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Plaintiffs Need Not Prove Intent In Age Discrimination Cases, Supreme Court Says

by Neal Mollen and Carson Sullivan

Adopting the "disparate impact" mode of proof for cases under the Age Discrimination in Employment Act ("ADEA"), the Supreme Court of the United States has concluded that plaintiffs with claims under that Act can, under certain circumstances, prevail without showing that the employer adopted a challenged rule or practice with a discriminatory intent. The Court's decision in *Smith v. City of Jackson*, No. 03-1160, 544 U.S. ___ (2005), resolves a split of authority among the courts of appeals that had persisted for more than two decades.

Although early reports have depicted the holding in *City of Jackson* as a major victory by the plaintiffs' bar, the practical implications of the decision are unlikely to be as far-reaching as some have suggested. While the Court embraced the disparate impact theory of liability for age discrimination cases, it also articulated a standard of proof for prevailing that plaintiff classes will find difficult to meet. Indeed, in those circuits that had previously acknowledged the applicability of the disparate impact theory under the ADEA, the increased proof standards will effectively limit the scope of the prevailing law.

Market-Based Compensation Plan

In 1998, the City of Jackson recognized that its compensation for police officers was out of alignment with the regional average, complicating its efforts to attract and retain qualified officers, provide performance incentives, and maintain competitiveness with other public sector agencies. To fix the problem, the City announced raises for all of its police officers and dispatchers. Because the compensation problems were most pronounced for junior officers, the City gave the biggest raises to its most junior officers. A class of plaintiffs sued the City, claiming, in part, that this skew in the City's compensation plan "adversely affected" senior workers.

The district court granted summary judgment to the City, and the Fifth Circuit affirmed on the ground that disparate impact claims were simply not viable under the ADEA. The Supreme Court agreed to hear the case in order resolve what had become a hotly debated issue in the lower courts.

A New Cause of Action

In a 5-3 vote (Chief Justice Rehnquist not participating) the Court held that the disparate impact theory – first recognized in *Griggs v. Duke Power v. Duke Power Co.*, 401 U.S. 424 (1971), a Title VII case – is cognizable under the ADEA. Justice Stevens, writing for Justices Souter, Ginsberg and Breyer, noted that the pertinent language of Title VII and the ADEA is nearly identical, and should be given like construction. "Except for substitution of the word 'age' for the words 'race, color, religion, sex or national origin,' the language of the [relevant] provision in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964. . . . [W]hen Congress uses similar language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." Thus, the Court placed primary emphasis on its unanimous 1971 decision in *Griggs*, which "squarely held" that Title VII did not require a showing of discriminatory intent.

The Court also noted that the Department of Labor, which initially drafted the ADEA legislation, and the EEOC, which is the agency charged by Congress with the responsibility of implementing the statute, "have consistently interpreted the ADEA to authorize relief on a disparate-impact theory."

This four-justice plurality controlled the outcome of the case because of a concurrence from Justice Scalia. Although Justice Scalia expressly agreed with the plurality's analysis of the ADEA's text and

history, he concluded that the case could and should be decided as a matter of deference to the EEOC's interpretive guidance on the subject under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). According to Justice Scalia, "[t]his is an absolutely classic case for deference to agency interpretation."

An Exceptionally Narrow Range Of Actionable Practices

Although the Court agreed with the plaintiffs that the ADEA, like Title VII, authorized a disparate impact theory of recovery, the Court explained that important differences in the structure of the two statutes leads to a cause of action under the ADEA with far less sweeping applicability than is the case under Title VII. First, the Court noted that its decision in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) – which Congress had legislatively overruled with the Civil Rights Act of 1991 *with respect to Title VII* – remained the operative legal standard for ADEA disparate impact claims, as Congress had not amended the ADEA in this respect. *Wards Cove*, the Court observed, had "narrowly construed the employer's exposure to liability" by requiring plaintiffs to demonstrate a close nexus between a specific practice and an alleged statistical disparity; that showing, the Court held, remains the plaintiffs' burden under the ADEA, undiluted by the Civil Rights Act of 1991.

In addition, the Court explained that Congress had given employers a defense in ADEA cases absent from Title VII – a prohibition on challenges to employer rules based on "reasonable factors other than age." This defense, the Court held, is "consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly is relevant to an individual's capacity to engage in certain types of employment." An employer's policy or practice thus need not be a "business necessity" to survive scrutiny under the ADEA; it need only be a "reasonable" judgment aimed at some purpose other than age. "Unlike the [Title VII] business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry [under the ADEA] includes no such requirement."

Plaintiffs Win the Doctrinal Battle, But Lose Their Case

Applying this standard to the case at hand, the Court affirmed the Fifth Circuit's dismissal of Plaintiffs' disparate impact claim because Plaintiffs had not met – and could not meet – their burden. Plaintiffs had not identified any specific text, requirement or practice within the City's pay plan that has an adverse impact on older workers. The Court explained, as it had in *Wards Cove*, 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 such an impact. Rather, the employee is 'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.'" (citations omitted, emphasis added). The Court also found that it was "clear from the record" that the City's plan was based on reasonable factors other than age: "[r]eliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities."

Impact on Employers

For employers, news of the *City of Jackson* decision may be disconcerting, and even startling. Though it is certainly true that the opinion will reshape the current legal landscape, at least in the world of ADEA litigation, it is important to recognize that the Court's opinion resolved a split in the circuits, and that several circuits, including the Second, Eighth, and Ninth, had *already* recognized a disparate impact theory of recovery under the ADEA. For employers in these circuits, the Court's opinion will be a welcomed narrowing of an already-existing legal standard. The newly articulated rigor regarding plaintiffs' burden should act as a brake on unsupported allegations.

Thus, while *City of Jackson* will undoubtedly lead to some additional ADEA litigation, employers should not assume that the increase will be substantial. Nonetheless, employers should carefully and critically evaluate current and proposed employment plans and programs, including retirement policies, salary practices, benefit plans and reduction-in-force plans that may have a negative and disproportionate effect on employees over the age of 40. The business rationale for such a practice or plan must be reasonable and easily explained. Ensuring that these plans, programs and policies are based on reasonable and well-conceived factors other than age is the best defense to potential disparate impact claims.

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