Supreme Court Preview: Disparate Impact Claims Under the ADEA

*By Michael A. Carvin and Louis K. Fisher**

Later this year the Supreme Court will hear arguments in *Smith v. City of Jackson*,[1] which presents the question whether so-called "disparate impact" claims are available under the Age Discrimination in Employment Act of 1967.[2] Under "disparate impact" theory, an action is unlawful if it has disproportionate adverse effects on members of a protected class and lacks sufficient justification, even if the action is not taken with a purpose to discriminate on the basis of the protected characteristic. The Court's decision, which should hold that ADEA disparate impact claims are *not* cognizable, will be extremely important to public and private employers.

The Supreme Court has allowed disparate impact claims under Title VII of the Civil Rights Act of 1964,[3] but it has held that several other civil rights statutes (including Title VI of the same Act) as well as the Fourteenth and Fifteenth Amendments authorize only "disparate treatment" claims – *i.e.*, claims of intentional discrimination.[4] Until 1993, the courts of appeals reflexively assumed that disparate impact claims allowed under Title VII were also permissible under the ADEA.[5] In *Hazen Paper Co. v. Biggins*,[6] however, the unanimous opinion of the Court emphasized that "we have never decided whether a disparate impact theory of liability is available under the ADEA,"[7] and a concurring opinion for three Justices stated that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."[8] Since *Hazen Paper*, five courts of appeals have held that ADEA disparate impact claims are not available,[9] and three courts of appeals have adhered to their pre-*Hazen Paper* holdings that such claims are allowed.[10]

City of Jackson is the second case in which the Supreme Court granted *certiorari* on this issue. In 2002, the Court heard arguments in *Adams v. Florida Power Corp.*, but then dismissed the case on the ground that *certiorari* had been improvidently granted.[11] During the hearing, some Justices expressed concern about the fact that the plaintiffs challenged the employer's reduction-in-force itself, without identifying any specific selection practices through which the RIF fell more heavily on older employees.[12] In *City of Jackson*, a group of police officers are challenging a pay plan that raised the salaries of *all* officers but, according to the plaintiffs, generally gave higher increases to officers under age forty.[13] Although this claim does not suffer from the same type of flaw as the claim in the *Florida Power* case, its validity would be dubious even if disparate impact claims were generally cognizable. Even under Title VII, the Court has held that disparate impact doctrine is not applicable to a discriminatory *compensation* claim.[14] In addition, the plaintiffs focus on salary *increases* rather than on the salaries themselves, and the City's experts reported – without contradiction – that older officers statistically were paid more overall than younger officers, even *after* the allegedly discriminatory pay increases. As discussed below, moreover, the facts of the *City of Jackson* case highlight the particular problems with applying disparate impact theory in the age context.

As argued by the City in its brief to the Supreme Court, the text and legislative history of the ADEA, bolstered by pragmatic considerations, convincingly demonstrate that disparate impact claims are not available under the statute. The ADEA's prohibitory sections make it unlawful for an employer to take certain actions "because of [an] individual's age."[15] This language is a conventional reference to discriminatory intent. Indeed, the classic description of the difference between disparate treatment and disparate impact is that, under the former, "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[16] The *City of Jackson* plaintiffs argue that the "because of" language merely establishes a causation requirement and that, for example, an older worker who fails a physical strength test does so "because of" age. On the contrary, even if physical strength is negatively correlated with age, the two factors are analytically distinct, making it incorrect to say that an action taken because of physical weakness is an action taken because of age. The effort to *equate* decreased physical strength with old age is precisely the sort of generalized stereotype that the ADEA was designed to prohibit.

Other ADEA provisions confirm that the prohibitory section covers only disparate treatment. In particular, the ADEA affirmatively provides that an action is lawful where "based on reasonable factors other than age."[17] This "RFOA" provision further demonstrates that the legality of an employment practice depends on the employer's motives, which would be ir-

relevant to a disparate impact prohibition. According to the *City of Jackson* plaintiffs, the RFOA provision would be unnecessary if the ADEA otherwise applied only to intentional discrimination. No court of appeals, however, has concluded that the RFOA provision *supports* disparate impact liability. To the contrary, the courts of appeals uniformly have applied the RFOA provision to disparate treatment claims. Under these decisions, the provision confirms that an action is lawful where the employer's explanation is not a "pretext" for intentional discrimination,[18] and also that an action is lawful in a "mixed-motive" case where age was a factor but the same decision would have been made based solely on other factors.[19] Nor is there merit to the contention that the word "reasonable" signals a prohibition of decisions based on *unreasonable* factors other than age. The term "reasonable" in the RFOA provision is best understood simply to restate the traditional requirement of antidiscrimination law that there be a rational basis for a purportedly nondiscriminatory action. Thus, it is sometimes said in disparate *treatment* cases that a *prima facie* showing by the plaintiff establishes liability unless there was a "reasonable" or "valid" or "legitimate" basis for the employer's action.[20] These modifiers add nothing beyond the basic requirement of nondiscriminatory intent.

Still other ADEA provisions, together with the statute's legislative history, confirm that the statute was not intended to address adverse effects on older workers by prohibiting age-neutral practices. The report of the Secretary of Labor (who was charged by Congress with making a report and recommendations on age discrimination) and the ADEA's statement of findings and purposes reflect that the statute prohibits only "arbitrary age discrimination."[21] In turn, the report clearly defines "arbitrary age discrimination" as the type of discrimination that occurs through "employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications."[22] The *City of Jackson* plaintiffs erroneously focus on the Secretary's and Congress's recognition that, due to the "force of certain circumstances," many practices inevitably will "affect older workers more strongly, as a group, than they do younger workers."[23] The report and the statute show that these adverse effects were to be addressed not through prohibitions but through a broad range of non-coercive measures, which are in fact found in Section 3 of the ADEA.[24] Furthermore, the legislative history – like Sherlock Holmes' "dog that didn't bark" – contains neither any mention of disparate impact liability nor any discussion of the many subsidiary issues that would have arisen if such liability had been contemplated.[25]

Although the text and legislative history are wholly dispositive, there are also important pragmatic reasons for not recognizing ADEA disparate impact claims. The difficulties of resolving the complex and/or amorphous questions inherent in disparate impact theory – *e.g.*, whether the disparity is substantial, whether the selection practice is justifiable, and whether an effective alternative exists – would be greatly exacerbated in the context of the ADEA, which provides a right to a jury trial on all issues of fact.[26] In addition, because age (unlike other protected characteristics such as race or sex) is a continuum, there is no non-arbitrary way to divide people into two age groups for the purpose of assessing disparate impact. Most importantly, for reasons that are neither avoidable nor lamentable, older workers *are* different from younger workers in myriad ways. As a result, it is to be expected that many sound and efficacious work, selection, and compensation practices will have a disproportionate impact on older workers. In fact, some neutral practices adversely affect older workers because those workers started off in a *better* position than their younger counterparts. This is illustrated by the facts of the *City of Jackson* case: The City has asserted, and the plaintiffs have not disputed, that younger officers generally received higher raises because they are employed in the lowest paid ranks, where the new minimum salaries resulted in greater increases over prior pay. Because an adverse effect on older workers is neither unusual nor suspect, it is inappropriate to second-guess every employment practice correlated with age, as would occur under a disparate impact regime.

In an attempt to deflect these points, the plaintiffs in *City of Jackson* are taking a different tack. They contend that, even if the best reading of the ADEA does not authorize disparate impact claims, those claims should be allowed because (1) disparate impact claims are available under Title VII, which has language similar to the ADEA, and (2) the Equal Employment Opportunity Commission allegedly has a longstanding regulation authorizing ADEA disparate impact claims. Neither of these arguments withstands scrutiny.

Any reliance on the Supreme Court's decision in *Griggs*, which interpreted Title VII to authorize disparate impact claims, is mistaken because "*Griggs* perverted both the language and the legislative history of the act."[27] Regardless of whether an erroneous holding would be followed under the doctrine of *stare decisis*, it should under no circumstances be trans-

planted into a different statute. Speaking realistically, however, it is questionable whether even one or two Justices would reach out to repudiate the reasoning of *Griggs*. And even if *Griggs* was decided correctly, there would be no basis to carry its interpretation of Title VII over to the ADEA. *Griggs* was not decided until four years *after* the enactment of the ADEA, so Congress cannot be deemed to have known of, much less accepted, *Griggs*' holding. Furthermore, the prohibitory provisions of the two statutes, though similar, are materially different. The common understanding of discrimination "because of . . . age" is narrower than the common understanding of discrimination "because of . . . race [or] sex"; for example, the Supreme Court held just last Term that Title VII prohibits discrimination against employees of *any* race or sex, whereas the ADEA prohibits only discrimination against *older* employees.[28] Most importantly, the Court repeatedly has held that an interpretation of one statute based on purpose rather than text cannot be transported to another statute with similar text but a different purpose.[29] *Griggs* unquestionably rests not on the text of Title VII but on its perceived "purpose" of counteracting deep-seated animus and the lingering effects of past discrimination.[30] Because neither of these factors affects employment opportunities for older people, however, no such purpose underlies the ADEA.

The *City of Jackson* plaintiffs' argument for deference to the EEOC fails for a much simpler reason: The agency has not in fact adopted a regulation providing that practices with disparate impact are prohibited by the ADEA. The plaintiffs point to a regulation that purports to flesh out the ADEA's description of *lawful* practices,[31] but, at most, this regulation merely *assumes* that the statute's prohibitory section encompasses disparate impact. Such assumptions, even if agency lawyers later seek to justify them, do not represent the type of considered agency action that is arguably entitled to deference.[32] Moreover, the EEOC's assumption conflicts with the original interpretations of the Department of Labor,[33] and it appears to be based on nothing more than an erroneous belief that *Griggs* applies with as much force to the ADEA as to Title VII.[34] In all events, the EEOC's position on disparate impact is contrary to the ADEA's plain meaning, discussed above. Notably, no court of appeals has relied on that position, and the Solicitor General has not appeared in the *City of Jackson* case to defend it.

In conclusion, the Supreme Court's decision in *Smith v. City of Jackson* will be one of the most significant of October Term 2004. The Court should read the ADEA to prohibit only disparate treatment, and it should allow neither *Griggs* nor the view of the EEOC to unsettle that interpretation.

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Footnotes

[1] No. 03-1160 (cert. granted Mar. 29, 2004).

[2] 29 U.S.C. §§ 621-634.

[3] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[4] *See* Alexander v. Sandoval, 532 U.S. 275, 288-93 (2001) (Title VI); Washington v. Davis, 426 U.S. 229, 238-48 (1976) (Fourteenth Amendment); City of Mobile v. Bolden, 446 U.S. 55, 61-74 (1980). (Fourteenth and Fifteenth Amendments).

[5] *See, e.g.*, Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

[6] 507 U.S. 604 (1993).

[7] *Id.* at 610.

[8] *Id.* at 618 (Kennedy, J., concurring).

[9] Smith v. City of Jackson, 351 F.3d 183, 186-95 (5th Cir. 2003); Adams v. Florida Power Corp., 255 F.3d 1322, 1326 (11th Cir. 2001); Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999); Ellis v. United Airlines, Inc., 73 F.3d 999, 1009 (10th Cir. 1996); EEOC v. Francis W. Parker School, 41 F.3d 1073, 1076-78 (7th Cir. 1994).

[10] Frank v. United Airlines, Inc., 216 F.3d 845, 856 (9th Cir. 2000); Smith v. Xerox Corp., 196 F.3d 358, 367 (2d Cir. 1999); Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996).

[11] 535 U.S. 228 (2002).

[12] Tr. of Oral Arg. at 6-8, 14-16, *available at* www.supremecourtus.gov/oral_arguments/ argument_transcripts/01-584.pdf.

[13] *See* 351 F.3d at 186.

[14] *See* County of Washington v. Gunther, 452 U.S. 161, 170-71 (1981); Los Angeles v. Manhart, 435 U.S. 702, 710-11 n.20 (1978); *cf.* Nashville Gas Co. v. Satty, 434 U.S. 136, 144-45 (1977) (declining to decide whether disparate impact doctrine applies to cases arising under subsection 703(a)(1), the provision applicable to discriminatory compensation claims).

[15] 29 U.S.C. § 623(a)(1) & (2).

[16] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). (footnote omitted).

[17] 29 U.S.C. § 623(f)(1).

[18] *E.g.*, Schwager v. Sun Oil Co., 591 F.2d 58, 61 (10th Cir. 1979).

[19] *E.g.*, Cuddy v. Carmen, 694 F.2d 853, 858 n.23 (D.C. Cir. 1982).

[20] *E.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 399-400 (1983); Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003).

[21] Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 21-22 (1965), *reprinted in* EEOC, *Legislative History of the Age Discrimination in Employment Act* 37-38 (1981); 29 U.S.C. § 621(b).

[22] Report at 6, *Legislative History* at 23.

[23] Report at 11-15, *Legislative History* at 28-32; *see also* 29 U.S.C. § 621(a)(2).

[24] 29 U.S.C. § 622; *see also id.* § 621(b); Report at 22-25, *Legislative History* at 38-41.

[25] Church of Scientology v. IRS, 484 U.S. 9, 17-18 (1987); *see* Michael E. Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 Berkeley J. Emp. & Lab. L. 1, 40 (2004).

[26] 29 U.S.C. § 626(c)(2).

[27] Richard A. Epstein, Forbidden Grounds 197 (1992).

[28] Gen. Dynamics Land Sys., Inc. v. Cline, 124 S. Ct. 1236 (2004).

[29] *E.g.*, Fogerty v. Fantasy, Inc., 510 U.S. 517, 523-25 (1994); United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 212-13 (2001).

[30] *See* 401 U.S. at 429-31.

[31] 29 C.F.R. § 1625.7(d).

[32] *See, e.g.*, Adamo Wrecking Co. v. United States, 434 U.S. 275, 287-89 & n.5 (1978); SEC v. Sloan, 436 U.S. 103, 117-18 (1978).

[33] *See, e.g.*, Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact*, *in* Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners 102 (Monte B. Lake ed., 1983).

[34] *See* Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,725 (1981).