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# Case at a Glance

The Supreme Court has held that an employer does not have to have a discriminatory intent in order to be held liable under Title VII. It is enough to show that a challenged employment practice has had a "disparate impact" on covered minorities. This case asks whether a claim brought under the Age Discrimination in Employment Act can likewise be established by showing that a "facially neutral" employment practice has fallen more harshly on employees over the age of 40.

## Can the Disparate Impact Method of Proving Discrimination Establish an ADEA Violation?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 304-306. © 2002 American Bar Association.

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**Editor's Note:** The respondent's brief in this case was not available by *PREVIEW's* deadline.

### ISSUE

Is the disparate impact method of proving age discrimination available to plaintiffs suing under the Age Discrimination in Employment Act?

### FACTS

The Florida Power Corporation (FPC) terminated Wanda Adams and other employees between 1992 and 1996 because of a series of reorganizations that FPC says were necessary to maintain its competitiveness in the newly deregulated electric utility market. More than 70 percent of the terminated employees were over the age of 40.

In 1996, Adams and 117 former employees (the Adams group) over the age of 40 brought a class action against FPC in federal district court, claiming that it had discriminated against them because of their age in violation of the Age Discrimination in Employment Act (ADEA).

According to the plaintiffs, FPC had violated the ADEA by (1) willfully discriminating against senior employees on the basis of their age, and (2) disparately impacting older employees. FPC denied any violation of the ADEA and asserted that it had legitimate nondiscriminatory reasons for firing the Adams group. Specifically, FPC asserted that it had undergone a series of reorganizations, not to trim the workplace of older workers, but to prepare for the competition that utility deregulation would bring it within the state of Florida.

The district court conditionally certified the class in 1996. Two years later, the district court decertified the class, holding that disparate impact analysis was not available under the ADEA and that the class members could not be deemed "similarly situated," as required for class certification, unless their claims could be premised on a theory of disparate impact. The district

ADAMS ET AL. v. FLORIDA POWER  
CORP. ET AL.  
DOCKET NO. 01-584

ARGUMENT DATE:  
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FROM: THE ELEVENTH CIRCUIT

court certified the question concerning the existence of ADEA disparate impact analysis to the U.S. Court of Appeals for the Eleventh Circuit because the question presented a controlling issue of law in the case, and the circuits were remarkably divided on the issue.

On appeal, the Eleventh Circuit affirmed the district court, holding that disparate impact claims may not be brought under the ADEA. 255 F.3d 1322 (11th Cir. 2001). The Eleventh Circuit noted that the ADEA's exception for "reasonable factors other than age" does not exist in Title VII and is similar to an exception in the Equal Pay Act that the Supreme Court has interpreted as precluding disparate impact claims. *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981). The Eleventh Circuit also found that the Supreme Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993), while leaving open the question of whether a disparate impact claim can be brought under the ADEA, suggested that no disparate impact claim could be brought under the ADEA.

The Supreme Court thereafter granted Adams's petition requesting review of the Eleventh Circuit's decision. 122 S.Ct. 643 (2001).

### CASE ANALYSIS

When Congress passed Title VII of the Civil Rights Act of 1964, it commissioned a study by the Secretary of Labor on age discrimination in the workplace. Thereafter, the ADEA was enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflect[ing] a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995). The ADEA broadly prohibits arbitrary discrimination in the workplace

based on age. *Lorillard v. Pons*, 434 U.S. 575, 577 (1978).

The ADEA makes it unlawful 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" (29 U.S.C. § 623(a)(1)), or "to limit, segregate, or classify ... 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." 29 U.S.C. § 623(a)(2).

In a "disparate *treatment*" case under the ADEA, liability depends on whether age actually motivated the employer's decision. On the other hand, a "disparate *impact*" age discrimination claim involves employment practices that, although facially neutral, have had an adverse impact on employees at least 40 years of age. The disparate impact theory of liability provides a means for members of protected classes to prove that discrimination occurred in the workplace even when proof of motive is difficult or unavailable.

Adams argues that the ADEA permits older workers to prove age discrimination by showing that the employer's action has had a disparate impact on older workers. According to Adams, the language in the ADEA imposing liability for employment practices that "adversely" affect an employee's status expressly permits claims based on disparate impact. In addition, Adams contends that the ADEA's prohibitions and related affirmative defenses strongly indicate that disparate impact is an available means of proving age discrimination.

The language of § 623(f)(1) of the ADEA is similar to language found in the Equal Pay Act. Section 206(d)(1) of the Equal Pay Act provides that wage discrimination on the basis of gender is prohibited unless the wage "differential [is] based on any other factor other than sex." The Supreme Court interpreted this language to preclude disparate impact claims under the Equal Pay Act. *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981). However, while the Equal Pay Act merely requires the employer to provide a neutral explanation for any disparity in the pay of male and female employees, § 623(f)(1) of the ADEA requires an employer to demonstrate the reasonableness of any such neutral factor. According to Adams, the Supreme Court's analysis in *Gunther* therefore should be applied to permit the use of disparate impact under the ADEA.

Adams argues that the ADEA's "reasonable factors" defense applies only if the factors upon which an employer based its discriminatory action were both (a) not age based and (b) reasonable. It is Adams's position that the necessary corollary to this defense is that it does not apply if the employer based its action on factors that were not "reasonable" even if the factors were "other than age."

The Florida Power Corporation, on the other hand, argues that the "reasonable factors other than age" provision in the ADEA is a "definitional provision" that "delineates which employment practices are illegal and thereby prohibited and which are not." Adams disagrees, arguing that the provision creates an affirmative defense against disparate impact claims.

(Continued on Page 306)

Contending that the FPC's method of downsizing was highly subjective, Adams argues that it would be extremely challenging for many members of the Adams group to prove discrimination by disparate treatment even if they were dismissed because of a culture of ageism that subtly pervaded the workplace.

## SIGNIFICANCE

The Supreme Court has held that Title VII supports a cause of action for employment discrimination based on a disparate impact method of proving discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In a case involving liquidated damages under the ADEA, however, the Court explicitly left open the question of whether a disparate impact theory of liability is also available under the ADEA. *Hasen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). See generally O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions* 483-84 (5th ed. 2001).

Several circuits have held that because the language of the ADEA closely parallels Title VII, disparate impact claims also should be allowed under the ADEA. See *Smith v. Xerox Corp.*, 196 F.3d 358, 367 (2d Cir. 1999); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950 (8th Cir. 1999); *Arnett v. California Public Employees Retirement System*, 179 F.3d 690 (9th Cir. 1999), judgment vacated on other grounds, 528 U.S. 1111 (2000); *Frank v. United Airlines, Inc.*, 216 F.3d, 856 n.11 (9th Cir. 2000).

On the other hand, in addition to the Eleventh Circuit, five other circuits have questioned the viability of disparate impact claims under the ADEA. *Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir.), cert. denied, 528 U.S. 811 (1999);

*DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995); *Lyon v. Ohio Educ. Ass'n*, 53 F.3d 135, 139 n.5 (6th Cir. 1995); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-77 (7th Cir. 1994); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-07 (10th Cir. 1996). The Fourth and Fifth Circuits have not addressed the issue.

Courts that question the viability of a disparate impact claim under the ADEA recognize that, while there are important similarities between the ADEA and Title VII of the Civil Rights Act of 1964, the text of the ADEA differs from Title VII. They note that an important difference between the two is that the language in Section 623(f)(1) of the ADEA provides that an employer may "take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age." The First Circuit has explained that, if the exception in Section 623(f)(1) "is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that 'only age discrimination is age discrimination.'" *Mullin v. Raytheon Co.*, 164 F.3d 696, 702 (1st Cir.), cert. denied, 528 U.S. 811 (1999).

Although it does not contain the express "reasonable factors" defense contained in the ADEA, Title VII requires an employer to demonstrate that its challenged practice is a job-related business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (disparate impact is a basis for relief under Title VII only if the practice in question is not founded on "business necessity" or lacks "a manifest relationship to the employment"). The EEOC interpretive guidelines (29 C.F.R. § 1625.7(d)) suggest that the ADEA's

reasonable factors defense works in tandem with Title VII's business necessity defense.

A ruling upholding the Eleventh Circuit's decision would make it easier for employers to defend against employment discrimination by requiring plaintiffs to prove discriminatory intent. On the other hand, a holding that the ADEA encompasses both disparate treatment and disparate impact claims would make it easier for plaintiffs to establish violations of the ADEA.

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