

SMITH v. CITY OF JACKSON: THE AGE DISCRIMINATION ACT AUTHORIZES DISPARATE IMPACT CLAIMS, BUT ONLY IN NARROW CIRCUMSTANCES

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Before the Supreme Court decided *Hazen Paper Co. v. Biggins*¹ in 1993, claims for the disparate impact theory of discrimination under the Age Discrimination in Employment Act (ADEA) were available in every circuit.² Ironically, in *Hazen Paper* the plaintiff did not pursue a claim under disparate impact, and instead proceeded solely on a theory of disparate treatment.³ Justice O'Connor, writing for the unanimous Court, emphasized that disparate treatment requires a finding of employer motivation to discriminate, but disparate impact does not.⁴ The Court found that “[d]isparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA.”⁵ The opinion also noted, “we have never decided whether a disparate impact theory of liability is available under the ADEA . . . and we need not do so here.”⁶

In the aftermath of *Hazen Paper*, circuit courts were unsure of how to interpret the Court’s cryptic comments about disparate impact

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1. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

2. *Smith v. City of Jackson*, 125 S. Ct. 1536, 1542–43 (2005).

3. *Hazen*, 507 U.S. at 610.

4. *Id.* at 609; *see also* *Teamsters v. United States*, 431 U.S. 324, 335–36 n.15 (1977) (explaining that in disparate treatment claims, “the employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical . . . [Disparate impact claims] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory”) (citations omitted).

5. *Id.* at 610.

6. *Id.*

in the ADEA. The Second, Eighth, and Ninth Circuits continued to allow disparate impact claims. In contrast, the First, Fifth, Seventh, Tenth, and Eleventh Circuits interpreted the comments to disfavor disparate impact and refused to allow them.⁷

It was into this confusing legal landscape that *Smith v. City of Jackson* entered in 1999. In May of that year, the city of Jackson, Mississippi, revised the salary structure for its police and public safety officers.⁸ The city's new structure granted salary increases to all police officers and public safety dispatchers.⁹ In an effort to make starting salaries regionally competitive, the increases were proportionally higher for officers with less than five years of seniority.¹⁰ Most of the officers with greater than five years of seniority were over the age of forty.¹¹ After the pay raise was instituted, thirty police officers and public safety dispatchers over the age of forty filed an age discrimination suit against the city.¹² The plaintiffs pursued claims under both disparate treatment and disparate impact theories of liability.¹³

With only the Supreme Court's dicta in *Hazen Paper* as a guide, the district court was greeted with a case of first impression on the question of the availability of a disparate impact claim.¹⁴ The district court ruled that disparate impact was not available under the ADEA.¹⁵ The district court granted the defendant's motion for summary judgment,¹⁶ and the plaintiffs appealed the district court's ruling to the Fifth Circuit. A three judge panel affirmed the district court's grant of summary judgment against the plaintiffs on the

7. See *Smith*, 125 S. Ct. at 1543 n.9 (finding that "in contrast to the First, Seventh, Tenth, and Eleventh Circuits, which have held that there is no disparate-impact theory, the Second, Eighth, and Ninth Circuits continue to recognize such a theory") (citations omitted). See also *Smith v. City of Jackson*, 351 F.3d 183, 184 (5th Cir. 2003) (holding in the decision below that the Fifth Circuit does not recognize a disparate-impact theory of liability).

8. *Smith*, 125 S. Ct. at 1539.

9. *Smith*, 351 F.3d at 184.

10. *Smith*, 125 S. Ct. at 1539.

11. *Id.*

12. *Smith*, 351 F.3d at 184–85.

13. *Smith*, 125 S. Ct. at 1539.

14. See *Smith*, 351 F.3d at 184.

15. *Id.* (finding also that the plaintiffs did not present sufficient evidence on the disparate treatment claim to survive summary judgment).

16. *Id.*

grounds that the ADEA does not authorize disparate impact claims,¹⁷ though one judge dissented.¹⁸

The plaintiffs appealed, and the Supreme Court granted certiorari. The rift among circuits foreshadowed the contentious Supreme Court decision, which rested on an unlikely coalition forged between Justice Scalia and Justices Stevens, Souter, Ginsburg, and Breyer. Justice Stevens wrote the plurality opinion, joined by Justices Souter, Ginsburg, and Breyer. Justice Scalia concurred in part and concurred in judgment. The plurality held that the ADEA does authorize claims under a theory of disparate impact.¹⁹ The Court overruled the lower court on both the legal principle and application of the principle to this case.²⁰ In opposition, Justice O'Connor wrote a concurring opinion that Justices Kennedy and Thomas joined. Although her opinion found little common ground with Justice Stevens's plurality opinion, the concurring opinion ultimately dictated the same disposition of the case, and this may be viewed as a concurrence.

The disagreement between the plurality and concurrence began with their differing interpretations of the statutory history of the ADEA. In examining the ADEA's statutory history, both the plurality and the concurrence analyzed a report written by Secretary of Labor Willard Wirtz in 1965. The Secretary's findings, commonly known as the "Wirtz Report," were the result of a request by Congress for a "study of the factors which might tend to result in discrimination in employment because of age."²¹ Congress also asked the Secretary to propose statutory language to remedy the problems addressed in the report.²² Because Congress adopted the proposed language in the ADEA, both the plurality²³ and concurrence²⁴ viewed the Wirtz Report as a reliable source of Congressional intent.

17. *Id.*

18. *Id.* at 199.

19. *Smith v. City of Jackson*, 125 S. Ct. 1536, 1540 (2005).

20. *See id.* at 1546 (stating that because the Supreme Court overruled the Fifth Circuit on both the legal principle and the application of that principle to this case, the Supreme Court agreed with the Fifth Circuit that the defendant's motion for summary judgment should be granted. Ironically, the Supreme Court therefore "affirmed" the Fifth Circuit).

21. *Id.* at 1540.

22. *Id.* at 1552 (O'Connor, J., concurring).

23. *See id.* at 1540 (majority opinion) (stating that Congress enacted ADEA legislation in response to the Wirtz Report).

24. *Id.* at 1552 (O'Connor, J., concurring).

The Wirtz Report identified three common instances in which older workers were treated differently than younger workers. The first was disparate treatment of older workers based on unfounded assumptions about the effects of age.²⁵ The second and third instances were examples of age-based classifications that had a disparate impact on older workers. Neither instance involved an actual employer's intent to discriminate. The second instance was differentiation based on the actual effects of age.²⁶ Finally, the third instance entailed classifications, such as seniority, that should have benefited older workers but may have practically worked against them by making them more costly to employ.²⁷ The Secretary advised the first category be remedied by legislation.²⁸ In contrast, the Secretary recommended the second and third categories be corrected through “noncoercive measures” such as programs and education.²⁹ The concurrence saw these noncoercive measures as the exclusive remedy of the ADEA under claims of disparate impact. Based on the Wirtz Report, Justice O'Connor concluded that “intentional discrimination was clearly distinguished from circumstances and practices merely having a disparate impact on older workers, which—as ADEA sections 2, 3, and 5 make clear—Congress intended to address through research, education, and possible future legislative action.”³⁰

The concurrence's interpretation was “not persuasive” to the plurality.³¹ Instead, the plurality stated that Congress meant the coercive measures to be merely a partial solution. After examining the Wirtz Report, Justice Stevens found, “there is nothing to suggest that [Congress] intended such measures to be the sole method of achieving the desired result of remedying practices that had an adverse effect on older workers.”³²

The Wirtz Report was not the only matter of statutory history that divided the Justices; the plurality and concurrence also reached different conclusions about the degree of similarity between the ADEA and Title VII. The comparison is important because the

25. *Id.* at 1553.

26. *Id.*

27. *Id.* at 1553–54.

28. *Id.* at 1554.

29. *Id.* at 1554.

30. *Id.* at 1554–55.

31. *Id.* at 1543 n.7.

32. *Id.*

Supreme Court in *Griggs v. Duke Power*³³ interpreted Title VII to authorize disparate impact claims, and part of the language interpreted was identical to the language contained in the ADEA.³⁴ In addition to the same language, the two statutes have similar purposes and were enacted one shortly after the other.³⁵ Invoking a rule of statutory construction, the plurality explained that when statutes are similar in language, purpose, and time, “it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”³⁶ Thus, the plurality held that the *Griggs* finding of disparate impact also applies to the ADEA.³⁷ In contrast, the concurrence found “significant textual differences between Title VII and the ADEA that indicate differences in congressional intent.”³⁸

Still, the Justices’ arguments were not limited to statutory history. The plurality and concurrence also clashed on points of statutory interpretation. One such clash concerned Section 623(a)(2), which was read in relation to Section 623(a)(1). Section 623(a)(1) made it illegal for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”³⁹ Section 623(a)(2) dictated that no employer could “limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.”⁴⁰

Both the plurality and concurrence agreed that Section 623(a)(1) did not authorize disparate impact claims. Instead, their disagreement focused on Section 623(a)(2)—the provision that the plurality believed to authorize disparate impact liability because of its textual differences from Section 623(a)(1). The plurality focused on the language, “otherwise adversely affect” in Section 623(a)(2) to

33. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

34. *Smith*, 125 S. Ct. at 1541.

35. *Id.*

36. *Id.*

37. *Id.* at 1542.

38. *Id.* at 1557 (O’Connor, J., concurring). The two textual differences the concurrence points to are the meaning of 29 U.S.C. § 623(a)(2) (2000) and the defense for actions based on “reasonable factors other than age.” *Id.* at 1551.

39. 29 U.S.C. § 623(a)(1) (2000).

40. 29 U.S.C. § 623(a)(2) (2000).

highlight that the provision prohibited effects of the employer's action, even in the absence of an intent to discriminate.⁴¹

In addition, the plurality believed that Section 623(a)(2) contained an incongruity between the employer's action and the individual employee.⁴² This incongruity stemmed from Congress's use of the plural "his employees" in the first part of the provision and then the singular "any individual" and "his status" in the latter part of the provision.⁴³ According to the plurality, the incongruity showed that an employer could be held liable for an employment action that had a discriminatory effect on an employee because of his age, even if the employer had no intent to discriminate, and that this was "the very definition of disparate impact."⁴⁴

The concurrence saw no incongruity in Section 623(a)(2). Instead, they viewed the difference in the provisions as the result of the type of acts prohibited by Section 623(a)(2).⁴⁵ According to the concurrence, Section 623(a)(1) prohibited acts that were inherently damaging to employees, but Section 623(a)(2) dealt with acts that were not necessarily damaging.⁴⁶ Accordingly, Congress inserted the language "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" to explain that the acts in Section 623(a)(2) were prohibited.⁴⁷

Moreover, the plain meaning the concurring justices drew from the statute differed from that of the plurality. The concurrence began its argument with the fact that Section 623(a)(1) did not authorize disparate impact liability. It then attempted to prove that the language "because of such individual's age" had the same meaning in Section 623(a)(1) and in Section 623(a)(2). In support, the concurring justices noted that the language is identical and appeared in consecutive paragraphs.⁴⁸ They then argued, based on statutory construction, that the comma before "because of such individual's age" indicated that

41. *Smith*, 125 S. Ct. at 1542.

42. *See id.* at 1542 n.6.

43. *Id.*

44. *Id.*

45. *See id.* at 1550 (O'Connor, J., concurring).

46. *Id.*

47. *Id.* (quoting 29 U.S.C. § 623(a)(2) (2000)).

48. *Id.*

the “because of” language modified the entire provision, rather than only the phrase that appeared directly before it.⁴⁹

Sections 623(a)(1) and 623(a)(2) were not the only provisions of the statute that draw the Justices’ attention. The plurality and concurrence also supported their positions by pointing to Section 623(f)(1), the “reasonable factors other than age” (“RFOA”) provision, which provides: “[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age.”⁵⁰ According to the plurality, the RFOA clause showed Congress authorized disparate impact claims in the ADEA because without disparate impact the clause would be redundant.⁵¹ The plurality’s reasoning began with the premise that disparate treatment included a finding of employer motivation to discriminate, which was not present if the employment action was based on a factor other than age.⁵² Because the employment action protected by the RFOA clause is not disparate treatment, it must instead be disparate impact.⁵³ If the ADEA did not authorize disparate impact, the plurality concluded, the RFOA clause would only provide a defense for employers who have not violated the act.⁵⁴

The concurrence conceded that the RFOA clause in the absence of disparate impact was “arguably redundant” but believed that the duplication was intentional.⁵⁵ According to the concurrence, the duplication was the result of “Congress’ abundance of caution” in protecting employers who act without the intent to discriminate on the basis of age.⁵⁶ Justice O’Connor found, “[t]he role of this protection is to afford employers an independent *safe harbor* from liability.”⁵⁷ In addition to the safe harbor argument, the concurrence

49. *Id.*

50. 29 U.S.C. § 623(f)(1) (2000).

51. *See Smith*, 125 S. Ct. at 1544 (reasoning that “[i]n most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place. In those disparate-treatment cases, such as in *Hazen Paper* itself, the RFOA provision is simply unnecessary to avoid liability under the ADEA, since there was no prohibited action in the first place”) (citations omitted).

52. *Id.*

53. *Id.*

54. *See id.* (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

55. *Id.* at 1551 (O’Connor, J., concurring).

56. *Id.*

57. *Id.* at 1551 (emphasis in original).

also pointed to two functions of the RFOA clause that were not related to disparate impact. First, in mixed motive claims, the clause provided a defense to employers who act based on a reasonable factor other than age, even if age also had some influence on the decision.⁵⁸ Second, the requirement that the factor be reasonable would prevent employers from avoiding liability by citing unreasonable factors as mere pretexts for age discrimination.⁵⁹

The sum of the Justices' interpretation of the ADEA's history and text was that five members of the Court agreed the ADEA authorized disparate impact claims. Those five votes came from the unlikely coalition of Justice Scalia and the four historically liberal Justices—Stevens, Souter, Ginsburg, and Breyer. Justice Scalia based his decision, which concurred in part and concurred in judgment, on a *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* administrative law analysis.⁶⁰ According to Justice Scalia, the EEOC's regulation recognizing disparate impact for the ADEA was reasonable and therefore worthy of judicial deference.⁶¹ Justice Scalia's defection may have been abetted by the leadership void among the conservative Justices left by the absence of Chief Justice Rehnquist who did not participate in the case because he was battling thyroid cancer. Had he been in the chambers, the Chief Justice may have been able to persuade Justice Scalia to view the case in the same manner as Justices O'Connor, Kennedy, and Thomas.⁶²

Disparate impact liability under the ADEA, if similar to disparate impact under Title VII, would provide plaintiffs with an easier method for proving age discrimination. Millions of American workers are over forty years old and may be subject to a "gray ceiling." Prior to *Smith*, workers over forty filed nearly 18,000 charges of discrimination per year.⁶³ Because plaintiffs who are unable to show that their employers were motivated by discrimination may prevail under disparate impact,

58. *Id.*

59. *Id.*

60. *Id.* at 1546 (Scalia, J., concurring) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

61. *See id.* at 1546–47.

62. *See* Posting of Tom Goldstein to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2005/06/the_54_cases_an.html (June 30, 2005, 12:22 EST).

63. Number of charges filed in fiscal year 2004. EEOC Statistics: ADEA Charges FY 1992-FY 2004, <http://www.eeoc.gov/stats/adea.html> (last visited Nov. 7, 2005).

the number of employees filing charges under the new system may increase dramatically.

Thus, although the decision in *Smith v. Jackson* appears a significant victory for employees, the ramifications of the decision will be limited—employers do not have to fear the massive liability that such a regime would impose. Eight Justices agreed on one issue: if the ADEA does authorize disparate impact claims, those claims are narrower than the disparate impact claims currently available under Title VII. *Smith* indicates by both overt and implied signals that disparate impact under the ADEA will be substantially narrower than under Title VII. Interestingly, the plurality, after having argued for the availability of disparate impact, adopted several of the concurrence’s points arguing that the scope of disparate impact should be limited. The Justices agreed that the form of disparate impact from *Ward’s Cove Packing Co. v. Antonio*⁶⁴ should govern disparate impact available under the ADEA.⁶⁵

In *Ward’s Cove*, the Supreme Court narrowed the scope of disparate impact under Title VII.⁶⁶ Two years after the *Ward’s Cove* decision, Congress amended the Court’s interpretation of disparate impact as part of the Civil Rights Act of 1991.⁶⁷ The amendment broadened the scope of disparate impact under Title VII and led to a large increase in employer liability. According to one study, the number of charges of race discrimination received by the EEOC following the amendments increased thirteen percent and the number of charges of gender discrimination increased by forty-six percent.⁶⁸ At the same time, employers paid forty-seven percent more to plaintiffs alleging race discrimination and eighty-seven percent more to plaintiffs alleging gender discrimination. Notably, Congress did not

64. *Ward’s Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

65. *See Smith*, 125 S. Ct. at 1545.

66. *See id.*

67. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2). *See also* Pub. L. No. 102-166, § 3, 105 Stat. 1071 (stating congressional purpose “to codify the concepts of ‘business necessity’ and ‘job related’ enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in the other Supreme Court decisions prior to *Ward’s Cove Packing Co. v. Antonio*”) (citations omitted).

68. Paul Oyer & Scott Schaefer, *The Unintended Consequences of the ’91 Civil Rights Act, Regulation*, June 2003, at 42–43, available at <http://www.cato.org/pubs/regulation/v26n2-7.pdf>.

grant a similar expansion of disparate impact under the ADEA.⁶⁹ Without a statute to overrule the Supreme Court, ADEA plaintiffs will have to survive the rigorous *Ward's Cove* standard.

The strongest indication that the scope of disparate impact under the ADEA will be narrow may be the Court's holding in *Smith* that the plaintiffs failed to establish a claim of disparate impact. The plaintiffs identified the pay plan as discriminatory because it provided proportionally higher pay raises for employees with less seniority. The plurality deemed the pay plan insufficiently specific and demanded the plaintiffs identify a "specific test, requirement, or practice within the pay plan."⁷⁰ This level of specificity will often be difficult for plaintiffs to show because employers typically have control over employment practices. The plurality also shows the narrow bounds of disparate impact under the ADEA by accepting, without question, the employer's articulated RFOA. This acceptance demonstrates that employers may escape liability by stating that its action was based on any reasonable justification other than age. The justification will not be subjected to a "less restrictive alternative" test, and the court will not question the legitimacy of the justification.

Erwin Chemerinsky, Alston & Bird Professor of Law at Duke University School of Law, commented on the case, "[t]he practical reality is that it is often much easier for a civil rights plaintiff to prove disparate impact than discriminatory intent. Although the Court ruled that *Smith* failed to demonstrate impermissible impact, the Court has significantly opened the courthouse doors to plaintiffs bringing age discrimination claims."⁷¹ For the reasons mentioned above, however, the decision will only aid plaintiffs in extraordinarily rare circumstances. The circumstances required are as follows: (1) no evidence of employer's motivation to discriminate, because with such evidence the plaintiff could proceed under disparate treatment; (2) the plaintiff can point to a specific discriminatory practice within the adverse employment action; and (3) the employer is unable to list one RFOA. These requirements will almost never be shown for two

69. See Pub. L. No. 102-166, § 105 Stat. 1071 (amending the burden of proof in disparate impact cases for the Civil Rights Act of 1964 but not for the ADEA).

70. *Smith*, 125 S. Ct. at 1545.

71. *So Far, a Surprising Year for Civil Rights*, CALIFORNIA EVIDENCE BENCHBOOK NEWSLETTER v. 13 (CEB, Oakland, CA) 2005, available at <http://ceb.com/newsletter13/CivilRights.htm>.

reasons. First, employers will likely always be able to articulate one non-discriminatory factor in its action. Second, once the employer has articulated its factor, the plaintiff will only win in the event that the articulated non-discriminatory factor is clearly a pretext for discrimination. Because the Supreme Court has shown it will not examine the legitimacy of the articulated factor, the factor will only be denied with a prima facie showing of employer motivation to discriminate. Employer motivation to discriminate, however, means the plaintiff could have previously brought the claim as a disparate treatment claim. Future plaintiffs are likely to learn the same lesson as the plaintiffs in *Smith* found at the end of their long road to the Supreme Court: the inclusion of disparate impact under the ADEA is a hollow victory.