

because of such individual's" race or age. The Court explained that this statutory text "focuses on the effects of the action on the employee rather than the motivation for the action of the employer." (Emphasis in original). The Court stated that its interpretation of this Title VII text in *Griggs* should also apply to the same ADEA text. Accordingly, the Court explained, *Griggs* "strongly suggests that a disparate-impact theory should be cognizable under the ADEA."

The Court explained that, contrary to the Fifth Circuit's reasoning, the RFOA provision of the ADEA bolsters the conclusion that the ADEA permits disparate-impact claims. According to the Court, the RFOA provision is unnecessary in disparate treatment cases in which an employer acts based upon a reasonable factor other than age, because, regardless of the RFOA provision, such an act cannot form the basis for disparate treatment liability. In disparate impact cases, however, the allegedly "otherwise prohibited" activity contemplated by the RFOA provision is not age-based. Therefore, it is in disparate-impact cases that the RFOA provision "plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'" The Court concluded that the RFOA supports the conclusion that the ADEA permits disparate-impact claims.

In holding that the ADEA permits disparate-impact claims, the Court also relied upon the fact that both the Department of Labor and the Equal Employment Opportunity Commission "have consistently interpreted the ADEA to authorize relief on a disparate-impact theory." Thus, the Court rejected the Court

of Appeals' holding that the ADEA does not permit disparate-impact claims.

Nonetheless, the Supreme Court explained that, as a result of two textual differences, the scope of disparate-impact liability under the ADEA is narrower than under Title VII. The first difference is the RFOA provision. The Court indicated that the reason for this provision was that, unlike race or other Title VII classifications, age may have genuine relevance to a person's ability to engage in certain types of employment. In addition, intentional age discrimination has not occurred historically at the same levels as discrimination prohibited by Title VII. The second difference is the amendment to Title VII included in the Civil Rights Act of 1991, which expanded the scope of coverage of Title VII, but did not amend the ADEA.

The Supreme Court concluded that the *City of Jackson* plaintiffs failed to establish a disparate-impact claim under the ADEA. The Court explained that the plaintiffs "have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers." In so doing, the plaintiffs failed to identify "any specific test, requirement, or practice within the pay plan that has adverse impact on older workers." In fact, although the least senior officers received larger raises as a proportion of their former salaries under the plan, the highest-ranking officers, who were all over forty years old, received larger raises in actual dollar amounts.

The Supreme Court concluded that the *City* reasonably relied upon seniority and rank in order to achieve its legitimate goal of raising salaries to match those

elsewhere in the region. The decision to grant proportionately larger raises to less senior employees in order to accomplish this goal was a decision based upon a "reasonable factor other than age" that addressed the legitimate goal of attracting and retaining police officers in a competitive market.

The Court explained that, under this "reasonableness inquiry," the employer is not obligated to demonstrate that there was no other way to achieve its goals, only that this way was not unreasonable. Thus, the Court held that the ADEA permits disparate-impact claims, but determined that the plaintiffs did not establish such a claim in this case.

Conclusion

Employers should be aware that even if they are not acting with discriminatory intent, any facially-neutral policies and actions that have a disproportionate effect on a protected class of employees – including older workers – may expose them to a disparate-impact claim.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

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CLIENT ALERT

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Supreme Court Permits Disparate-Impact Age Claims

The United States Supreme Court has resolved a conflict among the Circuit Courts of Appeals regarding whether the Age Discrimination in Employment Act (“ADEA”) provides older employees with a cause of action when their employer implements a facially neutral policy that has a “disparate-impact” on them. In *Smith v. City of Jackson*, the Court held that the ADEA permits recovery under a disparate-impact theory.

Factual Background

The City of Jackson, Mississippi adopted a pay plan that was designed to increase the starting salaries of police officers and dispatchers to bring them up to the regional average. Under the plan, all of the City’s officers received raises. Officers with less than five years of service, however, received proportionately larger raises (as compared to their former pay) than those with greater seniority. Most, though not all, of the officers over the age of forty had more than five years of service.

A group of officers over forty sued, claiming, among other things, that although the plan was neutral on its face, it had a disparate-impact on them and they were adversely affected because of their age in violation of the ADEA. The district court dismissed the disparate-impact claim and the Fifth Circuit affirmed, holding that disparate-impact claims are not cognizable under the ADEA.

The ADEA

It is unlawful under the ADEA for an employer to “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” In *City of Jackson*, the Supreme Court observed that the language of the ADEA is virtually identical to that of Title VII of the Civil Rights Act of 1964 (“Title VII”), which prohibits discrimination on the basis of race, color, religion, sex, or national origin. The Court noted, however, that, unlike Title VII, the ADEA contains a provision narrowing its coverage. That provision provides that the ADEA does not preclude an employer from taking “any action otherwise prohibited ... where the differentiation [in treatment] is based on reasonable factors other than age” (the “RFOA Provision”).

The Court’s Reasoning

The Supreme Court reasoned that when Congress includes the same language in different statutes that have similar purposes, Congress presumably intends the common text to have the same meaning. Therefore, the Court considered *Griggs v. Duke Power Co.*, in which it had previously held that disparate-impact claims are cognizable under Title VII. In *Griggs*, the Court held that Title VII prohibits an employer from requiring, as a condition of employment, facially-neutral qualifications with no apparent connection to the job, that have the effect – even if unintentional – of limiting the number of qualified African-American applicants. In other words, in *Griggs*, the Supreme Court held that establishing a Title VII disparate-impact claim does not require a showing of discriminatory intent.

In *City of Jackson*, the Supreme Court explained that Title VII and the ADEA contain identical language prohibiting actions that “deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,