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UNITED STATES SUPREME COURT RECOGNIZES DISPARATE IMPACT CLAIMS UNDER THE ADEA

On March 30, 2005, the United States Supreme Court decided that plaintiffs may bring actions under the Age Discrimination in Employment Act (ADEA) alleging that an employment policy had a "disparate impact" upon employees over the age of 40 even when there is no evidence that the employer intended to discriminate against older workers (*Smith v. Jackson, Miss.*, U.S., No. 03-1160, 3/30/05).

While courts have allowed disparate impact claims based on race or sex under Title VII, the viability of disparate impact claims under the ADEA has divided the circuit courts since the Supreme Court's 1993 decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). In *Hazen Paper*, the Court specifically stated that "we have never decided whether a disparate impact theory of liability is available under the ADEA." *Id.* at 610. Since *Hazen Paper*, five circuit courts (First, Fifth, Seventh, Tenth and Eleventh Circuits) had rejected disparate impact claims under ADEA, while three circuit courts (Second, Eighth and Ninth Circuits) allowed them. The United States Supreme Court's decision in *Smith* resolved a split of opinion among the federal circuit courts and found that a "disparate impact" claim is viable under the ADEA

In *Smith*, the city of Jackson, Miss., in October 1998, adopted a pay plan that would give raises to all city employees for the purposes of attracting and retaining qualified workers and remaining competitive with other public employers in the region. In May 1999, the city granted raises to all police officers and dispatchers. The plan treated employees differently depending on their seniority, with those having less than five years of tenure receiving a higher percentage raise than those with more years of service. Because older officers tended to occupy more senior positions, on average they received smaller increases when measured as a percentage of their salary.

The plaintiffs, 30 police officers over age 40, sued the city under the ADEA claiming they were adversely affected by the plan because of their age. The plaintiffs were unsuccessful in their claims at the federal district and federal appeals courts. In affirming the District Court's grant of

summary judgment for the city, the Fifth Circuit relied on the statutory language of the ADEA that specifically allows different treatment of employees "based on reasonable factors other than age" and found that the rationale for recognizing Title VII disparate impact claims does not apply in the ADEA context. The Fifth Circuit concluded that the disparate impact theory is "never" available under the ADEA.

The Supreme Court affirmed the Fifth Circuit's dismissal of the plaintiffs' claims but held that disparate impact claims *are* viable under the ADEA. The 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." Writing for the plurality, Justice John Paul Stevens, joined by Justices David H. Souter, Ruth Bader Ginsburg and Stephen Breyer, concluded that except for the substitution of "age" for "race, color, religion, sex, or national origin," the ADEA has identical language to Title VII. In the Title VII context, the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175 (1971) interpreted that language to allow disparate impact claims. Based on the statutory language and the *Griggs* decision interpreting that language, Justice Stevens concluded that the ADEA allows disparate impact claims.

In reaching this conclusion, Judge Stevens found, however, that "scope of disparate-impact liability under the ADEA, is narrower than under Title VII." For a valid disparate impact claim to exist under the ADEA, the "employee is responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical differences." Unlike Title VII, the ADEA permits an employer "to take any action otherwise prohibited…where the differentiation is based on reasonable factors other than age." If reasonable factors other than age account for the disparate impact, the action will not be found unlawful. Significantly, the ADEA's reasonableness inquiry, unlike the business necessity test applicable to Title VII claims, does not include a requirement that the selected method be the only method for achieving the desired goal.

The U.S. Supreme Court in *Smith* held that the older workers had not established a valid claim for age discrimination based on the adverse effects of the city's pay raise plan. The older workers did not identify any specific test, requirement or practice within the plan that adversely impacted the older workers, beyond pointing out that the plan was less generous to them. The Court also held that the city's stated reasons for the pay plan, including the need to bring the junior officers' salaries into line with comparable positions in the labor market, were reasonable. As such, the Court found no basis to support the older workers' claims of disparate impact resulting from the city's actions.

In the wake of the *Smith* decision, employers may expect increased challenges to employment decisions that affect older workers and retirees. The extent to which decisions motivated by economics, such as those relating to salary and benefits, will be protected by *Smith* is an open question. In the meantime the Court's ruling highlights the continuing need for employers to have a demonstrated business reason for employment decisions that adversely affect workers in protected classes.

Please feel free to contact **Maxine Neuhauser** in the firm's **Newark** office at 973/639-8269 if you have any questions or comments. Ms. Neuhauser's e-mail address is **mneuhauser@ebglaw.com**. **Peter F. Berk**, an associate in the Labor and Employment Department, assisted in the preparation of this Alert.

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