

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

WikiLeaks Document Release

<http://wikileaks.org/wiki/CRS-RS22170>

February 2, 2009

Congressional Research Service

Report RS22170

The Age Discrimination in Employment Act and Disparate Impact Claims: An Analysis of the Supreme Court's Ruling in Smith v. City of Jackson

Charles V. Dale and Jody Feder, American Law Division

June 20, 2005

Abstract. This report discusses *Smith v. City of Jackson*, a recent case in which the Supreme Court held that workers may sue employers under the Age Discrimination in Employment Act (ADEA) for workplace policies that have an adverse impact on older employees, even if the discriminatory effects are not intentional.

WikiLeaks

CRS Report for Congress

Received through the CRS Web

The Age Discrimination in Employment Act and Disparate Impact Claims: An Analysis of the Supreme Court's Ruling in *Smith v. City of Jackson*

Charles V. Dale and Jody Feder
Legislative Attorneys
American Law Division

Summary

This report discusses *Smith v. City of Jackson*, a recent case in which the Supreme Court held that workers may sue employers under the Age Discrimination in Employment Act (ADEA) for workplace policies that have an adverse impact on older employees, even if the discriminatory effects are not intentional.

In March 2005, the Supreme Court issued its decision in *Smith v. City of Jackson*,¹ a case that involved questions about the scope of protection that older workers are entitled to under the Age Discrimination in Employment Act (ADEA).² In a 5-3 ruling, the Court held that the ADEA authorizes disparate impact claims, which means that older workers may sue employers for policies that have a discriminatory effect, even if the employer did not intend to discriminate. This report provides a description of the *Smith* case, along with background information on the ADEA and a discussion of the disparate impact and disparate treatment theories of liability under civil rights laws.

The ADEA and Disparate Impact Claims

Enacted in 1967, the ADEA is designed to protect individuals who are age 40 or older from discrimination on the job. Finding that older employees are often at a disadvantage in the workplace, Congress made it unlawful for employers “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age” or “to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or

¹ 125 S. Ct. 1536 (2005).

² 29 U.S.C. § 621 et seq.

otherwise adversely affect his status as an employee, because of such individual's age."³ The statute, however, contains an exception under which employers are allowed to engage in action that would otherwise be unlawful where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."⁴ The latter exception appears to reflect the belief that age, unlike other classifications such as race or gender, may be relevant to an individual's ability to perform certain jobs.

Two basic methods have judicially evolved for proving unlawful discrimination in employment: disparate treatment and disparate impact. In general, disparate treatment involves intentionally discriminating against an individual for an impermissible reason. Such intentional discrimination is prohibited on the basis of race, color, sex, religion, or national origin under Title VII of the Civil Rights Act of 1964,⁵ on the basis of age under the ADEA, or on the basis of disability under the Americans with Disabilities Act.⁶ Furthermore, disparate treatment claims require proof that the employer intended to discriminate against the complaining party when it took the challenged employment action. Intent, the critical element of a disparate treatment claim, may be shown directly (e.g. by discriminatory statements or behavior of a supervisor towards a subordinate) or, perhaps more likely, by circumstantial evidence.

Unlike disparate treatment, disparate impact discrimination does not involve different treatment or an intent to discriminate. Rather, disparate impact discrimination arises when a neutral policy or practice has an adverse impact on a protected group and that policy or practice is not job related or a business necessity. Indeed, disparate impact claims may be established without proof of discriminatory intent, relieving the victim of an often insurmountable burden. The ultimate burden rests with the employer to prove a "business necessity" for any such disparity.

"Disparate impact" is not mentioned in the text or legislative history of the ADEA, nor of Title VII as originally enacted, but is a creature of judicial interpretation. The concept first emerged from the Supreme Court's ruling in *Griggs v. Duke Power Co.*⁷ In *Griggs*, black workers argued that the employer's use of a high school diploma requirement and general intelligence tests for entry into laborer positions violated Title VII because those requirements had an adverse impact on blacks and were not reasonably related to successful job performance. Underlying *Griggs* was the Court's determination that criteria unrelated to job performance not be allowed to "freeze" the effects of past discrimination or act as "built-in headwinds" to employment progress by previously segregated minority groups. Analogous reasoning underlay the Court's approach to sex discrimination in *Dothard v. Rawlinson*.⁸ *Dothard* invalidated an Alabama policy requiring a minimum height and weight for prison guards, since the policy had a disparate

³ *Id.* at § 623(a).

⁴ *Id.* at § 623(f).

⁵ 42 U.S.C. § 2000e et seq.

⁶ *Id.* at § 12101 et seq.

⁷ 401 U.S. 414 (1971).

⁸ 433 U.S. 321 (1977).

impact on female applicants and the state had not shown a correlation with job performance. In 1991, Congress amended Title VII, though not the ADEA, to codify the proscription on employment practices with disproportionate effects on protected classes which are unrelated to job performance or business necessity.⁹

In dictum to the Court's opinion in *Hazen Paper Co. v. Biggins*,¹⁰ a disparate treatment ADEA case, Justice O'Connor wrote for a unanimous Court that Congress passed the ADEA out of "concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."¹¹ Hence, she argued, the ADEA does not apply in instances where the employment decision is "wholly motivated by factors other than age, . . . even if the motivating factor is correlated with age."¹² In his concurring opinion, Justice Kennedy cast further uncertainty on the application of the disparate impact theory to age discrimination cases by declaring that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory. . . ."¹³ The Court expressly reserved judgment on the question of "whether a disparate impact theory of liability is available under the ADEA,"¹⁴ and it was that question that was later at issue in the *Smith* case.

The Supreme Court Decision in *Smith v. City of Jackson*

In the *Smith* case, the City of Jackson, Mississippi approved a plan to grant wage increases to all city employees. The plan, which was intended in part to attract and retain qualified employees, was subsequently modified with respect to police officers and other public safety officers. According to the city, the amended plan was designed to raise the starting salaries of police officers up to the regional average. Under the new plan, officers with less than five years of tenure received proportionally higher wage increases than officers with greater seniority. Since most officers over the age of 40 had greater than five years of tenure, the raises they received were less generous than the raises received by their younger colleagues, and these older officers sued under the ADEA, claiming both that the city intentionally discriminated against them on the basis of age (the disparate treatment claim) and that they were adversely affected by the plan because of their age

⁹ Title VII as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(a), provides in pertinent part:

An unlawful employment practice based on disparate impact is established under this subchapter only if —

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; . . .

¹⁰ 507 U.S. 604 (1993).

¹¹ *Id.* at 610.

¹² *Id.* at 611.

¹³ *Id.* at 618 (Kennedy, J. concurring).

¹⁴ *Id.* at 610.

(the disparate impact claim).¹⁵ Both the district court and the U.S. Court of Appeals for the Fifth Circuit ruled against the employees. The central issue in the Supreme Court appeal was whether the pay plan could be challenged due to its disparate impact.

Ultimately, the Court held “that the ADEA does authorize recovery in ‘disparate-impact’ cases” but nevertheless ruled “that petitioners have not set forth a valid disparate impact claim” with respect to their suit against the city’s new salary plan.¹⁶ Although five justices agreed that the ADEA permits disparate impact claims, they did so on different grounds. A plurality of four justices, led by Justice Stevens, based its decision on the text of the ADEA. To reach its decision, the plurality turned to previous cases in which the Court had interpreted statutory language in Title VII that was virtually identical to the statutory language at issue in the ADEA. The plurality noted that the language of Title VII, which makes it unlawful for an employer “to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin,”¹⁷ is identical to the ADEA language, except that the ADEA, which was modeled after Title VII, substitutes the word “age” for the words “race, color, religion, sex, or national origin.”¹⁸

According to the plurality, “when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”¹⁹ The plurality thus turned to its decision in *Griggs*,²⁰ which recognized unintentional disparate impact discrimination as a form of bias covered by Title VII. Because both Title VII and the ADEA target employment practices that “adversely affect” an employee’s status based on race or age and because Title VII has been interpreted to authorize disparate impact claims, the plurality concluded that the identical provisions in the ADEA also permit disparate impact claims.²¹

Notably, the plurality focused on statutory text stating that an employer may not take employment actions that “adversely affect” an employee’s status “because of such individual’s age.”²² This provision was found to allow disparate impact claims and was not overridden — as Justice O’Connor urged in her concurring opinion — by the ADEA’s exception for employer conduct based on “reasonable factors other than age [RFOA].”²³ In Justice O’Connor’s view, the RFOA provision “expresses Congress’ clear intention

¹⁵ *Smith v. City of Jackson*, 125 S. Ct. 1536, No. 03-1160, 2005 U.S. LEXIS 2931, *5-7 (March 30, 2005).

¹⁶ *Id.* at *8.

¹⁷ 42 U.S.C. § 2000e-2.

¹⁸ 29 U.S.C. § 623(a)(2).

¹⁹ *Smith*, 2005 U.S. LEXIS 2931 at *11.

²⁰ 401 U.S. 424 (1971).

²¹ *Smith*, 2005 U.S. LEXIS 2931 at *15.

²² 29 U.S.C. § 623(a)(2).

²³ *Id.* at 623(f).

that employers not be subject to liability absent proof of intentional age-based discrimination.”²⁴ On the other hand, Justice Stevens found actual support in the RFOA for disparate impact recovery, on the theory that the provision was largely redundant as applied to intentional age discrimination, which necessarily requires proof of age-related motivation.

The plurality also noted that the Equal Employment Opportunity Commission (EEOC), which is responsible for administering the ADEA, has long interpreted the statute to authorize recovery in disparate impact cases.²⁵ Since courts generally defer to an agency’s interpretation of the statutes it administers, the EEOC’s regulations provided additional support for the Court’s conclusion that the ADEA permits disparate impact claims. Justice Scalia, who concurred on the grounds that the EEOC’s interpretation was entitled to deference, provided the fifth vote in support of the Court’s ruling that the ADEA permits disparate impact claims.²⁶

Despite the fact that a plurality of the Court held in *Smith* that the ADEA allowed for disparate impact claims, the Court unanimously ruled that the older workers in the case before them had failed to prove their claim. Significantly for employers, the Court found that this type of claim under the ADEA is narrower and thus easier to defend than it is under Title VII. Under an earlier ruling that made it more difficult to use disparate impact, which Congress later changed for Title VII but not for the ADEA, older workers had to specifically identify the test, requirement, or practice that had the adverse impact.²⁷ In *Smith*, Justice Stevens noted, the petitioners did little more than identify a pay plan that was less generous to older workers than to younger workers. The failure to isolate and identify specific aspects of the policy responsible for statistical disparities, and the fact that the city’s plan was based on reasonable factors other than age — that is, a need to make junior positions more financially competitive with comparable positions in the marketplace — proved fatal to the older officers’ claim.

The remaining three justices, led by Justice O’Connor, concurred with the judgment to deny relief to the older police officers. As noted above, however, they disagreed with the Court’s reasoning and would have ruled instead that the ADEA did not authorize disparate impact claims. Specifically, they argued that the ADEA’s statutory text and legislative history demonstrate that Congress did not intend to authorize recovery in disparate impact cases and that the differences between the ADEA and Title VII, especially the ADEA’s RFOA provision, should preclude the Court from relying on its Title VII cases to interpret the ADEA.²⁸

²⁴ *Smith*, 2005 U.S. LEXIS 2931 at *40.

²⁵ *Id.* at *20-21.

²⁶ *Id.* at *27.

²⁷ See *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989); Civil Rights Act of 1991, as codified at 42 U.S.C. § 2000e-2(k).

²⁸ *Smith*, 2005 U.S. LEXIS 2931 at *34-35.

Conclusion

Disparate treatment or intent may be difficult to establish in ADEA cases since overt animus based on age is not usually apparent. Rarely are employers so imprudent as to announce to employees that they are too old to be productive. Rather, the issue typically arises when an employer relies on age-correlative factors — such as seniority, pension eligibility and salary tied to longevity, or Medicare eligibility — as the basis for decisions adversely affecting older workers. Disparate impact analysis permits the courts to examine the effects of policies and practices to determine whether they are illegally discriminatory. In *Smith*, the Court allowed older workers to file age discrimination claims against their employers on the basis of disparate impact, which is generally easier to prove than discriminatory treatment. As importantly, however, the decision provided employers with legal weapons to defend against such actions.

Under *Smith*, if the adverse impact of the employer’s decision is attributable to a “reasonable” non-age factor, there is no liability. Unlike Title VII, the ADEA permits employment decisions that would otherwise be prohibited “where the differentiation is based on reasonable factors other than age.” Nor does the ADEA, like Title VII, require employers to demonstrate business necessity.²⁹ Thus, even if the plaintiff demonstrates that a particular employment policy or practice adversely affects older workers, the employer — as in *Smith* — may readily defend the action by showing that the practice is based on a “reasonable” non-age factor. So while the *Smith* ruling may lead to an increase in age discrimination lawsuits, the outlook for success by older workers remains uncertain. Employers will likely be able to avoid liability — and even trial through summary judgment — provided only that the policies they adopt are founded on factors other than age and are not unreasonable.

²⁹ Business necessity is also an available defense under the ADEA, but employers who are charged with age discrimination are more likely to rely on the RFOA defense since it is generally much easier for an employer to establish that a workplace policy is reasonable, as opposed to necessary.