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NewsFlash!

U.S. SUPREME COURT AFFIRMS EEOC POSITION THAT THE ADEA AUTHORIZES DISPARATE-IMPACT CLAIMS

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Prior to March, 2005, there was considerable doubt as to whether a claim of age discrimination could be brought under a disparate-impact theory. The Federal Circuits were split on whether the ADEA permitted suits for discrimination in cases where an employer's facially neutral policy or practice discriminated against older workers. While the Second, Eighth and Ninth Circuits recognized such a theory, the First, Seventh, Tenth and Eleventh Circuits held that there was no disparate-impact liability under the ADEA.

In March, 2005, the U.S. Supreme Court resolved the issue. In *Smith v. City of Jackson, Mississippi*, the Court held that the text of the ADEA, its "reasonable factors other than age" provision, and the EEOC's regulations all support the conclusion that a disparate-impact theory is cognizable under the ADEA. As a result, disparate-impact claims are allowed under both Title VII of the Civil Rights Act of 1964 and under the ADEA. The only difference is that, under the ADEA, the scope of liability is narrower, because it permits an employer to cite "reasonable factors other than age" (the

RFRA defense) to justify a practice that penalizes older workers.

In *Smith v. City of Jackson*, the City adopted a pay plan designed to bring starting salaries of police officers up to the regional average. The pay plan granted raises to all police officers and police dispatchers. Those with less than 5 years of tenure received proportionately greater raises when compared to their former pay than those with more seniority. Although some officers over the age of 40 had less than 5 years of service, most of the older officers had more. A group of older officers filed suit under the ADEA, claiming both that the City deliberately discriminated against them because of their age (a "disparate-treatment" claim) and that they were "adversely affected" by the plan because of their age (a "disparate-impact" claim). The City's defense was that the plan was based on reasonable factors other than age; specifically, that the differential between older and younger workers was based on the need to make junior officers' salaries competitive with comparable positions in the market. The district court granted summary judgment for the City on both claims. The Court of

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Appeals for the Fifth Circuit held that the ruling on the disparate-treatment claim was premature and concluded that disparate-impact claims were categorically unavailable under the ADEA. The plaintiffs appealed the denial of their disparate-impact claim to the U.S. Supreme Court.

The Supreme Court reversed, holding that suits for age discrimination based on disparate impact are permissible under the ADEA. However, it ruled against the officers holding that the disparate impact of the City's pay plan was attributable to its decision to give raises based on seniority and position and that its reliance on those factors was unquestionably reasonable, given the City's goals.

The law is now clear. Under the ADEA, employers are subject to liability for unintentional age discrimination based on facially neutral policies that have a disparate impact on older workers. However, the employer may defend a challenged policy by demonstrating that it is based on reasonable factors other than age. This has been the law in the states covered by the Second, Eighth (which includes Missouri) and Ninth Circuits. It is now the law in all eleven circuits.

Employers should consult employment counsel before implementing a policy that, although neutral or non-discriminatory on its face, might adversely affect older employees.

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