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THERE IS LIFE IN THAT OLD (I MEAN, MORE "SENIOR") DOG YET: THE AGE-PROXY THEORY AFTER HAZEN PAPER CO. V. BIGGINS

Robert J. Gregory*

I. INTRODUCTION

In Hazen Paper Co. v. Biggins, the Supreme Court held that an employer’s termination of an employee solely to avoid the vesting of the employee’s pension did not constitute discriminatory treatment in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"). The Court stressed that “[b]ecause age and years of service are analytically distinct, it is . . . incorrect to say that a decision based on years of service is necessarily ‘age-based.’” While noting that several lower courts had embraced the theory that “an employer violates the ADEA by acting on the basis of a factor, such as an employee’s pension status or seniority, that is empirically correlated with age,” the Supreme Court ruled “that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee’s age.”

Hazen Paper purports to resolve a conflict in the lower courts concerning the appropriate use of age “proxies” in establishing disparate treatment discrimination. The Court made clear that an employer

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1. 113 S. Ct. 1701 (1993).
4. Id. at 1705.
5. Id.
6. See Hazen Paper, 113 S. Ct. at 1705 (citing lower court decisions). In its opinion, the Court gave the impression that lower courts had taken polar opposite views of the age-proxy theory — either treating the proxy as the equivalent of age or rejecting any connection between age and the proxy. Id. In fact, there was largely agreement in the lower courts that an inference of discrimination could be drawn, at least in some circumstances, from evidence.
does not violate the ADEA merely by relying upon a criterion that correlates with age. Thus, the Court rejected the view that factors like seniority and pension status are the statutory "equivalents" of age. While there might be some correlation between years of service and age, "a decision by the company to fire an older employee solely because he has nine-plus years of service and therefore is 'close to vesting' would not constitute discriminatory treatment on the basis of age."

It is hard to quarrel with the Supreme Court's assertion that there is no discriminatory treatment under the ADEA when the employer's decision is based solely on factors other than age. However, that assertion begs the question of whether the employment decision was, in fact, wholly motivated by such factors. Prior to Hazen Paper, a few courts had suggested that factors like seniority and high salary were so invariably correlated with age that an employer's reliance on the proxy was reliance on age. The Supreme Court rejected this variant of the proxy theory. However, other courts had taken the more modest view that an employer's reliance on age-related factors was sufficient to raise an inference that age played a substantial role in the decision. Under that view, the proxy could support a finding of age discrimination, but the employer could still defeat the claim by showing that it was in fact the proxy, not age, that motivated its decision.

Significantly, the Court in Hazen Paper did not foreclose the use of the proxy theory in all cases. The Court stated that factors like pension status "may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent . . . but in the sense that the employer may suppose a correlation between the two factors and act accordingly." The Court distinguished the employer's reliance on pension vesting in Hazen Paper, which reflected "an accurate judgment about the employee — that he indeed is 'close to vesting'" — from cases where the decision results from "an inaccurate and
denigrating generalization about age.” The Court suggested that the proxy theory was strongest where the proxy could be reasonably linked to “inaccurate and stigmatizing [age-based] stereotypes.”

In this article, I explore the extent to which the “age-proxy” theory survives the Supreme Court’s decision in *Hazen Paper*. I conclude that the proxy theory, in its more modest form, is alive and well. While *Hazen Paper* rejects the simplistic use of proxy “to mean statutory equivalence,” it leaves open the possibility that age-based proxies can provide the ground for establishing disparate treatment discrimination. This is particularly true where the age-related criterion is subjective in nature and, thus, can readily mask an age bias.

Indeed, understood in this light, the proxy theory is nothing more than an evidentiary tool for proving intentional discrimination. The Supreme Court has recognized that gender discrimination can be inferred from an employer’s reliance on factors that can be reasonably linked to sex-based stereotypes. The Court, in fact, has held that such evidence can be sufficiently strong to shift the burden of proof to the employer on the issue of causation. By the same token, evi-

12. *Id.*
13. *Id.* at 1706.
14. “Age-proxy theory” refers to a method of proof that permits a finding of age discrimination to be based on an employer’s reliance on an age-related factor. As so defined, the proxy theory is a device for proving a disparate treatment claim. There may be cases where an employer’s reliance on an age-related factor has an adverse effect on older workers. These cases, however, are properly analyzed under a disparate impact analysis, not a proxy theory. The thrust of the proxy theory is that the age-related factor is a stand-in for age itself. Such a theory falls under the disparate treatment wing of the statute. *See infra* notes 71-87 and accompanying text (discussing the distinction between the proxy theory and disparate impact analysis).

Cases involving age proxies should also be distinguished from cases in which an employer relies on a factor that is defined, in part, in age-based terms. An employer, for example, violates the ADEA by discriminating on the basis of retirement status where such status is defined in terms of years of service and age. *See*, e.g., EEOC *v.* Local 350, Plumbers & Pipefitters, 998 F.2d 641, 646 (9th Cir. 1993); EEOC *v.* Borden’s, Inc., 724 F.2d 1390, 1392 (9th Cir. 1984). In that case, age is a “but for” cause of the discrimination. The Supreme Court’s decision in *Hazen Paper* should have no bearing on this line of cases. *See Hazen Paper*, 113 S. Ct. at 1707 (suggesting that the ADEA would be violated “where an employee is about to vest in pension benefits as a result of his age, rather than years of service” and “the employer fires the employee in order to prevent vesting”).
17. *Id.* at 244-46. In *Price Waterhouse*, the Supreme Court held that where the plaintiff shows that an impermissible factor played a substantial role in an employment decision, the burden shifts to the employer to prove that the “same decision” would have been made in the absence of the impermissible factor. *Id.* If the employer can meet that burden, it would
idence that an employer has relied on factors that correlate with age can provide the basis for a finding of discriminatory treatment absent some clear indication that the proxy itself, rather than age, was the decisive factor. Properly understood, the age-proxy theory is fully consistent with the prevailing evidentiary standards for claims of intentional discrimination.

II. BACKGROUND

A. The Age Proxy and Disparate Treatment Theory

The ADEA was enacted in response to concerns about the pervasive effects of arbitrary age discrimination. Faced with evidence that “the setting of arbitrary age limits regardless . . . of potential for job performance [had] become a common practice,” Congress made it unlawful for an employer “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.” The ADEA was designed to “promote employment of older persons based on their ability rather than age” and to prohibit employers from acting on unfounded stereotypes concerning the abilities of older workers.

The primary theory for establishing an ADEA violation is the disparate treatment theory. Under that theory, a finding of liability depends on a finding that age “actually motivated the employer's decision.” A claim of intentional age discrimination requires proof that age “actually played a role in [the decisionmaking] process and

not be liable for discrimination. Id. at 253-54. In the Civil Rights Act of 1991, Congress amended Title VII to provide that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m) (Supp. 1993). Under the 1991 Act, the employer can still attempt to show that it would have taken the same action on the basis of a permissible factor, but only as a defense to the award of make whole relief, not liability. See 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. 1993).

20. 29 U.S.C. § 623(a)(1) (1988). The Act also 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.” 29 U.S.C. § 623(a)(2) (1988).
had a determinative influence on the outcome."

Courts have long recognized that intentional age discrimination can be inferred from evidence that an employer has acted on the basis of a factor that correlates in some fashion with age. Courts, for example, have inferred age discrimination from an employer's reliance on years of service in making an employment decision. Evidence that an employer acted because of concerns about the "longevity" of the workforce or the high salaries paid to "senior" employees has also been viewed as sufficient to support an inference that age, in fact, motivated the decision. Courts have also recognized that the rejection of an older applicant on the ground of "overqualifications" can support a finding of age discrimination since reliance on such a factor can readily "mask" a preference for younger applicants.

A case that typifies this view of the age-proxy theory is *Laugesen v. Anaconda Co.* *Laugesen* involved an employee whose separation notice stated that he had been dismissed because of "too many years on the job." The Sixth Circuit Court of Appeals acknowledged that "length of service" was sufficiently correlated with age to support a finding that age was the basis for the discharge. The court also noted, however, that the statement did not necessarily imply an age bias. The court stated, for example, that "if the language, read in context with other comments, meant that the plaintiff had become complacent, this could reflect considerations of merit and ability, rather than age." The court held that the evidence was sufficient to raise "a dispute of fact" but not to compel a finding of discrimination.

23. *Id.*


25. See, e.g., *Buckley v. Hospital Corp. of Am.*, 758 F.2d 1525, 1530 (11th Cir. 1985); *Dace v. ACF Indus.*, 722 F.2d 374, 378 (8th Cir. 1983), *aff'd on reh'g*, 728 F.2d 976 (1984); *Haydon v. Rand Corp.*, 605 F.2d 453, 455 (9th Cir. 1979).

26. *Taggart v. Time Inc.*, 924 F.2d 43, 44-48 (2d Cir. 1991) (stressing that "[f]or those individuals in the protected age group, [overqualified] may often be simply a code word for too old"); see also *EEOC v. General Elec. Co.*, 773 F. Supp. 1470, 1473 (D. Kan. 1991) (employer's statement that younger candidate had "more potential to advance in the company" was sufficient to raise inference of age discrimination since "[p]otential is often coextensive with age").

27. 510 F.2d 307 (6th Cir. 1975).

28. *Id.* at 311.

29. *Id.* at 313.

30. *Id.*

31. *Id.*
Laugesen illustrates two critical aspects of the age-proxy theory. First, the court analyzed the age proxy at issue under a disparate treatment theory. There can be cases in which an employer relies on a factor that has a disparate impact on older workers. The point of the proxy theory, however, is that the reliance on the proxy is actually a "disguised reliance on age." Disparate treatment occurs, not because the employer has relied upon a factor that has the effect of eliminating older employees, but because the factor relied upon is actually a mask for age discrimination.

In addition, Laugesen makes clear that an employer's reliance on an age proxy does not invariably constitute reliance on age. Without question, "[i]n most employment situations, there is a natural correlation between seniority and age of employees." By the same token, seniority and age are analytically distinct. An employer's reliance on years of service in making an employment decision may well reflect a disguised reliance on age. But if, in fact, it is years of service rather than age that motivates the employer's decision, there is no disparate treatment discrimination.

Take, for example, an employer that has fired a senior employee as part of a reduction-in-force. The employee claims that the termination was based upon age. The employer responds that it acted pursuant to a policy of firing all individuals with more than ten years of experience. If the employer had such an established policy and the evidence showed that the policy was adopted and applied on an age-neutral basis, there would be no ground for a disparate treatment claim. The employment action would be subject to challenge, if at all, under a disparate impact theory.

32. Id. at 315.
33. Id.
34. HOWARD C. EGLIT, 2 AGE DISCRIMINATION § 16.03A at 2S-97 to 2S-98 (Supp. 1992). The Eglit treatise formulates the doctrine as follows:

Sometimes an employer, rather than using age as the basis of its decisions, will rely on such factors as cost or seniority. As it turns out, however, these factors are so closely correlated with age that most courts have pierced the rhetoric and rejected employers' efforts. In other words, because typically (although not inevitably) seniority — i.e., years on the job — will correlate with age, use of seniority by an employer as a basis for decisionmaking, such as selecting the most senior employees for discharge, will be seen as a disguised reliance on age.

Id.
35. 510 F.2d at 315.
38. Id. at 1705.
In most cases, however, the age-related criterion will not be so clearly and objectively stated. The evidence might show, for example, that the employer acted because of vague concerns about the longevity or high cost of the workforce. The thrust of the proxy theory is that the employer must be put to its proofs. If the employer has an established seniority-based policy, then it should say so openly. So long as the policy does not have a disparate impact, there is no violation of the ADEA. But in the absence of some objective explanation of the policy, there is too great a risk that the age-related criterion is a front for age to permit the employer to rely upon the proxy without further scrutiny. At the very least, evidence of an employer's reliance on such a criterion would be sufficient to raise a factual inference of age discrimination.

The use of such a proxy theory, as an evidentiary tool, is hardly controversial. Courts have recognized "that subjective [employment] practices are particularly susceptible to discriminatory abuse and should be closely scrutinized." Where the subjective criterion is linked to an age-related factor, the danger that the subjective criterion is masking reliance on an impermissible criterion is even greater. As one court stated, an employer's reliance on a subjective age-related criterion "would allow the employer to shift the standard at its pleasure, raising the standard for some applicants and lowering it for others. A reviewing court could not determine whether the policy was uniformly applied to all applicants because it lacked any objective and measurable content."

Courts have also recognized that employers may utilize stereotypes in a way that violates the anti-discrimination statutes. Thus, a court has held that a decisionmaker's assessment of female candidates as overly "nervous" and "emotional" could support an inference that

1988) (although "[t]here may well be cases in which seniority is simply a code word for age discrimination," evidence demonstrated that employer's seniority-based policy was applied in an age-neutral fashion and did not have a disparate impact on older workers), cert. denied, 493 U.S. 846 (1989).

40. Hazen Paper, 113 S. Ct. at 1705.
41. Jauregui v. City of Glendale, 852 F.2d 1128, 1136 (9th Cir. 1988) (quoting Antonio v. Wards Cove Packing Co., 810 F.2d 1477, 1481 (9th Cir. 1987) (en banc)).
42. Stein v. National City Bank, 942 F.2d 1062, 1066 (6th Cir. 1991). Stein involved an employer's policy of refusing to hire individuals with a college degree. The court ruled that the policy did not have an adverse impact on older workers and could not be viewed as a mask for intentional age discrimination since it was applied to all applicants on an evenhanded basis. The court cautioned, however, that the result could be different where the employer relied on an age-related criterion that lacked "objective content." Id.
43. Lindahl v. Air France, 930 F.2d 1434, 1439 (9th Cir. 1991).
the employer’s explanation was a pretext for gender discrimination.\textsuperscript{44} Courts have also recognized that comments reflective of racial stereotypes can support a finding of discrimination.\textsuperscript{45} In the age context, comments that focus on the “adaptability,” “versatility,” or “energy-level” of longer-tenured employees have been viewed as sufficiently tied to stereotypical assumptions about older workers to raise an inference of discrimination.\textsuperscript{46}

In \textit{Price Waterhouse v. Hopkins},\textsuperscript{47} the Supreme Court lent credence to these views. The claimant in \textit{Price Waterhouse} was rejected for a partnership position because of criticisms of her “interpersonal skills.”\textsuperscript{48} Much of the evidence focused on criticisms that could readily reflect “stereotypical notions about women’s proper deportment.”\textsuperscript{49} While some of the criticisms were obviously linked to gender (e.g., claimant advised to “wear make-up” and “have her hair styled”), many of the criticisms were, on their face, “gender-neutral” (e.g., claimant described as “overly aggressive”).\textsuperscript{50} The Supreme Court ruled that the criticisms were too closely linked to impermissible stereotypes to foreclose the possibility that gender played a determinative role in the claimant’s rejection.\textsuperscript{51} The Court held that the burden of proof shifted to the employer to untangle the legitimate

\begin{itemize}
\item \textsuperscript{44} Id.
\item \textsuperscript{45} See, e.g., Richardson v. Restaurant Mktg. Ass’n, 527 F. Supp. 690, 692 (N.D. Cal. 1981) (finding of racial discrimination supported by evidence that manager was “outraged” at black plaintiff’s “flirtatious” attitude toward white co-workers).
\item \textsuperscript{46} See EEOC v. Clay Printing Co., 955 F.2d 936, 947 (4th Cir. 1992) (Restani, J., dissenting) (stating that decisionmaker’s reference to longer-tenured employees as “dead wood” supported inference of age discrimination); Bienkowski v. American Airlines, 851 F.2d 1503, 1507 & n.4 (5th Cir. 1988) (inferring age discrimination from supervisor’s comment that claimant was unable to “adapt” to new systems); McConnell v. Thomson Newspapers, Inc., 802 F. Supp. 1484, 1503-04 (E.D. Tex. 1992) (inferring age discrimination from management’s concerns about claimant’s “versatility” since “‘versatile’ may be virtually a synonym for ‘young’”); EEOC v. General Elec. Co., 773 F. Supp. 1470, 1473 (D. Kan. 1991) (evidence that employer based decision on belief that younger claimant had a greater “potential to advance in the company” was sufficient to support a finding of age discrimination since “[p]otential is often coextensive with age”); Mastrangelo v. Kidder, Peabody & Co., 722 F. Supp. 1126, 1134 (S.D.N.Y. 1989) (inference of age discrimination supported by decisionmaker’s comments that the company needed an individual who was “state of the art,” who “could embrace new technology,” and who had the “pace and urgency” required for the job); Reed v. Signode Corp., 652 F. Supp. 129, 135 (D. Conn. 1986) (comments about the “high energy level” and “aggressive management style” of younger candidate were sufficient to support an inference of age discrimination).
\item \textsuperscript{47} 490 U.S. 228 (1989).
\item \textsuperscript{48} Id. at 234-35 (plurality opinion).
\item \textsuperscript{49} Id. at 256.
\item \textsuperscript{50} Id. at 235.
\item \textsuperscript{51} Id. at 237.
criticisms from the illegitimate and prove that the same decision would have been made in the absence of the impermissible factor.\textsuperscript{52}

As \textit{Price Waterhouse} makes clear, a finding of discrimination can be based on evidence that correlates in some fashion with an impermissible criterion.\textsuperscript{53} At least when stated in subjective terms,\textsuperscript{54} an employer's reliance on a "correlated" factor can provide the basis for a finding of discrimination.\textsuperscript{55} This, in effect, is what is permitted under the age-proxy theory. If the evidence might not be sufficient to shift the burden of proof to the employer, as in \textit{Price Waterhouse}, the principles recognized in \textit{Price Waterhouse} would seem to provide strong support for a proxy-based theory. At the very least, evidence that an employer has relied upon an age-related factor would be sufficient to raise an inference of discrimination, absent some objective explication by the employer.\textsuperscript{56}

\begin{enumerate}
\item[52.] \textit{Id.} at 244-46. The Court also held that the employer's "same decision" evidence provided a defense to liability, not merely a limitation on relief. \textit{Id.} at 244-45 & n.10. This aspect of the Court's holding was "overruled" by the enactment of the 1991 Civil Rights Act, which provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." \textit{See} 42 U.S.C. \S 2000e-2(m) (Supp. 1993). An employer can still attempt to show that it would have taken the "same action" on the basis of a legitimate factor but only as a defense to the award of make whole relief, not liability. \textit{See} 42 U.S.C. \S 2000e-5(g)(2)(B) (Supp. 1993).

\item[53.] As noted above, some of the evidence in \textit{Price Waterhouse} was clearly linked to gender. The Court made clear, however, that liability could also be based on statements that could be fairly tied to gender-based stereotypes, even if those statements were not facially discriminatory. \textit{See} Price Waterhouse v. Hopkins, 490 U.S. 228, 235-36, 255-56 (1989) (plurality opinion).

\item[54.] In \textit{Price Waterhouse}, the plaintiff's expert witness had testified that the "subjectivity of the evaluations" made it more likely that the criticisms of the plaintiff's "interpersonal" skills were the product of sex stereotyping. \textit{Id.} at 236. The Court credited this testimony although the expert "admitted that she could not say with certainty whether any particular comment was the result of stereotyping." \textit{Id.}

\item[55.] This is not to say that reliance on a "correlated" factor is per se reliance on the impermissible factor. The point here is not that the employer's reliance on the related factor is itself discriminatory, but that the employer's purported reliance on such a factor puts the employer at risk of liability if it cannot persuade the factfinder that it acted in a non-discriminatory fashion. The version of the proxy theory that would make the correlated factor the legal equivalent of age is discussed, \textit{infra} notes 57-88 and accompanying text.

\item[56.] The legal significance to be accorded proxy-based evidence is discussed more fully, \textit{infra} notes 132-69 and accompanying text.
\end{enumerate}
B. The Age Proxy and Statutory Equivalence: The Blurring of Disparate Treatment and Disparate Impact

While the age-proxy theory, as described above, seems to be consistent with established evidentiary standards for disparate treatment claims, the proxy theory has not always been expressed in such modest terms. Specifically, there have been suggestions in some cases that an employer's reliance on an age proxy is, ipso facto, reliance upon age. Under that view, the proxy is in effect the statutory equivalent of age. A finding of age discrimination would not merely be permitted by a finding that the employer acted on the basis of the proxy, but compelled.

The lead case on this view of the proxy theory is *Metz v. Transit Mix, Inc.*

57. *Metz v. Transit Mix, Inc.* involved a claim by a fifty-four-year-old worker who had been terminated from his position as plant manager in the midst of an economic downturn.58 The district court found that “the determining factor in [the employer’s] decision to replace Metz . . . was a desire to save the higher cost of Metz's salary and that this factor ‘bore a relationship to Mr. Metz’s age.”'59 The district court ruled, however, that the employer's reliance on cost considerations to terminate Metz did not violate the ADEA.60

A divided panel of the Seventh Circuit Court of Appeals held that the employer’s reliance on cost considerations to discharge Metz constituted intentional age discrimination.61 The court framed the issue as “whether the salary savings that can be realized by replacing a single employee in the ADEA age-protected range with a younger, lower-salaried employee constitutes a permissible, nondiscriminatory justification for the replacement.”62 Noting that the ADEA prohibited business practices that had the effect of eliminating “older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts,”63 the court emphasized that the “same ADEA policy concern that forms the basis for rejecting cost-based employer practices that have an adverse impact upon older

57. 828 F.2d 1202 (7th Cir. 1987).
58. *Id.* at 1203.
59. *Id.* at 1204.
60. *Id.* at 1205.
61. *Id.*
62. *Id.*
63. *Id.* at 1206 (quoting Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691 (8th Cir. 1983)).
workers as a group is present in the case of Metz's discharge. The court ruled that "given the correlation between Metz's higher salary and his years of satisfactory service, allowing [the employer] to replace Metz based on the higher cost of employing him would defeat the intent of the statute." The precise scope of the Metz holding is open to question. On the one hand, the court emphasized that the "use of pay as a 'proxy' for age . . . may be employed only on a case-by-case basis where the facts support its use." The facts cited by the court were that the claimant's high salary was a function "of his twenty-seven years of service" to the company; the company fired the claimant without giving him the option of taking a pay cut; and the company replaced him with a "younger, less-costly" employee. The court disavowed any notion that it was establishing a per se rule that discrimination based on high salary constituted age discrimination.

Yet, despite the court's protestations, the holding in Metz did appear to have broader implications. Under Metz, an employer's decision to fire an older worker because of high salary would be unlawful so long as the high salary was a function of years of service and the worker was replaced by a younger employee. Thus, any time a claimant could make out a prima facie case of discrimination and

64. Id. at 1207.
65. Id.
66. Id. at 1208.
67. Id.
68. Id. at 1207.
69. Courts are divided over the precise elements of the prima facie case for an age discharge claim. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the Supreme Court held that a plaintiff alleging discrimination in hiring could establish a prima facie case by showing that he was a member of the protected class; that he applied for a position for which the defendant sought applicants; that he met the minimum qualifications for the position; and that the employer rejected him and continued to seek persons of comparable qualifications to fill the position. Courts have generally adapted this standard to the discharge context by requiring that the individual prove that he was performing his job in a satisfactory fashion and that the employer replaced him with another worker following his termination. See, e.g., Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979). Courts have split, however, over what evidence is required to satisfy the replacement element. Some courts have held that the replacement element is satisfied by evidence that the employer retained someone to perform the same work following the discharge regardless of the age of the replacement. See Freeman v. Package Mach. Co., 865 F.2d 1331, 1335 n.2 (1st Cir. 1988); Crimm v. Missouri Pac. R.R., 750 F.2d 703, 711 (8th Cir. 1984). Other courts have held that the replacement must be sufficiently younger than the plaintiff to raise an inference of age discrimination. See Barnes v. Gencorp, Inc., 896 F.2d 1457, 1465-67 & n.9 (6th Cir. 1989); Maxfield v. Sinclair Int'l, 766 F.2d 788, 792-93 & n.1 (3d Cir. 1985), cert. denied, 474 U.S. 1037 (1986); Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981). A few
the evidence showed that the employer acted because of seniority-based salary considerations, the employer would be liable under the ADEA. The employer, in fact, would be precluded from articulating the cost factor as the legitimate, nondiscriminatory explanation for its decision. As Judge Easterbrook observed in his dissenting opinion, "[t]he premise of the court's opinion is that wage"—at least when tied to seniority—"is the equivalent of age." Whether intended or not, the court's decision had the effect of making discrimination on the basis of a longer-tenured employee's high salary the equivalent of discrimination on the basis of age.

The problem with this approach is obvious. It is undoubtedly true that an employer who fires an employee because of his age cannot defend its decision on the ground that it costs more to employ an older worker. This begs the question, however, of whether it was cost or age that motivated the employment decision. Where an employer purports to act on the basis of cost or high salary, it may well be that the employer is using the proxy as a mask for age discrimination. This is the point of the proxy theory, as discussed above. Where it is clear, on the other hand, that the employment decision was prompted by cost, not age, there is no disparate treatment discrimination. The sole basis for challenging the employment decision would be under a disparate impact theory.

It is significant, in this regard, that the Metz holding was based largely on principles derived from disparate impact cases. In stating, for example, that "it would undermine the goals of the ADEA to recognize cost-cutting as a nondiscriminatory justification for an employment decision," the court drew from the decision of the Eighth Circuit Court of Appeals in Leftwich v. Harris-Stowe State College.

courts have required that the replacement come from outside the protected class. See McLawhorn v. John W. Daniel & Co., 924 F.2d 535, 536 (4th Cir. 1991). In Metz, the court cited to the standard which required replacement by a "younger" employee. 828 F.2d at 1204. The replacement element of the prima facie case and its bearing upon the proxy theory is discussed more fully, infra notes 160-69 and accompanying text.

70. Metz, 828 F.2d at 1213 (Easterbrook, J., dissenting).
71. 29 C.F.R. § 860.103(h) (1979). "To classify or group employees on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—a assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it." Id. (quoted in Metz, 828 F.2d at 1205-06).
72. See supra notes 18-56 and accompanying text.
73. Metz, 828 F.2d at 1207.
74. Id.
75. 702 F.2d 686 (8th Cir. 1983).
Leftwich, however, involved a claim that a faculty selection plan based on tenure status had a disparate impact on older workers. The evidence showed that tenure status correlated with higher salary, that there was "a positive, significant correlation between age and salary for faculty members," and that "the defendant's use of salary as a factor in the selection process would have an adverse impact on older faculty members." The court's holding was not that reliance on salary or tenure status was age-based, but that the cost-based justification for the employer's practice did not constitute a business necessity.

There are important reasons for distinguishing between the disparate treatment and impact theories. First, an employment decision may be based on a factor that correlates with age in some sense, but does not have a disparate impact on older workers. A policy of discharging all individuals with more than thirty years of seniority would certainly have a disparate impact on employees in the protected class. On the other hand, a policy of discharging all individuals with more than five years of experience may well affect as many people outside the protected class as in it. In such a case, there would be no disparate impact claim. Further, under a disparate impact analysis, the employer has a defense by proving that its discriminatory practice was justified as a business necessity. An employment practice that would be clearly illegal if viewed as intentionally dis-

76. Id. at 690.
77. Id.
78. Id.
79. The court in Metz stressed that "the Eighth Circuit itself applied the reasoning in Leftwich to an ADEA claim of discriminatory treatment brought by a single employee." Id. (citing Dace v. ACF Indus., 722 F.2d 374 (8th Cir. 1983)). However, in Dace, the Eighth Circuit merely held that age discrimination could be inferred from the employer's reliance on seniority-based cost concerns "given the close link between seniority and age." 722 F.2d at 378. Although it analogized to its previous holding in Leftwich, the court in Dace did not equate seniority, as a legal matter, with age.
80. The protected class under the ADEA is comprised of all individuals "who are at least 40 years of age." See 29 U.S.C. § 631(a) (1988). Obviously, an employment practice directed at employees with 30 years of experience would invariably impact upon individuals in this class.
81. But see Geller v. Markham, 635 F.2d 1027, 1032-33 (2d Cir. 1980) (finding that evidence showed that an employment policy based on five years of teaching experience had a significantly greater impact on teachers in the protected class), cert. denied, 451 U.S. 945 (1981).
criminatory might well be defensible under a business necessity analysis. To treat an employer’s reliance on a neutral factor as a direct proxy for age is to trump the standards that exist for disparate impact claims.

In his dissenting opinion in *Metz*, Judge Easterbrook stressed that the majority had blurred the distinction between the disparate treatment and impact theories. He agreed that reliance on factors that correlate with age could support a finding that age, in fact, was the basis for the decision. He disputed the view, however, that reliance on high salary or seniority translated directly into age discrimination. He reasoned that where the employment decision was clearly based on the proxy itself, the decision could only be challenged, if at all, under a disparate impact theory.

83. The Supreme Court made note of this point in *UAW v. Johnson Controls, Inc.*, wherein the Court held that an employer’s fetal protection policy discriminated against women in violation of Title VII. 499 U.S. 187 (1991). The lower court had subjected the employer’s policy to a business necessity analysis. The Supreme Court ruled that the policy was facially discriminatory and, thus, could only be justified under Title VII’s Bona Fide Occupational Qualification (“BFOQ”) defense. Id.; see 42 U.S.C. § 2000e-2(a) (1988); see also 29 U.S.C. § 623(f)(1) (setting forth the BFOQ defense for age claims). The Court observed that the “business necessity standard [was] more lenient for the employer than the statutory BFOQ defense.” *Johnson Controls*, 499 U.S. at 198.


85. *Id.* at 1212 (Easterbrook, J., dissenting). Judge Easterbrook stated that “[w]age discrimination is age discrimination . . . when wage depends directly on age, so that the use of one is a pretext for the other.” *Id*. He also stressed that “[t]he Act prohibits adverse personnel actions based on myths, stereotypes, and group averages, as well as lackadaisical decisions in which employers use age as a proxy for something that matters (such as gumption) without troubling to decide employee-by-employee who can still do the work and who can’t.” *Id*. at 1213.

86. *Id.*

87. *Id.* at 1215-16. Judge Easterbrook went on to conclude that the disparate impact theory was inapplicable to ADEA claims. *Id.* at 1216-22. This author strongly disagrees. Numerous courts have extended the disparate impact analysis to ADEA claims. See, e.g., *Maresco v. Evans Chemetics*, 964 F.2d 106, 115 (2d Cir. 1992); *MacPherson v. University of Montevallo*, 922 F.2d 766, 771-73 (11th Cir. 1991); *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 873-75 (6th Cir. 1990); *Holt v. Gamewell Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *EEOC v. Borden’s, Inc.*, 724 F.2d 1390, 1394-95 (9th Cir. 1984); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690-92 (8th Cir. 1983); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980); see also *Davidson v. Board of Governors*, 920 F.2d 441, 444 (7th Cir. 1990) (assuming without deciding that the disparate impact theory applies). These courts have reasoned, correctly in my view, that the adoption of policies that have the effect of excluding members of the protected class from employment opportunities are as suspect under the ADEA as they are under Title VII. See, e.g., *Borden’s, Inc.*, 724 F.2d at 1394. But see *Markham v. Geller*, 451 U.S. 945 (1981) (Rehnquist, J., dissenting from denial of certiorari) (stating that the ADEA’s “reasonable factor other than age defense” permits reliance on age-neutral factors that might have disparate impact); *Metz*, 828 F.2d at 1219-20 (Easterbrook, J., dissenting). Nonetheless, whether an ADEA claimant can maintain a suit under a disparate
The Age-Proxy Theory After Hazen Paper Co. v. Biggins

The notion that age discrimination can be inferred from an employer's reliance on an age-related factor is not controversial. The Metz court, however, appeared to take the principle a step further. By ruling that the employer could not rely on cost concerns as a nondiscriminatory explanation for its decision to terminate a longer-tenured employee, the court, in effect, converted the proxy into a statutory equivalent of age.

C. Hazen Paper Co. v. Biggins: The Decision

As the above discussion makes clear, courts have taken various approaches to the age-proxy theory. Most courts have accepted the view that evidence of an employer's reliance on an age proxy can be treated as evidence of age discrimination. Under this view, the proxy theory provides an evidentiary tool for proving disparate treatment discrimination. Some courts have taken the theory a step further, urging that reliance on the proxy can, at least under some circumstances, constitute reliance on age. This, in effect, makes the proxy the equivalent of age.

In Hazen Paper Co. v. Biggins, the Supreme Court offered its views on the scope of the age-proxy theory. Hazen Paper involved a claim by a sixty-two-year-old worker that he had been fired from his position as a technical director in violation of both the ADEA and the Employee Retirement Income Security Act of 1974. The employee prevailed before a jury on both claims. The district court, however, granted the employer's motion for judgment notwithstanding the verdict on the issue of whether the plaintiff had established a disparate impact theory remains an open question. See Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1706 (1993) (stating that the Supreme Court has "never decided whether a disparate impact theory of liability is available under the ADEA"); id. at 1710 (Kennedy, J., concurring) (stressing that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII").

88. Metz was by no means the only case to have embraced the more extreme version of the proxy theory. See, e.g., Geller, 635 F.2d at 1034-35 (ruling that once a 55-year-old claimant had made out prima facie case of discrimination, the employer could not defend its decision to reject the claimant in favor of a younger employee on the ground that it was cost-justified). Still, many of the courts that had adopted the proxy theory were careful to state the doctrine in evidentiary terms, thereby avoiding the implication that the proxy and age were legal equivalents. See, e.g., White v. Westinghouse Elec. Co., 862 F.2d 56, 62 (3d Cir. 1988) (question of whether the employer's reliance on seniority-based policy was age-based could not be decided "[i]n the context of a motion for summary judgment").

89. 113 S. Ct. 1701 (1993).

90. Id. at 1704; 29 U.S.C. §§ 1001-1461 (1988) [hereinafter "ERISA"].

91. Hazen Paper, 113 S. Ct. at 1704.
willful violation of the ADEA and, thus, was entitled to liquidated damages.\textsuperscript{92} The plaintiff appealed to the First Circuit, which reversed the district court’s ruling on willfulness and reinstated the damages award.\textsuperscript{93}

The employer appealed to the First Circuit on the issue of liability.\textsuperscript{94} The court of appeals held that the evidence was sufficient to sustain the jury’s finding of an ADEA violation.\textsuperscript{95} In part, the court relied on evidence that the plaintiff had been fired a few weeks before his pension would have vested.\textsuperscript{96} As the court explained:

\begin{quote}
The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins’ age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years.\textsuperscript{97}
\end{quote}

The Supreme Court granted certiorari to resolve the conflict in the lower courts on the standard for willfulness and to answer the following question: “[D]oes an employer’s interference with the vesting of pension benefits violate the ADEA?”\textsuperscript{98}

In ruling on the pension issue,\textsuperscript{99} the Supreme Court offered a primer on the principles of employer liability. The Court first noted that the plaintiff had proceeded in the case under a disparate treat-

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\textsuperscript{92} Id. See 29 U.S.C. § 626(b) (providing for the award of liquidated damages in cases where the employer’s violation is “willful”).

\textsuperscript{93} Hazen Paper Co. v. Biggins, 953 F.2d 1405 (1st Cir. 1992).

\textsuperscript{94} Id.

\textsuperscript{95} Id.

\textsuperscript{96} Id. at 1411-12. The court also pointed to a number of age-biased comments made by company officials and to discrepancies between a confidentiality agreement presented to the plaintiff and one provided to his younger replacement. Id. at 1411. On remand from the Supreme Court’s decision, the First Circuit held that there was sufficient evidence, independent of the pension-vesting concern, to support a finding of age discrimination. See Biggins v. Hazen Paper Co., No. 91-1591, 1993 WL 406515 (1st Cir. Oct. 18, 1993).

\textsuperscript{97} Hazen Paper, 953 F.2d at 1412.

\textsuperscript{98} Hazen Paper, 113 S. Ct. at 1705.

\textsuperscript{99} With respect to the willfulness issue, the Court reaffirmed its holding in Trans World Airlines v. Thurston, 469 U.S. 111 (1985), that an employer’s violation of the ADEA was willful if “the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.” Id. at 126; see also Hazen Paper, 953 F.2d at 1708. The Court dismissed the concerns of several lower courts that the application of Thurston to “informal” disparate treatment cases “would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age discrimination knows or recklessly disregards the illegality of its conduct.” Hazen Paper, 113 S. Ct. at 1709. The Court held that the Thurston standard applied to all disparate treatment cases under the ADEA. Id. at 1710.
The Age-Proxy Theory After Hazen Paper Co. v. Biggins

The Court stated that “[t]he disparate treatment theory is of course available under the ADEA.” While noting that it had never ruled on the point, the Court left open the possibility that a plaintiff could also prove an ADEA violation under a disparate impact theory.

The Court stated that, “[i]n a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer’s decision.” The Court stressed that it was “the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.” Noting that “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,” the Court reasoned that, “[w]hen the employer’s decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears.”

Drawing from these views, the Court held that “a decision by the company to fire an older employee solely because he has nine-plus years of service and therefore is ‘close to vesting’ would not constitute discriminatory treatment on the basis of age.” The Court acknowledged that there was some correlation between years on the job and age but opined that “age and years of service are analytically distinct.” In the Court’s view, because an employer “can take account of one while ignoring the other,” it is “incorrect to say that a decision based on years of service is necessarily ‘age-based.’”

The Court noted that some lower courts had taken the view that “an employer violates the ADEA by acting on the basis of a factor, such as an employee’s pension status or seniority, that is empirically correlated with age.” The Court specifically referred to the Seventh Circuit’s decision in Metz. Citing Metz, the Court expressly rejected the view that “[p]ension status may be a proxy for age . . .

100. Id. at 1706.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id. at 1707.
106. Id.
107. Id.
108. Id. at 1705.
109. Id. at 1707.
in the sense that the ADEA makes the two factors equivalent."110

While the Court rejected the broadest version of the proxy theory, it did not "preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination."111 The Court, in fact, stated that factors like years of service can be a proxy for age "in the sense that the employer may suppose a correlation between the two factors and act accordingly."112 The Court recognized that there were circumstances where the employer's purported reliance on an age proxy could reflect the type of "inaccurate and denigrating generalization about age" that the ADEA was designed to prohibit.113

There are several important features of the Court's decision in Hazen Paper. First, it is clear that the age-proxy theory, in all its manifestations, was not before the Court. The holding in Hazen Paper was that "an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service."114 The issue was not whether the employer's reliance on pension status could mask an age bias, but whether reliance on such a factor was, ipso facto, age discrimination. Essentially, the Court held that there is no intentional discrimination under the ADEA when it is clear that the proxy, rather than age, motivated the employer. The Metz decision notwithstanding,115 this is hardly a controversial view of disparate treatment theory.

Additionally, the proxy at issue in Hazen Paper was objective and measurable. The evidence suggested that the plaintiff was fired to avoid pension vesting. Pension vesting occurred at ten years of service. The evidence did not consist of vague comments of an age-

110. Id.
111. Id.
112. Id.
113. Id. The Court noted as well that firing an individual to prevent his pension benefits from vesting would, in any event, be actionable under ERISA. Id. Finally, the Court did not "rule out the possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status." Id.
114. Id. at 1707-08.
115. Indeed, not even the Metz decision would support the broad version of the proxy theory rejected in Hazen Paper. The court in Metz emphasized that the plaintiff had made out a prima facie case of discrimination independent of any proxy-based evidence. Id. at 1204, 1208. The court also stressed that the employer's cost concerns were tied to the claimant's 27 years of satisfactory service with the company, a factor that had a much closer correlation with age than the 10-year vesting proxy at issue in Hazen Paper. Id. at 1208.
related nature but of a very specific criterion that was weakly correlated with protected class status. In such a case, there is no possibility that "[t]he prohibited stereotype ('Older employees are likely to be ______') would . . . have figured in the decision . . . . The decision would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an accurate judgment about the employee — that he indeed is 'close to vesting.'&n#116

Finally, the Court lent credence to the view that reliance on factors that correlate with age-based stereotypes can support a finding of age discrimination. The Court emphasized that an employer "cannot rely on age as a proxy for an employee’s remaining characteristics, such as productivity, but must instead focus on those factors directly."117 The Court observed that certain factors can be a proxy for age because they can correlate in the employer’s mind with age. This, in effect, was precisely what had been recognized by courts that had adopted the more modest version of the proxy theory. Where it is clear that an employer acts because of a factor other than age, there is no disparate treatment discrimination even when the factor correlates in some fashion with age. Where, however, the proxy is stated in terms that are not readily severable from age, the employer’s purported reliance on the proxy is not sufficient to preclude the possibility that age, in fact, motivated the decision.

III. DISCUSSION

A. The Age-Proxy Theory After Hazen Paper

If Hazen Paper does not resolve all the issues surrounding the proxy question, there are some clear conclusions that can be drawn from the Court’s decision. First, the version of the proxy theory that equates the proxy with age is dead. The Court expressly rejected the notion that factors like years of service can be a proxy for age in the sense that the Act makes the factors “equivalent.”118 On the other hand, the disparate impact theory might be available to challenge an employment practice that has an adverse effect on older workers. Thus, an employer’s reliance on a factor such as high salary or seniority could violate the ADEA if shown to have a disparate impact on individuals in the protected category. More fundamentally, the

117. Id. at 1706.
118. Id. at 1707.
Court made clear that the proxy theory — as a tool for proving intentional discrimination — is still alive in some form. The question is in what form.

The starting point for consideration of this question is the case law that had predated *Hazen Paper*. As noted above, numerous courts had held that age discrimination could be inferred from an employer's reliance on an age proxy. These courts theorized that because of the obvious connection between age and certain factors, evidence that an employer relied on the related factor could be reasonably viewed, at least in some cases, as a disguised reliance on age. Nothing in *Hazen Paper* precludes this view of the proxy theory.

A critical distinction suggested in *Hazen Paper* is between proxies that are subjective in nature and those that have an objective content. Courts have long recognized that subjective employment practices are subject to heightened scrutiny because of the danger that such practices "are a 'covert means' to discriminate intentionally."119 While these concerns have general validity, they are even more vital in the proxy context. Where the evidence points to an objective and measurable employment criterion that is clearly differentiated from age, as in *Hazen Paper*, there is no direct basis for a finding of intentional discrimination.120 Where, however, the employer bases its decision on subjective, age-related criteria, there is a substantial risk that the employer is using the proxy as a mask for age discrimination.

There are several dangers in allowing the employer to front a subjective or vague age proxy as a legitimate basis for an employment decision. In some cases, an employer can use the proxy to de-
fend an employment practice that is clearly discriminatory in nature. The employer, for example, may have a policy of not hiring individuals who have more than thirty years of experience in a particular field. If the employer admitted to such a policy, it would expose itself to a very strong age claim. Instead, the employer makes vague assertions about not hiring the individual because of his level of qualification or experience.

Alternatively, the employer might assert grounds for an employment decision that can be easily manipulated, depending on the age of the individual. An employer, for example, may express general concerns about the level of experience of an older job applicant. It may be that the applicant’s experience did, in part, motivate the employer. It may also be true, however, that the employer would have a different reaction to an experienced employee who was younger than the older applicant. In effect, the proxy theory requires the employer to lay its cards on the table. If the employer has a policy that is truly based on the proxy rather than age, then it can defend that policy against a claim of age discrimination. If the employer, however, is unwilling to spell out its policy with sufficient clarity to sever age from the proxy, then it is fair to infer from the employer’s reliance on the age-related factor that age was, in fact, a determinative factor in the decisionmaking process.

The problem with age-based proxies is most acute where the proxy is suggestive of stereotypical assumptions about the competence

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121. Such a policy would obviously have an adverse impact on individuals within the protected class. The policy could also be challenged under a disparate treatment theory, since the 30-year factor would have a direct correlation with protected class status. In this regard, it is important to distinguish the 10-year pension vesting factor at issue in *Hazen Paper* from other age-related factors that more directly correlate with protected class status. While reliance on even the most correlated age-related factor would not mandate a finding of age discrimination, a close link between the related factor and protected class status makes it more likely that the employer has acted “on the assumption” that the affected employees “are likely to be older.” *Hazen Paper*, 113 S. Ct. at 1707. Even the most objective, age-related factor may not be readily severable from age to the extent it can be reasonably viewed as correlating in the employer’s mind with age.

122. See, e.g., *Stein v. National City Bank*, 942 F.2d 1062 (6th Cir. 1991) (discussed supra note 42). As the *Stein* court explained, the danger in permitting an employer to rely upon a subjective age-related criterion is that the employer could “shift the standard at its pleasure, raising the standard for some applicants and lowering it for others.” *Id.* at 1066. In such a case, “[a] reviewing court could not determine whether the policy was uniformly applied to all applicants.” *Id.* By contrast, the use of an objective criterion “removes the fear of a shifting standard and, as such, ensures that both the employer and applicant will be bound by the policy and at times suffer from its application.” *Id.*
or productivity of older workers. In *Price Waterhouse v. Hopkins*, the Supreme Court made clear that sex stereotyping can form the basis of a Title VII claim. The Court, in fact, adopted what amounted to a proxy theory for sex discrimination cases. An employer’s reliance on factors that correlate in an employer’s mind with sex-based stereotypes can be sufficient to establish that sex played a role in the decisionmaking process. In *Hazen Paper*, the Court emphasized that the ADEA was designed to protect older workers from “inaccurate and stigmatizing stereotypes.”

The Court suggested that an employer’s actions would contravene the ADEA when reasonably tied to the “prohibited stereotype.” While the “problem of inaccurate and stigmatizing stereotypes disappears” when the employment decision “is wholly motivated by factors other than age,” those problems persist where age cannot be clearly separated from an employer’s reliance on an age-related factor.

The type of case encompassed within the post-*Hazen Paper* proxy theory can be illustrated by the following hypothetical. An employer makes a decision to reorganize its operations. The employer announces that it plans to “streamline” its workforce and rid the company of “dead wood.” In the context of implementing the reorganization, a key decisionmaker comments that too many of the employees had been there “too long” and that the more “senior” employees needed to move on. The decisionmaker expresses a desire for bringing “new blood” into the company and accuses the “longer-tenured” employees of being lethargic and unwilling to adapt to changes. Pursuant to the reorganization, a number of workers within the protected class are fired.

The evidence described above should clearly be sufficient to implicate the age-proxy theory. The evidence makes clear that the employer is purporting to act on the basis of age-related factors. The evidence points to precisely the type of factors that can correlate in an employer’s mind with age. Several of the statements, moreover, are highly suggestive of age-based stereotypes. The decisionmaker’s comments about the lethargy and non-adaptability of the “long-tenured” employees can, in particular, be reasonably linked to stereotypes

123. 490 U.S. 228 (1989).
125. *Id.* at 1707.
126. *Id.* at 1706.
127. This hypothetical is loosely based upon *EEOC v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992).
about the productivity and competence of older workers. While it is conceivable that the employer's concerns are based solely on length of service, these concerns are too generally stated to foreclose the possibility that age is the motivating factor behind the decisions.

This is not to say, of course, that the employer could not establish that its actions were age-neutral. The employer, for example, may have targeted all "longer-tenured" employees regardless of age. The proxy theory does not compel a finding of discrimination. It does, however, put the employer at risk of liability absent some specific explication of its employment policies.

A similar scenario can arise in the hiring context. Consider, for example, an employer that advertises for an entry-level position. An older individual, with years of experience in the field, applies. The employer purports to reject the older applicant because he is "overqualified" for an entry-level position. "Overqualifications" can provide a legitimate basis for an employment decision. On the other hand, as several courts have recognized, reliance on the subjective factor of "overqualifications" can readily mask a preference for younger applicants.\(^\text{128}\) An employer might be able to persuade a factfinder that its reliance on "overqualifications" was age-neutral, particularly if the employer had substantiated concerns about the willingness of the older applicant to adapt to an entry-level position.\(^\text{129}\) Absent some clear evidence to the contrary, however, there is too great a risk that "overqualifications" is merely a "buzzword for 'too old'" to foreclose the possibility that age was behind the decision.\(^\text{130}\)

Of course, it can always be argued that factors like years of service and experience are not invariably linked to age. Thus, the fact that an employer decides to fire its most "senior" employees does not necessarily mean that the employees were fired because of age. The fact that the employer rejects an applicant with extensive experience does not necessarily mean that the applicant was rejected because of age. As the Supreme Court made clear in *Hazen Paper*, there is no necessary correlation between age and factors like "years of service."

The point of the proxy theory, however, is not that the proxy must correlate with age but that it can. As the Supreme Court noted, factors like "years of service" can readily correlate in an employer's


mind with age. An employer that purports to fire an employee because he has been there "too long," because he has "too many years on the job," or because he is not "adaptable" to new technologies may very well be rejecting the employee because of age. In a similar vein, an employer that fires an older worker because of his high salary may well be fronting this as a mask for age discrimination. It would defy common sense not to recognize the possible connection between these factors and age.

Indeed, taken to its logical extreme, rejection of a proxy theory would leave plaintiffs without any direct means of proving age discrimination. The ADEA protects individuals who are over the age of forty. The ADEA does not protect older workers, as such, but workers who have reached a specific age. Thus, the fact that an employer fires a forty-year-old worker because he is "too old" does not necessarily mean that the employer fired the worker because of his protected class status. After all, the employer might also have viewed a thirty-nine-year-old worker as being "too old" for the job. With the rare exception of evidence that specifically links an employer's decision to a bias against workers over the age of forty, most age-related evidence will in some sense be a proxy for the unlawful factor.

_Hazen Paper_ rejects the view that age-related proxies are the "statutory equivalent" of age. If anything, however, the decision strongly supports the more modest proxy theory that had been recognized by several lower courts. The proxy theory, to that extent, survives _Hazen Paper_ intact.

**B. The Legal Effect of Age Proxy Evidence**

Assuming that some version of the proxy theory survives _Hazen Paper_, there remains the question of what legal effect should be accorded to the proxy evidence. Courts have recognized that plaintiffs can prove discrimination by advancing specific evidence that an impermissible factor entered into an employment decision. Plaintiffs are also allowed, however, to rely upon the indirect method of proof first recognized by the Supreme Court in _McDonnell Douglas Corpor-

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131. See Metz v. Transit Mix, Inc., 828 F.2d 1202, 1216 (7th Cir. 1987) (Easterbrook, J., dissenting) (noting that an employer would violate the ADEA if it used an employee's "wage" as a "smokescreen for age").

132. See, e.g., Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1110-11 (9th Cir. 1991); Holmes v. Bevilacqua, 794 F.2d 142, 146 (4th Cir. 1986).
ration v. Green.\textsuperscript{133} Under that framework, the plaintiff must first establish a prima facie case of discrimination. To rebut the prima facie case, the employer must articulate a legitimate, nondiscriminatory explanation for its decision. The plaintiff can carry her ultimate burden of persuasion “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”\textsuperscript{134}

In some cases, an employer might proffer the proxy itself as the legitimate explanation. The more likely scenario, however, is that the employer will offer some other legitimate explanation for its decision. In response, the plaintiff cites to evidence indicating that the employer has relied on the type of subjective proxy factor that can be a mask for age discrimination. A decisionmaker, for example, may have made derogatory comments concerning its more “senior” employees. The question is what significance should attach to evidence that ties the employment decision to an age-related factor.\textsuperscript{135}

Conceivably, evidence that an employer has purported to rely upon the type of proxy suggested above could be viewed as sufficient to push the case into a “mixed-motives” posture. In \textit{Price Waterhouse},\textsuperscript{136} the Supreme Court held that when the evidence is sufficient to show that an impermissible criterion played a substantial role in the decisionmaking process, the burden of persuasion shifts to the employer to prove that the “same decision” would have been made in the absence of the impermissible factor.\textsuperscript{137} The Court ruled that the evidence in that case was sufficient to implicate the “mixed-motives” standard even though some of the evidence was not explicitly tied to gender.\textsuperscript{138} Lower courts have recognized that the plaintiff can satisfy

\begin{itemize}
\item \textsuperscript{133} 411 U.S. 792 (1973).
\item \textsuperscript{134} Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); accord St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993).
\item \textsuperscript{135} This inquiry does not implicate the Supreme Court's holding in \textit{Hazen Paper}. In \textit{Hazen Paper}, the Court confronted the question of whether reliance on the age proxy was itself age discrimination. See supra notes 89-117 and accompanying text (discussing \textit{Hazen Paper}). The issue here, by contrast, is what evidentiary significance should attach to an employer's purported reliance on an age-related factor. The distinction is between the concept of a “legal” proxy, which is clearly foreclosed by \textit{Hazen Paper}, and an “evidentiary” proxy, which is not.
\item \textsuperscript{136} Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
\item \textsuperscript{137} Id. at 244-46.
\item \textsuperscript{138} See id. at 256; see also supra note 50 and accompanying text. The Court also ruled that the burden could be fairly shifted to the employer even though the gender-biased statements were not directly attributed to the ultimate decisionmakers. See \textit{Price Waterhouse}, 490
\end{itemize}
her burden under *Price Waterhouse* by producing "evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude." So long as the proxy evidence could be tied in some fashion to the decisional process, it could be considered sufficient to satisfy the *Price Waterhouse* standard.

The effect of taking this approach would be to require the employer to elucidate the basis of its decision in terms that are clearly severable from age or be subject to liability for discrimination. An employer can base an employment decision on any nondiscriminatory factor it desires. In some cases, reliance on even the most age-suggestive proxy will not be reliance on age. Where, however, the employer has based a decision on an age-related factor and the employer cannot untangle age from the factor, it is fair to assume that age was the motivating factor.

A case that illustrates this use of the proxy theory is *Buckley v. Hospital Corporation of America*. *Buckley* involved the claim of a sixty-two-year-old nurse shift supervisor who asserted that she was constructively discharged in violation of the ADEA. To support her claim, the plaintiff cited to comments by a key decisionmaker made in the context of an effort to force turnover in the workplace. Specifically, the decisionmaker expressed "surprise" at the "longevity" of the workforce, commented that the hospital was in need of "new blood," stated that employees had been working there for "too long," and questioned the plaintiff about her retirement plans. The Eleventh Circuit Court of Appeals held that these proofs were sufficient to constitute "direct evidence of discriminatory intent." The court ruled that the burden fell upon the employer to prove "that the deci-

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140. Of course, if the proxy were the type of objective and measurable criterion at issue in *Hazen Paper*, there would be no basis for inferring age discrimination absent some evidence to show that the employer's reliance on the criterion was pretextual. The principle discussed here refers to the type of subjective or vague criteria that can readily mask an age bias.

141. 758 F.2d 1525 (11th Cir. 1985).

142. *Id.* at 1529.

143. *Id.* at 1527-28. The decisionmaker also made a comment about the claimant's "advanced age." *Id.* at 1530. The bulk of his comments, however, were directed toward factors that correlate with age. *Id.*

144. *Id.*
The Age-Proxy Theory After Hazen Paper Co. v. Biggins

145. Id.

146. Indeed, the impact of viewing proxy evidence in this light would be substantially enhanced under the amendments made by § 107 of the Civil Rights Act of 1991, which provide that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." See 42 U.S.C. § 2000e-2(m) (Supp. 1993). An employer can still attempt to show that it would have taken the "same action" on the basis of a legitimate factor that, in part, motivated its decision, but only as a defense to the award of make whole relief, not liability. See 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. 1993). Notably, however, these amendments are made to Title VII, not the ADEA. Thus, an argument could be made that the amendments do not affect the ADEA and that the standards announced in Price Waterhouse would continue to apply to age claims, as they had prior to the enactment of the 1991 Act. See, e.g., Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir. 1991) (applying Price Waterhouse standard to ADEA claim); Burns v. Gadsden State Community College, 908 F.2d 1512, 1517-18 (11th Cir. 1990) (same); Grant v. Hazelett Strip Casting Corp., 880 F.2d 1564, 1568-69 (2d Cir. 1989) (same).

147. Proxy evidence could be considered "direct" evidence even though some inferences would have to be drawn to reach the ultimate conclusion that age was the basis for the decision. In the traditional common law sense, direct evidence means evidence which, if believed, establishes an ultimate fact without the necessity of any additional inference. C. McCormick, MCCORMICK ON EVIDENCE § 185, at 543 (3d ed. 1984). In this context, however, direct evidence simply means evidence of a discriminatory bias that can be fairly tied to the "decisional process." Price Waterhouse, 490 U.S. at 276-78 (O'Connor, J., concurring); see also Charles A. Shanor & Samuel A. Marcuson, Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89, 6 LAB. LAW. 145, 149 & n.19 (1990) (noting that Price Waterhouse broadens the traditional conception of direct evidence). Courts, in fact, have applied direct evidence standards even where inferences had to be drawn to connect the discriminatory statements to the decision at issue. See, e.g., Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir. 1991); Burns v. Gadsden State Community College, 908 F.2d 1512, 1518-19 n.19 (11th Cir. 1990); EEOC v. Alton Packaging Corp., 901 F.2d 920, 923-24 (11th Cir. 1990). Alternatively, courts have held that evidence can be sufficient to shift the burden of proof under Price Waterhouse even if "circumstantial" in nature, so long as the statements or comments "reflect a discriminatory or retaliatory animus of the type complained of in the suit" and can be reasonably tied to the "decisionmaking process." Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 181-82 (2d Cir. 1992); accord Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 449 (8th Cir. 1993); Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1471 n.5 (10th Cir. 1992). Strong proxy-based evidence could fit within this definition. See also EEOC v. Clay Printing Co., 955 F.2d 936, 946-47 (4th Cir. 1992) (Restani, J., dissenting) (finding that evidence concerning an employer's concerns with the "seniority" and "salary" of its
Alternatively, evidence of this nature could be considered sufficient to raise an inference of age discrimination independent of the McDonnell Douglas presumption.\(^4\) Courts have recognized that a plaintiff can meet the "original production burden" on the basis of "direct evidence" or "indirect evidence whose cumulative probative force, apart from the presumption’s operation, would suffice under the controlling standard to support as a reasonable probability the inference that but for claimant’s age he would not have been demoted."\(^4\) As one court has stated: "when a plaintiff has established a prima facie inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer’s articulated reason for its employment decision."\(^5\)

Under this approach, the proxy evidence would provide the factual basis for prevailing on a disparate treatment claim. The burden of proof would remain on the plaintiff, but the plaintiff would be able to survive summary judgment and take her case to the factfinder. While this view would not affect the allocation of burdens in an ADEA case, it would have a significant impact. An increasing number of discrimination cases are resolved at the summary judgment stage.\(^6\) Whether evidence is sufficient to survive summary judgment has become the critical issue in federal discrimination practice. A standard that permitted the plaintiff to take the case to trial would put employers at risk for their reliance on subjective, age-related factors, while leaving the plaintiff with the ultimate burden of persuading the factfinder that age was the motivating factor behind the decision.

Significantly, many of the courts that had adopted the proxy theory prior to Hazen Paper had appeared to share this view of the legal effect of the proxy evidence. Thus, in White v. Westinghouse Electric Co.,\(^7\) the Third Circuit Court of Appeals held that it could not grant summary judgment in favor of the employer given the

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\(^{149}\) Id.

\(^{150}\) Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985), as amended, 784 F.2d 1407 (1986).


\(^{152}\) 862 F.2d 56 (3d Cir. 1988).
disputed issues of material fact raised by the employer's reliance on
seniority in making an employment decision.\textsuperscript{153} In \textit{Dace v. ACF Industries, Inc.},\textsuperscript{154} the Eighth Circuit Court of Appeals held that
evidence that an employer demoted an older worker to "save money"
could support a "reasonable inference" that age was involved in the
decision.\textsuperscript{155} These courts did not view the evidence as sufficient to
reallocate the burden of proof, but did hold that it was sufficient to
sustain a finding of age discrimination.\textsuperscript{156}

While age-proxy evidence might have sufficient independent
weight to support a finding of age discrimination, the proxy theory
can also be plugged into the \textit{McDonnell Douglas} framework. Specif-
ically, evidence of an employer's reliance on subjective age proxies
could support a finding that the employer's explanation for an em-
ployment action was a pretext for age discrimination. As the Supreme
Court recently reaffirmed, a finding of discrimination can be based on
evidence that calls into question the credence of an employer's expla-
nation for an adverse action.\textsuperscript{157} The pretext showing is strongest
where the evidence points to the employer's reliance on an impermis-
sible factor.\textsuperscript{158}

The effect of employing the proxy theory in this fashion would
be to give an added pretext "boost" to the plaintiff's case. Plaintiffs
are always entitled to challenge an employer's explanation as
pretextual. Thus, even when an employer purports to rely upon an
age-related factor that can be clearly separated from age, the plaintiff
can attempt to show that the employer's explanation is unworthy of

\begin{thebibliography}{99}
\bibitem{153} Id. at 62.
\bibitem{154} 722 F.2d 374 (8th Cir. 1983).
\bibitem{155} Id. at 378.
\bibitem{156} See also \textit{Haydon v. Rand Corp.}, 605 F.2d 453, 455 (9th Cir. 1979) (ruling that evi-
dence that a "long-time employee" was fired because of his "high salary" was sufficient to
(holding that summary judgment could not be granted where an employer purported to reject
plaintiff because he had "less potential" than other employees since potential and age "usually
are intertwined in sufficiently complicated ways to make resolution
inherently inappropriate"), \textit{aff'd}, 742 F.2d 1430 (2d Cir. 1983).
\bibitem{157} St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993). "The fact-finder's disbelief
of the reasons put forward by the defendant . . . may, together with the elements of the
prima facie case, suffice to show intentional discrimination." \textit{Id.} at 2749.
\bibitem{158} \textit{Id.} While the Court in \textit{Hicks} held that the rejection of the defendant's proffered
reasons would "permit the trier of fact to infer the ultimate fact of intentional discrimination," it
also ruled that a finding of pretext did not compel judgment for the plaintiff. \textit{Id.} Thus, the
plaintiff is at risk that the factfinder will refuse to draw the inference of discrimination ab-
sent some additional evidence that is probative of a discriminatory bias. See \textit{infra} notes 174-
80 and accompanying text (discussing \textit{Hicks}).
\end{thebibliography}
credence. If evidence showed, for example, that the employer had not applied the factor on an evenhanded basis, a factfinder could infer that the true reason for the employer’s action was discriminatory. In many cases, however, the plaintiff may not be able to point to such comparative evidence, particularly if the age-related criterion is vaguely stated. Yet, the employer’s reliance on a subjective, age-related factor would raise the possibility that age was behind the employment decision. The proxy theory would allow the plaintiff, in such a case, to carry her burden of persuasion on the pretext issue. 159

The problem with this view of the proxy theory is that the pretext issue only arises after a plaintiff establishes a prima facie case of discrimination. In termination or demotion cases, in particular, a critical element of the McDonnell Douglas prima facie case is the showing that the employer sought a replacement for the plaintiff. Some courts have held that the replacement must be younger than the plaintiff. 160 A few courts have held that the replacement must come from outside the protected class. 161 If the replacement element could not be satisfied, the proxy evidence, no matter how strong, would not be sufficient to sustain the plaintiff’s claim. 162

On the other hand, courts have also recognized that the prima case can be satisfied, in lieu of replacement evidence, by evidence that the employer “did not treat age neutrally in making the employment decision.” 163 Thus, even when the plaintiff cannot satisfy the replacement standard, the McDonnell Douglas standard can be met so long as the standard is not rigidly applied. 164 Proxy evidence could

159. The cases involving an employer’s reliance on the subjective criterion of “overqualifications” have been analyzed in this fashion. See Taggart v. Time Inc., 924 F.2d at 48 (stating that an employer’s reliance on subjective “overqualifications,” together with the prima facie case, “constitutes circumstances from which a reasonable juror could infer discriminatory animus on the part of [the defendant] based upon a finding that the reason prof ered was pretextual and unworthy of credence”); Marvin J. Levine, Age Discrimination in Employment: The Over Qualified Older Worker, 44 LAB. L.J. 440, 443 (1993) (noting that “[f]or conclusory statements and assumptions about an older applicant’s adaptability to a lower grade job “may be pretext for age discrimination”).

160. See supra note 69 and accompanying text (discussing replacement issue).

161. See supra note 69 and accompanying text.

162. See supra note 69 and accompanying text.


164. In general, courts have recognized that the McDonnell Douglas standard should not be applied in a rigid manner. See, e.g., Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); EEOC v. Metal Serv. Co., 892 F.2d 341, 348 (3d Cir. 1990); Lams v. General Waterworks Corp., 766 F.2d 386, 391 (8th Cir. 1985). “The plaintiff’s immediate burden of production may be discharged by proof of the four elements articulated in [McDonnell Doug-
be seen as sufficient to raise a prima facie inference of discrimination, thereby advancing the case beyond the initial stage.  

Nevertheless, the replacement issue does raise an intriguing question about the legal effect of proxy evidence. The proxy theory draws significance from the employer's reliance on an age-related factor because it can be fairly assumed that age was in fact the reason for the decision. That assumption is confirmed when a replacement is substantially younger than the claimant. When the replacement is not, an argument could be made that no significance can be fairly drawn from the proxy evidence. Indeed, the age of the replacement could be seen as confirming that it was the neutral proxy itself, not age, that led to the adverse decision.

The response to this line of argument is provided by how courts have responded to similar arguments in the areas of race and sex discrimination. In the race context, courts have recognized that employers can discriminate between or among different black employees based on race stereotypes. An employer, for example, may take action against one black employee because he is viewed as too "threatening," while having no problem with another black employee who is viewed as more "subservient." Employers can have a similar reaction with respect to different female employees. One female employee may be looked upon favorably because she deportes herself in accordance with traditional gender roles, while another is viewed as "overly aggressive." The notion that such stereotyping can constitute unlawful discrimination was one of the lessons of the Supreme
Court's decision in *Price Waterhouse*.168

Age discrimination lends itself to a similar analysis. Take, for example, an employer who chooses to fire a sixty-year-old worker who has been with the company for twenty years. The employer explains that the worker was fired because he had been at the company "too long." In his place, the employer hires another sixty-year old worker. While the hiring of an employee of the same age might tend to show that seniority alone was the basis for the discharge, it is entirely possible that the discharge was, in part, age-based. The employer's negative view of older workers may be limited to those with substantial experience with the company. Such workers might be perceived as complacent, lazy, or unproductive because of their time spent with the company *as well as* their age. The fact that the employer might take a different view of a newly hired older worker does not negate the significance of the proxy evidence.169

Proxy evidence can have one of several legal effects. In some cases, such evidence could be viewed as sufficiently probative to support a direct finding that age played a role in the decision, thus shifting the burden to the employer. Alternatively, the evidence could be viewed as sufficient to raise an inference of age discrimination either as independent circumstantial evidence or as part of the *McDonnell Douglas* standard. Under any of these approaches, evidence that an employer relied upon a vague or subjective age proxy can provide the factual basis for a finding of intentional age discrimination.

C. The Proxy Theory and Trends in Discrimination Law

As suggested above, the recognition of an age-proxy theory can be of vital importance to the ability of age plaintiffs to prevail in a disparate treatment case. With this theory, plaintiffs can fairly press their claims against employers that have purported to rely on factors that closely correlate with age. Absent this theory, many plaintiffs...
will be left with no basis for challenging an employment action outside of the confines of the *McDonnell Douglas* standard.

The proxy theory takes on even more importance because of current trends in discrimination law. It has been twenty years since the Supreme Court decided *McDonnell Douglas*. Initially, courts were responsive to the assumptions underlying the *McDonnell Douglas* framework. It is difficult to prove employer motivation. It is fair to infer discrimination from the fact that an employer has taken action against a qualified member of a protected class. It is fair to hold the employer liable for discrimination when the employer’s explanation is unworthy of credence.

In recent years, however, courts have become increasingly hostile to the *McDonnell Douglas* standard. Courts, for example, have adopted more restrictive positions on the elements of the prima facie case. In the age context, some courts have required proof that the individual hired in place of the claimant come from outside the protected class.¹⁷⁰ Such proof was not required under *McDonnell Douglas*.

More critically, courts have tightened the reins on the type of evidence that is sufficient to carry the plaintiff’s burden at the pretext stage. Many courts have, in practice, required that plaintiffs produce additional evidence of discrimination in order to establish pretext.¹⁷²

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¹⁷⁰. See supra note 69.

¹⁷¹. 411 U.S. at 802. In *McDonnell Douglas*, the Supreme Court merely required proof that the employer continued to search for an individual of comparable qualifications following its rejection of the claimant. *Id.* The Court did not insist upon evidence that “some person outside the protected class was hired in complainant’s place.” *Loeb*, 600 F.2d at 1013. There is a strong argument that no greater quantum of proof should be required in the discharge context. See *Crawford v. Northeastern Okla. State Univ.*, 713 F.2d 586, 588 (10th Cir. 1983) (stating that “there is no reason to apply a stricter version of the fourth part of the *McDonnell Douglas* test in a suit alleging a discriminatory discharge rather than a discriminatory failure to hire or promote.”); *Loeb*, 600 F.2d at 1013 (stating that *McDonnell Douglas* requires only that the claimant “show that his employer sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same services and skills”); A. LARSON & L. LARSON, supra note 166, § 86.40, at 17-53 (stating that requiring proof that the employer “sought people with [the claimant’s] qualifications to fill his job after his discharge” is “more in the spirit of the original *McDonnell Douglas* fourth element”). The Supreme Court has yet rule on this issue. See *St. Mary’s Honor Ctr. v. Hicks*, 113 S. Ct. at 2758 n.1 (Souter, J., dissenting) (stressing that the Court “has not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material”).

¹⁷². See Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the 'Pretext-Plus' Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 81-91 (1991). In fact, a few courts have adopted a per se rule requiring plaintiffs to produce additional evidence of discrimination in order to refute the employer’s articulation of a legitimate reason for its action. *Id.* Such a “pretext-plus” rule is clearly foreclosed by the Supreme...
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Courts have made it more difficult to prove pretext by reference to the employer’s treatment of comparable employees.\textsuperscript{173} While evidence that calls into question the credence of an employer’s explanation is supposedly sufficient to support a finding of unlawful discrimination, the reality is that courts have made it extremely difficult to prevail in a disparate treatment suit absent some other evidence that is suggestive of discrimination.

These trends may have culminated in the Supreme Court’s recent decision in \textit{St. Mary’s Honor Center v. Hicks}.	extsuperscript{174} In \textit{Hicks}, the Supreme Court reaffirmed the view that “rejection of the defendant’s proffered reasons is enough at law to sustain a finding of discrimination.”\textsuperscript{175} The Court also made clear, however, that a finding of pretext does not compel a finding of discrimination.\textsuperscript{176} In the Court’s view, while “[n]o additional proof of discrimination is \textit{required},”\textsuperscript{177} the plaintiff’s burden is to prove “\textit{both} that the reason was false, \textit{and} that discrimination was the real reason.”\textsuperscript{178} Citing the example of an employer that had a disproportionately high number of minority employees, the Court suggested that the employer’s rejection of a minority applicant, in such a case, might not be sufficiently suspect to support a finding of discrimination merely because there is strong evidence to refute the employer’s articulated explanation.\textsuperscript{179} Although legally supportive of the traditional view of the pretext theory, \textit{Hicks}, by its tone if nothing else, opens the door to further deterioration in the \textit{McDonnell Douglas} method of proof.\textsuperscript{180}

\textsuperscript{173} See, e.g., EEOC v. Rasher Co., 986 F.2d 1312, 1319-20 (10th Cir. 1992) (offering numerous explanations for why differences in treatment between a minority employee and a non-minority employee may not be discriminatory).

\textsuperscript{174} \textit{Id.} at 2749 n.4.

\textsuperscript{175} \textit{Id.} at 2749.

\textsuperscript{176} \textit{Id.} at 2752.

\textsuperscript{177} \textit{Id.} at 2749.

\textsuperscript{178} \textit{Id.} at 2749 n.4.

\textsuperscript{179} \textit{Id.} at 2750-51.

\textsuperscript{180} Justice Scalia’s opinion suggests more than a little discomfort with the assumptions of the \textit{McDonnell Douglas} standard. For example, Justice Scalia presents situations where traditional pretext evidence would not be enough to carry the plaintiff’s burden. \textit{Id.} Justice Scalia also scolds the dissent for suggesting that Title VII provides “a cause of action for perjury.” \textit{Id.} at 2754. While the opinion clearly acknowledges that a factfinder can base a
The change in the judicial attitude toward the *McDonnell Douglas* standard has also corresponded with a pronounced increase in the use of the summary judgment procedure. Historically, summary judgment was a rarely used procedural device. More recently, courts have looked favorably upon the summary disposition of claims, a view that gained legal support in a trilogy of Supreme Court cases in the 1980s. The result has been a near-explosion in the use of summary judgment. Discrimination claimants have felt the pinch of these changes, particularly where their cases hinge on straightforward pretext evidence.

In light of these developments in the law, it is imperative that courts take a generous approach toward theories that permit plaintiffs to prove intentional discrimination by more direct means. To the extent courts have whittled down the protections of the *McDonnell Douglas* standard, plaintiffs are left with nothing in their arsenal but the type of evidence that has been traditionally available to civil plaintiffs. A judiciary that is hostile to the special method of proof marked out in *McDonnell Douglas* should be amenable to the more direct approach provided by the proxy theory.

Indeed, an argument can be made that proxy evidence is, in most cases, stronger than straightforward pretext evidence. A pretext case can be based on nothing more than evidence that the employee was performing his job at the minimum level of expectations, that he was fired and replaced, and that the explanation offered by the employer is, in some respects, unpersuasive. In a proxy-based case, in contrast,
the plaintiff can cite to specific evidence that the employer has relied on an age-related factor in making an employment decision. Evidence of this nature may well provide a more reliable basis for the imposition of liability.

In this regard, one can see the proxy theory as part of a trend in discrimination law. As noted above, the *Hicks* decision suggests some discomfort with the rigid implications of the *McDonnell Douglas* standard. Conversely, the Court in *Price Waterhouse* gave broad play to reliance on independent evidence of discrimination even when the evidence is not explicitly tied to the impermissible factor. The Supreme Court's case law might suggest that discrimination law is at a crossroads, where the wooden assumptions of the *McDonnell Douglas* standard are giving way to more flexible case-specific approaches to the resolution of disparate treatment claims. A viable age-proxy theory is consistent with that trend.

**IV. CONCLUSION**

In *Hazen Paper*, the Supreme Court held that an employer's reliance on an age-related factor did not necessarily constitute age discrimination. The Court, however, did not reject the age-proxy theory outright. The Court, in fact, strongly suggested that a finding of discrimination could be based on evidence that ties the employment decision to age-related factors so long as the proxy at issue is not clearly severable from age. This is the view that many courts had taken prior to the Supreme Court's consideration of the issue. Courts

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185. Nonetheless, it is important to reiterate that *Hicks* holds that "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Hicks*, 113 S. Ct. at 2749. As the Court explained: "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer . . . ." Id. at 2756 (emphasis added). "[R]ejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination . . . ." Id. at 2749 n.4. Therefore, evidence that raises a question of fact as to pretext should be sufficient, under *Hicks*, to bar summary judgment. See, e.g., Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123-24 (7th Cir. 1994) (stressing that "for summary judgment purposes," *Hicks* requires only that the claimant "‘produce evidence from which a rational factfinder could infer that the company lied’ about its proffered reasons for his dismissal); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993) ("Because, as [Hick’s] recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment.").
should continue to apply the proxy theory in a manner that affords age plaintiffs a fair opportunity to challenge employment criteria that can readily mask age discrimination.