

## **SUPREME COURT AUTHORIZES DISPARATE IMPACT CLAIMS UNDER ADEA**

By: Gregory P. Kult\*

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In *Smith v. City of Jackson, Mississippi*, Case No. 03-1160 (U.S. 2005), a divided U.S. Supreme Court ruled that an individual may sue an employer under the ADEA if a policy, practice or other employment action has a disparate impact based on age.

As a reminder, two common types of discrimination claims are disparate treatment, which involves intentional discrimination, and disparate impact, which involves a facially neutral practice that has a significant adverse impact on a protected group. The former focuses on motivation, the latter on results. Disparate impact claims have been recognized under Title VII for many years. Until *Smith*, courts have been split on whether to recognize such claims under the ADEA because the ADEA, unlike Title VII, permits any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age."

Although *Smith* confirms that disparate impact claims may be brought under the ADEA, potential confusion remains. A plaintiff may succeed on a claim of disparate impact under Title VII if he demonstrates that a particular employment practice causes a disparate impact on a protected class and his employer cannot demonstrate that the practice is job related for the position in question and consistent with business necessity. Even if his employer produces evidence that the challenged practice is job related and consistent with business necessity, the plaintiff may succeed by showing there is an alternative with less adverse impact that his employer refuses to adopt.

By contrast, disparate impact claims under the ADEA are governed by a higher standard. If the disparate impact is based on reasonable factors other than age, the practice is not unlawful. Unlike Title VII's business necessity test (described in the preceding paragraph), the ADEA's reasonableness inquiry does not ask whether there are other ways for an employer to achieve its goals that do not result in a disparate impact on older workers. Moreover, whereas Title VII permits a plaintiff to attack an entire decision-making process when he cannot identify the particular practice that allegedly results in disparate impact, under the ADEA, the plaintiff must identify the specific practice allegedly responsible for the disparate impact.

In response to *Smith*, employers should consider reviewing their current compensation, benefit and other employment practices to determine whether they have a disproportionate adverse impact on older workers. In addition, employers should consider reviewing their practices for documenting business reasons for actions that impact a broad group of employees.

\*Current contact information:

Wooden & McLaughlin, LLP  
One Indiana Square, Suite 1800  
Indianapolis, IN 26204  
(317) 639-6151 ext. 341  
gkult@woodmclaw.com

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