

Supreme Court Expands Federal Age Discrimination Protections

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Since 1971, the U.S. Supreme Court has recognized a cause of action under Title VII of the Civil Rights Act of 1964 for what is called “disparate impact” discrimination. In the 1971 case, the Court held that Title VII prohibits an employer from requiring a job applicant to have a high school education where the employer couldn’t show that the requirement was significantly related to successful job performance and the requirement operated to disqualify African-Americans at a substantially higher rate than white applicants. Thus, an employer could be held liable where it had a facially-neutral policy or practice that “disparately impacted” a group based on race, color, national origin, sex or religion. Since then, there has been a 34 year dispute about whether this “disparate impact” theory of discrimination also applied to age discrimination under the federal Age Discrimination in Employment Act of 1967 (ADEA). On March 30, 2005, the Supreme Court answered this question.

In *Smith v. City of Jackson*, (Case No. 03-1160)(Mar. 30, 2005), the City of Jackson, Mississippi adopted a pay plan that treated employees differently based on length of service. In an effort to bring starting salaries up to the regional average, in 1999 the plan gave a higher percentage raise to employees having less than five years service than those with more. A group of police officers who were age 40 or older (*i.e.*, protected by the ADEA) sued the city alleging that they were disparately impacted by the pay plan because of their age since a greater number of the employees age 40 and older had worked for the city for more than five years. The trial court granted judgment to the city, finding that the ADEA did not permit claims of “disparate impact” discrimination. On appeal, the U.S. Supreme Court disagreed, concluding that the disparate impact theory is available to plaintiffs under the ADEA.

Although this decision has largely been viewed as a victory for employees, it is important to note that the Court expressly concluded that the ADEA’s protections against disparate impact discrimination are narrower than those existing under Title VII. This is because, unlike Title VII, the ADEA permits employers to take an otherwise prohibited action “where the differentiation is based on reasonable factors other than age.” Consequently, if an employer can show that reasonable factors other than

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age account for the disparate impact, the action will not be found unlawful. For this reason, the Court in *Smith v. City of Jackson* held that although the disparate impact theory was available under the ADEA, the plaintiffs did not have a valid claim because the city's stated reasons for the pay plan (*i.e.*, the need to bring junior officers' salaries into line with regional labor market) were reasonable and responded to the City's legitimate goal of retaining police officers. Accordingly, the Court found that the older workers' claims of disparate impact age discrimination failed.

LESSON: Now that it's clear that employers are potentially liable under the ADEA for tests, requirements or practices that have an adverse impact on those age 40 and older, employers should review their policies, compensation and benefits to determine whether any adverse impacts exist. If this review reveals a disparate impact, employers must determine what reasonable factors other than age account for the disparate impact. Employers are encouraged to consult with experienced employment/law counsel to determine whether they are in compliance with this new decision.

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