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A report
for clients
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U.S. Supreme Court Recognizes Disparate Impact Claims Under ADEA

In *Smith v. City of Jackson, Mississippi*, No. 03-1160, 544 U.S. ____ (2005), the U.S. Supreme Court provided greater protection to employees under the Age Discrimination in Employment Act of 1967 ("ADEA"), concluding that a disparate impact theory is viable under the ADEA. Specifically, the Court held that employees over the age of 40 do not have to prove that their employer intentionally discriminated against them because of their age to show a violation of the ADEA; rather, it is enough to demonstrate that their employer has a policy or plan that, although facially neutral, operates to have a disparate impact on employees over age 40. The Court also held that an employer can defeat a disparate impact claim by showing that it relied upon a "reasonable factor other than age."

The issue before the Court was whether the City's facially neutral policy of granting raises to all police officers and dispatchers in attempt to bring starting salaries up to the regional average — which resulted in officers with less than five years' service and generally under age 40 receiving proportionately greater raises than those with more seniority and over age 40 — resulted in prohibited age discrimination under the ADEA. While the Court held that a disparate impact theory is cognizable under the ADEA, it affirmed the dismissal of plaintiffs' claim because they failed to identify a specific employment practice that was allegedly responsible for any statistical disparity, and because the City's plan was based on reasonable factors other than age.

Background

Plaintiffs, Azel Smith and twenty-nine other city police officers and public safety dispatchers in Jackson, Mississippi, alleged that the City's new performance pay plan was age discriminatory. The City's plan was created to make the pay for recently hired officers more competitive with other police departments in the region. The new wage scales resulted in proportionally smaller raises to the more senior officers and dispatchers, most of whom were over age 40.

The plaintiffs argued that the City deliberately discriminated against them because of their age, and that the City's plan resulted in a disparate impact on officers and dispatchers over age 40 in violation of the ADEA because those under age 40 received substantially larger pay increases. In other words, plaintiffs argued that the City's intent was irrelevant; the fact of the matter was that the policy discriminated against police officers and dispatchers over age 40.

The district court granted summary judgment in favor of the City on both claims. The Fifth Circuit affirmed summary judgment on the disparate impact claim, but found that ruling on the disparate treatment claim was premature because plaintiffs were entitled to further discovery on the issue of intent.

The Supreme Court's Decision

In a 5-3 decision (Chief Justice Rehnquist took no part in the decision), the Court concluded that a disparate impact theory is viable under the ADEA, basing its decision primarily on the parallel provision found in Title VII of the Civil Rights Act of 1964 ("Title VII") and guidance provided by the U.S. Department of Labor ("DOL") and Equal Employment Opportunity Commission ("EEOC").

Initially, the Court compared the language in the ADEA with that in Title VII, focusing on the language in both statutes that prohibits employers from discriminating against employees based on protected factors. Given this overlap, the Court took note of the presumption that, “when Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.” (citing *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973)). Therefore, the Court looked to its unanimous interpretation of Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which it found that Congress had “directed the thrust of the Act to the consequences of employment practices, not simply motivation.” *Id.* at 432 (emphasis in original). Moreover, the Court found a “remarkable similarity” between the congressional goals of Title VII, cited in *Griggs*, and those set forth in the legislative history of the ADEA.

Unlike Title VII, however, the ADEA contains language that significantly narrows its coverage by permitting “otherwise prohibited” action “where the differentiation is based on reasonable factors other than age” (the “RFOA provision”). Contrary to the Fifth Circuit’s decision, the Court reasoned that the RFOA provision actually supports the conclusion that a disparate impact theory is viable under the ADEA because that provision “plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was ‘reasonable.’”

Additionally, the Court took note that the DOL, which initially drafted what is now known as the ADEA, and the EEOC, which is the agency charged with responsibility for implementing the ADEA, have consistently interpreted the ADEA to authorize relief based upon a disparate impact theory.

Notwithstanding the foregoing, the Court clearly stated 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 amendment to Title VII contained in the Civil Rights Act of 1991. Although the 1991 amendments expanded the coverage of Title VII (in response to the U.S. Supreme Court’s decision in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), where the Court narrowly construed the employer’s exposure to liability on a disparate impact theory), those amendments did not amend or speak of the subject of age discrimination. Consequently, the Court reasoned that *Wards Cove*’s pre-1991 interpretation of Title VII’s identical language remains applicable to disparate impact claims under the ADEA.

Given this analysis, the *Smith* Court concluded that plaintiffs had failed to adequately state a disparate impact theory as a matter of law, and thus affirmed summary judgment in favor of the City on that claim. In doing so, the Court held 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.” The Court opined that it is “unquestionably reasonable” to rely on seniority and rank given the City’s goal of raising salaries to match the surrounding communities. The Court stated that, “[w]hile there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable.” In reaching that decision, the Court made clear that, “[u]nlike the business necessity test [under Title VII], which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry [under the ADEA] includes no such requirement.”

Concurrence By Justice O’Connor, Joined By Justices Kennedy & Thomas

Although Justices O’Connor, Kennedy and Thomas agreed with the ultimate outcome of the case, they departed from the majority’s opinion insofar as it recognizes a disparate impact theory of discrimination under the ADEA. In reaching this conclusion, Justice O’Connor also looked to the language and legislative history of the ADEA and Title VII, but instead focused on the differences in the two statutes — primarily the absence in Title VII of a provision parallel to the RFOA provision in the ADEA. From this, Justice O’Connor argued that Congress specifically intended to leave out disparate impact claims when drafting the ADEA and thus required proof of intent to show a violation of the ADEA. Further, in response to the EEOC regulations stating otherwise, Justice O’Connor concluded that these regulations address only the so-called RFOA provision (discussed above), and have no relation to the only provision at issue, that setting out prohibited activity under the ADEA.

Concurrence By Justice Scalia

Justice Scalia, writing for himself, agreed that the ADEA permits disparate impact claims, but based his decision on referral to the reasonable views of the EEOC. Justice Scalia concluded that this was an “absolutely classic case for deference to agency interpretation[.]” arguing for full deference to the EEOC in accordance with the principles set out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Implications For Employers

The implications of the Court’s ruling may be significant for employers. *First*, by broadening employer liability under the ADEA, the potential for litigation from a large and growing sector of the workforce has multiplied exponentially. In response, employers should carefully evaluate all employment plans and programs, such as reductions-in-force plans, benefit plans, retirement policies or salary

practices, that may, unintentionally, have a negative and disproportionate effect on employees over age 40 to ensure that the impetus behind any such plan is legitimate and based upon reasonable factors other than age.

Further, the Court's decision could likely trigger legislative action, similar to that after *Wards Cove*. As previously discussed, the Court has made it clear that it is bound by its pre-1991 interpretation of Title VII when interpreting the ADEA, since the 1991 Civil Rights Act did not amend the ADEA. Accordingly, Congress may deem it necessary to amend the ADEA to include disparate impact provisions that are similar to those in the Civil Rights Act of 1991.

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