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Smith v. City of Jackson: Disparate Impact in Age Discrimination Cases

Michael Leedom

Introduction

In the wake of the landmark Civil Rights Act of 1964, an act which protected minorities and women from employment discrimination but did not prohibit discrimination based on age,¹ Congress enacted the Age Discrimination in Employment Act of 1967 (hereinafter “ADEA”).² This act prohibits an employer from taking actions 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.”³ At first glance, this statutory prohibition would seem to be very similar to Title VII of the Civil Rights Act of 1964,⁴ and indeed the language in the ADEA matches the language in Title VII as to employment discrimination.⁵ However, a key difference exists that makes proving an age discrimination case significantly more difficult than proving a Title VII case. The “reasonable factors other than age” (hereinafter “RFOA”) provision of the ADEA,⁶ as well as the qualitative differences between age discrimination and other forms of discrimination,⁷ raises a significant question as to whether the ADEA should be judicially interpreted in the same way as Title VII.

¹ *Smith v. City of Jackson*, 125 S.Ct. 1536, 1540 (2005).

² 29 U.S.C. §§ 621-634 (2000).

³ 29 U.S.C. § 623(a)(2) (2000).

⁴ 42 U.S.C. § 2000e-2(a)(2) (2000).

⁵ Compare 42 U.S.C. § 2000e-2(a)(2)(2000), with 29 U.S.C. § 623(a)(2)(2000).

⁶ 29 U.S.C. § 623(f)(1) (2000).

⁷ See REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 5 (1965). The report, which is the foundation for the ADEA, claimed that age discrimination, as opposed to other forms of discrimination, generally does not result from animosity towards the victims of the discrimination, but rather from a belief that the elderly are less productive. Also, unlike most other forms of discrimination, the discriminating factor at issue, age, very often does have an impact on productivity.

On March 30, 2005, the U.S. Supreme Court issued a 5-3 decision (Justice Rehnquist did not participate) in the case of *Smith v. City of Jackson*, a case in which the court was called upon to determine whether the ADEA should be interpreted in a way similar to Title VII.⁸ The Court answered in the affirmative regarding the question of disparate impact policies in employment, holding that disparate impact theory can provide a cause of action in ADEA cases, just as it does in Title VII cases.⁹ While the court rejected the plaintiffs' age discrimination claim in *Smith*,¹⁰ its decision could prove to be favorable to ADEA plaintiffs in the long term. After a discussion of disparate impact theory, this casenote will examine the arguments for and against allowing ADEA claims under disparate impact theory and will analyze whether the court's decision was proper and whether it will have a significant impact on age discrimination cases in the future.

I. What is Disparate Impact Theory?

A key problem that can arise in discrimination cases is the difficulty inherent in proving intent to discriminate. A policy may disproportionately affect a legally protected group, such as a racial, gender, or age group, but this does not necessarily mean that the policy is illegal.¹¹ Rather, the Supreme Court has drawn a line between intent-centered *de jure* segregation, which is generally illegal, and results-centered *de facto* segregation, which is generally not illegal.¹²

⁸ 125 S.Ct. 1536 (2005).

⁹ *Id.* at 1544 (referring to *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

¹⁰ *Id.* at 1540.

¹¹ See *Washington v. Davis*, 426 U.S. 229, 238-41 (1976) (holding that although it is possible for a facially-neutral policy to be discriminatory if it is applied "invidiously," the results of a policy are insufficient to prove discrimination); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-73 (2001) (holding that disparate impact in racial discrimination cases is evidence of discrimination, but generally does not stand on its own); see also *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270-71 (1977) (holding that facially-neutral policy did not violate the Constitution); *c.f.* *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (holding that facially-neutral policy was "so unequal and oppressive as to amount to a practical denial by the state of [an] equal protection of the laws").

¹² See *Davis*, 426 U.S. at 240; see also *Tennessee v. Lane*, 541 U.S. 509, 549 (2004) (Rehnquist, C.J., dissenting) (arguing that disparate impact should apply to Title II of the Americans with Disabilities Act, resulting in greater protections than the anti-discrimination protections of the Fourteenth Amendment, suggesting that disparate impact in other contexts, including the ADEA, might be broader than the Fourteenth Amendment).

Further, the courts have stated that certain policies are acceptable despite having been intentionally designed with the knowledge that they will disproportionately affect groups of people, most notably affirmative action programs.¹³

Disparate impact can be viewed as a vehicle used by the plaintiff to argue that a facially non-discriminatory policy is, nonetheless, illegal. At first glance, it may simply seem to be the means by which the plaintiff argues that a policy is being applied “invidiously,” so as to turn a *de facto* discrimination case like *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*¹⁴ into a *de jure* discrimination case like *Yick Wo v. Hopkins*.¹⁵ Disparate impact would have little importance in the latter context.¹⁶

However, *Griggs v. Duke Power Co.*,¹⁷ upon which *Smith* heavily relies, reveals that disparate impact is a valuable instrument for the plaintiff, at least in the context of Title VII employment claims.¹⁸ Cases like *Yick Wo*, *Bollinger*, and *Bakke* dealt largely with equal protection claims.¹⁹ In *Griggs*, the Supreme Court used Title VII to overturn an employer’s requirement that his employees pass a general intelligence test or possess a high school education, a policy which disproportionately affected black workers, reasoning that the requirements were not substantially related to job performance.²⁰ The Court held that even if the policy was neutral in terms of intent, it could still be overturned as disproportionately harming members of a protected group because the requirements of the policy were not substantially

¹³ See e.g. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). The key to an affirmative action program passing a constitutional test in the school admissions setting appears to be that the program must be narrowly tailored to achieve the goal of an improved educational setting through the creation of a more diverse student body, as opposed to being designed with the intention of discriminating against a class of people. Disproportionate impact may be overcome by a legally protected goal.

¹⁴ 429 U.S. 252.

¹⁵ 118 U.S. 356.

¹⁶ See *supra*, note 11.

¹⁷ 401 U.S. 424 (1971).

¹⁸ *Id.*

¹⁹ *Yick Wo*, 118 U.S. 356; *supra*, note 13.

²⁰ *Griggs*, 401 U.S. at 431-32.

related to job performance.²¹ The intent aspect is especially interesting, as it suggests that Title VII goes farther than *Washington v. Davis*²² in rooting out discrimination, as even certain forms of *de facto* discrimination may be impermissible under Title VII. Further, *Griggs* allows for the possible use of disparate impact to shift the burden of proof onto the employer to show why the policy is justified, after the plaintiff has shown that the policy disproportionately affects the group of which he or she is a member. This makes disparate impact a very powerful tool for the plaintiff.

II. Background of *Smith v. City of Jackson*

The disparate impact discrimination claim that arose in *Smith* was based on a pay raise policy for police officers in Jackson, Mississippi.²³ In 1999, the city adopted a plan that would give proportionately higher raises to officers having less than five years experience, in an attempt to bring the salaries of recently hired police officers up to the regional average.²⁴ Though the pay raise discrepancy was based upon years of experience rather than age specifically, the result of the city's policy was that on average, older officers tended to receive smaller raises than younger workers.²⁵ The Fifth Circuit Court of Appeals rejected the plaintiff police officers' disparate impact argument, holding that Title VII disparate impact theory cannot be used in claims arising under the ADEA.²⁶

III. The Majority Opinion

A. Use of *Griggs* – The ADEA is to be Interpreted Similarly to Title VII

²¹ *Id.* at 431.

²² 426 U.S. 229 (1976).

²³ *Smith v. City of Jackson*, 125 S.Ct. 1536, 1539 (2005).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Smith v. City of Jackson*, 351 F.3d 183, 187-95 (5th Cir. 2003).

In beginning its justification of why disparate impact theory can be used in ADEA claims, the majority turned to the *Griggs* case.²⁷ As previously stated, *Griggs* allows for the use of disparate impact in Title VII cases.²⁸ The majority noted that the relevant ADEA section mirrors the language in Title VII.²⁹ As a result, the ADEA's language that matches Title VII must be interpreted in the same manner as Title VII, and indeed *Smith* did not represent the first case where the court has so held.³⁰ Therefore, the majority concluded that the precedent set forth in *Griggs* that disparate impact claims can be brought under Title VII applies to ADEA cases as well.³¹

B. Prior Case Law Supports Allowing Disparate Impact Claims

The majority pointed out that many lower courts had previously accepted disparate-impact claims falling under the ADEA,³² and only after *Hazen Paper v. Biggins*³³ was such a policy thrown into doubt.³⁴ In *Hazen Paper*, the court rejected a lawsuit that was filed by Biggins, an employee who had been terminated just before his pension would have vested.³⁵ The Supreme Court, in rejecting Biggins' disparate impact claim, pointed out that he was not fired because of his age, but rather because his years of service would soon entitle him to a pension.³⁶

²⁷ *Smith*, 125 S.Ct. at 1541-43.

²⁸ *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

²⁹ *Smith*, 125 S.Ct. at 1540 (holding that the only difference between § 703(a)(2) of The Civil Rights Act of 1964 and the wording of the relevant ADEA section quoted above is replacement of the words "race, color, religion, sex, or national origin," with the word "age"); *see also* *Smith*, 125 S.Ct. at 1544 n.11 (noting the difference in language between the ADEA and the Equal Pay Act of 1963); 29 U.S.C. § 206(d)(1) (barring recovery in sex discrimination cases if "any factor other than sex" justifies a pay differential, as opposed to the ADEA, which deals only with reasonable factors) (emphasis added).

³⁰ *See, e.g.*, *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985).

³¹ *Smith*, 125 S.Ct. at 1542-43.

³² *Id.* at 1443 n.8; *see, e.g.*, *Maresco v. Evans Chemetics*, 964 F.2d 106, 115 (2d Cir. 1992); *Monroe v. United Air Lines*, 736 F.2d 394, 404 n.3 (7th Cir. 1984).

³³ 507 U.S. 604 (1993).

³⁴ *Smith v. City of Jackson*, 125 S.Ct. at 1543.

³⁵ *Hazen Paper*, 507 U.S. at 612-13.

³⁶ *Id.* at 612.

A firing for the latter reason was not held to be illegal under the ADEA.³⁷ The majority in *Hazen Paper* was not rejecting the general use of disparate impact in ADEA claims. Rather, the problem in the case was that the claim did not arise as a result of Biggins' age, but instead arose because of a factor logically correlated with age: his years of service.³⁸ The majority in *Hazen Paper* explained that “[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA.”³⁹

C. Executive Agency Interpretation of the ADEA Supports Allowing Disparate Impact Claims

1. The Majority View – Executive Agency Interpretation as Persuasive Evidence of the Correct ADEA Interpretation

The majority in *Smith v. City of Jackson* noted that both the Department of Labor, which drafted the ADEA, and the Equal Employment Opportunity Commission (hereinafter “EEOC”), which implements it, approve of the use of disparate impact claims under the ADEA.⁴⁰ The majority did not note that it was giving *Chevron*⁴¹ deference to the executive agencies,⁴² though perhaps it did not feel that such deference was necessary given the other factors that justified allowing disparate impact claims. The majority, however, may have used agency interpretations to bolster its case. The majority concedes that agency interpretations do not mention disparate

³⁷ *Id.* Biggins was sixty-two at the time. The relevant factor for him being fired, however, was not his age but the fact that he was nearing ten years of service to the company, at which time his pension would have vested. In support of this conclusion, the majority noted that the company even offered, as an alternative to termination, to have Biggins transferred to a consulting position, a job which would not have maintained his pension status.

³⁸ *Id.* Firing Biggins in this manner was still prohibited by other law, notably the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140. The ADEA is concerned with age, not experience. Note the similarity between the fact patterns in *Hazen Paper Co.* and *Smith*, which also deals with experience, as opposed to age.

³⁹ *Id.* at 610 (1993).

⁴⁰ *Smith v. City of Jackson*, 125 S.Ct. 1536, 1544 (2005).

⁴¹ *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (holding that the courts must show deference to agency interpretations of statutes when those interpretations are reasonable and not contrary to the law or the Constitution).

⁴² *Smith*, 125 S.Ct. at 1544.

impact by name.⁴³ However, regulations implementing the ADEA do suggest support for disparate impact claims by stating, for example, that when an employer attempts to use the defense that a reasonable factor other than age (RFOA) justifies a facially neutral policy that nonetheless tends to discriminate based on age, the employer bears the burden of proving the existence of that factor.⁴⁴

2. The Scalia concurrence – Use of *Chevron*

Justice Scalia's concurrence, while supporting most of the other points raised by the majority, focuses heavily on agency interpretation of the ADEA.⁴⁵ It appears that agency interpretation of the ADEA is enough to settle the matter for him.⁴⁶ Justice Scalia emphasizes regulations promulgated under the ADEA that were also emphasized by the majority.⁴⁷ He also notes that in prior cases, the EEOC has appeared to defend its position that the ADEA allows for disparate impact claims.⁴⁸ In this aspect of the opinion, Justice Scalia's concurrence drifts from the majority. As noted above, the majority did not signal that it was prepared to give *Chevron* deference to the opinions of executive agencies that appeared to support the use of disparate impact claims in ADEA cases.⁴⁹ Rather, the majority opinion merely used those agency positions as evidence supporting its decision.⁵⁰ Justice Scalia's opinion, however, places significantly more importance on the opinions of the agencies, suggesting perhaps that those interpretations would be sufficient, standing alone, to reach a decision in this case.⁵¹

⁴³ *Id.*

⁴⁴ 29 C.F.R. § 1625.7(e) (2005). This burden of proof suggests both that a policy being facially neutral is not sufficient to make it legal and that a disparate impact claim can be used to shift the burden of proof to the employer in a case involving a facially neutral policy. Both of these results eliminate the very difficult requirement of proving actual intent to discriminate.

⁴⁵ *Smith*, 125 S.Ct. at 1546-49 (Scalia, J., concurring).

⁴⁶ *Id.*

⁴⁷ *Id.* (discussing 29 C.F.R. § 1625.7(d) (2005)).

⁴⁸ *Id.* at 1547 (Scalia, J., concurring) (citations omitted).

⁴⁹ *Id.* at 1544 (majority opinion).

⁵⁰ *Id.*

⁵¹ *Smith v. City of Jackson*, 125 S.Ct 1536, 1546 (2005) (Scalia, J., concurring) (“This is an absolutely classic case for [*Chevron*] deference to agency interpretation.”).

D. The RFOA Provision of the ADEA Does Not Preclude the Use of Disparate Impact Claims

A principal difference between Title VII and the ADEA is the existence in the ADEA of the “Reasonable Factors Other than Age” (RFOA) provision.⁵² This provision permits otherwise illegal discriminatory policies where the policies are based on reasonable factor(s) other than age.⁵³ This means that even if a policy tends to harm members of a certain age group, it can still be permitted under the ADEA if there are other reasonable justification(s) for the policy.⁵⁴ This element of the ADEA understandably leads to confusion about whether disparate impact claims should be allowed under the ADEA.

One interpretation of *Hazen Paper* is that only two types of policies which may harm members of a certain age group exist: one where there is illegal discrimination against members of a certain age group (disparate treatment discrimination) and another where the policy is facially neutral on the question of age but tends to disproportionately harm members of an age group during implementation (disparate impact discrimination).⁵⁵ Any policy that cannot be justified by a reasonable factor other than age immediately falls into the first category, making policies that fall into the second category legally permissible.⁵⁶ At this point, disparate impact is not needed. Any policy that harms members of an age group and is not justifiable on other grounds is illegal, without the need to resort to disparate impact.⁵⁷ Such a policy is *not* facially neutral, meaning that disparate impact does not come into play.⁵⁸

⁵² 29 U.S.C. § 623(f)(1) (2000).

⁵³ *Id.*

⁵⁴ *Smith*, 125 S.Ct. at 1544 (majority opinion).

⁵⁵ *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609-10 (1993).

⁵⁶ *See id.*; *Smith*, 125 S.Ct. 1536.

⁵⁷ *Hazen Paper Co.*, 507 U.S. at 609.

⁵⁸ *Id.* at 610.

The majority in *Smith*, however, concluded that the RFOA provision does not logically eliminate the availability of disparate impact claims.⁵⁹ Rather than concluding that *Hazen Paper* was decided with regard to the RFOA provision, the majority rejected the argument that the RFOA provision and disparate impact played any role in *Hazen Paper*.⁶⁰ *Hazen Paper* thus stands for the proposition that it is possible for a policy to be permissible in an ADEA case without resorting to the RFOA provision.⁶¹ Such a policy would not violate the ADEA because it targets factors other than age.⁶² The RFOA provision then becomes a last line of defense for the party accused of discrimination.

IV. The Dissenting Opinion

A. The Language of the ADEA Does Not Support Disparate Impact Claims

In her dissent, Justice O'Connor argues against allowing disparate impact claims under the ADEA by focusing on the "because of such individual's age" language contained within it.⁶³ The dissent argues that this language must imply some purposeful discrimination.⁶⁴ A clear distinction exists between policies which intend to discriminate based upon age and those which indirectly and disproportionately affect members of a certain age group.⁶⁵ The policies in the second group are not designed "because of" an employee's age.⁶⁶ In interpreting the language of

⁵⁹ *Smith*, 125 S.Ct. at 1544.

⁶⁰ *Id.*; see also Kenneth R. Davis, *Age Discrimination and Disparate Impact: A New Look at an Age-old Problem*, 70 BROOK. L. REV. 361, 372-73 (2005) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here.") (citations omitted)).

⁶¹ *Smith*, 125 S.Ct. at 1544 (quoting *Hazen Paper*, 507 U.S. at 609 ("[T]here is no disparate treatment under the ADEA when the factor is some feature other than the employee's age.")).

⁶² *Id.*

⁶³ *Smith*, 125 S.Ct. at 1549-50 (O'Connor, J., dissenting) (quoting 29 U.S.C. § 623(a)(1)-(2) (2000)) (emphasis removed).

⁶⁴ *Id.* In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), the Court seems to agree with Justice O'Connor by stating that, in disparate impact cases, "[p]roof of discriminatory motive is critical." However, the Court goes on to state that the discriminatory motive "can sometimes be inferred from the mere fact of differences in treatment" (emphasis added).

⁶⁵ *Id.*; *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁶⁶ *Id.* at 1549-50.

the ADEA, the majority cited *Griggs* as precedent and noted the similarities between Title VII, which *Griggs* interpreted, and the ADEA.⁶⁷ However, the dissent points out that *Griggs* was decided after the ADEA had already become law, meaning that Congress could not have known at the time that disparate impact cases would be allowed under either law.⁶⁸ Congress could have amended the ADEA following *Griggs*, expressly rejecting disparate impact liability, had it been worried of a similar decision such as the one that arose in this case. It has not done so to date.

B. The RFOA Provision

As suggested above, the dissent's argument regarding the RFOA provision represents a practicality argument as opposed to the purely logical argument raised by the majority. The dissent's reading of the RFOA provision is best summarized by the notion that if there is no reasonable factor other than age upon which the policy is based, the policy illegally discriminates because the only possible factor left is age.⁶⁹ In short, the dissent calls into doubt the existence of facially neutral illegal policies. Policies which may appear facially neutral but that are not justified by RFOAs are in practical terms *not* facially neutral; the "neutrality" and the claimed "factors other than age" are mere pretext. A disparate impact theory of liability can reach and prevent such discriminatory policies.

V. Analysis of the Court's Conclusions

The argument regarding whether disparate impact should apply in ADEA cases is largely reducible to the majority's likening of Title VII to the ADEA⁷⁰ and the dissent's reliance upon the significance of the RFOA provision.⁷¹ Both arguments have strong elements. However, the

⁶⁷ *Id.* at 1541-43 (majority opinion).

⁶⁸ *Smith v. City of Jackson*, 125 S.Ct. 1536, 1556 (2005) (O'Connor, J., dissenting).

⁶⁹ *Id.* at 1552 ("Reliance on an unreasonable nonage factor would indicate that the employer's explanation is, in fact, no more than a pretext for *intentional* discrimination.") (emphasis in original).

⁷⁰ *Id.* at 1540-46 (majority opinion).

⁷¹ *Id.* at 1552-56 (O'Connor, J., dissenting).

dissent's rejection of the agency interpretation argument is poor; it is largely limited to the use of one EEOC interpretation of the RFOA provision, with the conclusion that the interpretation does not speak to the availability of disparate impact in ADEA cases.⁷² It does not address the claim of the majority and concurrence that agencies have supported use of disparate impact in other contexts⁷³ and it presents no evidence of alternative agency interpretations. On the other hand, the majority's decision regarding disparate impact, while perhaps correct in a purely logical sense, is inefficient and will not likely result in a significant future impact on ADEA cases. In some cases, it would be advantageous to immediately determine whether an RFOA exists. If so, the case may be dismissed. However, given the decision in the *Smith* case, the RFOA question is relegated to the later stages of a case.

Justice Scalia's concurrence, which heavily relies on agency interpretation, may be the best argument of all. Further, though *Smith* may shift the burden to the defendant to prove that an RFOA exists, the RFOA provision will remain a significant hurdle for plaintiffs in ADEA cases. A good defense attorney will come prepared with several possible RFOAs, and given the typical link between age and experience, a policy that discriminates based on experience can be an effective way to "back-door" age discrimination. At best, *Smith* could help plaintiffs benefit from state laws that are similar to the ADEA but which lack RFOA provisions, assuming that this case leads to similar interpretations of those laws.

The focus on disparate impact in the case is surprising and disappointing, especially given that it became the main question in the case. At its heart, this case is simply a rehashing of *Hazen Paper*. As in that case, the plaintiffs here were harmed not because of their age, but

⁷² *Id.* at 1558 (O'Connor, J., dissenting) (quoting 29 C.F.R. § 1625.7(d), which stipulates that a policy is justified by an RFOA when it is a "business necessity"). This regulation has since been overturned as too strict. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419 (1985). However, this alone does not necessarily mean that the RFOA provision must foreclose the possible application of a disparate impact theory of liability under the ADEA.

⁷³ *Id.* at 1547 (Scalia, J., concurring) (citations omitted).

because of their experience.⁷⁴ If a disparate impact theory of liability was not required to decide *Hazen Paper*,⁷⁵ as the majority suggests, it should not have been necessary in this case either. Ultimately, given the *Hazen Paper* precedent, the verdict in this case was correct. However, the majority and the Fifth Circuit⁷⁶ (despite reaching a contrary view to the Supreme Court majority) should both be faulted for taking it upon themselves to provide a legal interpretation of the ADEA that was not required to decide the case and, indeed, was not even at issue. If the policy in *Hazen Paper* was not facially neutral, than neither was the policy in *Smith*, meaning that disparate impact should have played no part in this case. The question of whether disparate impact should be allowed in ADEA cases should have been deferred to a future case in which it was at issue.

⁷⁴ See *Smith*, 125 S.Ct. at 1539 (majority opinion)

⁷⁵ See *id.* at 1544.

⁷⁶ *Smith v. City of Jackson*, 351 F.3d 183, 186-88 (5th Cir. 2003).