Supreme Court Again Agrees To Consider Viability of Disparate Impact Claims under the ADEA

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In a "disparate impact" case, an employee seeks to establish liability by showing that an employer's neutral employment practice policy has had a disparate (disproportionately negative) impact on a group of workers. The employee does not have to prove discriminatory intent.

While Courts have allowed disparate impact claims based on race or sex, Courts are split on whether such claims can be brought under the Age Discrimination in Employment Act ("ADEA"). The First, Fifth, Seventh, Tenth and Eleventh circuits have refused to recognize ADEA disparate impact claims, while the Second, Eighth and Ninth circuits have found the ADEA permits such claims. In December 2001, the Supreme Court agreed to decide the issue, but after oral argument in March 2002, the Court dismissed the case as "improvidently granted." On March 29, 2004, the U.S. Supreme Court once again agreed to consider whether disparate impact claims may be brought under the ADEA. [Smith v. City of Jackson, Miss.]

In Smith, thirty police officers and dispatchers for the Jackson, Mississippi police department (all age 40 or older), alleged they suffered an injury when the department implemented a new compensation plan that granted substantially larger salary increases to employees who had five years or less of tenure, all of whom tended to be younger employees.

The Fifth Circuit affirmed the dismissal of the case holding that "the ADEA was not intended to remedy age-disparate effects that arise from the application of employment plans or practices that are not based on age." The appeals court relied on the statutory language of the ADEA that specifically allows different treatment of employees "based on reasonable factors other than age" and found that the rationale for recognizing Title VII disparate impact claims does not apply in the ADEA context.

In their petition for Supreme Court review, the employees argued that "disparate impact claims are particularly appropriate to target these sorts of subtle employment biases." They contended that the ADEA's exemption for differentiation "based on reasonable factors other than age" should be interpreted as "a defense to liability, much like a showing of 'business necessity' can negate a prima facie claim of disparate impact in a Title VII case."

The police department responded that the Fifth Circuit correctly held that disparate impact claims are not permitted under the ADEA, because the statute prohibits only discrimination motivated by age and not conduct based on reasonable factors other than age. However, the department did not oppose Supreme Court review. Oral arguments will be heard during the 2004-2005 term, which begins in October.
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