

SUBGROUP ANALYSIS IN DISPARATE IMPACT AGE
DISCRIMINATION CASES: STRIKING THE
APPROPRIATE BALANCE THROUGH
AGE CUTOFFS

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I.	INTRODUCTION.....	1074
II.	DISPARATE IMPACT CLAIMS	1077
	A. <i>Disparate Impact Claims in General</i>	1077
	B. <i>Disparate Impact Claims Under the ADEA</i>	1079
III.	THE RESTRICTIVE VIEW OF DISPARATE IMPACT ADEA CLAIMS.....	1081
IV.	THE ALTERNATIVE VIEW OF DISPARATE IMPACT ADEA CLAIMS	1085
V.	THE RESTRICTIVE VIEW VERSUS THE ALTERNATIVE VIEW.....	1090
	A. <i>Arguments Against the Restrictive View</i>	1091
	1. <i>Rationale #1: Congressional Intent</i>	1091
	2. <i>Rationale #2: Gerrymandered Evidence</i>	1094
	B. <i>Sex-Plus Analogy</i>	1097
VI.	PROPOSAL: SPECIFIC AGE BREAKS FOR ADEA DISPARATE IMPACT CLAIMS	1101
	A. <i>The Case Against Unlimited Subgroups</i>	1101
	B. <i>Subgroups in Five-Year Increments</i>	1105
	C. <i>Subgroups with No Upper Limits</i>	1108
	D. <i>Implementing Age Cutoffs Through Daubert</i>	1109
VII.	CONCLUSION	1112

SUBGROUP ANALYSIS IN DISPARATE IMPACT AGE DISCRIMINATION CASES: STRIKING THE APPROPRIATE BALANCE THROUGH AGE CUTOFFS

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I. INTRODUCTION

Under federal employment discrimination statutes, employees may be protected against workplace discrimination based on their membership in certain protected classes, including race, color, religion, national origin, sex, disability, and age.¹ Victims of employment discrimination usually pursue one of two claims: disparate treatment, which requires proof of intentional discrimination, or disparate impact, which does not.² Regardless of which type of claim is alleged, discrimination cases usually involve an employer treating individuals in a particular protected class differently than those outside that protected class, such as where an employer promotes male but not equally-qualified female employees³ or where an employer imposes different workplace requirements on employees of different races.⁴ Less clear is whether a *subgroup* of workers within a protected class can claim discrimination when

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1. See 42 U.S.C. § 2000e-2(a)(1) (2012) (making it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”); 29 U.S.C. § 623(a) (2012) (making it unlawful to discriminate against employees on the basis of age); 42 U.S.C. § 12101 (2012) (making it unlawful for an employer to discriminate on the basis of disability).

2. *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986–87 (1988); see also *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (authorizing disparate impact claims under the Age Discrimination in Employment Act); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (authorizing disparate impact claims under Title VII). Other common claims include workplace harassment, see, e.g., *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (authorizing sexual harassment claims under Title VII), and retaliation, see, e.g., 42 U.S.C. § 2000e-3(a) (making it unlawful under Title VII “for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter”).

3. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

4. See, e.g., *Vazquez v. Caesar’s Palace Stream Resort*, No. 3:CV–09–0625, 2013 WL 6244568 (M.D. Pa. Dec. 3, 2013) (bringing a successful race discrimination claim where plaintiff, an African-American employee, claimed she was fired for wearing her hair in braids while a white employee was not).

other members of the same protected class are not subject to discriminatory treatment.⁵

Subgroup discrimination claims have proven most difficult in age discrimination cases brought pursuant to the federal Age Discrimination in Employment Act of 1967 (ADEA), which protects workers aged forty and older.⁶ The Supreme Court has authorized *disparate treatment* claims alleging intentional age discrimination under the ADEA where both an individual plaintiff and the favored individual are at least forty years old.⁷ The law with respect to *disparate impact* claims is less clear. Indeed, lower courts are split regarding whether subgroups of employees in the forty-and-older protected class may claim discrimination under a disparate impact theory for being treated less favorably than a younger subgroup,⁸ such as where employees aged fifty and older claim they were treated differently than a younger subset of ADEA-protected employees, such as those aged forty to forty-nine.⁹ This Article addresses this difficult and timely issue.

Courts have analyzed disparate impact discrimination cases under the ADEA in one of three ways. The first approach, referred to in this Article as “the restrictive view,” entirely precludes subgroup discrimination claims. This view of the ADEA—which has been adopted by the Second, Sixth, and Eighth Circuits—recognizes disparate impact claims based on age only if the entire segment of ADEA-protected employees are disproportionately and adversely affected by an employment practice as compared to the entire unprotected group of employees under the age of forty.¹⁰ Under the restrictive view, a statistically-demonstrated disparate impact upon employees over fifty, for example, is irrelevant if the employer’s practice does not harm the *entire*

5. See *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 68 (3d Cir. 2017) (recognizing that disparate impact claims in ADEA cases “ordinarily evaluate the effect of a facially neutral policy on all employees who are at least forty years old—that is, all employees covered by the ADEA,” but going on to evaluate whether a policy that disproportionately impacts a subgroup of that population can likewise violate the statute).

6. See 29 U.S.C. § 623(a) (making it unlawful to discriminate against employees on the basis of age); *id.* § 631(a) (limiting the ADEA’s protection to those employees who are at least forty years of age).

7. See, e.g., *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1372–74 (2d Cir. 1989) (refusing to permit subgroups of employees to claim disparate impact under the ADEA but recognizing that disparate treatment claims may be brought where the “beneficiaries” of the discrimination are younger than the plaintiff but also within the overall protected class of employees aged forty and older), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999).

8. Compare *Karlo*, 849 F.3d 61 (extending age discrimination claims to subgroups of workers within the “40-and-over” protected class), with *Lowe*, 886 F.2d at 1364 (refusing to extend age discrimination claims to such subgroups), and *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999) (same as *Lowe*), and *Smith v. Tenn. Valley Auth.*, 924 F.2d 1059 (6th Cir. 1991) (same as *Lowe*).

9. See, e.g., *Karlo*, 849 F.3d at 68 (involving disparate impact age discrimination claim brought by a subgroup of workers over the age of fifty); *Lowe*, 886 F.2d at 1372 (same).

10. See *Lowe*, 886 F.2d at 1364 (refusing to extend age discrimination claims to such subgroups); *McDonnell Douglas*, 191 F.3d at 948 (same); *Smith*, 924 F.2d at 1059 (same).

group of forty-and-over employees as compared to employees under forty.¹¹ Accordingly, this approach may permit an employer to escape liability for disparate impact discrimination even when its employment action significantly disfavors older employees, such as those aged fifty and older, who are the very employees most in need of ADEA protection.¹²

Reaching the opposite result and creating a circuit split on the issue, the Third Circuit recently authorized subgroups by treating age as a continuous variable instead of a binary trait between individuals aged forty or older, as compared to those under forty.¹³ This more employee-friendly view recognizes that the ADEA's prohibition section outlaws discrimination "because of [an] individual's age"¹⁴ rather than because of an individual's protected class status. This view interprets that phrase in light of the Supreme Court decisions in disparate *treatment* cases recognizing that if an older worker loses out to a younger one "because of [his relatively older] age," it is "irrelevant" that the favored individual is also in the forty-and-over protected class.¹⁵ Under this view, a particular subgroup of ADEA-protected employees, such as those aged fifty and older,¹⁶ may pursue a disparate impact age discrimination claim even though an employer practice has no adverse impact on the entire segment of ADEA-protected employees, as long as the employer practice disproportionately and adversely impacts that particular subgroup.¹⁷

A third approach, advocated by the Equal Employment Opportunity Commission (EEOC), is similar to the second in that it permits subgroup claims in disparate impact age discrimination cases.¹⁸ However, this approach is more flexible because it does not require lines to be drawn at designated

11. See *Karlo*, 849 F.3d at 74.

12. See *id.*

13. See *id.*; see also Gregory L. Harper, *Statistics as Evidence of Age Discrimination*, 32 HASTINGS L.J. 1347, 1360 n.105 (1981) (defining "continuous" and "discontinuous" variables and stating that "with age, there exists a theoretically infinite number of ages from birth to death").

14. 29 U.S.C. § 623(a)(1) (2012); see also *Karlo*, 849 F.3d at 74 (adopting this interpretation of the ADEA).

15. See *Gen. Dynamics Land Sys. Inc. v. Cline*, 540 U.S. 581, 590–91 (2004) (interpreting ADEA as "protect[ing] a relatively old worker from discrimination that works to the advantage of the relatively young"); *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (rejecting the requirement that an ADEA plaintiff be replaced by someone outside the ADEA's protected class as simply "irrelevant, so long as he has lost out because of his age").

16. See *Karlo*, 849 F.3d at 77 (validating subgroups in age discrimination cases with "lower boundaries" but not "upper boundaries," precluding a "banded" fifty-to-fifty-five subgroup); see also Reply Brief of Appellants at 6, *Karlo*, 849 F.3d 61 (3d Cir. 2017) (No. 15-3435) (clarifying that plaintiffs' disparate impact claim is brought on behalf of employees aged fifty and older, not an upper-limited age range such as fifty to fifty-nine, and noting that the *Karlo* plaintiffs "do not argue that plaintiffs [generally] should be permitted to manipulate age groups in this manner").

17. See *infra* note 90.

18. See Brief of the EEOC as Amicus Curiae in Support of Plaintiffs/Appellants and in Favor of Reversal at 4, *Karlo*, 849 F.3d 61 (3d Cir. 2017) (No. 15-3435) [hereinafter EEOC Amicus Brief].

age-cutoffs, such as age fifty-five and above or fifty and above.¹⁹ Instead, this approach permits plaintiffs to demonstrate a disparate impact based upon whatever age-line is most beneficial to them, statistically speaking, such as one where employees over the age of 56.5, or even those between the ages of 56.5 and 63.5, represent the class of allegedly disadvantaged employees.²⁰

After closely examining these three views, the Article concludes that the middle view strikes the most appropriate balance between employer and employee interests and is best implemented by trial courts through their evidentiary gatekeeping powers.²¹ Before developing that argument, Part II of this Article summarizes the disparate impact theory of discrimination. Parts III and IV then outline the arguments for and against ADEA disparate impact subgroup claims. Part V critically examines these competing arguments and explains why the restrictive view should be rejected. Finally, Part VI proposes designated age cutoffs for ADEA disparate impact subgroup claims. Part VII concludes.

II. DISPARATE IMPACT CLAIMS

A. *Disparate Impact Claims in General*

Rather than involving intentional acts of discrimination, disparate impact cases arise when an employer implements a rule, practice, or policy that appears neutral in its treatment of protected employees but excludes too many people from a particular class of individuals protected by discrimination laws, making it “fair in form, but discriminatory in operation.”²² The disparate impact theory was first recognized by the Supreme Court in a race discrimination case, *Griggs v. Duke Power Co.*,²³ which provides an excellent illustration of this type of claim.

In *Griggs*, thirteen African-American employees of Duke Power’s Dan River Steam Station sued the company for race discrimination.²⁴ At that time, the Dan River Station was organized into five departments, including the “la-

19. In one such case, plaintiffs brought a disparate impact claim under the ADEA, asserting that their employer’s buyout program adversely impacted a group of employees who were fifty-eight to sixty-three years old, while favoring a group of younger employees who were forty to fifty-six years old. See *Cooney v. Union Pac. R.R. Co.*, 258 F.3d 731, 733 (8th Cir. 2001).

20. *Cf. id.*

21. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

22. See *Connecticut v. Teal*, 457 U.S. 440, 446 (1982); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

23. 401 U.S. 424.

24. *Id.* at 426. At the time of plaintiffs’ suit, Duke Power employed ninety-five employees at its Dan River facility, fourteen of whom were African-American. *Id.*

bor department,” where all thirteen plaintiffs had been employed.²⁵ Under a program of intentional discrimination utilized by the company prior to Title VII’s enactment, African-Americans were employed only in the labor department, where the highest paying jobs paid less than the lowest paying jobs in the other four departments where only whites were employed.²⁶

The Civil Rights Act of 1964, which includes Title VII’s prohibition against race discrimination, became effective on July 2, 1965.²⁷ On that date, Duke Power ceased its program of intentional discrimination and instead required new hires in every department except the labor department to have a high-school education and to achieve certain scores on two general intelligence aptitude tests, both of which were neutral regarding race.²⁸ In addition, employees who were previously employed in the labor department could transfer to the more desirable departments only if they possessed the requisite high-school degree or had achieved scores that approximated the national median for high-school graduates on the company’s general intelligence aptitude tests, neither of which measured the ability to perform a particular job at the company.²⁹

Examining these seemingly race-neutral requirements, the district court found that Duke Power had overtly discriminated on the basis of race prior to Title VII’s enactment but had ended its program of intentional discrimination once Title VII was enacted, such that Duke Power’s high-school completion and aptitude tests were not unlawful.³⁰ The Fourth Circuit affirmed this decision on appeal,³¹ a decision the Supreme Court later reversed.³²

Citing the purposes of Title VII—including that of removing barriers that have operated in the past to favor white employees—the Supreme Court ruled that “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, [violate Title VII] if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”³³ Despite extending Title VII to

25. *Id.* at 427; *see also* *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 247 (M.D.N.C. 1968), *aff’d in part, rev’d in part*, 420 F.2d 1225 (4th Cir. 1970), *rev’d*, 401 U.S. 424 (1971).

26. *Griggs*, 401 U.S. at 426–27.

27. *Id.* at 426.

28. *Id.* at 427–28.

29. *Id.* at 428.

30. *See Griggs*, 292 F. Supp. at 247–50 (finding “the evidence . . . sufficient to conclude that at some time prior to July 2, 1965, [African-Americans] were relegated to the labor department and prevented access to other departments by reason of their race”); *id.* at 248 (stating that “the defendant discontinued those [previous] discriminatory practices”).

31. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1227 (4th Cir. 1970), *rev’d*, 401 U.S. 424 (1971).

32. *See Griggs*, 401 U.S. at 432 (“The Court of Appeals held that the Company had adopted the diploma and test requirements without any ‘intention to discriminate against [African-American] employees.’ We do not suggest that either the District Court or the Court of Appeals erred in examining the employer’s intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.” (citations omitted)).

33. *Id.* at 430.

employer “practices that are fair in form[] but discriminatory in operation,”³⁴ the Court clarified that such practices will be permitted if “related to job performance” and necessary to achieve business objectives, even if a protected class of employees is negatively impacted.³⁵ Finding no such necessity, the Court struck down Duke Power’s high-school completion requirement and general intelligence tests, since neither requirement was “shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.”³⁶ Rather, they were adopted based on an untested assumption that they “generally would improve the overall quality of the work force.”³⁷ Yet, evidence showed that employees who had not completed high school or taken the company’s aptitude tests continued to perform well in departments where those tests were now required.³⁸ As such, these requirements were nothing more than “‘built-in headwinds’ for minority groups [that were] unrelated to measuring job capability,” violating Title VII.³⁹

B. *Disparate Impact Claims Under the ADEA*

Over thirty years after *Griggs*, the Supreme Court held in *Smith v. City of Jackson* that the ADEA authorizes recovery on disparate impact claims.⁴⁰ Later cases clarified that to establish a prima facie claim of disparate impact under the ADEA, “the plaintiff must [first] identify a specific employment practice [that is allegedly discriminatory] and then present ‘statistical evidence of a kind and degree sufficient to show that the practice in question caused’ the plaintiff(s) to suffer an adverse employment action [because of his or her age].”⁴¹

Regarding the specific-employment-practice requirement, “a plaintiff falls short by merely alleging a disparate impact[] or ‘point[ing] to a generalized policy that leads to such an impact’”; rather, the plaintiff must identify the specific employment practice responsible for the asserted statistical disparities.⁴² According to the Supreme Court, identifying a specific employment practice is necessary to avoid the “result [of] employers being potentially liable

34. *Id.* at 431.

35. *See id.* (“[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African-Americans] cannot be shown to be related to job performance, the practice is prohibited.”).

36. *Id.*

37. *Id.*

38. *Id.* at 431–32.

39. *See id.* at 432.

40. 544 U.S. 228, 240 (2005).

41. *EEOC v. Allstate Ins. Co.*, 528 F.3d 1042, 1049 (8th Cir.) (first alteration in original), *reh’g en banc granted*, *opinion vacated* by 528 F.3d 1042 (8th Cir. 2008).

42. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 100 (2008); *see Smith*, 544 U.S. at 241.

for ‘the myriad of innocent causes that may lead to statistical imbalances.’”⁴³ As used here, specific employment practices may include a reduction in force,⁴⁴ a layoff,⁴⁵ a hiring decision or process,⁴⁶ and even the simple decision to commit employment decisions to the subjective discretion of supervisors.⁴⁷

By highlighting the effects of an employer’s action, disparate impact claims “usually focus[] on statistical disparities.”⁴⁸ Age discrimination cases, in particular, require proof of such a statistical disparity.⁴⁹ However, not just any evidence of statistical disparity will suffice, as ADEA plaintiffs have discovered through a host of errors, including relying on sample sizes that are too small,⁵⁰ analyzing the wrong comparison group,⁵¹ and failing to control for

43. *Smith*, 544 U.S. at 241 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003)).

44. *See, e.g.*, *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950 (8th Cir. 1999) (“[A]lleg[ing] that during a reduction in force (RIF) between May[] 1991[] and February[] 1993, McDonnell Douglas engaged in a pattern or practice of terminating employees 55 years and older because of their age.”).

45. *See, e.g.*, *Shelton v. Boeing Co.*, No. 4:02CV286SNL, 2004 WL 5831717, at *7 (E.D. Mo. Mar. 3, 2004) (addressing a disparate impact claim in the context of a layoff).

46. *See, e.g.*, *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989) (addressing a disparate impact claim in the hiring context), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999).

47. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (explaining that “an employer’s facially neutral practice of committing employment decisions to the subjective discretion of supervisory employees [is] a specific employment practice properly subject to a disparate impact analysis”) (citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 989–91(1988)).

48. *See Watson*, 487 U.S. at 987; *see also Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (“[O]ur 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.” (second alteration in original)).

49. *See Bader v. United Airlines, Inc.*, No. 14 C 2589, 2018 WL 2560960, at *12 (N.D. Ill. June 4, 2018); *see also, e.g.*, *Carson v. Lake Cty.*, 865 F.3d 526, 536 (7th Cir. 2017) (granting summary judgment to defendant on plaintiffs’ ADEA disparate impact claim because plaintiffs failed to “proffer statistical evidence that the policy caused a significant age-based disparity”) (quoting *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 69 (3d Cir. 2017)); *Fulghum v. Embarq Corp.*, 938 F. Supp. 2d 1090, 1129–30 (D. Kan. 2013) (examining statistical evidence in disparate impact ADEA case), *aff’d in part and rev’d in part*, 778 F.3d 1147 (10th Cir. 2015), *opinion amended and superseded on denial of reh’g en banc*, 785 F.3d 395 (10th Cir. 2015).

50. *See, e.g.*, *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 746 (10th Cir. 1991) (finding that a small sample size of nine employees over the age of forty “carries little or no probative force” in establishing discrimination); *Schechner v. KPIX-TV*, No. C 08-05049 MHP, 2011 WL 109144, at *5 n.5 (N.D. Cal. Jan. 13, 2011), *aff’d but criticized*, 686 F.3d 1018 (9th Cir. 2012) (“Given the small number of terminated employees, the court has serious doubts that plaintiffs could identify a sub-group large enough to be statistically significant.”); *see also Int’l Bhd. of Teamsters*, 431 U.S. at 340 n.20 (“Considerations such as small sample size may, of course, detract from the value of [statistical] evidence [in discrimination cases].”); *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1272–73 (9th Cir. 1981) (recognizing that a small sample size can detract from the value of statistical evidence).

51. *See, e.g.*, *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1371 (5th Cir. 1974) (finding statistical evidence insufficient due to improper geographic and age limitations); *Fulghum*, 938 F. Supp. 2d at 1130 (recognizing that statistical evidence must relate to the proper population to be valid and that when the claim is disparate impact in hiring, the statistics should be based on data with respect to persons qualified for the job).

key variables.⁵²

Although these common statistical blunders contain important lessons for ADEA litigants, this Article focuses on the more basic threshold requirement: whether a disparate impact claim may be proven with evidence of a disparate impact upon a particular segment of the ADEA's protected class, rather than the class as a whole.

III. THE RESTRICTIVE VIEW OF DISPARATE IMPACT ADEA CLAIMS

As noted, courts have analyzed disparate impact age discrimination cases in one of three ways. The restrictive view completely precludes subgroups and instead requires the entire segment of ADEA-protected employees aged forty and older to be disproportionately and negatively affected by an employment practice as compared to employees below the age of forty.⁵³ Under this view, a subgroup of workers in the law's forty-and-over protected class, such as workers aged fifty to fifty-nine, may not prevail on a disparate impact discrimination claim, no matter the impact upon that particular subgroup, as long as the entire group of forty-and-over workers is not substantially disfavored by an employer policy as compared to employees under forty.

The restrictive view was adopted in a 1999 opinion of the U.S. Court of Appeals for the Eighth Circuit, *EEOC v. McDonnell Douglas Corporation*.⁵⁴ In that case, the EEOC sued McDonnell Douglas for disparate impact discrimination due to a reduction in force (RIF) between May 1991 and February 1993.⁵⁵ Because the EEOC lacked evidence that the RIF had a disparate impact on all employees aged forty or older, the EEOC alleged that the company's practice of basing RIF decisions on things such as retirement eligibility, merit raises, and salary had a disparate impact on a subgroup of employees aged fifty-five or older.⁵⁶ The EEOC based this claim on statistical evidence showing that the company laid off 13.7% of its employees aged fifty-five or older, as compared to just 5.4% of its employees under fifty-five.⁵⁷ As the Eighth Circuit explained, the EEOC thus requested that the court "expand [its] recognition of disparate-impact claims under the ADEA to include claims

52. *See, e.g.*, *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 748 (9th Cir. 2003) (noting that statistics taking into account only two variables—termination and age—are treated "skeptically" when they fail to take other relevant variables into account); *Bingham v. Raytheon Tech. Servs. Co.*, No. 1:13-cv-00211-TWP-DKL, 2014 WL 6388756, at *4 (S.D. Ind. Nov. 14, 2014) (finding that, because plaintiff's expert "did not account for any of [defendant's] legitimate, nondiscriminatory factors in his analysis, including salary grade, duties, department, geography, job knowledge, or length of service," his opinion was not probative evidence in age discrimination claim).

53. *See, e.g.*, *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950–51 (8th Cir. 1999).

54. *Id.* at 950–53.

55. *Id.* at 950.

56. *Id.*

57. *Id.*

on behalf of subgroups of the protected class.”⁵⁸ Categorically rejecting such claims, the court “decline[d] to do so.”⁵⁹

The Eighth Circuit presented three primary reasons for rejecting subgroups. First, the court reasoned that if age-based subgroup discrimination claims were cognizable, a plaintiff could claim age discrimination “despite the fact that the statistical evidence indicated that an employer’s [specific employment action] had a very favorable impact upon the entire protected group of employees aged 40 and older, compared to those employees outside the protected group,” that is, those younger than forty.⁶⁰ In the court’s view, Congress could not have intended that result.⁶¹

Next, with the employer’s interests squarely in mind, the court declared that if disparate-impact subgroup claims “were cognizable under the ADEA, the consequence would be to require an employer engaging in a RIF to attempt what might well be impossible: to achieve statistical parity among the virtually infinite number of age subgroups in its work force.”⁶² As the district court had explained in its opinion affirmed by the Eighth Circuit, because “age is a continuum along which the distinctions between employees are often subtle and relative ones,”⁶³ an employer might find it difficult, if not impossible, to make decisions based on legitimate factors other than age—such as seniority or pension status⁶⁴—without creating some “unanticipated and unintended disparate impact” on some particular subgroup of older employees.⁶⁵ This, according to the district court, is due to the potentially “infinite number of variations . . . [of the] yet to be determined subgroup within the protected class,”⁶⁶ which may permit any given plaintiff to take his or her own age as the lower end of a subprotected group and then use statistical evidence to show a disparate impact on that particular subgroup.⁶⁷ Such problems of “gerrymandered evidence”⁶⁸ would be avoided, however, when the analysis is confined to the protected class as a whole.⁶⁹ Echoing the district court’s reasoning, the

58. *Id.*

59. *Id.*

60. *Id.* at 951.

61. *Id.*

62. *Id.*

63. *EEOC v. McDonnell Douglas Corp.*, 969 F. Supp. 1221, 1223 (E.D. Mo. 1997), *aff’d*, 191 F.3d 948 (8th Cir. 1999).

64. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608–09 (1993) (ruling that an employer does not “violate[] 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”).

65. *McDonnell Douglas*, 969 F. Supp. at 1223.

66. *Id.*

67. *Id.* at 1223–24 (quoting *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1373 (2d Cir. 1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999)).

68. *See Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 78 (3d Cir. 2017) (using this phrase).

69. *McDonnell Douglas*, 969 F. Supp. at 1223.

Eighth Circuit explained that the decision to authorize subgroups “might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute proscribes.”⁷⁰

Finally, the Eighth Circuit reasoned that Congress did not intend to impose liability on employers who rely on non-age-based criteria—such as retirement eligibility, salary, or seniority—even if their use had a disparate impact on a subgroup.⁷¹ In this particular case, however, it was undisputed that McDonnell Douglas had relied on such non-age-based criteria such that it should not be held responsible for any discriminatory impact it may have inadvertently created.⁷²

Although the Eighth Circuit has provided the most thorough explanation for rejecting subgroups in disparate impact age discrimination cases, the Second⁷³ and Sixth Circuits⁷⁴ have rejected such subgroups as well. At least a half-dozen federal district courts have also rejected such subgroup claims (usually by referencing one of these three circuit court opinions without additional analysis).⁷⁵ Aside from the Eighth Circuit’s decision, the most persuasive opin-

70. *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999).

71. *Id.* (citing *Hanebrink v. Brown Shoe Co.*, 110 F.3d 644, 647 (8th Cir. 1997)).

72. *Id.*

73. *See* *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999).

74. *See* *Smith v. Tenn. Valley Auth.*, 924 F.2d 1059 (6th Cir. 1991).

75. *See, e.g.*, *Petruska v. Reckitt Benckiser, LLC*, No. 14-03663(CCC), 2015 WL 1421908, at *7 (D.N.J. Mar. 26, 2015) (rejecting plaintiff’s subgroup discrimination claim because plaintiff did not adequately plead that defendant’s decision to eliminate only certain jobs “had an adverse impact on the protected class, namely those employees age 40 and over”); *Bingham v. Raytheon Tech. Servs. Co.*, No. 1:13-cv-00211-TWP-DKL, 2014 WL 6388756, at *4 (S.D. Ind. Nov. 14, 2014) (rejecting use of subgrouping and noting that, in the case at hand, “age groups appear to have been selected because it yielded the desired result—a showing of adverse impact—not because it was necessarily relevant to [the plaintiff’s] claim”); *Fulghum v. Embarq Corp.*, 938 F. Supp. 2d 1090, 1130 n.156, 1131 (D. Kan. 2013) (rejecting age discrimination claim in part because plaintiffs failed to present “relevant statistical evidence that the impact fell more harshly on the protected group than a non-protected group”), *aff’d in part and rev’d in part*, 778 F.3d 1147 (10th Cir. 2015), *opinion amended and superseded on denial of reh’g en banc*, 785 F.3d 395 (10th Cir. 2015); *Schechner v. KPIX-TV*, No. C 08-05049 MHP, 2011 WL 109144, at *5 (N.D. Cal. Jan. 13, 2011) (explaining that although a fifty-five-year-old replaced by a forty-year-old could prevail on a disparate treatment claim, the “focus for a disparate impact claim[] . . . must be on the impact of a facially age-blind employment decision on a specifically-identified protected group to which plaintiffs belong” and to which the comparators do not, namely, individuals aged 40 and older), *aff’d in relevant part*, 686 F.3d 1018 (9th Cir. 2012); *Rudwall v. Blackrock, Inc.*, No. C09-5176TEH, 2011 WL 767965, at *11 (N.D. Cal. Feb. 28, 2011) (rejecting ADEA claim because plaintiff’s statistical data did not compare the impact of defendant’s terminations on employees aged forty and older to that of employees aged thirty-nine and younger); *Kinnally v. Rogers Corp.*, No. CV-06-2704-PHX-JAT, 2009 WL 597211, at *9-10 (D. Ariz. Mar. 9, 2009) (rejecting disparate impact claim after finding as a matter of law that plaintiffs could not prove disparate impact with statistical evidence regarding the impact on a subgroup of workers aged sixty and over); *Shelton v. Boeing Co.*, No. 4:02CV286SNL, 2004 WL 5831717, at *7 (E.D. Mo. Mar. 3, 2004) (stating that disparate-impact claims on behalf of subgroups of the class protected by the ADEA are not recognized by the Eighth Circuit (citing *McDonnell Douglas*, 191 F.3d at 950-51)); *see also* *Karlo v. Pittsburgh Glass Works, LLC*, No. 2:10-cv-1283, 2015 WL 5156913, at *16 (W.D. Pa. Sept. 2, 2015), *rev’d in part, vacated in part*, 849 F.3d 61 (3d Cir.

ion on this issue is the Second Circuit's opinion in *Lowe v. Commack Union Free School District*.⁷⁶

Lowe involved two teacher assistants, both aged fifty-two, whose applications for one of thirteen full-time teacher positions were rejected in favor of other applicants, most of whom were younger.⁷⁷ After a jury rejected the plaintiffs' age discrimination claim, the plaintiffs appealed the district court's decision that they had failed to present a prima facie case of disparate impact discrimination.⁷⁸ The Second Circuit affirmed that ruling, however, stating that plaintiffs failed to prove that the defendants' hiring practices negatively impacted applicants aged forty or older and in fact appeared to favor the protected forty-and-older group.⁷⁹

In that opinion, the Second Circuit addressed the plaintiffs' argument comparing the effects of the defendants' hiring procedures on applicants over and under the age of fifty.⁸⁰ Categorically rejecting this argument, the court declared that "the Supreme Court generally has focused not on the individual plaintiff as much as on the adverse effect of the challenged practice *on the protected group* of which the plaintiff is a member."⁸¹ Although the court acknowledged *Connecticut v. Teal*⁸² as an exception to this "general" trend,⁸³ it nevertheless continued to focus on the forty-and-over group as a whole and characterized the plaintiffs' argument as a request to "expand the disparate impact approach so as to include recognition of 'sub-groups' [within] . . . the protected group under the ADEA."⁸⁴ Echoing the Eighth Circuit's concern regarding so-called "gerrymandered" evidence,⁸⁵ the court then explained that plaintiffs' approach would allow "any plaintiff [to] take his or her own age as the lower end of a 'sub-protected group' and argue that said 'sub-group' is

2017); *Leidig v. Honeywell, Inc.*, 850 F. Supp. 796, 803 n.7 (D. Minn. 1994) (stating that "comparison of employees over the age of fifty to employees under the age of fifty in support of an ADEA disparate impact claim is also troublesome, since the ADEA confers protected status on anyone forty or older").

76. 886 F.2d 1364 (2d Cir. 1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999).

77. *See id.* at 1366-69; *see also id.* at 1371 (inferring, due to the lack of evidence in the record regarding the ages of all applicants, that most of the over seven hundred external candidates for the thirteen vacancies "were likely young, as experienced teachers are less likely to apply to new school districts for jobs").

78. *See id.* at 1368-69.

79. *See id.* at 1371-72.

80. *Id.* at 1373.

81. *Id.*

82. 457 U.S. 440 (1982).

83. *See Lowe*, 886 F.2d at 1373 (citing *Teal*, 457 U.S. at 453-56). As explained below, the Supreme Court in *Teal* held that the purpose of Title VII "is the protection of the individual employee, rather than the protection of the minority group as a whole" and explained that in enacting Title VII "Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." *Teal*, 457 U.S. at 453-54, 455.

84. *Lowe*, 886 F.2d at 1373; *see also id.* at 1374 (asserting that its decision was not based on the "bottom line" defense rejected in *Teal*, but rather the decision was because the defendants' hiring process did not disparately impact persons forty years old and older).

85. *See supra* notes 62-71 and accompanying text.

disparately impacted.”⁸⁶ The court added that under this approach, “an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the ‘sub-group’ of those age 85 and above, even though all those hired were in their late seventies.”⁸⁷ In the *Lowe* court’s view, no inference of age discrimination should arise in a case such as this.⁸⁸

IV. THE ALTERNATIVE VIEW OF DISPARATE IMPACT ADEA CLAIMS

Unlike the restrictive view outlined above, courts in a second line of cases have authorized disparate impact claims when an employer’s practice disproportionately impacts a group of employees above a certain age in the ADEA’s protected class, such as employees aged fifty-five and above, as compared to younger employees, such as those below age fifty-five.⁸⁹ Under this approach, disparate impact claims are not limited to forty-and-older comparisons as under the restrictive view. This approach was adopted in 2017 by the Third Circuit in *Karlo v. Pittsburgh Glass Works, LLC*.⁹⁰

Karlo involved defendant Pittsburgh Glass Works, LLC (PGW), which manufactures automotive glass.⁹¹ In 2008, after the automobile industry began to falter, PGW attempted to offset its declining sales through several RIFs.⁹² Thereafter, seven terminated PGW employees over the age of fifty sued the company for disparate impact discrimination.⁹³

At the trial level, the district court granted summary judgment to PGW on the basis that fifty-and-older disparate impact claims are not cognizable under the ADEA.⁹⁴ On appeal, the Third Circuit ruled that subgroup disparate im-

86. *Lowe*, 886 F.2d at 1373.

87. *Id.*

88. *Id.*

89. *See, e.g.*, *Karlo v. Pittsburgh Glass Works, LLC*, 880 F. Supp. 2d 629, 636–41 (W.D. Pa. 2012); *Finch v. Hercules Inc.*, 865 F. Supp. 1104, 1129–30 (D. Del. 1994) (authorizing disparate impact subgroup claims under the ADEA because failure to do so would frustrate the ADEA’s purpose of protecting individual employees, rather than entire classes of persons, and would permit the type of age discrimination Congress sought to prevent); *Graffam v. Scott Paper Co.*, 848 F. Supp. 1, 4 (D. Me. 1994) (authorizing ADEA disparate impact claim brought by subgroup of employees aged fifty and older, and rejecting the restrictive view because the “basic policy of the ADEA requires a focus on fairness to individuals rather than fairness to groups”); *Klein v. Sec’y of Transp.*, 807 F. Supp. 1517, 1524 (E.D. Wash. 1992) (finding plaintiff had established that hiring practices had a disparate impact on individuals aged fifty and over, entitling plaintiff to damages); *EEOC v. Borden’s, Inc.*, 551 F. Supp. 1095, 1098–99 (D. Ariz. 1982) (authorizing a disparate impact claim brought by a subgroup of employees aged fifty-five and older), *disapproved by Pub. Emps. Ret. Sys. v. Betts*, 492 U.S. 159 (1989).

90. 849 F.3d 61, 68–69 (3d Cir. 2017).

91. *Id.* at 66.

92. *Id.*

93. *Id.*

94. *See Karlo v. Pittsburgh Glass Works, LLC*, No. 2:10-cv-1283, 2015 WL 4232600, at *18 (W.D. Pa. July 13, 2015) (district court order excluding the proposed testimony of Dr. Campion), *aff’d in part and vacated in part*, 849 F.3d 61 (3d Cir. 2017); *Karlo v. Pittsburgh Glass Works, LLC*, No. 2:10-cv-1283, 2015

pact claims are in fact cognizable under the ADEA.⁹⁵ Specifically, the court held that “an ADEA disparate-impact claim may proceed when a plaintiff offers evidence that a specific, facially neutral employment practice caused a significantly disproportionate adverse impact based on age,”⁹⁶ which can be proven in various ways, including by admissible evidence of “forty-and-older comparisons, subgroup comparisons, or more sophisticated statistical modeling.”⁹⁷

The court presented numerous reasons to support its decision. Beginning with the ADEA’s text, the court first noted that the ADEA prohibits disparate impacts based on *age*, not based on *forty-and-older* identity.⁹⁸ The court explained that although the ADEA protects only a particular class of persons—employees at least forty years old⁹⁹—the prohibition language in the statute prevents discrimination “because of [an] individual’s age,”¹⁰⁰ rather than because of an individual’s class membership.¹⁰¹ Accordingly, a rule that prohibited subgroup discrimination claims “would ignore genuine statistical disparities” actionable through the statute’s plain text.¹⁰²

The court supported its interpretation with two additional points about the text: (1) the focus on *relatively older age* as the statute’s protected trait,¹⁰³ as interpreted by the Supreme Court’s unanimous opinion in *O’Connor v. Consolidated Coin Caterers Corp.*,¹⁰⁴ and (2) the focus on individuals’ rights as compared to groups’ rights,¹⁰⁵ as articulated by the Supreme Court in *Connecticut v. Teal*.¹⁰⁶

Although *O’Connor* dealt with ADEA *disparate treatment* claims, the *O’Connor* Court interpreted statutory language identical to that governing ADEA *disparate impact* claims—i.e., language prohibiting discrimination against an individual “because of such individual’s age”¹⁰⁷—and unanimously rejected

WL 5156913, at *18–19 (W.D. Pa. Sept. 2, 2015) (district court order granting summary judgment to Pittsburgh Glass Works on disparate impact claim), *rev’d in part and vacated in part*, 849 F.3d 61 (3d Cir. 2017).

95. *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 68 (3d Cir. 2017).

96. *Id.*

97. *Id.* at 68–69.

98. *Id.* at 66; *see also* 29 U.S.C. § 623(a)(2) (2012) (making it unlawful for an employer, in a disparate impact case, “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”).

99. *Karlo*, 849 F.3d at 66; *see also* 29 U.S.C. § 631(a) (2012).

100. 29 U.S.C. § 623(a)(1)–(2).

101. *Karlo*, 849 F.3d at 70–71.

102. *Id.* at 66.

103. *See id.* at 70–71.

104. 517 U.S. 308, 312–13 (1996).

105. *See Karlo*, 849 F.3d at 70.

106. 457 U.S. 440, 458 (1982).

107. *Compare* 29 U.S.C. § 623(a)(1) (2012) (making it unlawful for an employer in a disparate treatment case “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”), *with* 29 U.S.C. § 623(a)(2) (making it unlawful for an employer in a disparate impact

the requirement that an ADEA plaintiff be replaced by someone outside the ADEA's protected class.¹⁰⁸ As the Court explained, "there can be no greater inference of *age* discrimination . . . when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old."¹⁰⁹ Stated differently, the Court has declared, "[T]he ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young."¹¹⁰ The *Karlo* court saw no reason to depart from this interpretation for disparate impact claims,¹¹¹ articulating the point as follows:

The Supreme Court's reasoning ineluctably leads to our conclusion that subgroup claims are cognizable. Simply put, evidence that a policy disfavors employees older than fifty is probative of the relevant statutory question: whether the policy creates a disparate impact "because of such individual[s]' age." . . . Although the employer's policy might favor younger members of the forty-and-over cohort, that is an "utterly irrelevant factor[]" in evaluating whether a company's oldest employees were disproportionately affected because of their age [under a disparate impact theory].¹¹²

Next, the *Karlo* court considered the Supreme Court's decision in *Connecticut v. Teal*, which interpreted the ADEA as protecting the rights of *individual* employees against age discrimination in disparate impact cases rather than the rights of an entire class of employees.¹¹³

Teal involved an employer's two-step process for identifying employees eligible for promotions. In the first step, the employer required candidates to take a written test.¹¹⁴ In the second step, the employer selected employees for promotion from among the candidates who passed the test.¹¹⁵ Of the 329 candidates who took the test, forty-eight were black and 259 were white.¹¹⁶ Of

case "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").

108. See *O'Connor*, 517 U.S. at 312.

109. *Id.* ("The discrimination prohibited by the ADEA is discrimination 'because of [an] individual's age,' 29 U.S.C. § 623(a)(1), though the prohibition is 'limited to individuals who are at least 40 years of age,' § 631(a). This language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*." (alteration in original)).

110. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 590–91 (2004).

111. See *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 70 (3d Cir. 2017); see also *Karlo v. Pittsburgh Glass Works, LLC*, 880 F. Supp. 2d 629, 639 (W.D. Pa. 2012) ("If a lone fifty-five year old [sic] can establish a claim for age discrimination, even if he was replaced by a forty-two year old [sic], the Court sees no reason why a group of fifty-five year olds [sic] cannot do the same."); Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1121–26 (1998) (reconciling purported concerns with ADEA disparate impact analysis).

112. *Karlo*, 849 F.3d at 71–72 (citation omitted) (quoting *O'Connor*, 517 U.S. at 312).

113. See *Connecticut v. Teal*, 457 U.S. 440, 453–54 (1982).

114. *Id.* at 443.

115. *Id.* at 444.

116. *Id.* at 443.

that group, almost 80% of the white candidates passed the test, whereas only 54% of black candidates passed.¹¹⁷ As such, black candidates achieved “approximately 68 percent of the passing rate for” whites, which was enough of a disparity to assert a discriminatory impact on blacks.¹¹⁸

Alleging disparate impact discrimination, four black employees who failed the test sued the employer, arguing that it violated Title VII by requiring promotion candidates to pass a test that disproportionately excluded blacks.¹¹⁹ In response, the employer argued that black employees who passed the test were given preferential treatment at the second step of the promotion process, thereby counterbalancing for black applicants *as a whole* the discriminatory effect of the written test.¹²⁰ The employer noted that of the “forty-six persons . . . promoted to permanent supervisory positions,” eleven were black and thirty-five were white.¹²¹ Accordingly, “of the 48 identified black candidates who participated in the selection process, 22.9 percent were promoted, and of the 259 identified white candidates, [only] 13.5 percent were promoted.”¹²² Highlighting “this ‘bottom-line’ result, [which was] more favorable to blacks than to whites,” the employer argued that plaintiffs’ disparate impact claim should fail.¹²³

Establishing an important rule for employment discrimination claims (at least insofar as Title VII claims are concerned), the Supreme Court in *Teal* rejected the employer’s so-called “bottom line” defense and held that the purpose of Title VII “is the protection of the individual employee, rather than the protection of the minority group as a whole.”¹²⁴ As the Court explained in enacting Title VII, “Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees’ group.”¹²⁵ The Court added that “Title VII does not permit the victim of [discrimination] to be told that he has not been wronged because other persons of his or her race or sex were hired,”¹²⁶ and this protection extends to “victims of a policy that is facially neutral but practically discriminatory.”¹²⁷ According to the *Karlo* court, “[this] is precisely the problem subgroups are meant to address [under

117. *Id.* at 443 & n.4.

118. *Id.* at 443; *see also* 29 C.F.R. § 1607.4(D) (2018) (setting forth a presumption of disparate impact, adopted by the EEOC, whenever the selection rate for the protected group “is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate”).

119. *Teal*, 457 U.S. at 443–44.

120. *See id.* at 444.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 453–54.

125. *Id.* at 455.

126. *Id.*

127. *Id.*

the ADEA.”¹²⁸ As *Karlo* explained, “*Teal* answers [the employer’s] argument that employees older than forty were, as a class, favored to keep their jobs. That is equivalent to [the employer’s argument in *Teal*] that black employees were collectively favored for promotions. The Supreme Court rejected that argument in *Teal*, and we reject it here.”¹²⁹

Along with these textual concerns, the *Karlo* court noted that a rule precluding subgroup disparate impact claims “would ignore significant age-based disparities,”¹³⁰ which, rather than being precluded by an outright ban on such claims, should instead be “justified pursuant to the ADEA’s relatively broad defenses.”¹³¹ The court noted, for example, that the ADEA’s reasonable-factor-other-than-age (RFOA) defense makes it easier for an employer to escape liability on an ADEA disparate impact claim as compared to a Title VII disparate impact claim.¹³² This is because under the RFOA defense, an employer need only show that it relied on some reasonable factor other than age, whereas the Title VII counterpart, the business necessity defense, requires employers to show “there are [no] other ways for the employer to accomplish its goals.”¹³³ As the Supreme Court has explained, Congress’s endorsement of the more robust RFOA defense is intentional, as it “is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual’s capacity to engage in certain types of employment.”¹³⁴

Finally, the *Karlo* court found support for its interpretation in the ADEA’s remedial purpose.¹³⁵ As the court explained, a rigid forty-and-older comparison group would have its greatest impact on the oldest of workers, who are “those most in need of the statute’s protection.”¹³⁶ Under this rigid approach, a disparate impact on employees in their seventies, for example, “may be easier to average out of existence” as compared to an impact that affects younger employees in the protected class.¹³⁷ Yet, as Second Circuit Court of Appeals Judge Pierce explained in his dissenting opinion in *Lowe*, “[i]t would indeed be strange, and even perverse, if the youngest members of the protected class

128. *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 72 (3d Cir. 2017).

129. *Id.* at 73.

130. *Id.* at 69.

131. *See id.*; *see also* 29 U.S.C. § 623(f)(1) (2012); 29 C.F.R. § 1625.7 (2018).

132. *Karlo*, 849 F.3d at 69–70.

133. *See id.* at 70 (alteration in original) (quoting *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005)); *see also Smith*, 544 U.S. at 243 (“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.”).

134. *Karlo*, 849 F.3d at 70 (quoting *Smith*, 544 U.S. at 240).

135. *See id.* at 74–75.

136. *Id.* at 74 (quoting *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1379 (2d Cir. 1989) (Pierce, J., dissenting in relevant part), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999)).

137. *Id.*

were to be accorded a greater degree of statutory protection than older members of the class.”¹³⁸

In a separate part of its opinion, the *Karlo* court addressed the type of statistical evidence litigants would be expected to produce under its ruling.¹³⁹ On this point, the court explained that because age exists along a continuum and “is not a discre[te] and immutable characteristic of an employee which separates the members of the protected group indelibly from persons outside the protected group,”¹⁴⁰ Title VII statistical techniques “are not perfectly transferable to ADEA cases.”¹⁴¹ For example, if the litigants in *Teal* had omitted some of the black employees who took the written test, the statistics would have failed to address whether there was a disparate impact “because of . . . race” as Title VII requires.¹⁴² With the ADEA, however, “a comparison group that omits employees in their forties is fully capable of demonstrating disparate impact ‘because of . . . age.’”¹⁴³ As the court noted, “age” is the trait protected by the ADEA, not forty-and-older status, and “disparate-impact statistics should be guided by the trait protected by the statute [i.e., age], not the population of employees inside or outside the statute’s general scope.”¹⁴⁴ Accordingly, the court concluded, “simply aggregating forty-and-older employees” will not do.¹⁴⁵ “More exacting analysis may be needed in certain cases, and subgroups may answer that need.”¹⁴⁶

V. THE RESTRICTIVE VIEW VERSUS THE ALTERNATIVE VIEW

As noted, courts are split regarding whether subgroups of employees in the ADEA’s 40-and-over protected class may claim disparate impact discrimination. The restrictive view, endorsed by the Second, Sixth, and Eighth Circuits, as well as numerous federal district courts,¹⁴⁷ is that such claims must be based on a comparison of all employees aged forty and older against those below age forty.¹⁴⁸ The alternative view, adopted by the Third Circuit and var-

138. *Id.* at 74–75 (quoting *Lowe*, 886 F.2d at 1379 (Pierce, J., dissenting in relevant part)).

139. *See id.* at 73–74.

140. *Id.* at 73 (alteration in original) (quoting *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1442 (11th Cir. 1985)).

141. *Id.*

142. *Id.*; see 42 U.S.C. § 2000e-2(a)(2) (2012).

143. *Karlo*, 849 F.3d at 74 (alteration in original) (quoting 29 U.S.C. § 623(a)(2) (2012)).

144. *Id.*

145. *Id.*

146. *Id.*

147. *See supra* notes 73–75.

148. *See EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999) (refusing to extend age discrimination claims to such subgroups); *Smith v. Tenn. Valley Auth.*, 924 F.2d 1059 (6th Cir. 1991) (same); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989) (same), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999).

ious federal district courts,¹⁴⁹ is not limited in this manner but instead recognizes that subgroups of employees in the upper reaches of the ADEA's protected class may be the victims of discrimination, even when relatively younger members of the class are not.¹⁵⁰ As this Part shows, the arguments favoring disparate impact subgroup claims are more persuasive.

A. *Arguments Against the Restrictive View*

Part IV summarizes the primary arguments for adopting subgroups in ADEA disparate impact cases. This Subpart rebuts each of the arguments *against* subgroups, with a particular focus on those set forth in the Eighth Circuit's *McDonnell Douglas* opinion.¹⁵¹

1. *Rationale #1: Congressional Intent*

The first rationale advanced by the Eighth Circuit is an unsupported assertion that “Congress could [not] have intended” to permit disparate impact claims where “statistical evidence indicated that an employer’s RIF criteria had a very favorable impact upon the entire protected group of employees aged 40 and older, compared to those employees outside the protected group.”¹⁵² There are numerous flaws with this argument.

First, the Eighth Circuit’s reasoning on this point is simply an assertion that ADEA disparate impact claims must compare employees within the protected group against those outside it.¹⁵³ Yet, the court provided no evidence that Congress meant to preclude subgroups of employees from claiming disparate impact discrimination.¹⁵⁴ And even assuming such evidence exists, “when [a] statute’s language is plain, the sole function of the courts . . . is to enforce it according to its terms”¹⁵⁵ without considering additional evidence of Congressional intent.¹⁵⁶

When considering the ADEA’s prohibition provision, 29 U.S.C. § 623(a)(2), in combination with its “Age Limits” provision, 29 U.S.C. § 631(a), the statute simply cannot be read to preclude subgroups. To explain,

149. *See supra* notes 89–90.

150. *See supra* notes 89–90 and accompanying text.

151. 191 F.3d 948 (8th Cir. 1999).

152. *Id.* at 951.

153. *See id.*

154. *See id.*

155. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

156. *See Ron Pair Enters.*, 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)) (recognizing that “[t]he plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters’” (second alteration in original)).

the ADEA's prohibition provision makes it unlawful for an employer "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."¹⁵⁷ The ADEA's "Age Limits" provision states that "[t]he prohibitions in this chapter [i.e., including those set forth in § 623(a)(2)] shall be limited to individuals who are at least 40 years of age."¹⁵⁸ Accordingly, the "Age Limits" provision delineates who is protected (i.e., employees at least forty years of age),¹⁵⁹ whereas the prohibition section specifies the exact nature of that protection (i.e., protection against discrimination because of one's "age").¹⁶⁰ Read together, then, these provisions prohibit employment practices that have a disparate impact upon an individual "because of such individual's *age*,"¹⁶¹ although a person may not claim this protection unless he or she is "at least 40 years of age."¹⁶²

Interpreting nearly identical language in the ADEA's disparate treatment provision, which also prohibits discrimination "because of such individual's age,"¹⁶³ the Supreme Court's decision in *O'Connor* confirms that the ADEA prohibits discrimination because of age, not because of one's membership in the protected class.¹⁶⁴ The *O'Connor* Court explained, "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*."¹⁶⁵ The law presumes two identically worded statutes have the same meaning.¹⁶⁶ Thus, the Eighth Circuit's contrary interpretation "that the ADEA prohibits only . . . employment practices having a disparate impact on the *entire protected group* [of] employees age[d] 40 and older [simply] cannot be reconciled with the [ADEA's] plain language . . . which [instead] prohibits discrimination against an '*individual*['] 'based on [that individual's] *age*.'"¹⁶⁷

157. 29 U.S.C. § 623(a)(2) (2012); *see also* *Smith v. City of Jackson*, 544 U.S. 228, 238–39 (2005) (interpreting 29 U.S.C. § 623(a)(2) as prohibiting employment practices having a disparate impact based on age).

158. 29 U.S.C. § 631(a) (2012).

159. *Id.*

160. *See supra* note 157.

161. 29 U.S.C. § 623(a)(2) (emphasis added).

162. *Id.* § 631(a).

163. *Id.* § 623(a)(1).

164. *Cf. O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (interpreting the ADEA's disparate treatment provision and stating that "[t]his language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older").

165. *Id.*

166. *See Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) ("[T]he 'normal rule of statutory construction' [is] that 'identical words used in different parts of the same act are intended to have the same meaning' . . ." (quoting *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986))).

167. *See* EEOC Amicus Brief, *supra* note 18, at 6 (seventh alteration in original) (emphasis added) (advancing a similar argument based on the plain text of the ADEA); *see also* 29 U.S.C. § 623(a)(2).

Second, by focusing on the effect of an employer's practice upon the entire group of ADEA-protected employees, the Eighth Circuit's rationale on this point has the potential to conceal individual rights violations,¹⁶⁸ making it nothing more than the type of "bottom-line" reasoning struck down by the Supreme Court in *Connecticut v. Teal*.¹⁶⁹ Indeed, the restrictive view of the ADEA would allow an employer to escape liability under a disparate impact theory when its employment action significantly disfavors employees over the age of fifty while favoring employees aged forty to forty-nine to a sufficient degree so as to wash out any negative statistical impact that exists for the older segment of employees (such that the entire group of ADEA-protected employees appear to suffer no discriminatory treatment).¹⁷⁰ In addition, under this view, the ADEA could be violated when a seemingly age-neutral policy discriminates against fifty-year-olds in favor of employees in their thirties, but not when it discriminates against sixty-year-olds in favor of employees in their forties.¹⁷¹ However, in either scenario, nearly the same "inference of age discrimination" exists because workers above a certain age in the protected group were treated less favorably than substantially younger workers, a view supported by the Supreme Court's decision in *O'Connor*.¹⁷² Thus, as *Karlo* explained, "[f]ar from being a result 'Congress could [not] have intended,' the Supreme Court's ruling in *Teal* vindicated Title VII's plain text and purpose," and the ADEA should be interpreted with a similar focus on individual rights.¹⁷³

Although the arguments for subgroups generally favor individual employ-

168. See *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 78–79 (3d Cir. 2017); see also *supra* notes 113–29 and accompanying text (discussing *Connecticut v. Teal*, 457 U.S. 440 (1982)).

169. 457 U.S. 440, 442 (1982).

170. See *Finch v. Hercules Inc.*, 865 F. Supp. 1104, 1129 (D. Del. 1994) (noting testimony of plaintiff's expert on this point); *Fentonmiller*, *supra* note 111, at 1125 ("[I]f subgrouping is not permitted, an employer could adopt a policy which, though facially-neutral, has a significant disparate impact on workers over age sixty, as long as a relatively equal number of employees age forty or forty-five have not been affected."); Michael O. Finkelstein & Bruce Levin, *Proportional Hazard Models for Age Discrimination Cases*, 34 JURIMETRICS J. 153, 155 (1994) ("[I]f discrimination lies within the protected group, the simple under-40 to over-40 comparison may not reveal it. If there is discrimination against employees between ages 50 and 60 and the pattern is concealed by favoring those between 40 and 50, the discrimination would not be detected by the simple under-40 and over-40 dichotomy."); Sandra F. Sperino, *The Sky Remains Intact: Why Allowing Subgroup Evidence is Consistent with the Age Discrimination in Employment Act*, 90 MARQ. L. REV. 227, 254 (2006) ("By not allowing plaintiffs to proceed as a subgroup, the courts are essentially condoning a situation in which companies could develop policies designed to more harshly impact their oldest employees, as long as they treated younger employees in the protected class favorably enough to avoid a statistical disparity. Such a result is not consistent with the purposes of the ADEA."). *But see* *Schechner v. KPIX-TV*, No. C 08-05049 MHP, 2011 WL 109144, at *4 n.4 (N.D. Cal. Jan. 13, 2011), *aff'd in relevant part*, 686 F.3d 1018 (9th Cir. 2012) ("[T]o the extent that employers gerrymander facially neutral policies to disfavor employees over the age 50 or 60 while significantly favoring employees closer to the age of 40, such practices would appear to be material evidence of disparate treatment discrimination.").

171. *Fentonmiller*, *supra* note 111, at 1125.

172. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

173. *Karlo*, 849 F.3d at 79 (second alteration in original) (citation omitted) (quoting *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999)).

ees who may be the victims of discrimination, employers might also benefit by subgroup claims in certain cases. As Professors Michael Finkelstein and Bruce Levin have observed, “an overall statistic comparing over-40 with under-40 employees may be only generally relevant to the probability that a particular plaintiff who is over 40 suffered discrimination.”¹⁷⁴ Accordingly, without subgroups, a terminated plaintiff in her early forties could sue for disparate impact discrimination even though the adverse impact suffered by the over-forty group as a whole was generated by terminations of numerous employees in their fifties and sixties.¹⁷⁵ In this example, the forty-two-year-old plaintiff may have been the only terminated employee in her forties, and yet she would still have a valid disparate impact discrimination claim due to a rigid view of the ADEA focusing too broadly on the protected class as a whole.¹⁷⁶

Finally, legislative history supports the conclusion that the ADEA authorizes subgroups. As the Supreme Court has explained, Senators Javits and Yarborough were “two of the legislators most active in pushing for the ADEA.”¹⁷⁷ As the Court noted, Senator Javits addressed a concern mentioned by Senator Dominick “that ‘the bill might not forbid discrimination between two persons each of whom would be between the ages of 40 and 65.’”¹⁷⁸ Senator Javits then gave his own view that, “if two individuals ages 52 and 42 apply for the same job, and the employer selected the man aged 42 solely . . . because he is younger than the man 52, then he will have violated the act.”¹⁷⁹ Senator Yarborough agreed, stating that “[t]he law prohibits age being a factor in the decision to hire.”¹⁸⁰ Accordingly, although their comments pertain more directly to *disparate treatment* claims of discrimination, Senators Javits and Yarborough understood the ADEA as prohibiting discrimination based on *age* rather than membership in the protected class.¹⁸¹

2. Rationale #2: Gerrymandered Evidence

The second reason offered by the Eighth Circuit for rejecting subgroup disparate impact claims is more persuasive, meriting more critical review. In essence, the concern is that unclear lines of protection created by subgroup claims would make it nearly impossible for an employer to avoid inadvertently impacting some potential subgroup of employees within the protected class.¹⁸²

174. Finkelstein & Levin, *supra* note 170, at 155.

175. *See id.*

176. *See id.*

177. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 598 (2004).

178. *Id.* (quoting 113 CONG. REC. 31255 (1967)).

179. *Id.* (alteration in original) (quoting 113 CONG. REC. 31255 (1967)).

180. *Id.* (alteration in original) (quoting 113 CONG. REC. 31255 (1967)).

181. EEOC Amicus Brief, *supra* note 18, at 27.

182. *See* EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 951 (8th Cir. 1999).

Advancing a similar argument, the Second Circuit in *Lowe* worried that “any plaintiff can take his or her own age as the lower end of a ‘sub-protected group’ and argue that said ‘sub-group’ is disparately impacted.”¹⁸³ The Second Circuit stated, for example, that if subgroups were allowed, “an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the ‘sub-group’ of those age 85 and above, even though all those hired were in their late seventies.”¹⁸⁴

This particular concern with subgrouping has merit, given that age exists along a continuum and is not a binary trait.¹⁸⁵ Yet, the concern is overstated. First, with the Second Circuit’s example in mind, it is highly unlikely that a sufficiently large subgroup of employees aged eighty-five and above would even exist in a given workforce *and* that a case would arise where that entire subgroup would be disparately impacted by an employer policy to a sufficient degree so as to satisfy the prima facie case.¹⁸⁶ This is especially true given the relatively small number of workers in the United States over the age of sixty-five, let alone eighty-five.¹⁸⁷

More importantly, the core requirements of the prima facie case protect against such liability.¹⁸⁸ Even without subgroups, “it has always been the case that ‘a completely neutral practice will inevitably have some disproportionate impact on one group or another,’”¹⁸⁹ and for this reason, plaintiffs asserting disparate impact claims must both (1) provide sufficient evidence of statistical disparities in the employer’s work force and (2) identify a specific employment practice that causes the disparity.¹⁹⁰ A deficiency in either requirement will

183. *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1373 (2d Cir. 1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999).

184. *Id.*

185. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 597 (2004) (“The term ‘age’ employed by the ADEA is not[] . . . comparable to the terms ‘race’ or ‘sex’ employed by Title VII.”); *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1442 (11th Cir. 1985) (“Age discrimination is qualitatively different from race or sex discrimination in employment, because the basis of the discrimination is not a discreet and immutable characteristic of an employee which separates the members of the protected group indelibly from persons outside the protected group.”).

186. *See Graffam v. Scott Paper Co.*, 848 F. Supp. 1, 4 (D. Me. 1994) (describing the Second Circuit’s example in *Lowe* as an “unlikely hypothetical”); EEOC Amicus Brief, *supra* note 18, at 19–20 (finding it “difficult to fathom how a plaintiff could marshal reliable statistics showing that a specific employment practice had a statistically significant disparate impact on a subgroup of employees age 85 and older”); Sperino, *supra* note 170, at 262 (recognizing that in a typical workforce, it is unlikely that a group of employees in their seventies or older will be able to demonstrate a large enough group size to be statistically significant).

187. *See* BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES tbl. 51, <https://www.bls.gov/cps/cpsa2017.pdf> (last visited Feb. 10, 2019) (reporting that of the 153,337,000 total persons employed in the United States in 2017, only 9,234,000 are sixty-five years old or older).

188. *See* EEOC Amicus Brief, *supra* note 18, at 18.

189. *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 79 (3d Cir. 2017).

190. *See id.*

defeat a disparate impact claim.¹⁹¹ Moreover, as courts have noted, “[i]dentifying a specific practice is not a trivial burden,”¹⁹² and “not just any disparity will make out the *prima facie* case; the disparity must be significant.”¹⁹³ Thus, in a case like the one imagined by the Second Circuit, where the difference in age between the plaintiff and the favored employee is slight, the district court might well find the evidence insufficient to permit an inference of discrimination.¹⁹⁴ This is particularly true in the example noted by the Second Circuit, not only because many courts require an age difference of at least eight years to satisfy the *prima facie* case in a disparate treatment case,¹⁹⁵ a trend which can be applied in the disparate impact context,¹⁹⁶ but also because a small sample size of comparators may undermine statistical reliability.¹⁹⁷

Going one step further, an employer that *inadvertently* impacts some oddly defined subgroup of employees would ordinarily escape liability, even if a *prima facie* case is shown, by pointing to evidence that its decision was based on a reasonable factor other than age.¹⁹⁸ This is a relatively easy burden for an

191. *See id.*

192. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 101 (2008); *see, e.g., Clark v. Matthews Int'l Corp.*, No. 4:07CV2027SNLJ, 2009 WL 3680771, at *10 (E.D. Mo. Oct. 30, 2009) (finding that plaintiff failed to identify a “specific test, requirement, or practice” that has an adverse impact on older workers and thus failed to establish a *prima facie* case of ADEA disparate impact (quoting *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005))), *aff'd in relevant part*, 628 F.3d 462 (8th Cir. 2010), *and vacated and rev'd in other part on reh'g*, 639 F.3d 391 (8th Cir. 2011).

193. *See Karlo*, 849 F.3d at 79; *see also Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 995 (1988) (“[S]tatistical disparities must be sufficiently substantial that they raise . . . an inference of causation.”).

194. *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1380 (2d Cir. 1989) (Pierce, J., concurring), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999); *see also K.H. v. Sec'y of Homeland Sec.*, 263 F. Supp. 3d 788, 796 (N.D. Cal. 2017) (rejecting plaintiffs’ disparate impact claim because the three-year age difference plaintiffs relied on was “insufficiently substantial”).

195. *See generally O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (stating that replacement of a worker with another worker “insignificantly younger” will not support an inference of discrimination); *see also France v. Johnson*, 795 F.3d 1170, 1174 (9th Cir.), *as amended on reh'g* (Oct. 14, 2015) (“[A]n average age difference of ten years or more between the plaintiff and the replacements will be presumptively substantial, whereas an age difference of less than ten years will be presumptively insubstantial.”); *Petruska v. Reckitt Benckiser, LLC*, No. 14-03663(CCC), 2015 WL 1421908, at *5 (D.N.J. Mar. 26, 2015) (reviewing cases suggesting an eight-year age difference is sufficient, whereas a seven-year age difference is insufficient).

196. *See Sperino, supra* note 170, at 264; *see also, e.g., K.H.*, 263 F. Supp. 3d at 796 (rejecting plaintiffs’ disparate impact claim because three-year age difference was “insufficiently substantial”).

197. *See Watson*, 487 U.S. at 996–97; *see also Finch v. Hercules Inc.*, 865 F. Supp. 1104, 1129–30 (D. Del. 1994) (“If a plaintiff attempts to define the subset too narrowly, he or she will not be able to obtain reliable statistics upon which to prove a *prima facie* case.”).

198. *See Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 69 (3d Cir. 2017) (recognizing that a rule entirely precluding such subgroup discrimination claims “would ignore significant age-based disparities,” which, when they exist, “must be justified pursuant to the ADEA’s relatively broad defenses”); *cf. Smith v. City of Jackson*, 544 U.S. 228, 239 (“It is[] . . . 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.”); *see also, e.g., Filipek v. Oakton Cmty. Coll.*, 312 F. Supp. 3d 693, 703–05 (N.D. Ill. 2018) (granting summary judgment to defendant on plaintiffs’ ADEA disparate impact claim because, although plaintiffs had established a *prima facie*

employer to meet, as the employer need only show that it relied on *any* reasonable factor other than age to escape liability.¹⁹⁹ Accordingly, rather than being a reason to entirely preclude subgroup claims, unanticipated impacts should instead be addressed through defenses in individual cases.²⁰⁰

Along the same lines, the Eighth Circuit’s final rationale—that “Congress [did not] intend[] to impose liability on employers who rely on [non-age based] criteria”²⁰¹—is similarly flawed given that it does not justify the *categorical denial* of all subgroup claims. Rather, an employer’s reliance on non-age based criteria is simply a defense that individual employers may utilize in defending such claims.

B. *Sex-Plus Analogy*

Although *Karlo* provides numerous persuasive arguments for recognizing disparate impact subgroup claims, including those based on the plain text of the ADEA,²⁰² an additional rationale derives from sex-plus cases, which represent another form of subgroup discrimination.

In a typical sex-plus case, a group of employees claim that they were discriminated against not because of their protected class *per se*, but because of the combination of their protected class plus some additional factor.²⁰³ Thus, if an employer refuses to hire women with children but has no such hiring policy for men with children, the employer cannot escape liability for sex discrimination simply by noting that it broadly employs many women—i.e., those without children.²⁰⁴ Rather, discrimination has occurred due to differential treatment between the genders with respect to the additional factor of having children, particularly when the employer’s decision is based on a gen-

case of age discrimination, defendant successfully asserted the RFOA defense); *Romero v. Allstate Ins. Co.*, 251 F. Supp. 3d 867, 885–87 (E.D. Pa. 2017) (same).

199. See *Karlo*, 849 F.3d at 69–70; see also *Smith*, 544 U.S. at 243 (“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.”).

200. See, e.g., *Smith*, 544 U.S. at 242–43 (recognizing that the RFOA defense may be used even when a plaintiff makes out a prima facie case of disparate impact discrimination, such as in a case where a company’s oldest employees are inadvertently disadvantaged by a merit-based policy).

201. *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999).

202. See *supra* notes 99–128 and accompanying text.

203. See *Franchina v. City of Providence*, 881 F.3d 32, 54 (1st Cir. 2018) (alteration in original) (quoting *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 43 (1st Cir. 2009)) (recognizing that in sex-plus claims, “the simple question posed . . . is whether the employer took an adverse employment action at least in part because of an employee’s sex,” and applying the sex-plus theory to plaintiffs who were allegedly discriminated against at least in part because of their gender where the “plus-factor” is sexual orientation).

204. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543–44 (1971) (finding an employer policy of refusing to hire women with pre-school aged children discriminatory on the basis of sex because it imposed a requirement—i.e., no pre-school aged children—on females that it did not impose on males); see also *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032–34 (5th Cir. 1980) (discussing the sex-plus theory of discrimination).

der stereotype that the law seeks to eradicate.²⁰⁵

Although the comparison in a sex-plus case is typically made across genders—for example, by comparing how an employer treated married women as opposed to married men²⁰⁶—another way to expose an instance of sex-plus discrimination is to highlight the employer’s differential treatment of subgroups within the same gender category, making sex-plus discrimination, in essence, subgroup discrimination.²⁰⁷ As the Second Circuit has noted, “[t]he term ‘sex plus’ or ‘gender plus’ is simply a heuristic” or “a judicial convenience developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against.”²⁰⁸ For this reason, an employer in a sex-plus case brought by women with children cannot justify its discriminatory actions by pointing to the fact that it employs many women, albeit those without children, given that it is the rights of individual employees that truly matter.²⁰⁹ In the same vein, an employer in an age discrimination case should not be permitted to defend its actions by arguing that although its policies disfavor employees over a certain age, such as age fifty, it nevertheless does not discriminate based on age because it favors younger members of the protected group—i.e., employees aged forty to forty-nine—as this is nothing

205. See *Phillips*, 400 U.S. at 545 (Marshall, J., concurring); see also *Smith v. AVSC Int’l, Inc.*, 148 F. Supp. 2d 302, 308 (S.D.N.Y. 2001) (stating that the “sex plus” theory “recognizes that it is impermissible to treat men with an additional characteristic more or less favorably than women with the same additional characteristic”); *Luce v. Dalton*, 166 F.R.D. 457, 460 (S.D. Cal.), *aff’d*, 167 F.R.D. 88 (S.D. Cal. 1996) (“[T]here are peculiar stereotypes associated with subclasses of African-American and Asian women. . . . These unique discriminatory biases justify subclass treatment under Title VII, so as to ensure that an employer is not permitted to avoid liability for discrimination merely by showing it has not discriminated against all women.”).

206. See, e.g., *Coleman v. B–G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1203 (10th Cir. 1997) (finding, in gender-plus-marital-status claim, that female plaintiff must show that male workers with same marital status were treated differently, and stating that, “although the protected class need not include *all* women, the plaintiff must still prove that the subclass of women was unfavorably treated as compared to the corresponding subclass of men”).

207. See *id.* (“Title VII not only forbids discrimination against women in general, but also discrimination against subclasses of women, such as women with pre-school-age children.”). Sex-plus jury instructions are also telling. In one recent case, for example, the First Circuit upheld a sex-plus jury instruction that read as follows: “Element three requires that harassment must be based on gender. The plaintiff need not prove that all women were discriminated against or were harassed, but she must prove that she was harassed at least in part because she is a woman. In other words, she may meet this element by proving that she was harassed because she is part of a subclass of women, in this case lesbians, if she also proves that this harassment was at least in part because of her sex or gender.” *Franchina*, 881 F.3d at 55 (1st Cir. 2018).

208. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004); see also *Myers v. Goodwill Indus. of Akron, Inc.*, 701 N.E.2d 738, 743 (Ohio Ct. App. 1997) (“The point behind the establishment of the sex-plus discrimination theory is to allow Title VII plaintiffs to survive summary judgment when the defendant employer does not discriminate against *all* members of the sex.”).

209. See *Phillips*, 400 U.S. at 543–44 (finding a policy of refusing to hire women with pre-school-aged children discriminatory on the basis of sex, even though 75 to 80% of those hired for the position at issue were women).

more than the type of “bottom line” defense rejected in sex-plus cases.²¹⁰ Quite simply, “the favorable treatment of younger members of the [ADEA’s] protected age group does not justify discrimination against older members of the protected age group”; yet, this is precisely what the restrictive view allows.²¹¹

There is more to this argument. In many cases, unlawful instances of sex-plus discrimination are based on a prohibited stereotype such as, for example, that women with small children are likely to be bad employees.²¹² Similar stereotyping exists in age discrimination cases, which likewise involve the prohibited stereotype of the following form: “Older employees are likely to be [poor employees].”²¹³ In addition, a number of courts have authorized employee claims that they were discriminated against based upon their gender plus some other protected trait, including age.²¹⁴ The Second Circuit has explained:

[A] plaintiff’s discrimination claims may not be defeated on a motion for summary judgment based merely on the fact that certain members of a protected class [such as younger women] are not subject to discrimination, while another subset [such as older women] is discriminated against based on a protected characteristic shared by both subsets. . . . [because] “where two bases of discrimination exist, the two grounds cannot be neatly reduced to distinct components.”²¹⁵

In effect, these age-plus cases validate discrimination claims brought by certain subgroups of older workers—such as *older women*—even though not *all*

210. See *Connecticut v. Teal* for an explanation that “Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees’ group.” 457 U.S. 440, 455 (1982). *Teal* also supports this conclusion with a reference to a sex-plus case. See *id.* (citing *Phillips*, 400 U.S. at 542).

211. See EEOC Amicus Brief, *supra* note 18, at 9–10.

212. See *Phillips*, 400 U.S. at 545 (Marshall, J., concurring).

213. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993); see also *id.* at 610 (“Congress’ promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.”).

214. See *Leal v. McHugh*, 731 F.3d 405, 414–15 (5th Cir. 2013) (noting that the requirement that an ADEA plaintiff prove that age was the but-for cause of an adverse employment action does not preclude plaintiff from establishing a discrimination claim based on age plus some other trait, like disability); *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 109–10 (2d Cir. 2010) (recognizing that an “age-plus-gender” claim may not be defeated on a motion for summary judgment where evidence supports it, and stating that “where two bases of discrimination exist, the two grounds cannot be neatly reduced to distinct components”); see also *Smith v. Conn. Packaging Materials*, No. 3:13-CV-00550 JAM, 2015 WL 235148, at *3 (D. Conn. Jan. 16, 2015) (choosing to “analyze [plaintiff’s] claims not only as separate age and gender discrimination claims, but also as including an ‘age-plus-gender’ claim”); *Suggs v. Cent. Oil of Baton Rouge, LLC*, No. CIV.A. 13-25-RLB, 2014 WL 3037213, at *9 (M.D. La. July 3, 2014) (recognizing plaintiff’s claim that he was terminated due to his age and his disability); *Myers v. Goodwill Indus. of Akron, Inc.*, 701 N.E.2d 738, 743 (Ohio Ct. App. 1997) (“We agree that a cause of action exists for plaintiffs who can show discrimination based upon sex and age.”).

215. *Gorzynski*, 596 F.3d at 109–10.

older employees within the company suffer the same discrimination.²¹⁶ If distinctions like this can be made across different subsets of older employees who differ only with respect to some other protected trait, like race or gender, there is no reason similar distinctions cannot be made across subsets of older workers who differ only in regards to their relative age.²¹⁷

To be sure, some courts have rejected so-called “age-plus” theories under the ADEA.²¹⁸ Those decisions, however, are generally grounded in the fact that age discrimination claims brought pursuant to the ADEA require proof that age was the “but-for” cause of the discriminatory conduct, rather than simply one of several motivating factors, as under Title VII.²¹⁹ For this reason, some courts have rejected discrimination claims on the basis of age plus some other trait, such as gender or disability.²²⁰ Nevertheless, many courts disagree with this narrow interpretation of the ADEA’s “but-for” cause requirement, as does the author.²²¹ More importantly, the particular scenario at issue in this Article is one that would not typically involve some other motivating factor beyond age. Rather, in a disparate impact age discrimination case brought by a subgroup of ADEA-protected employees, the allegation is simply that the employer’s practice adversely impacted the plaintiffs “because of [their] age,”²²² which is precisely the type of allegation the ADEA is meant to address.

216. See, e.g., *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 503 (2d Cir. 2009), *superseded by statute*, Local Civil Rights Restoration Act of 2005, N.Y.C. Local L. No. 85, *as recognized in* *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102 (2d Cir. 2013).

217. For a much more elaborate discussion of the age-plus discrimination doctrine, see Marc Chase McAllister, *Extending the Sex Plus Discrimination Doctrine to Age Discrimination Claims Involving Multiple Discriminatory Motives*, 60 B.C.L. REV. 469 (2019).

218. See, e.g., *Bauers-Toy v. Clarence Cent. Sch. Dist.*, No. 10-CV-845, 2015 WL 13574291, at *8 (W.D.N.Y. Sept. 30, 2015); *Smith v. Bd. of Cty. Comm’rs*, 96 F. Supp. 2d 1177, 1187 (D. Kan. 2000) (“No district court has explicitly adopted an age-plus-gender theory of liability under the ADEA.”); *Kelly v. Drexel Univ.*, 907 F. Supp. 864, 875 n.8 (E.D. Pa. 1995) (rejecting an “age-plus-disability” theory of liability).

219. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009) (“We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.”).

220. See, e.g., *Famighette v. Rose*, No. 2:17-cv-2553 (DRH)(ARL), 2018 WL 2048371, at *5 (E.D.N.Y. May 2, 2018); *Bauers-Toy*, 2015 WL 13574291, at *8.

221. See, e.g., *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1203 (10th Cir. 1997); see also McAllister, *supra* note 217, at 504–14 (arguing that the ADEA’s but-for causation requirement, when read in context, does not preclude age-plus discrimination claims).

222. See 29 U.S.C. § 623(a)(2) (2012) (making it unlawful for an employer, in a disparate impact case, “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”).

VI. PROPOSAL: SPECIFIC AGE BREAKS FOR ADEA DISPARATE IMPACT CLAIMS

Once subgroups are accepted as valid under the ADEA, the question becomes whether limitations upon subgrouping arrangements are warranted. One option is to authorize disparate impact claims for only select subgroups, such as those with lower boundaries divisible by five, including employees aged fifty and above or fifty-five and above.²²³ Another option is to allow plaintiffs to present subgroup claims beginning at any age above forty, such as age 46.2.²²⁴ Under either scenario, one must also determine whether subgroups should contain an upper age limit.²²⁵ This Part examines these issues and argues that trial courts should utilize their *Daubert* gatekeeping powers to mandate incremental age cutoffs with no upper age limits.

A. *The Case Against Unlimited Subgroups*

One option for courts in ADEA disparate impact claims is to impose no limitations on any particular subgroup arrangement.²²⁶ This approach would appeal to plaintiffs who stand to benefit most by a subgroup of their choosing. In one recent case, for example, plaintiffs alleged that their employer's "buyout program adversely impacted employees . . . who were 58 to 63 years old, while favoring younger employees . . . who were 40 to 56 years old."²²⁷ The Eighth Circuit later rejected such claims,²²⁸ prompting the plaintiffs to amend their complaint.²²⁹ Although ultimately unsuccessful, this case exemplifies the types of subgroup claims plaintiffs may assert in jurisdictions that authorize them. Accordingly, it is only a matter of time before courts will have to determine the proper makeup of ADEA disparate impact subgroups.

As courts that have adopted the restrictive view have articulated, the freewheeling approach to subgrouping, where lines can be drawn at any point along the age continuum, might require well-meaning employers to defend

223. See *Fentonmiller*, *supra* note 111, at 1122.

224. See *id.* The alternative approaches described above were squarely before the court in *Karlo*, where plaintiffs argued that the lower boundary of any ADEA subgroup should be divisible by five, see Brief of Appellants & Joint Appendix – Volume I at 25–26, *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017) (No. 15–3435), whereas the EEOC, as *amicus curiae*, argued that virtually any bottom boundary should be allowed, see EEOC Amicus Brief, *supra* note 18, at 18–20; see also Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Appellee at 11–13, *Karlo*, 849 F.3d 61 (No. 15–3435) (examining these competing approaches).

225. See *Karlo*, 849 F.3d at 77 (validating subgroups in age discrimination cases with "lower boundaries" but not "upper boundaries," such that a "banded" fifty-to-fifty-five subgroup would be precluded).

226. See EEOC Amicus Brief, *supra* note 18, at 18–20.

227. *Cooney v. Union Pac. R.R. Co.*, 258 F.3d 731, 733 (8th Cir. 2001).

228. See *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950 (8th Cir. 1999).

229. See *Cooney*, 258 F.3d at 734.

claims of disparate impact that most employers could not anticipate.²³⁰ This point is best demonstrated by examining the types of statistical evidence plaintiffs usually present in such cases.

To establish a prima facie case of disparate impact under the ADEA, a plaintiff must (1) identify a specific, facially-neutral employment practice and (2) “present ‘statistical evidence of a kind and degree sufficient to show that the practice in question caused’” a statistically significant adverse impact on the protected group (or subgroup).²³¹ When a statistically significant disparity is shown, liability is established unless the employer either shows that the plaintiff failed to present reliable statistics²³² or that the statistical disparity is the result of a practice or policy that was based on reasonable factors other than age.²³³

According to a leading treatise, “[t]he most widely used means of showing that an observed disparity in outcomes is sufficiently substantial” in a disparate impact claim “is to show that the disparity is sufficiently large that it is highly unlikely to have occurred at random.”²³⁴ “This is typically done [through] . . . tests of statistical significance,” including measures of probability and standard deviation, which “determine the probability [that] . . . the observed disparity” would occur “by chance.”²³⁵

“Probability levels (also called ‘p-values’) are simply the probability that the observed disparity is . . . the result of chance fluctuation or distribution. . . . [A] 0.05 probability level,” for instance, “means that one would expect to see the observed disparity occur by chance only one time in twenty cases—[such that] there is only a five percent chance that the disparity is random.”²³⁶ A standard deviation analysis accomplishes essentially the same task, where an increasing “number of standard deviations from the mean” corresponds to an increasing likelihood that an “observed result is not due to chance.”²³⁷

230. See Finkelstein & Levin, *supra* note 170, at 156 n.11 (“Even if the employer were non-discriminatory, it would be possible by selecting the worst break point to create a statistically significant difference between the two groups.”) (citing Rupert G. Miller & David O. Siegmund, *Maximally Selected Chi-Square Statistics*, 38 *BIOMETRICS* 1011 (1982)).

231. *EEOC v. Allstate Ins. Co.*, 528 F.3d 1042, 1049 (8th Cir.) (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994–95 (1988)), *reh’g en banc granted, opinion vacated*, 528 F.3d 1042 (8th Cir. 2008); see also *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005).

232. See, e.g., *Allstate*, 528 F.3d at 1049–50 (analyzing a challenge to plaintiffs’ disparate impact statistics).

233. See *Smith*, 544 U.S. at 242.

234. *Stagi v. Nat’l R.R. Passenger Corp.*, 391 F. App’x 133, 137 (3d Cir. 2010) (alteration in original) (quoting 1 B. LINDEMANN & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 124 (4th ed. 2007)); see also A.J. JAFFE & HERBERT F. SPIRER, *MISUSED STATISTICS: STRAIGHT TALK FOR TWISTED NUMBERS* 174–75 (1987) (describing a basic example of alleged age discrimination involving this method of analysis).

235. *Stagi*, 391 F. App’x at 137.

236. *Id.*

237. *Id.*

For a plaintiff attempting to establish a prima facie case of disparate impact, federal courts, including the Supreme Court, generally endorse the standard deviation measure to gauge whether apparent discrepancies are statistically significant.²³⁸ “As standard deviations increase numerically, the probability of chance [being] the cause of . . . underrepresentation . . . diminishes.”²³⁹ Under this methodology, courts typically find that a particular observed aspect of an employer’s workforce, such as the number of minorities employed, is not the product of chance if the difference between the number of actual minorities employed and the number that would be anticipated in a random selection is more than two or three standard deviations.²⁴⁰ Two standard deviations means the probability of the event occurring by chance is just five percent, and three standard deviations means the probability of it occurring by chance is less than one percent.²⁴¹ As such, when an actual observed outcome, such as the racial composition of an employer’s workforce, is more than two standard deviations from the expected outcome (which would depend on the racial composition of the relevant pool of workers available to the employer), this generally rules out the possibility of a purely random event, making the observed fact arguably attributable to discrimination.²⁴²

The Equal Employment Advisory Council has offered the following illustration:

[A]ssume an employer has a total workforce of 200 employees, half of whom are age forty or older. The employer lays off fifty employees, forty of whom are age forty or older and only ten of whom are under age forty. All other things being equal, one would have expected half of the employees selected for layoff (twenty-five) to be under age forty, and half to be age forty or older. Under the standard deviation test, discrimination might be inferred because the actual outcome differs from the expected one by more than four standard deviations.²⁴³

For purposes of ADEA disparate impact analysis, the key point is that in

238. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n.14 (1977); *NAACP v. N. Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 472 (3d Cir. 2011).

239. *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1191 (4th Cir. 1981).

240. *Hazelwood*, 433 U.S. at 308 n.14.

241. *Am. Nat'l Bank*, 652 F.2d at 1192 (“Just short of two standard deviations—specifically at 1.96—the probability of chance is only 5 in 100; at just over two and one half, it is only 1 in 100; by three it is less than 1 in 100.”); see also *Stagi*, 391 F. App'x at 137–38.

242. See *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977) (“As a general rule for . . . large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the [event] was random would be suspect to a social scientist.”); *Stagi*, 391 F. App'x at 137–38 (recognizing that “many courts accept a 0.05 probability level (or below) as sufficient to rule out the possibility that the disparity occurred at random”).

243. See Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Defendant-Appellee and in Support of Affirmance at 22, *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017) (No. 15–3435) [hereinafter *EEAC Amicus Brief*] (alteration in original) (quoting Carla J. Rozycki & Patricia A. Bronte, *A Game of Numbers: ADEA Compliance and Litigation*, 18 LAB. LAW. 203, 210 (2002)).

order to demonstrate reliably that an identified employment practice is the cause of an alleged disparity, disparate impact statistics must compare the appropriate groups.²⁴⁴ When a researcher fails to examine the appropriate comparison groups, the standard deviation test is susceptible to manipulation. For this reason, “[a] data analysis based on a subgroup of older workers cherry-picked precisely to produce the most plaintiff-friendly statistical results is not a reliable indicator of potential discrimination.”²⁴⁵ For example, it may be possible to demonstrate an actionable disparate impact on employees aged forty-nine and older, without being able to show a similar impact on employees aged fifty and older, simply because one additional terminated employee, a forty-nine-year-old, is included in the plaintiff’s carefully selected subgroup of terminated employees.²⁴⁶ As this example shows, depending on the precise age cuts selected, “subgroup impact could vacillate [between] adverse [and] favorable at various points along the 40-and-over continuum.”²⁴⁷

Karlo further illustrates this danger of data manipulation. In that case, plaintiffs’ expert, Michael Campion, Ph.D., utilized a standard deviation test and uncovered little evidence of adverse impact on the forty-and-older protected class as a whole,²⁴⁸ but found a substantial adverse impact on employees aged forty-five and older (as compared to employees under age forty-five), employees aged fifty and older (as compared to employees under age fifty), and employees aged fifty-five and older (as compared to employees under age fifty-five).²⁴⁹ Dr. Campion, however, was unable to demonstrate a disparate impact on employees aged sixty and older.²⁵⁰ What’s more, Dr. Campion con-

244. *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1243 (10th Cir. 1991) (“[A]ny statistical analysis must involve the appropriate comparables and must ‘cross a threshold of reliability before it can establish even a prima facie case of disparate impact.’”) (citations omitted) (quoting *Allen v. Seidman*, 881 F.2d 375 (7th Cir. 1989)), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; *see also* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–55 (1989) (discussing relevant statistics in a disparate impact race discrimination case), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

245. *See* EEAC Amicus Brief, *supra* note 243, at 15; *see also* Finkelstein & Levin, *supra* note 170, at 155–56 (discussing similar reliability concerns and stating that “the post hoc selection of a break point to produce the greatest difference between the two groups will invalidate the usual tests of statistical significance”).

246. *Cf.* *Bingham v. Raytheon Tech. Servs. Co.*, No. 1:13-cv-00211-TWP-DKL, 2014 WL 6388756, at *3 (S.D. Ind. Nov. 14, 2014) (discussing an instance where changing the time period of analysis by one month generated one additional termination, thus tipping the scale to a finding of statistical significance).

247. *See* EEAC Amicus Brief, *supra* note 243, at 11.

248. *See* Michael A. Campion, Revised Statistical Analysis of Adverse Impact by Employee Age in *Karlo et al. v. Pittsburgh Glass Works* (Civil Action No. 10-1283) (2013), *reprinted in* Joint Appendix – Volume II, *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. Apr. 6, 2016) (No. 15–3435), 2017 BL 6064, Doc. 003112256067, at A.185–87.

249. *See id.* at A.184–87; *see also Karlo*, 849 F.3d at 81 (“Dr. Campion would testify that employees older than forty-five, fifty, and fifty-five years old were likelier to be fired in the March 2009 RIF than were younger employees.”).

250. According to Dr. Campion’s report, he was unable to identify a disparate impact on employees aged 60 and older due to a small sample size of employees. Campion, *supra* note 248, at A.184.

ducted six different analyses, each examining different groups of employees.²⁵¹ Across these different analyses, Dr. Champion found varying impacts among the subgroups he selected, with the subgroup of employees aged fifty and older suffering the greatest adverse impact in two of his six analyses, and the subgroup of employees aged fifty-five and older suffering the greatest adverse impact in the other four.²⁵² With such data, a savvy plaintiff need only define the legal issue by reference to the particular comparison group most beneficial to his or her case.

In another, more sophisticated statistical analysis conducted by George Woodworth and Joseph Kadane utilizing a proportional hazards model, Woodworth and Kadane determined that, in one case example, “only [one] subgroup of older employees, . . . age 54–55, ha[d] even moderately strong statistical evidence to support a claim of age discrimination,” whereas all other subgroups did not.²⁵³ Using data such as this, a plaintiff’s lawyer might turn away a fifty-nine-year-old potential plaintiff, but might consider asserting a disparate impact claim on behalf of a fifty-four-year-old plaintiff, thereby initiating what would surely become an expensive lawsuit on questionable statistical proof.

Without some limitation on subgrouping analysis, the prospect of some plaintiff’s expert slicing and dicing the class of ADEA protected employees in hopes of uncovering *some* narrow, adversely impacted group is almost untenable for employers to navigate.²⁵⁴ To combat this danger, courts should mandate select comparison groups through designated age cutoffs.²⁵⁵

B. *Subgroups in Five-Year Increments*

As the previous Subpart shows, without some limitation on potential subgrouping arrangements, it may be possible for plaintiffs to manipulate age groupings “to produce a desired statistical result,”²⁵⁶ forcing employers to ex-

251. See *id.* at A.185–87; see also Finkelstein & Levin, *supra* note 170, at 156 (noting, in the context of disparate impact age discrimination analysis, that “[p]ooling the data over different points in time or departments is a tempting strategy but creates the well-known risk of aggregation bias”).

252. See Champion, *supra* note 248, at A.190.

253. George Woodworth & Joseph Kadane, *Age- and Time-Varying Proportional Hazards Models for Employment Discrimination*, 4 ANNALS APPLIED STAT. 1139, 1156 (2010).

254. See EEAC Amicus Brief, *supra* note 243, at 10–11.

255. Of course, this very argument further supports the restrictive view requiring a statistical showing of disparate impact among the entire ADEA group of protected employees, as compared to those employees outside the protected group. However, for the reasons stated in Part V, the restrictive view is not a textually sound interpretation of the ADEA.

256. See Fentonmiller, *supra* note 111, at 1122; see also, e.g., Bingham v. Raytheon Tech. Servs. Co., No. 1:13-cv-00211-TWP-DKL, 2014 WL 6388756, at *4 (S.D. Ind. Nov. 14, 2014) (finding plaintiff’s expert had chosen certain research methods “because [they] yielded the desired result [sought by plaintiff’s counsel]—a showing of adverse impact—not because it was necessarily relevant to [plaintiff’s age discrimination] claim”).

pend time and resources defending borderline discrimination claims (even if the defense is ultimately successful). Requiring certain preset age cutoffs is not only fair to employers, it is also more statistically sound,²⁵⁷ more likely to generate reliable and admissible evidence,²⁵⁸ and more in line with the practices of employers who actually discriminate against older employees.

Regarding the latter point, the prospect that an employer would discriminate, intentionally or not, against employees over the age of 46.2 seems remote, whereas the possibility of an employer discriminating against employees in their fifties seems much more likely.²⁵⁹ In addition, if the object of subgrouping data analysis is to determine whether there is any evidence that *older employees* are more likely to be treated adversely by a given employer,²⁶⁰ such a hypothesis can be tested using “logical increments in age.”²⁶¹ Finally, from a more practical standpoint, requiring designated age cutoffs is desirable because, in the event a group of plaintiffs were to present impact data derived from an oddly delineated subgroup, it is highly unlikely that a court would accept the evidence as reliable.

To illustrate, in one recent case from New Jersey, a terminated employee, Joseph Petruska, attempted to base a disparate impact claim through an age cutoff of 47.7.²⁶² Petruska’s employer underwent a company reorganization,

257. See *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 77 (3d Cir. 2017) (recognizing that “if an expert does not devise the age breaks independently of the data, and instead cherry-picks groups to manufacture a particular result, that ‘may invalidate the usual tests of statistical significance’” (quoting RAMONA L. PAETZOLD & STEVE L. WILLBORN, *THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES* § 7:11, at 341 (2016–2017 ed. 2016))); see also Finkelstein & Levin, *supra* note 170, at 156 (noting that in age discrimination cases “the post hoc selection of a break point to produce the greatest difference between the two groups will invalidate the usual tests of statistical significance”); Harper, *supra* note 13, at 1369 (“As in any line drawing, subgrouping done for the purpose of statistical analysis should be justified independently of the data.”).

258. See *Karlo*, 849 F.3d at 77; see also *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589–90 (1993) (requiring scientific evidence to be reliable to be admissible).

259. Cf. Sperino, *supra* note 170, at 227 n.1 (“[W]hen study participants were asked to rate the cognitive abilities of individuals in certain age groups, those considered to be middle-aged (with a range from thirty-five to fifty-five years old) were rated higher than both older adults and younger adults.” (citing Carole S. Slotterback & David A. Saarnio, *Attitudes Toward Older Adults Reported by Young Adults: Variation Based on Attitudinal Task and Attribute Categories*, 11 *PSYCHOL. & AGING* 563, 565, 567 (Dec. 1996))); see also *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 588 (2004) (examining the ADEA’s legislative history and quoting statement of Rep. Joshua Eilberg “[a]t age 40, a worker may find that age restrictions become common[.] . . . [b]y age 45, his employment opportunities are likely to contract sharply; they shrink more severely at age 55 and virtually vanish by age 65”).

260. As the Supreme Court has recognized, age-based stereotypes appear to get worse with increasing age. For example, the Court stated in *Cline* that “an individual’s chances to find and keep a job get worse over time; as between any two people, the younger is in the stronger position, the older more apt to be tagged with demeaning stereotype.” *Cline*, 540 U.S. at 589. Thus, it “is beyond reasonable doubt, that the ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young.” *Id.* at 590–91.

261. See *Karlo*, 849 F.3d at 82.

262. *Petruska v. Reckitt Benckiser, LLC*, No. 14-03663(CCC), 2015 WL 1421908, at *7 (D.N.J. Mar. 26, 2015).

resulting in the elimination of various jobs, including Petruska's.²⁶³ Petruska presented two statistics to support his claim alleging a disparate impact on the company's older employees. "First, [Petruska] allege[d] that the average age of those released as part of the reorganization of his department was 54.4, while the average age of those retained was 41."²⁶⁴ Second, Petruska presented evidence of a "'Fisher's exact' test" allegedly demonstrating that "the reorganization of his department had an adverse impact upon employees older than 47.7."²⁶⁵ The court explained, "Fisher's exact test is a statistical test used to determine if there are nonrandom associations between two categorical variables. In plaintiff's [evidence], [the two] variables" were (1) "being over or under age 47.7 and" (2) "whether the individual was released or retained."²⁶⁶

Employing the Fisher's exact test, Petruska's evidence showed that for "employees age[d] 47.7 and older, there was a less than 0.1% chance that their layoff was by a random event."²⁶⁷ Petruska's employer "also ran the Fisher's exact test using a breakpoint age of 40" and presented evidence "that the association between being 40 and over or 39 and younger and whether that individual was released or retained was not statistically significant."²⁶⁸ Finding the employer's evidence more persuasive (while essentially rejecting subgroup claims), the court found that Petruska had failed to "adequately plead that [the] [d]efendant's" elimination of jobs "had an adverse impact on the *protected class [of] employees age[d] 40 and over,*" and dismissed the claim.²⁶⁹

Although the *Petruska* opinion represents an outright rejection of subgroup claims,²⁷⁰ the court in that case effectively rejected Petruska's attempt to "gerrymander" evidence to support his claim, citing the following passage from the district court's opinion in *Karlo*²⁷¹:

While technically possible, this Court perceives that it is *highly* unlikely that litigants may engage in the child-like practice of subdividing years. For example, [defendant] points to the possibility of a "creative 'subset,' even one as absurd as ages 45 ½ to 49 ¾." That truly is absurd. One can only imagine a litigant coming to federal court and arguing "Acme Company discriminated against me because I'm *fifty and a half*, and my replacement is only *fifty and a quarter!*" One can also imagine the haste with which a court would dispose of such a case.²⁷²

263. *Id.* at *1.

264. *Id.* at *6.

265. *Id.*

266. *Id.* at *8 n.4.

267. *Id.* at *7.

268. *Id.* at *8 n.7.

269. *Id.* at *7 (emphasis added).

270. *See id.*

271. *See id.*

272. *Karlo v. Pittsburgh Glass Works, LLC*, 880 F. Supp. 2d 629, 640–41 n.8 (W.D. Pa. 2012) (first alteration in original) (citation omitted).

By doing exactly what the *Karlo* court envisioned—namely, disposing of a case bolstered by evidence of a “creative subset”—*Petruska* illustrates that courts will likely be unreceptive to oddly defined subgroups. Thus, it is perhaps no surprise that ADEA disparate impact claims based on subgroups have routinely involved “employees age[d] forty-five . . . and older,”²⁷³ aged fifty and older,²⁷⁴ or aged fifty-five and older.²⁷⁵ As Professor Sandra Sperino has noted, “the typical subgroup claim is not attempting to create strange subgroups” with “random starting and ending points,” such as individuals between the ages of 56.5 and 64.2.²⁷⁶ As such, by mandating preset, designated age cutoffs, courts would simply demand what is already a litigation best practice.²⁷⁷

C. Subgroups with No Upper Limits

In jurisdictions where ADEA subgroup claims are accepted, one point that seems quite certain is that subgroups should have no upper age limit. This insight is based primarily on the Supreme Court’s decision in *General Dynamics Land Systems, Inc. v. Cline*, in which the Court interpreted the ADEA as “protect[ing] a relatively old worker from discrimination that works to the advantage of the relatively young.”²⁷⁸ For this reason, no person can claim discrimination for having been treated worse than someone who is relatively older; rather, the favored comparator must be “substantially younger than the plaintiff.”²⁷⁹ As the Supreme Court has declared, “[t]he enemy of 40 is 30, not 50.”²⁸⁰

Given the *Cline* holding, “[t]he logical conclusion . . . is that no subgroup

273. *Clark v. Matthews Int’l Corp.*, No. 4:07CV2027SNLJ, 2009 WL 3680771, at *11 (E.D. Mo. Oct. 30, 2009), *aff’d in relevant part*, 628 F.3d 462 (8th Cir. 2010), and *vacated and rev’d in other part on reh’g*, 639 F.3d 391 (8th Cir. 2011); *see, e.g., id.* (“[T]he plaintiff’s ‘statistical evidence’ and his pleadings consistently focus on employees over the age of 45, rather than over the age of 40.”).

274. *See, e.g., Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 68 (3d Cir. 2017) (aged fifty and older); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1372 (2d Cir. 1989) (aged fifty and older), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999); *Graffam v. Scott Paper Co.*, 848 F. Supp. 1, 4 (D. Me. 1994) (aged fifty and older); *Finch v. Hercules Inc.*, 865 F. Supp. 1104, 1129 (D. Del. 1994) (aged fifty and older and aged fifty-five and older).

275. *See, e.g., EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950 (8th Cir. 1999) (aged fifty-five and older); *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997) (aged fifty-five and older); *Finch*, 865 F. Supp. at 1129 (aged fifty and older and aged fifty-five and older).

276. Sperino, *supra* note 170, at 248.

277. *See supra* notes 68–70 and accompanying text.

278. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 590–91 (2004).

279. *See O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (holding that “the replacement of one worker with another worker insignificantly younger” will not state a prima facie case, even if the replacement worker is under forty); *see also Karlo v. Pittsburgh Glass Works, LLC*, 880 F. Supp. 2d 629, 639 (W.D. Pa. 2012).

280. *Cline*, 540 U.S. at 591.

may be defined with an upper boundary—only a lower one.”²⁸¹ If, for example, a plaintiff based his claim on a subgroup of fifty-five-to-fifty-eight-year-olds, and the defendant employed persons over fifty-eight years of age, it must be assumed that employees aged fifty-nine and above were treated relatively better than those in the fifty-five-to-fifty-eight-year-old subgroup. Otherwise, it makes little sense for the plaintiff to omit such older employees from his subgroup claim, particularly given that larger sample sizes would typically make the plaintiff’s statistics more reliable.²⁸² Yet, treating relatively older employees better than relatively younger employees cannot be considered discriminatory as a matter of law. For this reason, subgroups should ordinarily contain no upper age limit.²⁸³

D. *Implementing Age Cutoffs Through Daubert*

Although the arguments favoring subgroup claims are more persuasive than those for precluding such claims,²⁸⁴ there is simply no textual basis for concluding that *only select subgroups* of employees should be recognized under the ADEA, such as those aged fifty and above or fifty-five and above, as compared to those aged fifty-two and above or fifty-seven and above.²⁸⁵ Accordingly, either Congress should amend the ADEA to clarify the law with respect to disparate-impact subgroup claims, or courts should designate particular age cutoffs as acceptable points of comparison for purposes of subgroup discrimination analysis.

In the author’s view, trial courts should require designated age cutoffs in five-year increments as part of their gatekeeping function under *Daubert*.²⁸⁶ This is a function district courts are well-equipped to perform,²⁸⁷ and in this

281. See *Karlo*, 880 F. Supp. 2d at 639; see also Sperino, *supra* note 170, at 248 (“*Cline*’s holding that policies that favor older workers within the protected subgroup are not discriminatory lessens the universe of possible subgroup claims.”).

282. See *supra* note 50.

283. See *Karlo*, 880 F. Supp. 2d at 639.

284. See *supra* Part V.

285. See Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Appellee at 5, *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017) (No. 15-3435) (arguing that the text of the ADEA does not contemplate a rule segmenting the ADEA protected class into subgroups divided by five years); see also *Karlo*, 880 F. Supp. 2d at 640 (“[W]hile an ‘infinite’ number of subgroups is *technically* feasible, as time can be divided into an infinite number of increments, as a practical matter courts will only have to deal with discrete, and rather limited, proposed subgroups. Full years, *i.e.* 52, 56, or 70, are the only likely discrete values that might be used to construct subgroups.”).

286. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (holding that *Daubert*’s “basic gatekeeping obligation” requiring “a trial judge to ‘ensure that any and all scientific testimony . . . is not only relevant, but reliable[.]’ . . . applies to all expert testimony,” not just that which is “scientific” in nature).

287. See *Karlo*, 849 F.3d at 76 (rejecting defendant’s argument to preclude all subgroups in ADEA disparate impact cases and stating that the requisite “evidentiary gatekeeping[.] . . . is capably performed by district judges who routinely apply the Federal Rules of Evidence and *Daubert* jurisprudence,” which is “a sufficient safeguard against the menace of unscientific methods and manipulative statistics”); *Lowe v.*

manner courts could effectively weed out cases unsupported by relevant statistical evidence.²⁸⁸

Although there can be no real dispute regarding the ability of trial courts to exclude suspect evidence under *Daubert*,²⁸⁹ a recent case from Indiana, *Bingham v. Raytheon Technical Services Co.*,²⁹⁰ illustrates the ability of trial courts to exclude irrelevant statistical evidence in age discrimination cases. In that case, plaintiff Charles Bingham alleged that his employer, Raytheon, terminated his employment because of his age.²⁹¹ Bingham began working for Raytheon in 1981 at its Indianapolis facility, where he worked in logistics until a “spy plane” program ended in 2010, at which point he was transferred to another program, where his logistics services proved less fruitful for the company.²⁹²

In January 2011, Raytheon “reorganized [its] logistics division.”²⁹³ At that time, “[Bingham] and two other employees . . . Frank Nicola . . . and David Blessing . . . provided” similar logistics services in the company’s LMI section in Indianapolis.²⁹⁴ To reduce costs, Raytheon decided to eliminate one LMI employee.²⁹⁵ To that end, the company initiated its standard reduction-in-force policy, under which it created a “decisional unit” consisting of “all similarly situated employees based on job function, skills, responsibilities, compensation, and job classification.”²⁹⁶ Bingham’s decisional unit included just three employees—Bingham, Nicola, and Blessing—among whom Bingham ranked the lowest, resulting in his termination on February 24, 2012,²⁹⁷ at the age of sixty-three.²⁹⁸

Commack Union Free Sch. Dist., 886 F.2d 1364, 1374 (2d Cir. 1989) (“[T]he trial court is in the best position to analyze the statistics offered in a case such as this one.”), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999).

288. See, e.g., *Fulghum v. Embarq Corp.*, 938 F. Supp. 2d 1090, 1130 (D. Kan. 2013) (rejecting disparate impact claim because plaintiffs failed to provide “relevant statistical evidence,” given that “[p]laintiffs attempt[ed] to demonstrate a disparate impact by comparing the impact on persons within the protected group (i.e., age 40 and above) to the impact on hypothetical persons,” consisting of “younger versions of themselves,” “who are also within the protected group”), *aff’d in part and rev’d in part*, 778 F.3d 1147 (10th Cir. 2015), *opinion amended and superseded on denial of reh’g en banc*, 785 F.3d 395 (10th Cir. 2015).

289. *Duffee ex rel. Thornton v. Murray Ohio Mfg. Co.*, 91 F.3d 1410, 1411 (10th Cir. 1996) (“*Daubert* requires district judges to act as gatekeepers to ensure that scientific evidence is both relevant and reliable. . . . Like the Supreme Court, we are confident that federal judges possess the capacity to undertake this review.” (quoting *Daubert*, 509 U.S. at 593)).

290. *Bingham v. Raytheon Tech. Servs. Co.*, No. 1:13-CV-00211-TWP, 2014 WL 6388756 (S.D. Ind. Nov. 14, 2014).

291. *Id.* at *1.

292. Entry on Motion for Summary Judgment at 1, *Bingham v. Raytheon Tech. Servs. Co.*, No. 1:13-CV-00211-TWP-DKL, at 1 (S.D. Ind. Oct. 31, 2014).

293. *Id.* at 2.

294. *Id.*

295. *Id.*

296. *Id.* at 3; see also *id.* at 2–3 (describing Raytheon’s standard reduction-in-force policy and procedure).

297. *Id.* at 3.

298. *Id.* at 1.

Bingham then sued Raytheon for age discrimination and designated Lance Seberhagen, Ph.D., as a statistics expert to support his claim.²⁹⁹ After completing his analysis, Dr. Seberhagen opined that Bingham's layoff was due to his age, rather than a legitimate reduction in force.³⁰⁰ As the court explained, Dr. Seberhagen

base[d] this conclusion on a comparison between the number of logistics specialists hired and the number laid off between January 2011 and January 2013. In addition, he performed a statistical analysis from which he [determined] that Raytheon's layoffs from February 1, 2012 to January 31, 2013 had an adverse impact on employees age fifty-five and over.³⁰¹

Raytheon then moved to exclude the proposed testimony, arguing that Dr. Seberhagen's report and testimony failed to meet the admissibility standards of Federal Rule of Evidence 702 and *Daubert*.³⁰²

Granting Raytheon's motion, the district court found "that Dr. Seberhagen failed to . . . account [for] important facts that would have impacted . . . his analysis," including erroneously assuming "that all logistics specialists [across numerous pay grades], regardless of . . . location, were similarly situated and could perform the work of any other logistics specialist."³⁰³ The court further noted that Dr. Seberhagen acknowledged under oath "that the method he used to analyze the data—adverse impact ratios—is inappropriate for analysis of small sample sizes such as the one analyzed for his report."³⁰⁴ He also "acknowledge[d] that the Fisher's Exact Test is recognized as the best test for analyzing small sample sizes," but admitted that he did not use this test.³⁰⁵

Although the court observed numerous additional flaws in Dr. Seberhagen's analysis, one particular example of data manipulation by the plaintiff's expert is particularly noteworthy.³⁰⁶ Specifically, the court noted that Dr. Seberhagen found "no adverse impact for the layoff of employees age fifty-five and over in calendar years 2011 or 2012."³⁰⁷ Nevertheless, he was able to identify an adverse impact by utilizing a different "time period specified by Mr. Bingham's counsel," namely, "the twelve month period beginning February 1, 2012 through January 31, 2013."³⁰⁸ "Dr. Seberhagen conceded that the one month shift from a starting date of January 1, 2012 to February 1,

299. *Bingham v. Raytheon Tech. Servs. Co.*, No. 1:13-cv-00211-TWP-DKL, 2014 WL 6388756, at *1 (S.D. Ind. Nov. 14, 2014).

300. *Id.* at *1.

301. *Id.*

302. *Id.*; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

303. *Bingham*, 2014 WL 6388756, at *2.

304. *Id.* at *3.

305. *Id.*

306. *See id.* at *2-3.

307. *Id.* at *3.

308. *Id.*

2012, . . . added one additional laid-off employee, result[ing] in ‘a significant statistical difference’ in his assessment versus [an analysis of] 2012 as a calendar year.”³⁰⁹ For this reason, the court found that Dr. Seberhagen, at counsel’s urging, had deliberately selected a time period that would result in a showing of adverse impact.³¹⁰ This time period, however, was not relevant to Bingham’s claim, and the court therefore rejected the report under *Daubert* as unreliable.³¹¹

Although *Bingham* may be viewed as a disparate treatment case,³¹² courts are equally equipped to exclude unreliable statistical evidence in disparate impact claims brought by subgroups of older workers.³¹³ In *Finch v. Hercules Inc.*, for example, the U.S. District Court for the District of Delaware ruled that disparate impact claims of subgroups are cognizable under the ADEA but cautioned that “[i]f a plaintiff attempts to define the subset too narrowly, he or she will not be able to obtain reliable statistics upon which to prove a prima facie case.”³¹⁴ To be clear, this Article does not suggest that any particular statistical method should be used in ADEA disparate impact cases, as the *Karlo* court recognized in its opinion.³¹⁵ Rather, the point is simply that courts are accustomed to excluding unreliable evidence of disparate impact under *Daubert*, and unless Congress elects to mandate particular age cutoffs for purposes of proving a prima facie case of disparate impact discrimination under the ADEA, courts should fill that gap through their usual methods of excluding unreliable evidence.

VII. CONCLUSION

This Article has examined a circuit split on the question of whether a subgroup of employees in the ADEA’s forty-and-older protected class, such as employees over the age of fifty, may claim disparate impact discrimination when the protected class as a whole has suffered no adverse impact. Having examined the competing views on this issue, this Article contends that the ADEA does indeed contemplate such subgroup claims and that trial courts are best equipped to implement this view of the statute through a careful review of plaintiffs’ statistical evidence under *Daubert*. Nevertheless, recognizing the difficulties employers face in defending such claims, this Article proposes reasonable limitations upon the types of statistical evidence plaintiffs may uti-

309. *Id.*

310. *Id.* at *3, *4 n.1.

311. *Id.* at *5.

312. *See id.* at *3 (explaining that although Bingham seemingly attempted to cast his claim as a disparate impact claim, it was more properly characterized as a disparate treatment claim).

313. Brief of Appellants and Joint Appendix – Volume I, *supra* note 224, at 16.

314. *Finch v. Hercules Inc.*, 865 F. Supp. 1104, 1129–30 (D. Del. 1994).

315. *See Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 76–77 (3d Cir. 2017).

lize in such cases, including designated age cutoffs in five-year increments and no upper age limits on subgroups. Through these proposals, a reasonable balance may be struck between employee rights, as articulated by the ADEA, and employer interests.