



4. Plaintiffs' ADEA disparate impact claims must be dismissed because by alleging only intentional age discrimination, they: (1) fail to identify a neutral policy that disparately impacted LSS's workers who are age forty and older, (2) fail to indicate how neutral work rules that prohibit employees from sending inappropriate emails can constitute the basis of a disparate impact claim as they do not fall more harshly on any particular group, and (3) they failed to file a charge that put the EEOC and LSS on notice that they were alleging disparate impact claims, thus not exhausting their administrative remedies.

5. In sum, the essence of a "disparate impact" age 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, sexual 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.

6. 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.

7. 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.

WHEREFORE, for these reasons as discussed more fully in LSS's Brief in Support of Partial Motion to Dismiss, which is incorporated by reference, LSS respectfully requests that the

Court dismiss with prejudice plaintiffs' ADEA disparate impact claims in count II of their complaint.

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Respectfully submitted,

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