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The Supreme Court Rules that Employees Who are 40 or Over May Bring Disparate Impact Claims Alleging Age Discrimination

On March 30, 2005, the U.S. Supreme Court issued its 5-3 decision in *Smith v. City of Jackson, Mississippi*, No. 03-1160, 125 S.Ct. 1536 (2005), resolving a split among the Circuits and ruling that a disparate impact theory is viable under the Age Discrimination and Employment Act ("ADEA"). The Court explicitly found that proving intentional discrimination is not required for a finding of violation under the ADEA. Instead, it is sufficient to show that the employer has a plan or policy that has a disparate impact on employees who are 40 and over. The Court also said that an employer can prevent liability by showing that it relied on "a reasonable factor other than age."

Facts in *City of Jackson*

About 30 city police officers and public safety dispatchers in Jackson, Mississippi, including the named plaintiff Azel Smith, claimed that the City's new performance pay plan discriminated against them based on their age (40 or older). The City's plan was created to make the pay for newly hired officers more competitive with other police forces in the region. The result of the plan was increasingly smaller raises to the more senior officers and dispatchers. For the most part, these senior officers were over age 40.

The plaintiffs alleged that the City purposefully discriminated against them because of their age and, separately, that the City's plan caused a disparate impact on officers and dispatchers 40 years or older because they received smaller pay increases than those under 40. Plaintiffs argued that under the disparate impact allegation, discriminatory intent was irrelevant.

The district court granted summary judgment for the City and dismissed both claims. The Court of Appeals for the Fifth Circuit affirmed summary judgment on the disparate impact claim but determined that, on the disparate treatment claim, further discovery was necessary on the issue of intent before a determination could be made dismissing that claim.

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Supreme Court's Decision

The Court held that a disparate impact theory was cognizable under the ADEA based on the similar provision found in Title VII of the Civil Rights Act of 1964 ("Title VII") and guidance from the Equal Employment Opportunity Commission ("EEOC") and the Department of Justice ("DOJ").

At first, the Court compared the language in the ADEA with the language in Title VII. The Court examined the language in both statutes that prohibits employers from discriminating against employees based on protected factors. Given this substantial similarity, the Court highlighted the presumption that "when Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that the Congress intended that text to have the same meaning in both statutes." 125 S.Ct. at 1541. Moreover, the Court recognized a "remarkable similarity"

between the congressional goals of Title VII and those set out in the ADEA's legislative history. *Id.*

Interestingly, the ADEA has language — the “reasonable factor other than age” or “RFOA” provision — that significantly narrows a finding of ADEA violation by permitting “otherwise prohibited” action “where the differentiation is based on reasonable factors other than age.” Contrary to the Fifth Circuit’s decision, the Court held that the RFOA provision actually supports the conclusion that a disparate impact theory is viable under the ADEA since that provision “plays its principal role by precluding liability” if the impact was attributed to a non age factor that is “reasonable.” *Id.* at 1544-1545.

Even so, the Court expressly said that a disparate impact theory under the ADEA is narrower than it is under Title VII because of the RFOA provision (discussed above) and the Civil Rights Act, as amended in 1991. *Id.* Although the 1991 amendments expanded coverage of Title VII, those amendments did not apply to the ADEA. Accordingly, the Court determined that plaintiffs failed to state a viable disparate impact theory as a matter of law and affirmed summary judgment in favor of the City. *Id.*

The Court went on to say that plaintiffs failed to identify a specific employment practice that was allegedly responsible for any statistical disparity and that it was clear from the record that the City’s plan was based on “reasonable factors other than age.” *Id.* The Court said that it was “unquestionably reasonable” to rely on seniority and rank given the City’s goal of raising salaries to match the surrounding communities. *Id.* at 1545. In reaching this conclusion, the Court commented that the business necessity test of Title VII, which requires courts to consider other alternative measures in its determination of whether the practice at issue is discriminatory, does not apply to the ADEA. *Id.* at 1546.

Effect of the Ruling

This decision may have a significant effect on employers: by recognizing disparate impact claims under the ADEA, the Supreme Court lowered the threshold requirement for asserting viable claims in court. The likely effect is that litigation costs for employers will go up: more employers will be confronted with more lawsuits alleging disparate impact claims in violation of the ADEA. To avoid such increasing litigation costs, now more than ever, employers should bring knowledgeable employment counsel into strategizing sessions before company restructurings, reductions in force and any other decision making processes that may have significant effect on workers age 40 and over.

Also, employers are well advised to carefully reevaluate all current employment plans and programs, such as retirement policies, benefit plans, or salary and bonus practices, to determine whether they have a negative effect on employees 40 and over. As mentioned above, the Supreme Court held that ADEA violation will not be found, despite adverse effect on older workers, if an employer can demonstrate that the practice at issue was based on reasonable factors other than age. Accordingly, employers should ensure that the reasons behind and basis for such plans are legitimate, well grounded and based on factors other than age.

Finally, employers are well advised to keep a close watch on new developments in legislation affecting the ADEA. Congress soon may attempt to square the stricter ADEA requirements for a finding of liability with the less stringent requirements of Title VII.

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