

Labor Law Bulletin

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SUPREME COURT ALLOWS DISPARATE IMPACT CLAIMS UNDER ADEA

In a surprise ruling, the U.S. Supreme Court decided on March 30, 2005 that a claimant may establish liability under the federal Age Discrimination in Employment Act (ADEA) even if there is no intent to discriminate. *Smith v. City of Jackson, Mississippi*, No. 03-1160.

Background

The City of Jackson granted raises to its police officers to bring their starting salaries up to the regional average. However, officers with less than five years' service received proportionally greater raises, and most officers over 40 had more than five years of service. A group of older officers filed suit claiming that even if the compensation plan was age-neutral on its face, older officers were adversely affected in violation of the ADEA. The district court and court of appeals dismissed the suit on the ground that disparate impact claims are not available under ADEA. Plaintiffs appealed to the Supreme Court.

Although Title VII has been construed to prohibit facially neutral employment policies that have a disparate impact on minorities and women, the federal courts have been divided on whether the ADEA permits these type of claims. In 1993, the Supreme Court held that an employee who was discharged shortly before his pension would have vested did not state a cause of action under the ADEA. Many federal courts interpreted that decision as disapproving of disparate impact liability under the ADEA.

The Supreme Court Decision

In *Smith*, a five-member majority of the Supreme Court held that disparate impact claims can be brought under the ADEA. The Court noted that the language in Title VII, which already has been found to prohibit disparate impact, is also contained in the ADEA. Thus, the Court found it appropriate to presume that Congress intended the same statutory language to have the same meaning.

The ADEA contains a provision not in Title VII which states that "any action otherwise prohibited [under ADEA]" is lawful "where the differentiation is based on reasonable factors other than age" discrimination (RFOA). The Court concluded that this provision could not be referring to intentional discrimination claims so it must be referring to disparate impact claims.

The Court also found that the legislative history of the ADEA and the EEOC's long-standing interpretation of the statute supported disparate-impact liability.

Disparate Impact Liability Under ADEA is Narrower Than Under Title VII

Although recognizing for the first time that disparate impact liability exists under ADEA, the Court held that this type of claim under the ADEA is narrower and thus easier to defend than it is under Title VII. Again looking at the RFOA language unique to the ADEA, the Court decided that an employer can justify a policy that has a disproportionate adverse effect on older employees by showing the policy is based on “reasonable” non-age factors. In contrast, an employer defending a disparate impact claim under Title VII must show that a policy having an adverse effect is justified by “business necessity,” a standard that requires the employer to show that it has no alternative means to achieve its business goals. The reasonableness standard has no such requirement.

This lesser standard resulted in the *Smith* plaintiffs attaining a Pyrrhic victory. Although the older police officers could challenge the city’s compensation plan on disparate impact grounds, the Supreme Court decided

that the plan was based on reasonable non-age factors (i.e., the city’s goal to bring junior officers to wage parity with the marketplace) and that plaintiffs could not prevail.

Impact of Decision

Although disparate impact is now added to the arsenal of claims that can be brought under the ADEA, the Supreme Court has made it easier for employers to defend that type of claim under ADEA than under Title VII. It is impossible to predict how the lower courts will apply *Smith* in the ADEA disparate impact litigation which inevitably will follow from this case. But this decision is far from a resounding victory for future age discrimination claimants.

Vedder Price is highly experienced in defending ADEA claims and in analyzing and defending disparate impact claims. If you have questions about the Supreme Court’s decision or want to discuss an employment discrimination issue, please call Bruce Alper, Michael Cleveland, or any other Vedder Price attorney with whom you have worked.

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