
Supreme Court Expands Age Discrimination Protection in Allowing Disparate Impact Claims under ADEA

2005-04-05

The United States Supreme Court recently cleared the way for employees who are age 40 and over to bring age discrimination claims against their employers without having to prove an **intent** to discriminate. In *Smith v. City of Jackson*, the Court held that the Age Discrimination in Employment Act (ADEA) authorizes recovery in "disparate impact" cases—where an employment practice or policy that is neutral on its face with respect to its treatment of different groups nonetheless has a harsher or disproportionate impact on employees age 40 and over. Significantly, in a disparate impact claim, there is no requirement to prove that the employer intended to harm or discriminate against employees because of their protected age status. In *Smith*, the Court found that the employees had not met their burden of proof on their disparate impact claim.

In holding that a disparate impact claim may be maintained under ADEA, the Court relied in part on its prior decision in *Griggs v. Duke Power Co.* (401 U.S. 424 [1971]), which recognized a disparate impact theory of recovery under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.) (Title VII prohibits discrimination on the basis of race, gender, religion or national origin). The Court also relied on the similarities in the language of ADEA and Title VII and the fact that the Department of Labor and the Equal Employment Opportunity Commission have consistently interpreted ADEA to allow for a disparate impact claim.

Although authorizing a claim under the disparate impact theory, the Court made it clear that the scope of disparate impact liability under ADEA is **narrower** than under Title VII. Unlike Title VII, under ADEA, an employer can defend against a disparate impact claim by establishing that its policy or practice is based on a "reasonable factor other than age." Moreover, in the ADEA context, the employer is not required to show that its policy or practice is a "business necessity" and that there are no alternative means to achieve its business goal, as it must under Title VII. Additionally, an employee seeking relief under ADEA must identify the specific test, requirement or practice that has an adverse impact.

In applying this narrower scope of liability in *Smith*, the Court held that the employees—older police officers with more service who received a smaller pay increase as a percentage of salary than more junior officers with less service—could not prevail. The Court reasoned that the city's decision to

raise the pay of junior officers with less service was based on its desire to be competitive at the lower end of its wage scale, which was a "reasonable factor other than age."

The Supreme Court's decision will have the greatest impact in the First, Third, Sixth, Seventh, Tenth and Eleventh Circuits, which generally have declined to recognize disparate impact claims under ADEA. The *Smith* holding paves the way for employees to maintain a disparate impact claim of age discrimination, challenging an employer's policies or practices which adversely impact employees age 40 and over. However, employers can still prevail if they are able to demonstrate that the employment policy or practice is based on a reasonable factor other than age.

In light of the *Smith v. City of Jackson* decision, employers should review existing employment policies and practices such as those involving reductions in force, pay and retirement benefits that might have a disparate impact on employees who are age 40 and over. Employers should ensure that the policy or practice is based on a reasonable factor other than age.

Authors



**Jonathan
Rosenfeld**

RETIRED PARTNER

✉ jonathan.rosenfeld@wilmerhale.com

☎ +1 617 526 6000