IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOUGLAS M. HODCZAK, JAMES M. CROSSAN, THOMAS J. MAGDIC AND JOSEPH A. LITVIK, on behalf of themselves and all others similarly situated,	)	Civil Action No. 08-CV-00649
Plaintiffs,	)	Magistrate Judge Amy Reynolds Hay
v.	)	*Electronically Filed*
LATROBE SPECIALTY STEEL COMPANY,	)	
Defendant.	)	

DEFENDANT'S BRIEF
IN SUPPORT OF PARTIAL MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs are four former employees of Defendant Latrobe Specialty Steel Company ("LSS") who purport to bring a nationwide collective action under the ADEA. (Compl. ¶ 71). They allege two counts under the ADEA: count I is disparate treatment and count II is disparate impact. (*Id.* at ¶70). The Plaintiffs allege that their employment was not terminated for emailing allegedly improper material, but because LSS "targeted a class of employees over the age of forty." (*Id.* at ¶ ¶ 25-26, 39-40, 53-54, 66-67). LSS moves to dismiss count II -- Plaintiffs' disparate impact claims -- for three reasons:

(A) Plaintiffs allege intentional age discrimination instead of identifying a neutral policy that disparately impacted workers over the age of forty;

(B) LSS's work rules that prohibit employees from sending inappropriate emails cannot constitute the basis of a disparate impact ADEA violation as it does not impact a protected class and there is no causal link between it and Plaintiffs' age;

(C) Plaintiffs only raised intentional discrimination claims in their EEOC charges -- not disparate impact claims.

II. LEGAL STANDARD

The Third Circuit has extended the Supreme Court's standard for deciding a Rule 12(b)(6) motion first articulated in *Bell Atlantic Corp. v. Twombly,* --- U.S.---, 127 S.Ct. 1955 (2007), described as the "plausibility paradigm," to the employment discrimination context. *Wilkerson v. New Media Technology Charter School*, 522 F.3d 315, 321 (3d Cir. 2008); *Twombly*, 127 S.Ct. 1955, 1974 (while not adopting a heightened pleading standard, a plaintiff must "nudge [his or her] claims across the line from conceivable to plausible"). Under *Twombly,* "it is no longer sufficient to allege mere elements of a cause of action; instead a complaint must allege facts suggestive of the [proscribed] conduct." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). This means that plaintiffs must not only provide a "short and plain statement," but also a statement "showing that the pleader is entitled to relief." *Id.*

LSS's submission of each Plaintiff's EEOC Charge of Discrimination -- attached as Exhibits A-D to this motion -- does not convert it to a motion for summary judgment as they are public records. *Wilson v. Philadelphia Housing Auth.*, Civ.Act. No. 06-4932, 2008 WL 699001, *4 (E.D. Pa. March 12, 2008) (in ruling on a 12(b)(6) motion and evaluating whether a plaintiff has exhausted administrative remedies, "courts routinely consider the plaintiff's administrative filings as public records.") (citing cases). The court may also consider the EEOC documents on a motion to dismiss because they are integral to plaintiffs' claims and authentic.[1] *See U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002) ("[A] document *integral to or explicitly relied* upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment") (emphasis in original); *Pension Benefit Guaranty Corp. v. White Cons. Indus*., Inc., 998 F.2d 1192, 1196-97 (3d Cir. 1993) (an undisputedly authentic document relied on in a complaint is to be considered when resolving a 12(b)(6)

[1] Plaintiffs allege filing these charges (Compl. ¶ ¶ 11, 12), but did not attach them to their complaint.

motion); *see also Rogan v. Giant Eagle, Inc*., 113 F.Supp.2d 777, 782 (W.D. Pa. 2000) (Cohill, J.) ("It is clear to us that under the applicable legal standard we may consider the EEOC charge and related EEOC documents . . . without converting this [12(b)(6)] motion to one for summary judgment.").

III. ARGUMENT

Plaintiffs fail to allege a *prima facie* case for their ADEA disparate impact claims. A *prima facie* case under a disparate impact theory requires a showing that an employment practice that is facially neutral in its treatment of different groups in fact falls more harshly on one group than another and cannot be justified by business necessity. *Smith v. City Jackson*, 544 U.S. 228, 239 (2005) (citing *Teamsters v. U.S.*, 431 U.S. 324,335-36 n.15 (1977); *see Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (citing same). Evidence in disparate impact cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities. *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 987 (1988).

The purpose behind this theory is to proscribe "practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.* 401 U.S. 424, 431 (1971) (involving general aptitude tests and high school diploma requirements). For example, in *Smith v. City Jackson*, the senior police officer plaintiffs alleged that the City promulgated a neutral pay policy that disproportionately impacted officers over the age of forty, who received fewer raises than officers under forty years of age. The Supreme Court held, *inter alia*, that plaintiffs failed to isolate and identify "the *specific* employment practices that are allegedly responsible for any observed statistical disparities." *Smith*, 544 U.S. 228, 241 (emphasis in original) (affirming summary judgment). It stated:

> petitioners have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They have not identified any specific test, requirement,

> or practice within the pay plan that has an adverse impact on older workers.

Id. Thus, plaintiffs are required to allege: (1) a *specific* facially neutral practice, (2) the degree of the impact that practice has on a protected class, and (3) the causal relationship between the practice and adverse impact. ROBERT BELTON & DIANNE AVERY, EMPLOYMENT DISCRIMINATION LAW 170 (6th ed. 1999).

Plaintiffs do not meet this standard. Their disparate impact theory boils down to LSS having a "neutral policy regarding discipline for the inappropriate use of LSS employee email" that it ***intentionally*** applied in a discriminatory manner in that it "favored younger employees and targeted older workers in deciding who would be terminated." (Compl. ¶ 89). They further claim that "the Representative Plaintiffs' ages were a motivating factor in their terminations," LSS "terminated the employment of all other Class Members . . . upon the basis of their age," and "LSS's desire to rid itself of older employees." (Compl. ¶ ¶ 22, 35, 49, 63, 87, 90). These allegations clearly fall under disparate treatment theory and not disparate impact model. *See Wilson v. The Philadelphia Housing Auth.*, Civ. Act. No. 06-4932, 2008 WL 699001, *5 (E.D. Pa. March 12, 2008) (concluding the plaintiff complained not of the neutral procedures, but of her supervisor's directive to violate them-- which is at most, a complaint of disparate treatment not disparate impact); *Kourofsky v. Genencor Intern, Inc.*, 459 F.Supp.2d 206, 215 (W.D.N.Y. 2006) (concluding plaintiffs' "factual allegations indicate that they are really alleging disparate treatment only") (citing multiple cases). For that reason, as set forth below, they do not meet the *prima facie* standard for a disparate impact claim and do not meet the requisite administrative exhaustion requirements.

A. Plaintiffs Do Not Identify Any Specific, Neutral Employment Practice Resulting in Disparate Impact.

To meet the requirements of Fed.R.Civ.P 8(a)(2), emphasized in *Twombly*, 127 S.Ct. 1955, 1974 (2007), Plaintiffs' vague and conclusory allegations regarding LSS's "company-wide practices" (Compl. ¶ 8), its "policies, practices and procedures" (Compl. ¶ 72), and "neutral policy regarding discipline for the inappropriate use of LSS employee email" (Compl. ¶ 89) are insufficient to withstand this motion to dismiss. *Kourofsky*, 459 F.Supp.2d at 215 (granting defendant's motion to dismiss because plaintiffs only alleged "the involuntary reduction in force had a disparate impact against those employees over the age of forty"). *See also Ladd v. The Boeing Co.*, Civ. Act. No. 06-28, 2008 WL 375725, *15 (E.D. Pa. Feb. 8, 2008) (finding plaintiff failed to identify specific employment practices having disparate impact on his protected group); *Silver v. Leavitt*, No. Civ.A. 05-0968, 2006 WL 626928, *14 (D. D.C. March 13, 2006) (granting the employer's motion to dismiss because it is not enough to allege that the GS-9 interview policy disparately impacted older workers).

Plaintiffs allege that LSS terminated their employment (and that of other Class Members) "*because* that [sic] are older employees." (Compl. ¶ 72) (emphasis in original). Such allegations that LSS applied its neutral policy in a discriminatory fashion equate to claims that "non-neutral employment practices were being utilized." *Tomaselli v. Upper Pottsgrove Township 1409*, No. Civ.A. 04-2646, 2004 WL 2988515, (E.D. Pa. Dec. 22, 2004) (granting motion to dismiss the disparate impact claims because plaintiffs alleged they were "outwardly discriminated against"); *Mongo v. The Home Depot, Inc.*, No.3:02-CV-2593, 2003 WL 22227864, *2 (N.D. Texas Sept. 26, 2003) (finding Mongo "wrongly combine[d] the mutually exclusive and often competing disparate impact theory and disparate treatment analysis.").

Plaintiffs in the case at hand allege far less than the plaintiffs in *Smith v. City Jackson*. In *Smith,* the plaintiffs pointed to a pay plan that they claimed was relatively less generous to older workers than to younger workers. 544 U.S. 228, 241 (2005). The Plaintiffs here mention a work rule -- not sending inappropriate emails -- among vague references to non-specific "policies, practices, and procedures," but they claim LSS applied its policies in a non-neutral, discriminatory manner to target employees over forty. (Compl. ¶ ¶ 25-26, 39-40, 53-54, 66-67, 89). Plaintiffs confuse disparate impact theory with disparate treatment. *See George v. Genuine Parts Co.*, No. Civ.A.3:04-108, 2007 WL 217684, *6 (W.D. Pa. Jan. 25, 2007) (concluding plaintiff cannot proceed on a disparate impact claim because only intentional discrimination can be inferred from the complaint).

Thus, this Court should hold that Plaintiffs fail to isolate and identify any *specific* employment practice allegedly responsible for any purported statistical disparities and dismiss count II of Plaintiffs' complaint. *See Rodriguez v. Beechmont Bus Service, Inc.*, 173 F.Supp.2d 139, 147-148 (S.D.N.Y. 2001) (finding allegations of "facially neutral employment practices in regard to employee discipline" that allegedly disparately impacted Hispanic employees insufficient to state a claim).

B. LSS'S Prohibition Against Sending Inappropriate Emails Cannot Form the Basis of a Disparate Impact Claim -- It Does Not Fall More Harshly on Older Employees, Therefore Lacking a Causal Link.

Even assuming the LSS's work rule against sending inappropriate emails constituted a specific neutral practice that meets the requirements specified in *Smith v. City Jackson*, 544 U.S. 228, 241 (2005) -- which it does not -- Plaintiffs fail to allege sufficiently its impact on workers over forty or any causal link between the policy and their employment terminations. They, like the EEOC in *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 192-193 (3d Cir. 1980), ignore that a neutral, work rule does not fall more harshly on any particular protected class.

In that case, the EEOC alleged that Greyhound's neutral no-beard policy in public-contact positions disparately impacted African American males. *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 189 (3d Cir. 1980). At the outset, the court stated that it was concerned that the "EEOC may have seriously misconceived the nature and purpose of Title VII and the disparate impact theory" as the "wearing of beards is not a characteristic that is peculiar to any race." *Id.* at 191 n.3. It further noted that "we may have been willing to hold that a policy against beards simply cannot constitute a Title VII violation." *Id.* Consistent with the Third Circuit's invitation, LSS contends that a truly neutral work rule of not sending inappropriate emails, like a no-beard policy, cannot form the basis of disparate impact claim. *Id.* As discussed above, disparate impact claims must be based upon policies that appear neutral but are "discriminatory in operation." *Griggs v. Duke Power Co.* 401 U.S. 424, 431 (1971).

Furthermore, in *Greyhound Lines, Inc.*, the Third Circuit held that the plaintiff must show: (1) an actual "disparate impact" on the members of the protected class, *see id.* at 192, and (2) "a causal connection between the challenged policy or regulation and a racially unequal result." *Id.* at193. Plaintiffs must plead factual allegations that demonstrate the disparate impact and causal connection is more than conceivable, but is plausible. *Twombly*, 127 S.Ct. 1955, 1974 (2007). Alleging six employees were suspended for emailing improper material, five of whom were over forty and the four plaintiffs, who are over forty, were fired, *see* Compl. ¶ ¶ 25, 39, 53, 66, is insufficient. *See Pippin v. Burlington Resources Oil & Gas Co.*, 440 F.3d 1186, 1198, 1201 (10th Cir. 2006) (concluding that Pippin's statistical evidence that fourteen out of nineteen RIF-terminated employees were over forty was insufficient as it represented a small sample size and failed to show what portion of the workforce was over forty).

A bare allegation that a small number of older workers were suspended/terminated -- for

their actions -- fails to establish that there is any evidence of younger, similarly situated employees being treated differently. *See id.* at 1201; *Aylward v. Hyatt Corp.*, No 03C6097, 2005 WL 1910904, *15 (N.D. Ill. Aug. 5, 2005) (holding the plaintiff failed to state a valid disparate impact claim because, *inter alia*, she made "no effort to show . . . any rigorous analysis that her statistics [involving just ten employees] are either reliable or relevant"). Plaintiffs must plead some factual basis that makes it plausible that they will be able to show "through relevant statistic analysis . . . that the challenged practice has an adverse impact on a protected group." *Butts v. McCullough*, Nos. 05-6337, 05-6488, 237 Fed.Appx. 1, 2007 WL 1296030, *7 (6th Cir. May 2, 2007) (granting summary judgment on the disparate impact claim for Butts' complete failure to make any statistical showing).

Plaintiffs' allegations are somewhat analogous to those alleged in *Ackerman v. Home Depot, Inc.* Ackerman alleged that the companywide Performance Management Initiative ("PMI") to standardize wages disparately impacted older workers. *Ackerman v. Home Depot, Inc.*, No.Civ.A. 304CV0058N, 2005 WL 1313429, *1, 5 (N.D. Texas May 31, 2005). To show causation between the PMI policy and its impact on older workers, she merely claimed that she was over forty, the policy caps her salary and limits her overtime opportunities, and younger workers were not similarly affected. *Id.* at *5. The court held, albeit on a summary judgment motion, that the "evidence does not establish any correlation between membership in a protected class and adverse effects from the PMI." *Id.* Plaintiffs similarly simply allege that they are over forty and were terminated for violating the policy, they do not allege that LSS investigated and knew of similarly situated, substantially younger employees who violated the work rule in the same manner who were treated differently. There is no allegation of how many employees allegedly violated the work rule, how many employees that the Company allegedly investigated

or were somehow aware violated the work rule, or the ages of such employees.

But even if Plaintiffs made more specific allegations, their claims would be of intentional discrimination and not disparate impact claims. To allege disparate impact, Plaintiffs would have to claim LSS's facially neutral policy of not sending inappropriate emails falls more harshly on older workers because they are older workers. That would require Plaintiffs to allege that older workers are more likely, by virtue of being older, to send emails with offensive content. Plaintiffs, however, are not logically or factually advancing such claims.

In sum, count II of the complaint should be dismissed because a neutral work-rule cannot form the basis of a disparate impact claim and Plaintiffs' allegations -- involving just six suspensions and four terminations -- do not show the necessary causal link between LSS's prohibition against sending inappropriate emails and an adverse impact on workers over forty years of age.

C. Plaintiffs Failed to Raise Disparate Impact Claims in Their EEOC Charges.

Even if this case were to proceed despite Plaintiffs' failure to allege the *prima facie* case for disparate impact ADEA claims, their claims for disparate impact discrimination in count II of the complaint must be dismissed for failure to exhaust administrative prerequisites.

Before filing suit alleging violation of the ADEA, a plaintiff must exhaust administrative prerequisites by filing a timely charge of discrimination with the EEOC. 29 U.S.C. § 626(d)(2). The underlying EEOC charge or ensuing investigation must give notice of the claims in the subsequent lawsuit. *Robinson v. Dalton*, 107 F.3d 1018, 1025 (3d Cir. 1997); *Waiters v. Parsons*, 729 F.2d 233, 237 (3d Cir. 1984); *Rogan v. Giant Eagle*, 113 F.Supp.2d 777, 786, 788 (W.D. Pa. 2000). The relevant test is whether the claims in the lawsuit are fairly within the

scope of the prior EEOC charge or investigation. *Antol v. Perry,* 82 F.3d 1291, 1295 (3d Cir. 1996). If they are not, their dismissal is appropriate. *Id.*

The basis for the ADEA disparate impact claims Plaintiffs allege in count II must be a specific practice or policy that has an adverse impact on older workers in the form of observed statistical disparities. *See Smith v. City of Jackson*, 544 U.S. 228, 238-39, 241 (2005). However, Plaintiffs' underlying EEOC submissions allege only intentional discrimination.

Allegations of intentional discrimination in an EEOC charge will not support a disparate impact claim in federal court. *See, e.g., Pacheco v. Mineta*, 448 F.3d 783, 791 (5th Cir. 2006) (affirming dismissal of Plaintiff's disparate impact claim because charge failed to allege any elements of a disparate impact claim, including neutral employment policy); *Lawton v. Sunoco, Inc.,* No. 01-2784, 2002 WL 1585582 (E.D. Pa. Jul. 17, 2002), *aff'd*, 65 Fed. Appx. 874 (3d Cir. 2003) (dismissing disparate impact claim because plaintiff's EEOC documents failed adequately to describe policy or practice that disparately impacted African Americans); *Woodman v. WWOR-TV*, 293 F.Supp.2d 381, 390 (S.D.N.Y. 2003) (dismissing disparate impact claim because charge only alleged intentional discrimination). The EEOC charge underlying a judicial claim for disparate impact discrimination must contain notice of a facially neutral practice (or policy) that adversely affects a protected group disproportionately. *Jackson v. Merck & Co.,* No. 99-cv-3069, 1999 WL 962522, at *5 (E.D. Pa. Oct. 21, 1999); *Woodman*, 293 F. Supp. 2d at 390.

Here, Plaintiffs' EEOC charges contain no reference to adverse or disparate impact age discrimination and identify no neutral policy or practice with an adverse effect on older workers. *See* Exhibits A-D. Each of Plaintiffs' EEOC charges say: (1) "the real reason for my termination was LSS's desire to rid itself of older employees," (2) "[m]y termination . . . is part of a systematic pattern and practice of terminating older workers," (3) "LSS has targeted a class of

employees over the age of forty for termination based largely, if not exclusively on their age." *Id.* ¶ ¶ 9, 13. These statements describe intentional discrimination.

Because they identify no neutral policy claimed to have disparate impact on older workers, but instead claim that LSS intentionally applied LSS's work rule against sending inappropriate email to Plaintiffs ***because*** of their age, which at best constitutes intentional discrimination, Plaintiffs' disparate impact claims in count II of the complaint must be dismissed.

IV. CONCLUSION

Plaintiffs only allege facts supporting claims of intentional discrimination --not disparate impact -- in both their complaint and EEOC charges. The essence of a "disparate impact" claim is that a facially-neutral policy (e.g. a policy that on its face does not make determinations based on age) necessarily falls more harshly on older workers ***because*** they are older. Thus, the essential allegation that Plaintiffs would need to make, which they do not, and cannot, make here, is that older workers are more likely, by virtue of being older, to send emails with offensive content. In that circumstance, a "neutral" policy would be alleged to more harshly impact older workers. Plaintiffs' complaint advances no factual, or logical, basis to come to that conclusion.

Instead, the central allegations of the complaint are that a facially-neutral policy was intentionally administered in a way that would "get rid of" older workers. *See* Compl. ¶ ¶ 22, 35, 49, 63, 87, 90. While LSS vehemently denies any such animus or motivation, it is plain that the only legal theory of liability actually alleged in the complaint, no matter how labeled, is one of disparate treatment, and any claims based on a disparate impact theory must, therefore, be dismissed.

Dated: June 4, 2008

Respectfully submitted,

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