

E*Alert

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Older Workers Can Make Claims of Age Discrimination Based on Disparate Impact Under the ADEA

Providing greater protection to older workers, the United States Supreme Court ruled, in a 5-3 decision, that individuals age 40 and over do not have to prove intentional discrimination because of their age (i.e., disparate treatment) to recover under the federal Age Discrimination in Employment Act (ADEA). *Smith v. City of Jackson*, Mississippi, No. 03-1160, 544 U.S. __ (March 30, 2005). Older workers can sue if their employer has a policy, practice, or plan that although facially neutral, has a disparate impact upon an age-protected individual or class of individuals.

The case before the Court concerned a change in the pay plan for police officers and dispatchers employed by the City of Jackson, Mississippi. The City raised the pay of all officers and dispatchers to bring their pay up to the regional average. As a result, employees who had less than five years of service and were primarily under age 40 received proportionately greater raises than employees who had more seniority and were over age 40. A class of 30 police officers over age 40 sued the City under the ADEA, claiming that they were adversely affected by the pay plan because of their age.

While the Court held that disparate impact claims are viable under the ADEA, it affirmed the dismissal of the plaintiffs' disparate impact claim. It found that the plaintiffs failed to identify any specific test, requirement, or practice within the pay plan that adversely impacted older employees, other than showing that they received proportionately smaller pay increases. The Court also ruled that the City's plan was based on reasonable factors other than age, i.e., a need to raise the salaries of junior offices to make them competitive with comparable positions in the labor market.

On the positive side, the Court held that the scope of disparate-impact liability is narrower than under Title VII because of textual differences in the statutes. If a

disparate impact is based on reasonable factors other than age, there is no liability under the ADEA. A different test is applied under Title VII. The Court also recognized that age, unlike race or the other classifications protected by Title VII, may be relevant to an individual's capacity to engage in certain types of employment.

In response to the Court's expansion of liability under the ADEA, employers should evaluate the impact of their compensation, benefit, and reduction-in-force plans on employees age 40 and over, and ensure that any disparate impact can be explained by reasonable factors other than age.

If you have any questions about the issues raised by this e-alert, please feel free to contact Laura Lindner at (414) 273-3910 or by e-mail at llindner@lindner-marsack.com

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