyan Valley, 382 S.E.2d at 91. In that case the plaintiff's cause of action accrued in July 1976 when she was not hired by the employer for allegedly discriminatory reasons. The West Virginia Supreme Court of Appeals, in an opinion written by Justice Neely, applied the Title VII disparate impact analysis as it existed at the time of the litigation and not as it had existed at the time of the refusal to hire. Disparate impact analysis under Title VII had been modified by the Supreme Court in its 1989 \textit{Wards Cove} decision and it was this model of analysis that was adopted in Guyan Valley. See supra notes 50-51 and accompanying text for a discussion of \textit{Wards Cove}.
\item \textsuperscript{188} Decker, 447 S.E.2d at 265 n.10.
\item \textsuperscript{189} "To prevail under disparate impact, the plaintiff must show that the defendant's facially neutral policy has a disproportionate adverse impact on the basis of the protected trait. . . . [S]ee also, 42 U.S.C. § 2000e-2(k)." Decker, 447 S.E.2d at 264. In Decker, the West Virginia Supreme Court of Appeals adopted the Civil Rights Act of 1991 as the standard for disparate impact analysis under the Human Rights Act for all protected classes. \textit{Id.} at 266. See also Barefoot, 457 S.E.2d at 159 ("We have consistently held that cases brought under the West Virginia Human Rights Act, W. Va Code, 5-11-1, \textit{et seq.}, are governed by the same analytical framework and structures developed under Title VII, at least where our statute's language does not direct otherwise."). See also Woodall \textit{v.} International Bhd. of Elec. Workers, Local 596, 453 S.E.2d 656, 658 n.6 (W. Va. 1994) (West Virginia is not bound by federal law but will adopt federal precedent that is compatible with the Human Rights Act).
\item \textsuperscript{190} For example there is no "reasonable factor other than age" defense under the West
the anti-discriminatory protections of the Human Rights Act available to age-discrimination plaintiffs.

The distinctions between a discrimination analysis under the ADEA and Title VII have been justified by differences in the statutory language, judicial decision-making, and legislative intent. Courts have interpreted the ADEA as giving employers more leeway when considering factors that disparately affect older workers under the ADEA than factors that disparately affect Title VII’s protected classes. Therefore, given that classes protected by the Human Rights Act are treated equally, the risk is that the less rigorous standards of the ADEA in allowing cost as a factor other than age, will weaken the protection available to victims of other types of discrimination such as race, gender, and disability. For example, under the ADEA, it is acceptable for an employer to lower overhead costs by discharging more expensive, senior employees. But it is hard to imagine that an employer could opportunistically discharge its most costly employ-

Virginia Human Rights Act or Title VII, unlike under the ADEA.

191. Title VII does not include a “reasonable factor other than . . . “ defense as available under the ADEA. 29 U.S.C. § 623(f)(1). See also Michael D. Moberly, Reconsidering the Discriminatory Motive Requirement in ADEA Disparate Treatment Cases, 24 N.M. L. REV. 89, 96 (1994) (noting that Title VII has no equivalent to the reasonable factor clause).

192. See U.S. Equal Emp. Opp. Comm’n. v. Newport Mesa Unified Sch. Dist., 893 F. Supp. 927, 932 (C.D. Cal. 1995) (Noting that the Supreme Court and the Ninth Circuit have already found that the “business necessity” of Title VII is analogous to ADEA, 29 U.S.C. § 623(a)(1) and (2). Therefore, if the defense is already provided by these sections, the reasonable factor clause of 29 U.S.C. § 623(f)(1) would be surplusage.).

193. Congress codified its post-Wards Cove disparate impact analysis into Title VII by the passage of the Civil Rights Act of 1991. Congress took no such steps to amend the ADEA. Therefore, if a court finds that ADEA plaintiffs may bring a disparate impact claim, litigants will be bound by the Supreme Court’s Wards Cove framework of analysis and not the more pro-plaintiff framework codified in the Civil Rights Act of 1991. See supra notes 50-54 and accompanying text.


195. Decker, 447 S.E.2d at 265 (“Therefore, if disparate impact has been applied by this court to other cases arising under the Human Rights Act, it would similarly be applied to claims of age-based discrimination.”).

ees if their higher cost was due, not to years of service and seniority, but rather to the cost of reasonably accommodating their disabilities. In ruling on age discrimination claims, the Supreme Court of Appeals of West Virginia should be careful to avoid creating precedents which would be harmful to other Human Rights Act plaintiffs.

2. Cost Justification Defenses to Discrimination

The extent to which the "reasonable factor other than age" exception under the ADEA exempts an employer from liability for actions taken on the basis of cost is still unclear. This is the question currently at the heart of the debate about the use of disparate impact analysis under the ADEA. EEOC regulations state that the lower cost of employing younger employees as a group does not justify screening out or discharging older employees. However this provision has received little deference from the courts. Courts are often reluctant to interfere with managerial decisions regarding what constitutes a business necessity.

197. See Louise Witt, Middle-Aged Squeeze: More Workers are Going to Court With the Charge That Age Cost Them Professionally, DETROIT FREE PRESS, Jan. 31, 1994, at 8F.

198. See Browne, supra note 57, at 370 ("The argument against a cost-justification in disparate impact cases is a fundamentally incoherent one. Indeed a cost-justification defense is compelled by the logic of the disparate-impact theory . . . . "). See also Hugh S. Wilson, A Second Look At Griggs v. Duke Power Co.: Ruminations on Job Testing, Discrimination and the Role of the Federal Courts, 58 VA. L. REV. 844, 851 (1972) ("Business necessity can only meaningfully be measured in terms of dollars and cents."); Metz, 828 F.2d at 1219 (Easterbrook, J., dissenting) ("It is hard to imagine how the use of wages could not be valid; wages correspond precisely to the costs of doing business, and hence to profitability.").

199. "A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the Act." 29 C.F.R. § 1625.7(f) (1995).

200. See EEOC v. Clay Printing Co., 955 F.2d 936, 947 (4th Cir. 1992) (Ignoring regulatory language in reaching its decision in favor of the defendant-employer. The dissent cites the regulation to support its position); Rivas v. Federacion de Asociaciones Pecurias de Puerto Rico, 929 F.2d 814, 821-22 (1st Cir. 1991) (suggesting a way for employers to circumvent the language of § 1625.7(f)); Metz, 828 F.2d at 1205 cited the regulation, but the case was subsequently overruled by Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994).

201. See Fumco Constr. Co. v. Waters, 438 U.S. 567, 578 (1978) (Rehnquist, J.) ("Courts are generally less competent than employers to restructure business practices, and
The success of the market rate defense, as used by the University in *Decker*, should be viewed in the context of the more general development of cost-based defenses in disparate impact litigation.\textsuperscript{202} "Again we observe the phenomenon of judicial rejection of cost containment as a justification for discrimination which is overt and direct . . . contrasted with acceptance of such justification when the discrimination results from the operation of a ‘neutral’ rule (like market rate)."\textsuperscript{203} Any market-based compensation scheme will inevitably result in salary differentials.\textsuperscript{204} Justice Neely further described this market rate defense in *Largent v. West Virginia Division of Health*.\textsuperscript{205} He explained that, under the Civil Service Regulations and Rules, employees who are doing the same work must be placed within the same classification.\textsuperscript{206} But pay differences are permissible within that classification based on "market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds or other specifically identifiable criteria that are reasonable and that advance the interests of the employer."\textsuperscript{207}

3. The Significance of the *Decker* Decision

At present, employees over the age of forty receive the same protections under the Human Rights Act as employees alleging that their employers have discriminated against them on the grounds of their race, gender or other "protected" classifications.\textsuperscript{208} This is not true at the federal level where the protections available to an ADEA plaintiff are more restricted than those available to a Title VII plaintiff. Judging from recent trends, Title VII and ADEA case law will continue to diverge. Therefore, one can conclude that it may become increas-
ingly difficult for West Virginia courts to treat age plaintiffs in the same way as other Human Rights Act plaintiffs when there is compelling federal case law holding that age-discrimination cases should be judged by a different standard. As Justice Neely has often stated, hard cases make bad law.209

The *Decker* court explained its reluctance to distinguish age as a protected class by stating that it was not free to fashion a distinction absent legislative action.210 However, the court also stated that “[o]ur Human Rights Act prohibits deliberate treatment of persons differently because of different individual traits unrelated to the work environment.”211 A creative employer could use this language to argue that an employee’s age is related to his abilities to perform at work, thereby justifying treating employees differently on the basis of age.212

This job-related defense makes sense when dealing with an employer’s refusal to hire, denial of promotion to or selection for discharge of an older employee. However, job-relatedness has little to do with wage discrimination situations such as that in *Decker*. For the most part employers in wage discrimination cases have relied upon cost-justification as a defense. Courts have been uncomfortable with second-guessing an employer’s managerial decision-making. Consequently courts are reluctant to require either that employers not make employment decisions based on wage differentials or that all employees be paid “market rates.” Such requirements could impose burdensome costs on an employer and inhibit its ability to compete. This was particularly true in *Decker* where not only the University but the State faced huge financial costs if the court had agreed with the Human Rights Commission and found in Decker’s favor.


211. 447 S.E.2d 259 (W. Va. 1994).

212. See supra notes 28-37 and accompanying text discussing “age” as a protected class. Age may indeed correlate at some level with declining performance and productivity in the workplace.
Cost justification as a defense to discrimination will continue to evolve and the Supreme Court of Appeals of West Virginia will continue to look to developments under both Title VII and the ADEA at the federal level when faced with the issue again in the future. Employment scenarios where senior employees receive lower or equal salaries to those of their junior colleagues are so rare outside the world of academia that it is difficult to anticipate how the Supreme Court of Appeals of West Virginia will rely on its decision in *West Virginia University v. Decker* in the future.

The *Decker* decision would be easy enough to distinguish given the unlikelihood of a factually similar compensation system occurring in the business world. On the other hand, so far the court has shown interest in extending its rationale in *Decker* to other non-Human Rights Act cases.213 In *Largent*, the court referred to *Decker* to support its statement that employers should have flexibility in their hiring processes to allow for fluctuations in market conditions.214 Therefore, age discrimination plaintiffs who appeal Human Rights Act cases to the Supreme Court of Appeals of West Virginia in the future can anticipate little success if their victory would restrict their employer’s ability to compete economically.

V. CONCLUSION

Cost-based age discrimination represents society’s struggle to balance its interests in protecting the reasonable expectations of its older employees and in defending the rights of employers to respond to market conditions. *West Virginia University v. Decker* exemplifies this struggle. The Supreme Court of Appeals of West Virginia was confronted by Decker’s sense of injustice that younger, inexperienced faculty received greater compensation than himself, on the one hand, and the University’s financial inability to pay all of its faculty market-rate salaries, on the other. The court has now chosen to accept an employer’s cost-justification for salary differentials among employees, absent intentional discrimination. The court continues to treat age dis-

214. *Id.* at 49.
crimination plaintiffs in the same fashion as other discrimination plain-
tiffs, and has confirmed that a disparate impact theory of discrimination is available to all plaintiffs under the Human Rights Act.

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