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Employment Law Client Alert

April 2005

Supreme Court Clarifies Scope of Age Discrimination Law

In a ruling widely reported to be a major victory for employees, the Supreme Court has determined that an employee 40 years or older may bring a claim under the federal Age Discrimination in Employment Act ("ADEA") without having to prove the employer intended to discriminate. In *Smith v. City of Jackson*, the Court held that an employee may bring a "disparate impact" claim under the ADEA. A "disparate impact" claim, long established to apply to federal claims of race, gender, religion and national origin discrimination, arises where an employment practice or policy that is neutral on its face has a harsher impact on workers age 40 and older than those ages 39 and below. As distinguished from a "disparate treatment" claim, where the employee has to prove the employer intended to discriminate, no intent is required under a disparate impact case.

While the media has portrayed this ruling as a significant victory for employees, a close reading of the decision leads to the inescapable conclusion that the media hype is overblown. The Court made clear that an employer can successfully defend a disparate impact age claim by establishing that the challenged policy or practice is based on a "reasonable factor other than age." Simply stated, a decision made by an employer in consideration of any *reasonable* interest or goal of the employer will defeat a disparate impact claim as long as it can be justified on non-discriminatory grounds. Significantly, this is a much easier standard for employers to meet than that required to defend other federal discrimination claims, where the employer must establish that its policy or practice is a "business necessity" and that there were no alternate means to achieve its goal. In fact, the *Smith* Court actually ruled *against* the plaintiffs, finding that the City's implementation of a salary raise whereby a larger percentage raise went to lower echelon and younger officers was based on reasonable factors other than age.

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The lesson in *Smith* for employers is that every employment decision affecting more than a single employee (including layoffs, reductions in force or other restructurings, implementation of or modifications to benefit programs, and salary plans) should be tested for its impact on employees 40 and over and should be the product of a *reasoned* and *documented* analysis of age-neutral business interests.

If you have any questions about this alert or any other employment issue, please contact Gary Feldman at (617) 589-3874 or gfeldman@davismalm.com. ◆

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