


United States Supreme Court Approves “Disparate Impact” Age Discrimination Claims

On March 30, 2005, the U.S. Supreme Court, in *Smith v. City of Jackson*, concluded that, in addition to prohibiting intentional discrimination, the Age Discrimination in Employment Act (“ADEA”) covers employee lawsuits challenging facially neutral plans or policies that have a disproportionate adverse impact on older workers. The Court, however, also afforded employers a broad defense to these “disparate impact” claims.

Smith involved a group of police officers who sued the City of Jackson based on the City’s adoption of a pay plan granting raises to all City employees. The City enacted the pay plan to attract and retain qualified employees, provide an incentive for performance, maintain competitiveness with other public sector agencies, and ensure equitable compensation to all employees regardless of age, sex, or disability. Less than a year later, the City revised the Plan to raise the police officers’ starting salaries and bring them in line with the regional average. The City granted raises to all police officers and police dispatchers. However, those officers who had less than five years of tenure received proportionally greater raises than those with more seniority. Most of the older officers over 40 years of age had more than five years of service. The upshot: the revised plan, the officers alleged, tended to treat younger officers more generously than older officers.

Given these facts, the Fifth Circuit Court of Appeals concluded that the officers could not pursue a “disparate impact” claim under the ADEA because the statute only authorized intentional discrimination claims, not claims predicated on the effect of a neutral policy or plan on the protected age group. Rejecting the Fifth Circuit’s analysis, the U.S. Supreme Court decided that the ADEA, like Title VII, authorizes recovery in “disparate impact” cases. This is the bad news. Now, the good news: Unlike Title VII, the ADEA contains language significantly narrowing the scope of a disparate impact claim. The ADEA permits any otherwise prohibited action where the differentiation is based on *reasonable factors other than age* (“RFOA”). Thus, employers should encounter fewer hurdles satisfying the RFOA defense than they would the more stringent “business necessity” defense courts apply to disparate impact claims under Title VII.

Additionally, the 1991 Civil Rights Act (“CRA”) did not amend the ADEA to *broaden* the scope of a disparate impact claim under Title VII and, therefore, the Court applied its rigorous pre-1991 CRA analysis to ADEA disparate impact claims. Applying this analysis, the Supreme Court narrowly construed the City’s exposure to liability under a disparate impact theory—the officers must do more than simply show that the pay plan was relatively less generous to older workers than to younger workers. According to the Court, the officers must identify a *specific test, requirement, or practice* within the pay plan that had an adverse impact on older workers. The officers failed to do so and anchored their claim on a generalization about an age disparity. The Court reasoned 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 a disparate impact. Rather, the officers were responsible for isolating and identifying the specific employment practices that were allegedly responsible for any observed statistical disparities. Affirming the dismissal of the officers’ lawsuit, the Court concluded that not only did the officers fail to identify any relevant, specific practice, but also, the City’s plan was based on reasonable factors other than age, such as seniority and rank. The Court, however, did not purport to provide an exhaustive list of what might



This alert is for informational purposes only and is not intended to be legal advice. Transmission is not intended to create and receipt does not establish an attorney-client relationship. Legal advice of any nature should be sought from legal counsel. For more information about Haynes and Boone and our practices, please visit www.haynesboone.com

constitute RFOA. That will likely be the subject of future litigation. Plainly, the Court's decision broadens an employer's potential liability under the ADEA; however, that liability exposure is tempered by the broad RFOA defense.

Additionally, an employer's liability exposure might include employee claims that certain employee benefit plans discriminate on account of age. Some of the employee benefit plan issues that may be the subject of future litigation under this theory include:

- Cash balance pension plans, which by their very nature, provide for higher benefits over time for younger employees than older employees, and are already the subject of on-going age discrimination litigation.
- Hybrid pension plans, which operate under many of the same principles as cash balance pension plans, and can favor younger workers over the long term.
- Retiree medical plans, particularly where an employer makes modifications to the benefits or funding mechanisms in order to reduce escalating costs resulting in negative impact on the benefits of older workers.
- Retirement-type subsidies in pension plans, where an employer makes modifications to prospectively reduce such benefits.
- Excluded classes of employees from plans, where the excluded class happens to adversely affect older workers.
- Outsourcing decisions, where the outsourced services were formerly performed by older workers.

In short, employers should consider the impact of policy, practice, and benefit plan design and modification decisions on older workers, and determine if one or more RFOA exist to justify the decisions. Otherwise, employers could, especially in the workforce reduction, pay, and employee benefit plan context, be subject to liability because the practice, plan, or policy adversely impacts older workers even when the disparity is unintended.

If you have any questions or require additional information, please contact your Haynes and Boone labor and employment attorney.

Dean J. Schaner
Houston, TX
(713) 547-2044

Jonathan C. Wilson
Dallas, TX
(214) 651-5646

William P. Finegan
Richardson, TX
(972) 739-6932

Laura O'Donnell
San Antonio and Austin, TX
(210) 978-7408

Terry Boone
Fort Worth, TX
(817) 347-6612