

Client Alert

Supreme Court Finds Disparate Impact Claims Permitted Under ADEA

Overview of the Court's Decision

The U.S. Supreme Court's decision on March 30, 2005 in *Smith v. City of Jackson, Mississippi*, expanded the scope of liability for employers under the Age Discrimination in Employment Act ("ADEA") by recognizing employees' rights to relief under the Act based on a theory of disparate impact.

Resolving a split of opinion among the federal circuit courts, the Court held that employees can bring a claim under the ADEA if a practice, policy, plan or other employment action, albeit facially neutral, has a disproportionate adverse effect on employees age 40 or over. As a result, the employer's intent in implementing a plan, policy or action is irrelevant as the employee no longer needs to prove intentional discrimination. The employer has the burden to show that the challenged plan, policy or action having an unfavorable effect on employees age 40 or over was based on "reasonable factors other than age."

In reaching its decision, the Court compared the text of the ADEA to the similar text of Title VII, under which claims for both disparate impact and disparate treatment are permitted. Recognizing, however, some textual differences between the two acts, the Court found that the scope of disparate impact liability for employers is narrower under the ADEA than under Title VII.

The Reasonableness Inquiry

Although the Court in *Smith* held that the plaintiffs (police and public safety officers over 40, the "officers") could bring an age-based claim under a disparate impact theory, it concluded that the officers failed to state such a claim, affirming the lower court's grant of summary judgment in favor of the defendants (the City of Jackson, Mississippi, the "City").

Applying this narrower disparate impact analysis under the ADEA, the Court determined that the officers' contention that the City's salary increases were more favorable to younger officers than older officers failed to identify any specific test, requirement or practice within the pay plan that adversely impacted the older officers. While the Court did not define what constitutes "reasonable factors other than age," it held that the City's explanation for the salary increases -- its need to raise the junior officers' salaries to make them more competitive in the market with comparable positions -- was "unquestionably reasonable."

The Court also stated that although there may have been other reasonable ways the City could have achieved these same goals, the "reasonableness inquiry" under the ADEA does not require courts to consider whether there are other ways to reaching the same result that do not disparately impact older protected employees.

Practical Tips For Employers

The courts' determination as to whether a given challenged employment policy or plan having a disparate impact on older employees is based on "reasonable factors other than age," will be made on a case-by-case basis. While federal courts in New York (the Second Circuit) and California (the Ninth Circuit) have permitted disparate impact claims under the ADEA for years prior to the *Smith* decision, this decision serves as a reminder that all employers can and should take steps to ensure that their policies and actions withstand any such challenges.

- Initially, employers should review all of their current employment policies and plans to determine whether any of these practices inadvertently have a disproportionate adverse effect on employees over 40 years old.
- In evaluating these policies, employers should pay particular attention to reductions-in-force plans (RIFs), reclassification of job categories, internal restructuring of positions, salary policies, retirement plans and benefit plans.
- In assessing these employment policies and plans, employers can conduct a statistical analysis by bracketing the employees into various age groups and then comparing the brackets and the respective outcome a given policy or plan has on each age group.
- Employers should remember to not only analyze whether employees under 40 years old are impacted differently than employees 40 years or older by a particular practice or policy, but also to evaluate whether, within the protected class of employees, the older employees are affected in a disproportionate negative manner compared with the younger protected employees. (For example, if a proposed RIF results in a significant number of employees in their fifties being laid off compared with the amount of employees in their forties who are subject to the RIF, such a practice could be challenged under the ADEA).
- Upon determining a plan or policy unintentionally has a disparate impact on older protected employees, the employer then needs to consider whether the implementation of the policy or practice was motivated by legitimate reasonable factors other than age. An employer should be satisfied that age played no role in the achievement of the plan or policy.
- Finally, employers should remember to document, document, document! Maintaining a solid trail of documentation relating to the implementation, revision or analysis of employment policies and practices can often make the difference in the successful defense of an age-based disparate impact challenge of an employment action.

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