## 11.4 Age Discrimination—Disparate Impact—Elements

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

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

2. the defendant 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

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

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

**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). 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 a detailed discussion of a disparate impact claim arising under the Fair Housing Act, *see Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc*., 576 U.S. 519 (2015) (relying on cases interpreting Title VII and the ADEA).

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 heightened disparate impact standard of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989), applies in ADEA cases because Civil Rights Act of 1991, which abrogated Wards Cove in Title VII cases, did not amend ADEA). Thus, the plaintiff must establish that the employer uses a “specific test, requirement, or practice . . . that has an adverse impact on older workers.” Smith, 544 U.S. 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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