

Terry J. Smith  
Smith O'Callaghan & White  
(312) 419-1000  
terry.smith@socw.com

## **U. S. Supreme Court Allows Disparate Impact Claims Under ADEA**

This is an update to employers on a recent important decision of the U. S. Supreme Court decided on March 30, 2005, under the Age Discrimination in Employment Act ("ADEA"), the federal age discrimination law.

In Smith v. City of Jackson, No. 03-1160, 544 U.S. \_\_\_, 125 S. Ct. 1536 (2005), the U. S. Supreme Court allowed older workers to sue their employer for disparately impacting them absent proof that their employer actually meant to do so, i.e., without proving the employer's age discrimination was intentional. As you know, this firm is involved in a good deal of litigation and counseling concerning alleged age discrimination in the workplace, in individual and class cases. We thought it might be of assistance to provide some guidance with respect to this decision.

The plaintiffs' bar and certain media accounts tout City of Jackson as a substantial victory for plaintiffs that will result in a flood of ADEA litigation and judgments for plaintiffs. But our view of the case's implications for employers, outlined below, is different: While this ruling may result in additional ADEA litigation on the horizon, the decision also recognizes a key defense that provides employers with an excellent basis for defending disparate impact claims and the ability to take specific measures to limit exposure to these claims.

### **Background**

In 1998, the City of Jackson increased the pay of its police officers toward regional averages to ameliorate recruiting and retention problems. Disparities were most pronounced for junior officers, so they got the biggest raises. Senior officers sued the City under the ADEA, claiming the new compensation scheme disparately impacted them. The concept of disparate impact focuses on the *consequences* of an employer's actions, not an employer's *motivations*.

### **Split in the Circuits**

The U. S. Supreme Court took the case to resolve what had become a hotly contested issue in the lower courts – whether disparate impact claims are permitted under the ADEA. Prior to this decision, the law in the Federal Circuits was as follows:

#### **Rejected ADEA Disparate Impact Claims**

**1<sup>st</sup> Circuit** (MA, ME, NH, PR, RI)  
**5<sup>th</sup> Circuit** (LA, MS, TX)  
**7<sup>th</sup> Circuit** (IL, IN, WI)  
**10<sup>th</sup> Circuit** (CO, KS, NM, OK, UT, WY)  
**11<sup>th</sup> Circuit** (AL, FL, GA)

#### **Permitted ADEA Disparate Impact Claims**

**2<sup>nd</sup> Circuit** (CT, NY, VT)  
**8<sup>th</sup> Circuit** (AR, IA, MN, MO, NE, ND, SD)  
**9<sup>th</sup> Circuit** (AK, AZ, CA, HI, ID, MT, NV, OR, WA)

**Issue Open in 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and D.C. Circuits**

### **The U. S. Supreme Court Decision**

In a 5-to-3 vote (without Chief Justice Rehnquist) the Court held that the ADEA permits disparate impact claims. The Court noted that the pertinent text of the ADEA is nearly identical to Title VII of the Civil Rights Act of 1964 and deserves like construction. Thus, the Court reasoned that if Title VII allows disparate impact claims, so too must the ADEA.

### **Defense Available to Employers**

The Court recognized, however, that unlike Title VII, the ADEA contains a defense immunizing employer actions based on “reasonable factors other than age.” Thus, the Court held that employer conduct causing a disparate impact on older workers does *not* violate the ADEA if the conduct is “reasonable” and aimed at some purpose other than age.

By contrast, employers contesting disparate impact claims under Title VII must justify their conduct as a “business necessity,” an immeasurably tougher defense that requires employers to prove that they had no other way of achieving the challenged result. The difference, the Court in City of Jackson observed, flows from the reality that unlike race, gender or other Title VII-protected classifications, age sometimes “has relevance to an individual’s capacity” to perform certain jobs, and that Congress itself afforded Title VII classifications greater protections than age when drafting the ADEA.

The Court concluded that the impetus for the City’s pay plan was reasonable and unrelated to age: its desire to bring the junior officers to wage parity with the marketplace. Thus, the ADEA’s reasonableness defense protected the City against disparate impact scrutiny.

### **Implications for Employers**

In sum, City of Jackson broadens employer ADEA exposure, creating a new source of potential litigation from a large and growing sector of the workforce. However, this does not necessarily mean more judgments for plaintiffs. Employers should recognize and take steps to utilize the powerful defense articulated by the Court in this case where policies and decisions may unintentionally and disproportionately impact employees who are age 40 or over – such as in staff reductions, job assignments, retirement incentives, and salary and benefit changes. Employers should identify and fully document the reasonable and non-discriminatory goal(s) that the action is intended to achieve, the factors considered in the decision-making process and even whether alternatives were explored and given consideration. In view of the U. S. Supreme Court’s recent decision, such a pre-implementation record demonstrating “reasonable factors other than age” is critical to the avoidance of ADEA disparate impact liability.