

11.4 Age Discrimination—Disparate Impact—Elements

The plaintiff [name] seeks damages based on age discrimination in violation of federal law. To prevail on this claim, the plaintiff [name] has the burden of proving each of the following elements by a preponderance of the evidence:

First, the plaintiff [name] was 40 years of age or older at the time the plaintiff [name] was [discharged] [not hired] [not promoted] [demoted] [state other adverse action];

Second, the defendant [name] used a specific [test] [requirement] [practice] [selection criterion] that had a significantly adverse or disproportionate impact on employees 40 years of age or older; and

Third, the defendant [name]'s [test] [requirement] [practice] [selection criterion] resulted in the plaintiff [name] being [discharged] [not hired] [not promoted] [demoted] [state other adverse action].

If you find that the plaintiff [name] has proved all three of these elements, your verdict should be for the plaintiff [name]. If, on the other hand, the plaintiff [name] has failed to prove any of these elements, your verdict should be for the defendant [name].

Comment

“A disparate impact claim challenges employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another” *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 749 (9th Cir. 2003) (internal quotation marks and citation omitted). In *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005), the Supreme Court affirmed the availability of a disparate impact claim under the ADEA. For detailed discussions of disparate impact claims arising under the Fair Housing Act, see *Tex. Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519 (2015) (relying on cases interpreting Title VII and the ADEA) and *Ohio House, LLC v. City of Costa Mesa*, 135 F.4th 645, 667 (9th Cir. 2025) (“To establish prima facie disparate impact, a plaintiff must present evidence of: (1) the existence of a policy . . . that is outwardly neutral; (2) a significant, adverse, and disproportionate effect on a protected class; and (3) robust causality that shows, beyond mere evidence of a statistical disparity, that the challenged policy, and not some other factor or policy, caused the disproportionate effect.” (alteration in original) (internal quotation marks and citation omitted)).

The first element states the age threshold necessary to fall within the ADEA. See 29 U.S.C. § 631(a).

The second element reflects *Smith*’s holding that “it is not enough to simply allege that there is a disparate impact on workers or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific

employment practices that are allegedly responsible for any observed statistical disparities.” *Smith*, 544 U.S. at 240-41 (internal quotation omitted) (emphasis in original) (holding that the heightened disparate impact standard of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989), applies in ADEA cases because the Civil Rights Act of 1991, which abrogated *Wards Cove* in Title VII cases, did not amend the ADEA). Thus, the plaintiff must establish that the employer uses a “specific test, requirement, or practice . . . that has an adverse impact on older workers.” *Id.* at 241.

The third element states the requirement that the plaintiff “must show that he was subject to the particular employment practice with the alleged disparate impact.” *Pottenger*, 329 F.3d at 750.

When an affirmative defense is asserted, this instruction should be accompanied by the appropriate affirmative defense instruction.

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