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Supreme Court Holds That Workers Can Sue For Age Discrimination In Some "Disparate Impact" Cases

A recent decision of the Supreme Court, *Smith v. City of Jackson, Mississippi*, is being heralded by the plaintiffs' bar as making it easier to sue employers for age discrimination. On March 30, 2005, the Supreme Court held in that case that employees may sue for age discrimination under the Age Discrimination in Employment Act ("ADEA"), even in the absence of any intent by the employer to discriminate, if the employees can show that the employer's facially neutral policy negatively impacts older workers.

In *Smith*, a group of police officers challenged their employer's new pay plan as discriminatory under the ADEA. The new pay plan granted salary increases to all police officers, but officers with less than five years service received proportionately greater raises than those with more seniority. The plaintiffs, all over 40 years in age, sued for age discrimination claiming that they were adversely affected by the plan because of their age. However, there was no evidence that, in enacting the pay plan, the city intended to discriminate against older police officers.

The critical issue before the Supreme Court was whether the ADEA authorized recovery where an employer's policy or practice had a disparate impact on older workers, even when there was no showing of discriminatory intent. While a majority of the Court disagreed on the rationale, five justices concluded that employees may bring a claim under the ADEA that their employer's neutral policy has a disparate impact on older workers.

Notwithstanding this relaxed standard, the Court made clear that it will be difficult for plaintiffs to actually prevail on such disparate impact claims. The Court explained that an employer's policy that has an adverse impact on older workers is not unlawful, if the impact is attributable to a "reasonable" non-age factor. In fact, the Court dismissed the plaintiffs' lawsuit in *Smith*, concluding that the city's pay plan was based on seniority and position and was legitimately designed to raise employees' salaries to match those in surrounding communities and to retain employees.

The Court emphasized that to defeat a disparate impact claim, an employer merely needs to show that its policy relies on reasonable non-age factors and is a reasonable method to achieve its goals. The employer is not obligated to show that there are no other ways for the employer to achieve its goals. It remains to be seen how lower courts will define and interpret this reasonableness standard.

Thus, while *Smith* opens the door to the courthouse for plaintiffs to bring disparate impact claims under the ADEA, it also sends a signal that the likelihood of success on such claims is low. That may deter such cases from ever being brought, but the decision also could mean increased litigation costs for employers. Thus, employers now need to consider whether a neutral practice or policy may have an adverse impact on older workers and need to ensure that there is a legitimate business reason for adopting the policy, that the policy relies on reasonable non-age factors and that the policy is a reasonable way to achieve goals.

This Bulletin was prepared by Sheila O'Leary of Foley Hoag LLP's Labor & Employment Law Department. If you would like additional information on this topic, please contact Ms. O'Leary (soleary@foleyhoag.com or 617-832-3044), or contact your attorney at Foley Hoag LLP. For "Alerts and Updates" on other topics, please visit our website at http://www.foleyhoag.com/.

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