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Preventing Disparate Impact Age Cases: Though the Supreme Court's Recent Ruling May Make It Easier For Employees to Bring These Cases, It Will Not Necessarily Make Them Easier To Win

On March 30, 2005, the Supreme Court settled a long-standing disagreement among the federal courts of appeal about whether to recognize a disparate impact theory under the Age Discrimination in Employment Act ("ADEA"). The disparate impact theory typically applies to facially neutral policies, hiring tests, layoff decisions, and other employment practices that disproportionately and detrimentally affect a protected class of employees. If the employer cannot justify the policy, hiring test, layoff decision, or practice as job-related or a "business necessity," liability could attach even if the employer did not intend to discriminate against a protected group of employees. For decades, the Supreme Court and lower courts embraced the disparate impact theory for other—non-age-related—types of employment discrimination, such as discrimination against women and racial minorities. The 10th Circuit, which includes Colorado, however, treated age discrimination differently, refusing to hold employers liable for neutral policies and practices that have a "disparate impact" on older workers. By authorizing disparate impact as a theory of recovery under the ADEA, the Supreme Court changed the rules: in the context of age discrimination, disparate impact exists, and, therefore, age matters.

Television pundits and plaintiff-side employment lawyers have hailed the Supreme Court's ruling as a huge victory for older workers. Some have even predicted a flood of disparate impact age cases in the courts, cheering that this recent ruling will make it "easy" to bring these cases whenever a policy, practice, or test adversely affects older workers.

In reality, however, the Supreme Court's opinion hardly makes *winning* an ADEA disparate impact case "easy." The opinion emphasized a special provision in the ADEA that permits employers to justify age differentiations that are based on "reasonable factors other than age" ("RFOA"). This RFOA defense, the justices reasoned, greatly narrows the scope of a disparate impact age case. Thus, if an employer can show that other "reasonable" factors justify the policy, hiring test, practice, etc., the employer can avoid liability. In the very case that has been lauded as a "huge victory for older employees," the Supreme Court relied upon the employer's articulation of the RFOA (to make salaries of newly hired employees more consistent with surrounding communities) to hold that the employees had not proven a case of disparate impact.

The Supreme Court's opinion should not inspire outrage, joy, or fear. It should, however, prompt us, as human resources professionals, to start examining policies, hiring practices, layoff decisions, pre-employment testing, etc., that could disproportionately affect employees aged 40 and older. Consider the business reasons why the employer implemented the policy or practice in the first place. In the hiring context, if the employer uses a selection instrument or criterion

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(e.g., written test, physical agility examination), the employer should closely monitor the hiring process to ensure that no more than 20% of the older workers are screened out compared with younger applicants. If this instrument or criterion does tend to screen out older workers disproportionately, the employer must be prepared to demonstrate that the instrument or criterion has been validated—that is, that an empirical study has demonstrated that the instrument or criterion is predictive or significant when correlated with important elements of job performance. In the layoff context, if older workers are disproportionately affected by an overall reduction in force, the employer must be prepared to demonstrate the non-age-related factors that resulted in the selection of older workers (e.g., the elimination of a complete department or certain positions, performance evaluation scores).

In the final analysis, undertaking an audit of current policies and practices—whether in hiring, pay, termination, promotions, applicant testing, etc.—could help an employer ward off a disparate impact age claim. At the very least, this type of audit will ready an employer to defend against a claim of disparate impact brought by older workers and ensure it can avail itself of the important, built-in defenses that the Supreme Court highlighted in its recent ruling. If, as plaintiff-side attorneys predict, this ruling will open the floodgates for age-discrimination claims, good preventive techniques can hold the levee.