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Disparate Impact Analysis and the Age Discrimination in Employment Act: the Supreme Court Decision in Smith v. City of Jackson

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Summary

There are two basic methods for proving discrimination under federal equal employment opportunity laws: disparate treatment and disparate impact. The first requires proof that the employer intended to discriminate against the complainant when it took the challenged employment action. Disparate impact claims, however, may be established without proof of discriminatory intent, often a burdensome task for discrimination victims. Instead, disparate impact derives from the theory that employment policies that appear neutral on their face may actually affect protected groups more harshly than an unprotected group. The ultimate burden rests with the employer to prove a "business necessity" for any such disparity. Disparate impact first emerged as a mode for judicial analysis of race discrimination under Title VII of the 1964 Civil Rights Act. Three decades later, however, the federal circuits were divided over its application to age discrimination cases. The language of the Age Discrimination in Employment Act (ADEA) differs from Title VII in allowing employers to make decisions on the basis of "reasonable factors other than age." The First, Fifth, Seventh, Tenth, and Eleventh Circuits had relied on this exception to deny ADEA disparate impact claims. The Second, Eighth, and Ninth Circuits allowed them. On March 30, 2005, in *Smith v. City of Jackson* (No. 03-1160), the Supreme Court resolved this circuit conflict by deciding 5 to 3 that the ADEA permits disparate impact claims. But, the Court concluded, the facts in *Smith* were inadequate to prove such a claim.

On March 30, 2005, the U.S. Supreme Court resolved a conflict among the federal circuits as to whether the Age Discrimination in Employment Act (ADEA) prohibits employment policies or practices which, although facially neutral with respect to age, have a "disparate impact" on older workers. "Disparate impact" or "adverse impact" generally refers to "employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another and cannot

be justified by a business necessity."[1] In *Smith v. City of Jackson,* police officers over the age of 40 claimed that new wage scales adopted by the city police department, to make entry level recruitment more competitive with other law enforcement agencies, violated the ADEA by giving proportionately smaller raises to senior officers. A panel of the Fifth Circuit joined the majority of federal circuits, holding that disparate impact claims are not cognizable under the ADEA. While disagreeing with the conclusion that the disparate impact theory of recovery is never available, the Supreme Court ruled that evidence presented by the petitioners was inadequate to prove an ADEA claim.

Legal Background.

The ADEA prohibits age discrimination against any individual aged 40 or over in hiring or discharge, or with respect to "compensation, terms, conditions, or privileges of employment,"[2] and also makes it unlawful to "limit, segregate, or classify" older employees so as to "adversely affect" their status because of age.[3] In language and structure, these proscriptions mirror Title VII, which imposes identical restrictions on employers in regard to race, color, religion, sex, and national origin. Fundamental to the present controversy, however, is an ADEA exception, not found in Title VII, which allows employers "to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age."[4] The Equal Pay Act[5] contains a nearly identical phrase — "any factor other than sex" — which has been interpreted to preclude disparate impact claims under that law.[6]

Two basic methods have judicially evolved for proving unlawful discrimination in employment: disparate treatment and disparate impact. The former requires 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. Disparate impact claims, however, may be established without proof of discriminatory intent, relieving the victim of an often insurmountable burden. Instead, disparate impact derives from the theory that employment policies that appear neutral on their face may actually affect protected groups more harshly than an unprotected group. 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 ADEA, nor of Title VII as originally enacted, but is a creature of judicial interpretation. The concept first emerged from the U.S. Supreme Court ruling in *Griggs v. Duke Power Co.*[7] In *Griggs***,** black workers argued that the employer's use of a high school diploma

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[1] Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).

[2] 29 U.S.C. § 623(a)(1).

[3] Id. at § 623(A)(2).

[4] Id. at § 623(f)(1).

[5] 29 U.S.C. § 206(d)(1).

[6] County of Washington v. Gunther, 452 U.S.161 (1981).

[7] 401 U.S. 414 (1971).

requirement and general intelligence tests for entry into laborer positions violated Title VII of the 1964 Civil Rights Act,[8] 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*.[9] *Dothard* invalidated an Alabama policy requiring a minimum height and weight for prison guards, since the policy had a disparate 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.[10]

In dictum to the Court's opinion in *Hazen Paper Co. v. Biggins*,[11] 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."[12] 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."[13] In his concurring opinion, Justice Kennedy cast further uncertainty on the disparate impact theory by declaring that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory. . . .[14] The Supreme Court expressly reserved judgment on the question of "whether a disparate impact theory of liability is available under the ADEA."

Prior to *Hazen Paper*, several courts ruled that the ADEA permitted disparate impact claims, either because of the similarity of its substantive provisions with Title VII or a perceived commonality of language, structure, and purpose of the two laws. With some

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[8] 42 U.S.C. 2000e et seq.

[9] 433 U.S. 321 (1977).

[10] 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; . . .

[11] Supra n. 1.

[12] Id at 610.

[13] Id. at 611.

[14] Id. at 618 (Kennedy, J. concurring).

qualifications, the Second,[15] Eighth,[16] and Ninth Circuit[17] adhered to this position, based on Pre-*Hazen Paper* case law and general textual similarities between the ADEA and Title VII. The D.C. Circuit had "assume[d] without deciding that disparate impact analysis applies to age discrimination claims."[18] Five other Circuits — the First, Fifth, Seventh, Tenth, and Eleventh — adopted a contrary position.[19] Generally, these courts relied upon the "reasonable factors" exception to the ADEA, and judicial treatment of its Equal Pay Act corollary, as reason to distinguish Title VII and reject disparate impact claims. In addition, the historical emphasis of the ADEA on combating stereotypes about age, especially the stigma of declining productivity, was also held to preclude its application to employment decisions impacting older workers but motivated by factors other than age. Finally, these courts found support in the language of *Hazen Paper* for refusing to recognize disparate impact ADEA claims.

The Smith Ruling.

In *Smith*, police officers and safety dispatchers sued the City of Jackson alleging that a performance pay plan awarded substantially larger salary increases to their colleagues under the age of 40. Officers and dispatchers with five or fewer years of tenure received proportionately greater increases than those with more than five years. For purposes of a summary judgment motion, the district court assumed that employees with the least seniority were under age 40, while those with more seniority were over age 40. Implementation of the age-neutral plan was alleged to be unlawful without a showing of intentional bias because it resulted in four standard deviations of pay difference in favor of the younger group of employees. Separately, a disparate treatment claim, alleging that the City was motivated by age discrimination to adopt the pay plan, was permitted to proceed. Both the district court and the U.S. Court of Appeals for the Fifth Circuit ruled against the employees. The central issue on this appeal was whether the pay plan could be challenged due to its disparate impact.

The Supreme Court narrowly held, 5 to 3, the Chief Justice not participating, that the disparate impact method for proving age discrimination is available under the ADEA. A plurality led by Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer seized 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."[20] This provision was found to allow disparate impact claims and was not overridden — as Justice O'Connor urged in her concurring opinion — by ADEA's § 623(f) "safe harbor"

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[15] District Council 37 v. New York City Dep't of Parks and Recreation, 113 F.3d 347 (2d Cir. 1997).

[16] Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996).

[17] Mangold v. California Pub. Utilities Comm'n, 67 F.3d 1470 (9th Cir. 1995).

[18] Koger v. Reno, 98 F.3d 631, 639 (D.C. Cir. 1996).

[19] See Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999); EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994), cert. denied, 515 U.S. 1142 (1995); Ellis v. United Airlines, Inc., 73 F.3d 999 (1995), cert. denied, 517 U.S. 1245 (1996); Adams v. Florida Power Corp., 255 F.3d 1322 (11th Cir. 2001), cert. gr., 534 U.S. 1054 (2001), writ dismissed as improvidently granted, 535 U.S. 228 (2002).

[20] 29 U.S.C. § 623(a)(2).

exception for employer conduct based on "reasonable factors other than age."(RFOA) In Justice O'Connor's view, the RFOA provision "expresses Congress' clear intention that employers not be subject to liability absent proof of intentional age-based discrimination." 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 opinion further relied on textual similarities between Title VII and the ADEA, the contemporaneity of congressional consideration of the two statutes, and the fact that the Labor Department and the EEOC had adopted ADEA regulations expressly providing for disparate impact analysis. A fifth vote was provided by Justice Scalia who agreed with much of Justice Stevens' opinion, but who would have instead anchored the Court's decision on the principle of deference to agency rule-making. "This is an absolutely classic case for deference to agency interpretation," he wrote.

As noted, however, while *Smith* 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.[21] 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. Justice Scalia joined the Stevens opinion on this point and Justice O'Connor concurred that if disparate impact is available, the petitioners had not shown it.

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 rather than discriminatory intent. 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

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[21] See Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Civil Rights Act of 1991, codified at 42 U.S.C. § 2000e-2(k).

employment decisions that would otherwise be prohibited "where the differentiation is based on reasonable factors other than age." Nor does the the ADEA, like Title VII, require employers to demonstrate business necessity. 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.