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In a recent decision, the U.S. Supreme Court held that workers age 40 and over do not have to prove an intent to discriminate and may allege age discrimination under the ADEA under a “disparate impact” theory. The proof required for such an action, however, may be more favorable to employers than in other discrimination cases.

## Supreme Court Expands Scope of Age Discrimination Law

*By Christopher J. Perry and David M. Jaffe*

On March 30, 2005, in a decision that will change the landscape of age discrimination litigation, the U.S. Supreme Court ruled in *Smith v. City of Jackson* that workers age 40 and older may prove discrimination under the Age Discrimination in Employment Act (ADEA) using a disparate impact theory. Prior to this holding, a claimant could only obtain recovery under the ADEA by claiming that an employer, or prospective employer, made an adverse employment decision that was motivated by an intent to discriminate against the claimant because she/he was at least 40 years of age. This case now allows a claimant (or claimants) to recover if it can be shown that an employer used a neutral business practice (not motivated by discriminatory intent) that had an adverse impact on people age 40 and over. The claimant need not establish that the employer intended to discriminate.

### The Facts of the Case

In *Smith*, the plaintiffs were police and public safety officers employed by the City of Jackson (“City”). In order to attract and retain qualified people, the City adopted a plan that granted raises to all police officers and police dispatchers under which officers with less than five years of service received proportionately higher raises than those with more seniority. Most officers who were over the age of 40 had more than five years of service, and a group of older officers filed suit under the ADEA claiming both that the City had deliberately discriminated against them because of their age (“disparate treatment claim”) and that they were adversely affected by the plan because of their age (“disparate impact claim”).

The evidence in the case established that the average percentage increase for the entire class of officers with less than five years of tenure was somewhat higher than the

percentage for those with more seniority, and because older officers tended to occupy more senior positions, on average they received smaller increases when measured as a percentage of their salary. The City explained this differential by stating that it needed to raise the salaries of junior officers to make them competitive with comparable positions in the market.

The district court granted summary judgment to the City on both claims. The court of appeals reversed the ruling on the disparate treatment claim permitting further discovery on the issue of intent, but it affirmed the dismissal of the disparate impact claim, concluding that the ADEA did not authorize recovery for disparate impact claims.

### Majority of the Court Interprets the ADEA to Permit Disparate Impact Claims

A majority of the Court held that the ADEA allows disparate impact claims, although the five-justice majority disagreed on the rationale. Justice Stevens, joined by three other justices and writing for a plurality of the Court, concluded that the ADEA permitted disparate impact claims because the relevant language in Title VII and the ADEA are identical and because both statutes were enacted close in time. Accordingly, it was appropriate to presume that Congress intended the same meaning in both statutes, and the Supreme Court had already ruled that Title VII’s statutory language permitted disparate impact claims.

Justice Stevens also discussed what he referred to as the RFOA (“reasonable factors other than age”) provision in the ADEA. Narrowing the potential reach of an ADEA disparate impact claim, the opinion stated that under this RFOA provision, an employer can escape liability even if the plaintiff can show a statistical

differentiation that adversely impacts people age 40 and over, as long as the otherwise prohibited business practice is based on reasonable factors other than age, such as seniority.

Finally, Justice Stevens noted that both the Department of Labor, which initially drafted the ADEA, and the Equal Employment Opportunity Commission (EEOC), the agency responsible for implementing the statute, had consistently interpreted the ADEA to authorize relief on a disparate impact theory. The Court, therefore, held that the court of appeals erred when it held that the disparate impact theory of liability is categorically unavailable under the ADEA.

Justice Scalia agreed that the ADEA permits disparate impact claims, but disagreed with Justice Stevens' analysis. Instead, he deferred to the EEOC's reasonable view that the ADEA authorizes disparate impact claims. In view of Justice Scalia's concurrence, therefore, disparate impact is now a cognizable cause of action under the ADEA.

In a concurring opinion, Justice O'Connor (and two other justices) concluded that the ADEA did not permit disparate impact claims, but agreed that the plaintiffs were not entitled to recover under the ADEA.

## Majority Holds that Scope of Disparate Impact Liability Under ADEA Is Narrower than Under Title VII

Both practitioners and employers should note that a majority of the Court concluded that two textual differences between Title VII and the ADEA make it clear that the scope of disparate impact liability under the ADEA is narrower than under Title VII. First, the RFOA provision in the ADEA does not exist in Title VII. Second, the Civil Rights Act of 1991 modified the Court's holding in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), to expand the coverage of Title VII. In *Wards Cove*, the Court held that the dispositive issue was whether a challenged practice served, in a significant way, the legitimate employment goals of the employer. The Civil Rights Act of 1991, which amended Title VII, overturned that part of the decision and now provides that an employer can justify a practice shown to have an adverse impact by demonstrating that the practice is job related and consistent with business necessity. In addition, *Wards Cove* held that an employee had to point to a specific employment practice that caused the disparate impact. But the Civil Rights Act of

1991 provided that an employee may be able to avoid pointing to a specific practice if he can show that the employer's decision-making process is not easily dissectible for analytical purposes. Under such circumstances, the employer's decision-making process may be analyzed as one employment practice. The Civil Rights Act of 1991, however, did not amend the ADEA. Thus, the Majority concluded that *Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable in ADEA claims even if it no longer applies to Title VII claims. As a result, this case has revived *Wards Cove's* importance and employers and practitioners should dust off its cobwebs when confronted with disparate impact claims under the ADEA.

## All Eight Justices Find for the Defendant

While five justices found that the ADEA authorized disparate impact claims (albeit for different reasons), the eight justices who took part in the decision unanimously held that the plaintiffs had not shown that they were disparately impacted by the City's policies. The majority held that the plaintiffs had not "identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers." Justice Stevens referred to the Court's decision in *Wards Cove* and said that it was not enough for a plaintiff simply to allege that there is a disparate impact on workers or point to a generalized policy that leads to such an impact. The employee is "responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities." The Court held that the plaintiffs failed to identify a specific practice. Justice Stevens noted that if the plaintiffs could recover without identifying specific practices that had a discriminatory impact, employers could be held liable for a "myriad of innocent causes that may lead to statistical imbalances." The Majority also concluded that the City's decision to grant raises based on seniority and position was unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities.

## Practical Considerations

There is little doubt that plaintiffs' attorneys will attempt to use the Court's decision as another arrow in their quivers. Here are some thoughts to consider in the aftermath of the Court's decision:

### 1. Collective action litigation under the ADEA may increase.

Potential ADEA plaintiffs represent a large segment of the workforce. According to the Bureau of Labor Statistics, there were over 72 million workers over the age of 40 last year. These employees are generally better educated, more highly compensated and have accumulated more benefits than their younger colleagues. Thus, older plaintiffs have more at risk. In addition, juries may regard them as more sympathetic plaintiffs.

The Court's decision presents an opportunity for plaintiffs' attorneys to bring more class actions under the ADEA. An employer's business practice, as opposed to, for example, a discrete decision to terminate a single employee, will likely affect several employees. Thus, one should expect the number of class action lawsuits to increase. Any argument that the number will increase will, however, be tempered by the fact that "class" actions under the ADEA expressly borrow the opt-in class action mechanism of the Fair Labor Standards Act of 1938. These types of class actions are referred to as collective actions. The opt-in procedure is generally considered more risky for plaintiffs because it is more difficult and laborious to induce putative plaintiffs to opt in to a collective action than to choose to opt out. Thus, it is difficult to predict how much of an impact the Court's decision will have on the number of collective action lawsuits filed each year under the ADEA. But the number is likely to increase.

The ADEA's limited damages provisions, relative to other civil rights statutes, may also inspire an increase in collective actions under the ADEA. Under the ADEA, successful plaintiffs may be entitled to compensatory damages, including lost wages and benefits, front pay and future pension benefits, liquidated damages in certain circumstances, promotion, reinstatement and other equitable relief, interest and attorney's fees and costs. But because plaintiffs are not entitled to either emotional distress damages or punitive damages under the ADEA, plaintiffs' attorneys may choose to pursue disparate impact theories of recovery in collective action lawsuits in order to maximize their fees and potential for settlement.

Under a disparate impact claim, plaintiffs generally allege that a facially-neutral practice or program (e.g., a decision to eliminate higher-salaried positions) has a discriminatory effect, or "impact," on a protected class of employees. By necessity, therefore, proving

such an effect involves the use of statistical analyses. The parties in such a case must retain statisticians in order to determine whether there has been a disproportionate impact on the relevant protected class. Now that the *Smith* case has been decided, employers should think carefully about doing such a statistical analysis for employees age 40 and over when effectuating workforce changes such as layoffs.

#### **2. RFOA provision provides a safe harbor for employers.**

While many commentators may see the Court's decision as a significant plaintiff's victory, one must keep in mind that the Court found unanimously against the plaintiffs in this case. All five justices who held that a disparate impact claim was cognizable under the ADEA still found that the plaintiffs had failed to identify a *specific employment practice* that was responsible for the statistical disparity. Even if a plaintiff can identify a specific business practice that caused the disparity, the employer can still prevail if it can show that its practice was based on reasonable factors. Here, the City perceived a need to raise salaries of junior officers to make them competitive with comparable positions in the market. The Court approved this justification as reasonable and not based on age. This is particularly notable because the Court distinguished age from seniority; a distinction that at first glance may appear to be without a difference. But, in this case, the Court upheld an employment policy that used seniority, or time in service, as a criterion because it was not based on the age of the employees.

#### **3. Remember state law, however.**

The *Smith* case was decided under the ADEA, a federal law. In some states, including, for example, California, the decision is less significant in light of state laws that provide a more narrow employer defense. In those states, many plaintiffs will file under state law, rather than federal, to take advantage of the more generous laws and pro-worker proof requirements.

#### **4. Employers must, as always, think prospectively.**

The Supreme Court's decision does not change the fact that employers who plan to design and implement policy or practice changes that will affect a substantial number of their employees must ensure they can articulate and provide evidence that these changes are based on reasonable non-discriminatory factors. Employers should remain vigilant and carefully plan these major personnel changes to ensure that they can avoid liability.

Employers should take the time now to review their current policies to ensure that there is no disparate statistical impact on workers age 40 and over.

## Conclusion

Contrary to some of the recent newspaper headlines, the Supreme Court's decision in *Smith* does not guarantee victory for ADEA plaintiffs. But it should reinforce the notion that employers must continue to think prospectively and consult with counsel before they implement any policies or procedures that will affect substantial parts of their workforce.

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