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Supreme Court Rules Disparate Impact Theory Applicable to ADEA Claims

The United States Supreme Court recently held that the disparate impact theory of recovery, which generally refers to claims for "unintentional discrimination," applies to cases brought under the Age Discrimination in Employment Act ("ADEA"). The holding represents a departure from the previous approach of the majority of jurisdictions, which generally held that disparate impact claims are only available for claims of race, gender, national origin or religious discrimination under Title VII. While the holding exposes employers to increased litigation under the ADEA, the scope of the exposure appears to be narrow.

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Facts

In *Smith v. City of Jackson* (Case No. 03-1160, March 30, 2005), the City of Jackson, Mississippi adopted a pay plan designed to attract and retain qualified employees. The plan granted police officers and dispatchers with less than five years' service proportionately greater pay raises than those with more seniority. The purpose of the revision was to align police officer starting salaries with the regional average. After a group of older officers sued the city, the Fifth Circuit dismissed the officers' disparate impact claim, holding that such claims are unavailable under the ADEA.

Disparate Impact Applies . . .

The Supreme Court reversed. The Court focused on the ADEA's provision that makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." Since this language, which focuses on the effects instead of the motivation of the employer's actions, is identical to a provision in Title VII (except for its use of the word "age" instead of "race, color, religion, sex or national origin"), the Court reasoned that disparate impact is also available under the ADEA. . . in narrower circumstances. However, the Court also held that the scope of such liability is narrower under the ADEA than under Title VII. First, the ADEA has a provision which eliminates liability by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age"

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(the RFOA provision). The Court recognized that "Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment." Second, in 1991, Congress amended Title VII to expand its coverage with respect to disparate impact liability, but did not amend the ADEA.

Therefore, despite holding that disparate impact claims are available under the ADEA, the Court dismissed petitioners' disparate impact claims on the merits. First, petitioners had done "little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers." To be successful on a disparate impact theory under the ADEA, plaintiffs are required to isolate and identify "the specific employment practices that are allegedly responsible for any observed statistical disparities." Second, the Court focused on the RFOA provision, and held that the "City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a 'reasonable factor other than age' that responded to the City's legitimate goal of retaining police officers."

Conclusion

While the Court's ruling is certainly not good news for employers, appearances can be deceiving. Employers facing a disparate impact claim under Title VII often are in the position of justifying their actions under the "Business Necessity" standard. This standard is much more stringent than the "reasonable factor other than age" requirement under the ADEA. As Justice Stevens noted at the conclusion of his opinion, "While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the 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 includes no such requirement."

Accordingly, while the ruling signals the potential for increased litigation under the ADEA, such claims may be difficult for plaintiffs to litigate successfully.

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