

SUPREME COURT RECOGNIZES DISPARATE IMPACT CLAIMS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

MAY 5, 2005

The United States Supreme Court held in the case of *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005), that the Age Discrimination in Employment Act (“ADEA”) authorizes recovery on a “disparate-impact” theory of liability, that is, liability despite the absence of any intent to discriminate, where a facially-neutral practice adversely affects protected employees. The Court relied on its prior ruling in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which held that disparate-impact claims were cognizable under Title VII of the Civil Rights Act of 1964 (“Title VII”). However, the Court stressed that the scope of disparate-impact liability under ADEA is much narrower than under Title VII, because under ADEA, unlike Title VII, an otherwise prohibited action is permitted where the differentiation is based on reasonable factors other than age (the “RFOA” provision). Providing an immediate illustration of its narrow view of disparate-impact liability under ADEA, the Court relied on the RFOA provision to affirm dismissal of the disparate-impact claim based on the facts before it. The Court concluded that the challenged employment practice was based on a reasonable factor other than age and, in employer-favorable language, noted that the reasonableness inquiry did *not* require the employer to show that there were other ways to achieve its goals that would not result in a disparate impact.

DISPARATE –TREATMENT AND DISPARATE- IMPACT CLAIMS

With respect to employees who are at least 40 years old, ADEA makes it unlawful for an employer:

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age[.]

29 U.S.C. §§ 623(a), 631(a). Title VII uses virtually identical language to prohibit discrimination in employment based on race, sex, religion, national origin and color. 42 U.S.C. § 2000e-2(a).

The Supreme Court originally recognized only claims for intentional discrimination under the federal anti-discrimination laws, so-called “disparate-treatment claims.” Disparate-treatment claims under Title VII, ADEA and other anti-discrimination statutes generally proceed within the framework established by *McDonnell-Douglas* and its progeny, which

requires that: (1) the plaintiff first must establish a prima facie case of discrimination; (2) the employer must respond with a legitimate, nondiscriminatory reason for its actions; and (3) in order to prevail, the plaintiff must establish that the employer's articulated legitimate, nondiscriminatory reason was a pretext to mask unlawful discrimination. See BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 11-12 (3d ed. 1996).

The landscape changed dramatically with the Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, the Court considered whether Title VII prohibited an employer from using high school diploma and test requirements as a condition of employment where (i) those requirements were not shown to be significantly related to job performance, (ii) the requirements operated to disqualify African-American applicants at a substantially higher rate than white applicants, and (iii) there was a longstanding practice of giving the jobs in question to white applicants. *Id.* at 425-26. Though the Court accepted the appellate court's conclusion that the employer had adopted the job requirements without any intent to discriminate, the Court held for the first time that § 703(a)(2) of Title VII does not require a showing of discriminatory intent, concluding that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431.

The *Griggs* Court provided employers with a possible defense to an impact claim, but one with a high threshold: business necessity. The Court decreed that an employment practice which operates to exclude a protected group is prohibited unless the employer can show that the practice is related to job performance. *Id.* And, when subsequent Supreme Court cases eroded the scope of liability under the adverse impact theory, Congress stepped in with passage of the Civil Rights Act of 1991, which codified the business necessity test, mandating that once a plaintiff establishes a prima facie case of adverse impact, the employer may defend its policy or practice by proving that it is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

THE SUPREME COURT DECISION

Petitioners in *Smith v. City of Jackson* were police and public safety officers employed by the City of Jackson, Mississippi (the "City"), who claimed that a 1999 pay plan violated ADEA because salary increases under the plan were less generous for officers over age 40. 125 S. Ct. 1536, 1539 (2005).

The Pay Plan At Issue

The stated purpose of the original pay plan, put into effect in 1998, was to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability." *Id.* at 1539. In 1999, the plan was revised to bring the starting salaries of police officers up to the regional average, and the City granted raises to all officers. *Id.* The five basic job positions, ranging from police officer up to deputy police chief, were divided into a series of steps, and wages were assigned to each range based on a survey of

comparable communities in the Southeast. *Id.* at 1545. The employees then were assigned the lowest step that would yield a 2% raise. *Id.*

Most of the officers – a group including officers under and over age 40 – fell within the three lowest ranks. *Id.* Petitioners are the smaller group of officers in the upper two ranks, who are all over age 40. Though petitioners’ raises were higher in dollar value, the raises represented a smaller percentage of their salaries, which were higher than the junior officers’ salaries. *Id.* at 1545-46. For example, while 66% of the officers under 40 received raises of more than 10%, only 45% of those over 40 did. *Id.* at 1546. In addition, the average percentage increase for officers with less than five years experience was somewhat higher than for those with more seniority, and it was older officers who tended to occupy the more senior positions. *Id.*

Proceedings Below

Petitioners brought two claims under ADEA based on the pay plan. First, petitioners claimed that by employing the pay plan, the City deliberately discriminated against them because of their age – the disparate-treatment claim. In addition, petitioners claimed that the pay plan had an adverse impact on them because of their age – the disparate-impact claim. *Id.* at 1539. The district court granted summary judgment to the City on both claims. *Id.* The Court of Appeals for the Fifth Circuit held that petitioners were entitled to further discovery on the issue of intent but affirmed dismissal of the disparate-impact claim, concluding that such claims were not available under ADEA. *Id.* at 1539-40.

The Court Recognizes Disparate-Impact Liability Under ADEA

In reaching its conclusion that ADEA does, in fact, authorize recovery in disparate-impact cases, the Supreme Court began by comparing the text of ADEA to Title VII. *Id.* at 1540. Section 4(a)(2) of ADEA makes it unlawful for an employer “to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.” 29 U.S.C. § 623(a)(2). The Court noted that “[e]xcept for substitution of the word ‘age’ for the words ‘race, color, religion, sex, or national original,’ the language of that provision in the ADEA is identical to that found in § 703(a)(2) of [Title VII].” 125 S. Ct. at 1540. Beginning “with the premise 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,” the Court concluded that its “unanimous interpretation of § 703(a)(2) of the Title VII in *Griggs* is therefore a precedent of compelling importance.” *Id.* at 1541 (citations omitted). The Court noted that *Griggs* was “the better reading” of the statutory text, which prohibits actions that “adversely affect” an employee and thus focuses on the effects, not motivation, of the action. *Id.* at 1542. In addition, the Court noted that both the Department of Labor and the EEOC have interpreted ADEA to authorize relief in disparate-impact cases. *Id.* at 1544.

The RFOA Provision

The RFOA (reasonable factors other than age) provision played a significant and interesting dual role in the Court’s analysis: the Court cited that provision both as support for finding disparate-impact liability under ADEA but also as a basis for construing disparate-impact liability more narrowly under ADEA than in the Title VII context.

The RFOA provision permits any “otherwise prohibited” action “where the differentiation is based on reasonable factors other than age.” 29 U.S.C. § 623(f)(1). The Court cited the inclusion of this provision as textual support for allowing disparate-impact liability under ADEA. The Court reasoned that if an employer took an action based on a factor other than age, then the action would not constitute disparate treatment in the first place. 125 S. Ct. at 1544. The Court concluded: “It is, accordingly, in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was ‘reasonable.’” *Id.*

The Court cited the RFOA provision as a textual difference between ADEA and Title VII that “[made] it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII.” *Id.* The inclusion of the RFOA provision, the Court found, “is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual’s capacity to engage in certain types of employment.” *Id.* at 1545. The Court further stated that “intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII” and that the RFOA provision “reflects this historical difference.” *Id.* Signaling the role the RFOA provision will play in the Court’s restricted view of liability, the Court concluded: “Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group.” *Id.*

The Court Dismisses the Disparate-Impact Claim

Relying on the RFOA provision, the Court quickly disposed of petitioners’ disparate-impact claim. The Court initially remarked that petitioners had not met their burden to identify a specific test, requirement or practice within the pay plan that had an adverse impact on older workers, noting that “it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact.” *Id.*

Moving on to the RFOA provision, the Court found it clear from the record that the City’s plan was based on reasonable factors other than age. *Id.* Under the plan, older officers in more senior positions received, on average, smaller raises when measured as a percentage of their salary. *Id.* at 1546. Noting that “[t]he basic explanation for the differential was the City’s perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market,” the Court determined that the disparate impact therefore was attributable not to age, but to the City’s decision to give raises based on “seniority and position.” *Id.* Without probing any further, the Court found reliance on seniority and rank to

be “unquestionably reasonable,” given the City’s stated goal of raising salaries to make them competitive with surrounding communities. *Id.* The Court concluded: “In sum, we hold that the City’s decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a ‘reasonable factor other than age’ that responded to the City’s legitimate goal of retaining police officers.” *Id.*

Significantly, the Court refused to hold the City to a higher standard akin to “business necessity” under Title VII. Though acknowledging that there may have been other reasonable ways for the City to achieve its goals, the Court gave deference to the one selected by the City because it was not unreasonable. *Id.* Drawing a sharp distinction between the RFOA provision and the business necessity test, the Court stated: “Unlike the business necessity test, 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 includes no such requirement.” *Id.* Accordingly, the Court affirmed dismissal of the disparate-impact claim.

PRACTICAL CONSIDERATIONS

The Court’s decision to open a new avenue of liability under ADEA will undoubtedly spur increased age discrimination claims against employers. Employers must now consider whether an existing practice or contemplated action will have an adverse impact on employees over age 40. To that end, employers should review existing policies for any such potential impact and also should educate human resource specialists, managers and other decision-makers about disparate-impact liability under ADEA as well as the nature of the RFOA provision.

The Court’s opinion, with its emphasis on the RFOA provision, provides a blueprint for ADEA compliance where employers suspect that an action may have a disparate impact on older workers. In those instances, employers are best protected by identifying and, where possible, documenting the reasonable factors other than age on which the actions or decisions are based. It is advisable that these factors be objective and fact-based and avoid any subjectivity on the part of the decision-makers. This exercise will serve as the best defense to claims that may be subsequently brought.

This is particularly important in force reductions, where employees protected by ADEA will have access to the mandatory disclosure setting forth how many employees under and over the age of 40 were selected for termination. Traditionally, employers implementing a force reduction would analyze demographic data to assess selection rates based on age, because an adverse impact was possible evidence of discriminatory intent. Now, as a result of the *Smith* decision, the adverse impact itself can be a cause of action against the employer. Thus, it is more important than ever for an employer to engage in impact analysis. If the data reveal an adverse impact, the employer must confirm that the selection criteria were based on reasonable factors other than age. If that cannot be done with certainty, then the employer should reconsider the criteria or revisit particular selections.

What constitutes a “reasonable factor other than age” will undoubtedly be the subject of lower court decisions in the wake the Supreme Court’s ruling, and an employer will have no assurance that a court will deem its proffered explanation to be reasonable. A plaintiff might argue that an employer’s proffered non-age factor is unreasonable because it is simply a proxy for age itself. For example, it is unclear at this time whether courts will recognize cost-savings – often resulting in the reduction of higher paid, generally older employees – as a reasonable factor other than age. In *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), a disparate treatment case, the Supreme Court held that an employer does not violate ADEA by acting on the basis of a factor that happens to be correlated with age, such as pension status, salary or seniority. *Id.* at 608-09. But the Court noted the possibility of liability where the employer acts on a factor *because* it correlates with age, *i.e.*, targeting employees with certain seniority on the assumption that those employees are likely to be older. *Id.* at 612-13. Now that liability can result from impact alone without any intent to target older workers, courts must assess whether an employer’s reliance on a factor such as salary or seniority is reasonable under the circumstances or whether it functions as an unreasonable proxy for age – regardless of whether the employer was attempting to purge older workers.

As courts flesh out these issues, employers should be cautious when making decisions based on factors closely correlated to age. Nevertheless, employers should be encouraged by the *Smith* Court’s deference to both the employer’s decision and rationale for its decision. There, the Court found the City’s reliance on seniority and rank to be “unquestionably reasonable” given the City’s goals of raising salaries to make them competitive with surrounding communities, and the Court dismissed the disparate-impact claim as a matter of law. As the Court made clear, the employer does not have to select the best course of action or the one with the least impact on older workers, but rather any course of action that is reasonable under the circumstances. The practical import of this is that when faced with a disparate-impact claim, an employer may be able to avoid a costly jury trial and secure judgment as a matter of law by making a convincing argument that the factors on which it relied were reasonable.

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