



## SUPREME COURT EXPANDS AGE DISCRIMINATION PROTECTIONS

By John F. Bowen

### *In This Issue*

- ◆ Supreme Court Expands Age Discrimination Protections
- ◆ Lawfax Update

On Wednesday March 30, 2005, the U.S. Supreme Court expanded the Age Discrimination in Employment Act (ADEA) to include “disparate impact” claims—opening the door for employees to bring more age bias claims against employers. *Smith v. City of Jackson*, (March 30, 2005). The Court in *Smith*, however, also ruled that employer liability for disparate impact age discrimination is narrower than disparate impact claims based on race, gender, religion, or other protected classes.



### THE SMITH CASE

In *Smith*, the City of Jackson implemented a pay policy to attract and retain qualified employees that gave police officers and dispatchers with less than five years service disproportionately higher wages.

Most of the officers over 40 had more than five years of service and therefore received lower wages. A group of those officers filed suit, alleging the City intentionally discriminated against them and that the pay plan adversely affected them because of their age. The trial court dismissed both the intentional discrimination and disparate impact claims. On appeal, the 5th Circuit ruled the lower court should not have dismissed the intentional discrimination claim because plaintiffs were entitled to additional discovery on the issue of intent. However, the Court of Appeals disposed of the disparate impact claim entirely, holding the disparate impact theory was not available under the ADEA.

The Supreme Court disagreed, holding the ADEA did not categorically preclude disparate impact claims. Nevertheless, the Supreme Court held the City of Jackson was not liable under a disparate impact theory because the policy of paying less senior employees higher wages than employees with more years of service was based on a reasonable-

**Seaton Beck Peters**  
**Bowen**  
**Feuss**

the lawyers for employers

Alec J. Beck  
John F. Bowen  
Marc T. Chrismer  
Charles E. Feuss  
Suzanne V. Hansen  
Robin N. Kelleher  
Kyle T. Kustermann  
Shareen R. Luze  
Gregory L. Peters  
Thomas R. Revnew  
Douglas P. Seaton  
Robert Grossman,  
of counsel

7300 Metro Blvd  
Suite 500  
Minneapolis, MN  
55439  
Tel 952-896-1700  
Fax 952-896-1704  
www.seatonlaw.com

*The Upper Midwest's premier  
management labor and  
employment law firm.*

factor other than age — *i.e.*, bringing officer and dispatch salaries in line with surrounding police forces.

## DISPARATE IMPACT AND AGE DISCRIMINATION

“Disparate impact” claims allow employees to challenge an employer’s neutral employment practices that have a disproportionately negative impact against a “protected class” of employees. Before the *Smith* decision, courts did not recognize the disparate impact theory with respect to age discrimination claims. Although the ADEA prohibits discrimination against individuals over 40, the ADEA specifically permits employer actions where the discrimination between employees is based on “reasonable factors other than age.”

Prior to *Smith*, courts applied the “reasonable factors other than age” language to preclude disparate impact claims alleging age discrimination. In *Smith*, however, the Supreme Court recognized that “reasonable factors other than age” do not prevent disparate impact claims entirely. Rather, the ADEA merely precludes disparate impact claims where “the adverse impact was attributable to a non-age factor that was ‘reasonable.’” In other words, a neutral employment policy or action based on some legitimate factor “other than age” is not discriminatory—even if it adversely affects employees over 40. However, a pol-

icy or action that adversely impacts employees over 40 that can not be justified by factors “other than age” constitutes unlawful age discrimination because of its disparate impact.

## THE DIFFERENCE FOR EMPLOYERS

Plaintiff’s attorneys herald the *Smith* decision as a significant step in the fight against age discrimination in the workplace because the disparate impact theory makes it easier to establish age discrimination without having to show evidence of intentional discrimination by the employer.

Management employment attorney Tom Revnew of Seaton, Beck, Peters, Bowen & Feuss noted, “The *Smith* decision will likely increase the number of age claims and should serve as a reminder to employers that proving intent to discriminate is not necessary to establish a discrimination claim based on race, gender, religion or other protected class—including age.”

In light of the *Smith* decision, employers should carefully review their payroll practices and employment policies and procedures to make certain they are facially neutral and that the basis for pay distinctions is based on objective criteria whenever possible. Moreover, employers must be prepared to provide adequate documentation of the reasonable business purpose behind each action, policy, and procedure.

### Fax, E-mail or “None of the Above?”

If you are receiving this *LawFax*, you or another member of your organization is a client, a member of one of the trade associations or chambers of commerce of which we are members also, or have requested a subscription to our periodic *LawFax*. If you’d rather receive our *LawFax* by e-mail, or if you no longer wish to receive it, please e-mail us ([firm@seatonlaw.com](mailto:firm@seatonlaw.com)) or call our toll-free number (800-268-5008) and we will change your *LawFax* subscription to e-mail or delete you from our database.

*This communication is intended for general informational purposes only and is not intended to constitute legal advice with respect to any individual facts or circumstances. You are urged to consult with one of our attorneys regarding your own situation and your specific question. We would be happy to help!*

*2005 Seaton, Beck, Peters, Bowen & Feuss, P.A.*