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Fact Pattern: THE NEW YORK LAW SCHOOL MOOT COURT ASSOCIATION 27TH ANNUAL ROBERT F. WAGNER, SR., NATIONAL LABOR AND EMPLOYMENT LAW MOOT COURT COMPETITION

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THE NEW YORK LAW SCHOOL MOOT COURT ASSOCIATION 27TH ANNUAL ROBERT F. WAGNER, SR., NATIONAL LABOR AND EMPLOYMENT LAW MOOT COURT COMPETITION

FACT PATTERN

Jisha S. Vachachira & Stella Yamada

A Note on the Format

The Wagner Competition Fact Pattern contains two fictitious Federal Court opinions. Citations in the opinions follow formatting specifications for Court Documents and Legal Memoranda in *The Bluebook*, 17th ed.

2002-2003 TRANSCRIPT OF RECORD

DOCKET NO. 01-58914
In the
Supreme Court of the United States
OCTOBER TERM, 2002

City Style, Inc.,
Petitioner,
-against-
Carrie S. Bradshaw,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

Cite as: *Bradshaw v. City Style, Inc.*, 203 F.4th 1 (14th Cir. 2001)[1]

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

Carrie S. Bradshaw,
Appellant,
-against-
City Style, Inc.,
Appellee.

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[1] Subsequent references to the record should be cited as 203 F.4th 1 (14th Cir. 2001) and as dictated by the sequential pagination in this typewritten opinion.

Majority opinion delivered by BRODERICK, C.J., with whom STEVENS, J., joins.

STAR, J., filed a dissenting opinion:

We address two issues on this appeal. The first is whether a claim under the Age Discrimination in Employment Act of 1967 ("ADEA")[2] may be based entirely on a disparate impact analysis. The second is whether Carrie S. Bradshaw established that she is substantially limited in the major life activity of working under Title I of the Americans with Disabilities Act of 1990 ("ADA").[3] For the following reasons, we reverse the district court's grant of summary judgment for City Style and remand for proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

On January 5, 2000, Bradshaw filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") against City Style, Inc. ("City Style"). Bradshaw asserted violations under the ADEA and the ADA based on age and disability. The EEOC investigated the charge without making a determination and issued a notice of right to sue letter. Bradshaw then filed suit in the United States District Court of the Southern District of Wagner, asserting two counts of employment discrimination. Count one of the complaint alleged a violation of the ADEA. Count two alleged a violation of the ADA. At the conclusion of discovery, the district court, in an oral opinion, granted City Style's motion for summary judgment on both counts.

II. FACTS

The facts, drawn from the pleadings and the parties' stipulations, are not in dispute.

City Style, a company incorporated in the State of Wagner, publishes *Fashion and the City,* a local newspaper that centers on the fashion, entertainment, and politics of Martini City. Martini City is the only major city located in the State of Wagner; the nearest city is approximately 180 miles away. In the fall of 1981, when it was founded by Miranda Hobbes and Charlotte York, *Fashion and*

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2 29 U.S.C. § 621 *et seq.* (2002).
3 42 U.S.C. § 12101 *et seq.* (2002).

the City brought free-form, high-spirited, and passionate journalism into the public discourse. From its founding until 1989, City Style maintained a modest circulation and advertising base, depending on the season. As Martini City's first newsweekly, *Fashion and the City* preserved a tradition of no-holds barred reporting and criticism, intertwined with the comedy and spunk of the City.

In May 1989, Mr. Big, a renowned businessman, came to Martini City from New York City to purchase a publishing company. He acquired City Style because of its increasing popularity and potential for growth. Mr. Big became the sole owner and Chief Executive Officer of City Style. Between 1989 and 1998, City Style expanded its news coverage, circulation, and advertising base. By the end of 1998, City Style employed 125 people and returned a profit of $3.3 million for the fiscal year.

In 1999, the advertising market hit a downturn. At the same time, a competing weekly newspaper, *The Sopranos Edition*, located 200 miles away, entered the market and diverted a significant number of advertisers from City Style. By the middle of 1999, Mr. Big determined that City Style was operating beyond its budget. He decided to change City Style's focus to attract a smaller, more elite audience. Mr. Big determined that a reduction in force ("RIF") was necessary to implement that goal. Mr. Big set a target reduction in non-management labor costs at $2.5 million per year. In his instructions to his senior management staff, Mr. Big implemented a policy in which employees whose salaries over $100,000 annually, or those with unsatisfactory work performance evaluations, were the first employees considered for layoff.[4]

Appellant, Bradshaw, age fifty-one, was laid off because of City Style's RIF. Bradshaw was a features reporter[5] for City Style. As a features reporter, she was required to be "on the scene" to report fashion violations and other breaking news. To uphold *Fashion and the City*'s tradition of being the first to report the newest "do's and don't's," Bradshaw's work day began at 6:00 a.m. Bradshaw also typically worked late at night covering evening social events, parties, award ceremonies, and other socialite engagements. Bradshaw also frequented Martini City's trendiest night spots to report on who was arriving with whom and what they were wearing.

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[4] *See* Appendix A.

[5] As a features reporter, Bradshaw was exempt from overtime pay under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. (2002).

Bradshaw suffered a seizure in June 1999. Dr. Trey MacDougal, a neurologist, diagnosed her as suffering from epilepsy. Epilepsy is a neurological condition that causes unprovoked seizures. After her diagnosis, Bradshaw began taking Dilantin, a medication that suppresses seizures by controlling rapidly firing neuronal discharges. Dilantin's side effects include insomnia and drowsiness. Absent this medication, Bradshaw risks suffering multiple, debilitating seizures and possible death. Although other medications to control seizures were available, Dr. MacDougal determined that Dilantin was the safest medication for Bradshaw because it would have the fewest harmful side effects.

Initially, Bradshaw attempted to maintain her prior work hours. Within three months of suffering from the side effects of the medication, however, Bradshaw realized that she could not keep her rigorous schedule. On September 15, 1999, Bradshaw met with her supervisor, Ms. Brady, and requested that City Style permit her to begin work at noon. Bradshaw argued that her nighttime work was more critical to her column than her early morning work. Ms. Brady advised Bradshaw to make the request directly to Mr. Big. Later that day, Bradshaw informed Mr. Big of her request. She told Mr. Big that the side effects of her medication were greatest in the morning. Bradshaw promised that her column would not suffer and that she would work additional evening hours to make up any lost time. Before Mr. Big gave Bradshaw an answer, Bradshaw received notice that City Style had terminated her employment as part of the RIF.

On October 5, 1999, Mr. Big announced the layoff of twenty-five employees, effective immediately. The RIF resulted in the termination of five employees under the age of forty, of whom three earned over $100,000 annually and of whom two had records of poor job performance. In addition, twenty employees over the age of forty were terminated, of whom seventeen earned over $100,000 annually and of whom three had records of poor job performance. Before the RIF, the average age of City Style's employees was thirty-seven. After the RIF, the average age was thirty-four. Before the RIF, the average salary of the non-management employees was $77,455. After the RIF, the average salary was $64,199.

On January 5, 2000, Bradshaw filed a charge of discrimination with the EEOC alleging that City Style unjustly terminated her and other similarly situated individuals based on their age. Bradshaw

claimed that City Style implemented a policy that had an adverse impact on employees over the age of forty. In addition, Bradshaw alleged that City Style discharged her because she is a disabled individual substantially limited in the major life activity of working.

In her deposition, Bradshaw testified that she had worked for City Style for sixteen years. Bradshaw is a graduate of Catrall University Journalism School; one of the country's best. Bradshaw asserts that she was already a respected fashion reporter when she began her career with City Style. During her employment at City Style, Bradshaw's salary and bonuses increased, as did the respect she received from her peers in the fashion industry. Indeed, Bradshaw's column was one of the most read features in *Fashion and the City*.

Bradshaw also testified that she heard rumors that Mr. Big wanted to discharge twenty-five employees. Bradshaw testified that she was aware that five individuals who earned over $100,000 would be unaffected by the RIF because thirty employees earned over $100,000. Bradshaw testified that she then approached Mr. Big on or about September 20, 1999. At that time, Bradshaw relayed that she hoped that her request for the accommodation would not affect Mr. Big's decision regarding her employment status. Bradshaw stated that Mr. Big replied that he had to "factor all risks and considerations in making any determination."

Bradshaw further testified that upon her termination she applied for numerous jobs in the journalism field. Due to her inability to begin work before noon, however, Bradshaw was unable to find comparable work in the Martini City area.

At the conclusion of discovery, City Style moved for summary judgment. The district court considered the briefs from both parties and, after oral argument, issued a decision from the bench granting summary judgment. The district court judge dismissed the ADEA claim based on precedent holding that a disparate impact theory is not cognizable under the ADEA. The judge dismissed the ADA claim because Bradshaw was not a qualified person with a disability under the ADA.

III. ANALYSIS AND CONCLUSIONS OF LAW

This case concerns age and disability discrimination under the ADEA and the ADA. We reverse the district court's grant of sum-

mary judgment for City Style and remand for proceedings consistent with this opinion.

A. Standard of Review

Summary judgment is appropriate if there is no genuine issue of material fact.[6] The moving party bears the initial burden of showing, by reference to materials in the record, that no genuine issues of material fact need be decided at trial.[7] The moving party may discharge this burden by exposing an absence of evidence to support the nonmoving party's case.[8]

We review a grant of summary judgment de novo to determine whether the record, viewed in the light most favorable to Bradshaw, the nonmoving party, reveals any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.[9]

B. Age Discrimination in Employment Act of 1967

A disparate impact claim is viable under the ADEA. Thus, the district court improvidently granted summary judgment. Bradshaw alleges that she was discriminated against because City Style's RIF had a disparate impact on employees over the age of forty. Bradshaw argues that by targeting employees with the highest salaries, City Style implemented a policy that resulted in terminating a disproportionate number of employees over the age of forty.

Because Bradshaw relies solely on the disparate impact theory of discrimination, the first issue before this Court is whether that claim is cognizable under the ADEA. Given that this is a case of first impression before this Court, we look to other jurisdictions for guidance. For the reasons set forth below, we follow the jurisdictions that recognize a disparate impact claim.

The ADEA provides that "[i]t shall be unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age."[10] A successful disparate impact claim relies on a facially neutral employment practice or policy, not otherwise justified by a business

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6 FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).
7 *Celotex*, 477 U.S. at 320.
8 *Id.* at 325.
9 FED. R. CIV. P. 56(c); *Celotex*, 477 U.S. at 322.
10 29 U.S.C. § 623(a)(1).

necessity, which has an adverse impact on a protected class.[11] Disparate impact claims have traditionally been available to Title VII claimants.[12] Congress created Title VII to achieve broad-based equality of employment opportunities. Consequently, disparate impact claims, which focus on discrimination as an end-result rather than as a cause, comport with what Congress was trying to accomplish.[13]

The ADEA's prohibitions broadly define discrimination by tracking the language of Title VII.[14] As such, the ADEA, like Title VII, permits proof of discrimination using the theory of disparate impact.

In the case before us, City Style implemented a RIF that affected employees with higher salary ranges. As a result, older employees and those with the most years of service were terminated because, in general, salaries correlate with experience and job tenure. Bradshaw has demonstrated a statistical disparity between the ages of the laid-off employees and the ages of the retained employees. We therefore find genuine issues of material fact concerning the claim of disparate impact and accordingly reverse the grant of summary judgment.

C. Americans with Disabilities Act of 1990

Bradshaw's physical impairment substantially limits her in the major life activity of working. The ADA provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees . . . ."[15] A claimant must be a qualified individual with a disability to be within the class of individuals the ADA protects.

A qualified individual with a disability is "an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[16] The ADA defines a disability as

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[11] *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993)

[12] Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k).

[13] *See* Griggs v. Duke Power Co., 401 U.S. 424, 437 (1971) (finding that high school diploma requirement had an adverse impact on minority employees).

[14] *Hazen*, 507 U.S. at 604; Lorillard v. Pons, 434 U.S. 575, 577 (1978); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980).

[15] 42 U.S.C. § 12112(a).

[16] *Id.* § 12111(8).

"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."[17]

To determine whether an individual is disabled within the meaning of the ADA, this Court must first determine whether the condition in question constitutes a physical or mental impairment. Epilepsy is defined as a "disorder of the nervous system, usually characterized by fits of convulsions that end with loss of consciousness."[18] Bradshaw's diagnosis as an epileptic qualifies her as having a physical impairment for the purpose of defining a disability under the ADA. Further, both parties stipulate that epilepsy is a physical impairment.

Next, this Court must determine whether Bradshaw's epilepsy substantially limits one or more of her major life activities. The Supreme Court has determined that major life activities refer to those activities of central importance to most people's daily lives.[19] The EEOC regulations identify major life activities as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[20]

Several circuit courts have also concluded that working falls within the category of major life activities.[21] We are persuaded by the circuits' reasoning and the EEOC's guidance. As such, we join the majority of the circuits and find that working is a major life activity.

Bradshaw contends that her epilepsy limits her in the major life activity of working because the side effects of her medication impedes on her ability to work. However, Bradshaw's seizures are substantially controlled by her medication, which in some circumstances would render her not impaired at all for purposes of ADA analysis.[22] Nonetheless, the very medication that Bradshaw must

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17 *Id.* § 12102(2).

18 5 Oxford English Dictionary 332 (2d ed. 1989).

19 *See* Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184, 196 (2002).

20 29 C.F.R. § 1630.2(j).

21 *See, e.g.*, Fjellestad v. Pizza Hut, 188 F.3d 944, 950 (8th Cir. 1999) (holding that restaurant manager was substantially limited in ability to work because of injuries from car accident); Quint v. A.E. Staley Mfg., 172 F.3d 1, 16 (1st Cir. 1999) (finding that former warehouse worker established that carpel tunnel syndrome substantially limited ability to work).

22 *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 488 (1999) (holding that disability under ADA must be determined with reference to corrective measures).

take to control her epilepsy has potentially debilitating side effects. The effects of Bradshaw's medication are the basis for her impairment as much as the underlying epilepsy.[23]

The final step in determining whether an individual is disabled is to determine if the plaintiff's impairment results in a substantial limitation on a major life activity. The EEOC provides several factors in determining whether a person is substantially limited in a major life activity: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact or the expected permanent or long-term impact resulting from the impairment.[24]

The Supreme Court has held that when the major life activity under consideration is that of working, the statutory phrase "substantially limits requires . . . that plaintiffs allege that they are unable to work in a broad class of jobs."[25] To be substantially limited in the major life activity of working, a person must be precluded from more than one type of job, a specialized job, or a particular job of choice.[26] Even if a job uses an individual's skills, but no unique talents, then the individual is not precluded from performing in a substantial class of jobs.[27] Similarly, if different types of jobs are available, the individual is not precluded from a broad range of jobs.

The EEOC has identified several factors that courts should consider when determining whether an individual is substantially limited in the major life activity of working. These factors include the geographical area to which the individual has reasonable access and "the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within the geographical area, from which the individual is also disqualified."[28]

We are persuaded that a reasonable trier of fact could conclude that City Style discriminated against Bradshaw because of her impairment. A reasonable trier of fact could conclude that Bradshaw's disability significantly restricted her ability to perform the major life activity of working. We are further persuaded that genuine is-

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23 *See id.* at 492 (holding that side effects of medication may be taken into account in ADA analysis).

24 29 C.F.R. § 1630.2(j)(2).

25 *Sutton*, 527 U.S. at 491; *Toyota*, 534 U.S. at 190

26 *Toyota*, 534 U.S. at 190.

27 *Id.*

28 29 C.F.R. § 1630.2(j)(3)(ii)(A)(B).

sues of material fact exist about whether Bradshaw's epilepsy and the medication's side effects significantly interfered with her ability to work. Bradshaw's discharge came precipitously after her request for accommodation. This raises questions from which inferences could be drawn in Bradshaw's favor. Therefore, we find that the district court improvidently granted summary judgment.

Reversed and remanded for further proceedings consistent with this opinion.

STAR J., dissenting:

I disagree with the majority on both issues. Thus, I dissent.

A. Age Discrimination in Employment Act of 1967

The district court correctly granted City Style's motion for summary judgment. City Style did not discharge or otherwise discriminate against Bradshaw or any other similarly situated individuals with respect to terms, conditions, or privileges of employment because of the individuals' ages.

The majority's interpretation of the ADEA in relation to Title VII is an abhorrent deviation from reasoned logic. In 1991, Congress amended Title VII of the Civil Rights Act of 1964 to outline the parties' respective burdens of proof in cases involving an "employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[29] However, the Civil Rights Act of 1991 made no mention of disparate impact based on age and did not similarly amend the ADEA. Therefore, Congress did not intend to allow disparate impact claims under the ADEA. Although a disparate impact theory in Title VII cases effectuates the overall goals of the Civil Rights Act, the same is not true for the ADEA.

Moreover, the majority's decision cannot be reconciled with the Supreme Court's ruling in *Hazen Paper Co. v. Biggins*.[30] The Court in *Hazen Paper* did not decide whether a disparate impact claim is viable under the ADEA. However, Justice O'Connor, writing for a unanimous Court, categorically declared that "disparate treatment" was distinct from disparate impact under the ADEA.[31] The Court articulated that disparate treatment, rather than dispa-

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29 42 U.S.C. § 2000e-2(k)(1)(A)(i).
30 507 U.S. 604 (1993).
31 *Id.* at 607.

rate impact, "captures the essence of what Congress sought to prohibit in the ADEA."[32]

City Style implemented a policy that made no reference to age; it simply terminated employees based on budgetary reasons—a differentiation based on a reasonable factor other than age. Even if City Style's neutral policy had an adverse effect on employees over forty, a violation of the ADEA may not be established using a disparate impact theory of employment discrimination. Accordingly, the district court's grant of summary judgment was proper.

B. Americans with Disabilities Act of 1990

The district court was also correct in granting City Style's motion for summary judgment under the ADA claim. Bradshaw presents no genuine issues of material fact because she is not a qualified individual with a disability under the ADA. Bradshaw fails to demonstrate that City Style discriminated against her based on her disability. Working is not a major life activity accepted within the meaning of the ADA.[33]

Even assuming that working is a major life activity, Bradshaw has submitted no evidence to place in issue her inability to work in a "broad range of jobs," rather than simply a specific job.[34] The Supreme Court has specified that the terms of the ADA need to be interpreted strictly to create a demanding standard for a person to qualify as disabled under the ADA.[35] Further, the ADA requires individuals to prove a disability by offering evidence that their impairment substantial limits a major life activity.[36]

The position of features reporter is a single, particular job, and a limitation on a single, particular job cannot constitute a substantial limitation on the major life activity of working. By way of comparison, courts have held that a disability that precludes piloting an

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[32] *Id.* at 608.

[33] *See Toyota*, 534 U.S. at 200 (noting "conceptual difficulty" of considering working as a major life activity when underlying question is whether one is excluded from working because of an impairment).

[34] *See id.* at 190 (*quoting Sutton v. United Airlines, Inc.*, 527 U.S. 471, 491 (1999)).

[35] *See Toyota*, 534 U.S. at 197.

[36] *Id.*; *see also* Doren v. Battle Creek Health Sys., 187 F.3d 595 (6th Cir. 1999) (finding that pediatric nurse's impairment prevented performing nursing duties on adult floor but that plaintiff presented no evidence concerning number of pediatric nursing jobs from which she was excluded).

airplane does not substantially impair working because the relevant class of jobs includes ground trainer, flight instructor, and an airline management or administrative employee.[37] Bradshaw simply asserts that she could not perform the early morning responsibilities of a field reporter due to the side effects of her medication. Surely, a journalist of Bradshaw's stature and experience could find employment in the field of journalism in Martini City or elsewhere.

As a matter of law, Bradshaw is unable to place at issue whether she is substantially limited in both a class of jobs and a broad range of jobs in various classes in the Martini City metropolitan area. The record is devoid of evidence that Bradshaw is limited in her ability to perform other reporting jobs, much less all jobs that require an early morning shift. Therefore, summary judgment is appropriate.

I dissent.

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[37] *See* Witter v. Delta Air Lines, Inc., 138 F.3d 1366, 1370-71 (11th Cir. 1998); *see also* Bridges v. City of Bossier, 92 F.3d 329, 334-36 (5th Cir. 1996) (holding that firefighter's inability to work is not substantial limitation on major life activity of working because fire-fighting does not constitute "class of jobs").

IN THE SUPREME COURT OF THE UNITED STATES

Docket No. 01-58914

City Style, Inc.,

Petitioner,

-against-

Carrie S. Bradshaw,

Respondent.

The petition for writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby granted so that this Court may hear and consider the following issues:

1. Whether the Age Discrimination in Employment Act of 1967 provides a cause of action based solely on a disparate impact analysis and whether Respondent has satisfied the requirements for such a claim for purposes of surviving summary judgment.
2. Whether "working" is a "major life activity" under Title I of the Americans with Disabilities Act of 1990 and whether Respondent has satisfied, for purposes of surviving summary judgment, the requirements for an ADA claim based on a substantial impairment of her ability to work.

APPENDIX A

CITY STYLE, INC.
29 Yamada Avenue
The Vachachira Building
Martini City, Wagner 10013
Tel: (212) 867-5309 / Fax: (212) 867-6969

MEMORANDUM

TO: Senior Management Staff
FROM: Mr. Big
DATE: September 15, 1999
RE: Decision to Downsize

All employees are considered valuable and indispensable at City Style. However, due to budgetary constraints, a reduction in force is necessary for the continued success of City Style.

The non-management labor budget must be reduced by at least $2.5 million. Thus, approximately 25 employees will be terminated based on their current salaries. Please give me a list of the 30 individuals whose current salaries and benefit packages exceed $100,000 annually, along with their past 6 performance evaluations. Of the highest paid staff members, those with poor work histories will be laid off first. The remaining reductions will be based on salary, save the best performers.

I believe that this decision will best effectuate the goal of operating City Style efficiently. The RIF will take place on October 5, 1999.
//MB