

# Labor and Employment Alert



## Hall Render Offices:

**Indianapolis-Downtown**  
One American Square  
Suite 2000  
Indianapolis, Indiana 46282  
(317) 633-4884

**Indianapolis-North**  
8402 Harcourt Road  
Suite 820  
Indianapolis, Indiana 46260  
(317) 871-6222

**Louisville Office**  
614 West Main  
Suite 4000  
Louisville, Kentucky 40202  
(502) 568-1890

**Troy Office**  
Columbia Center  
201 West Big Beaver Road  
Suite 315  
Troy, Michigan 48084  
(248) 740-7505

## Claims of Unintentional Age Discrimination Allowed by Supreme Court

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Stephen W. Lyman, Esq.  
John P. Ryan, Esq.  
Jonathan C. Bumgarner, Esq.  
Kevin A. Stella, Esq.  
Dana E. Stutzman, Esq.  
Kevin J. Gfell, Esq.

### Executive Summary

An employee can now sue for age discrimination, even though the employer never intended to discriminate, according to the U.S. Supreme Court's holding in *Smith, et al. v. City of Jackson, Mississippi*. In its ruling, the Supreme Court decided that employers can be liable for unlawful age discrimination if a neutral employment practice can be shown to have an adverse impact on employees over the age of 40. An employee need not prove a discriminatory intent or even that age was a factor in the employer's practice in order to prevail. However, an employer can avoid liability if it can demonstrate that its practice was based on "reasonable factors other than age." This ruling is significant because many employment decisions involving hiring, promotions, compensation and reductions in force may unintentionally adversely affect a relatively larger number of older workers. It will be extremely important for employers to always be able to articulate reasonable factors other than age to support their employment practices. *Reference: Smith, et al. v. City of Jackson, Mississippi, 2005 WL 711605, 2005 U.S. LEXIS 2931 (March 30, 2005).*

### Detailed Analysis

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination on the basis of an individual's race, color,

religion, sex or national origin. The Age Discrimination in Employment Act (ADEA) was passed by Congress three years later and prohibited discrimination because of an individual's age (over 40 years old). The language prohibiting discrimination in both statutes is identical. Both statutes make it unlawful for an employer to discriminate against any individual with respect to hiring, firing, compensation, and other terms, conditions or privileges of employment. This type of discrimination is known as "disparate-treatment". Both statutes also make it unlawful to limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or adversely affect their status as an employee. This type of discrimination is known as "disparate-impact."

A showing that the employer intended to discriminate against an individual is a necessary element in a disparate-treatment case. Disparate-impact cases are viewed differently. Long ago, in a case involving the discriminatory impact of requiring a high school diploma for hiring eligibility, the Supreme Court held that where a neutral employment practice created a disparate impact on a protected group a showing of an intent to discriminate under Title VII was not necessary. It was the consequence of the practice, not the motivation, that was important. *Griggs v. Duke Power, Co.*, 401 U.S. 424 (1971).

However, unlike the provisions of Title VII, the ADEA contains a provision that specifically states that it is not unlawful for an employer to take discriminatory action against an employee where the differentiation is based on "reasonable factors other than age." This special provision contained in the ADEA led many federal courts to the conclusion that a specific intent to discriminate based on age was necessary for an age claimant to prevail.

### **Neutral pay practice had disparate impact on older workers**

Because there was disagreement among the federal courts of appeal on this issue, the Supreme Court agreed to consider the case of a group of older police officers in Jackson, Mississippi who claimed disparate-impact discrimination under the ADEA. The police officers complained that when the city granted pay raises to all police officers in an attempt to bring starting salaries up to the regional average, officers with fewer years of service received proportionately greater raises than officers with more seniority. As it turned out, the impact of the city's plan was that most of the officers who were over 40 received a smaller percentage increase in pay compared to the officers who were under 40. The older officers claimed that they were adversely affected by the city's pay plan because of their age.

The older officers' claims were rejected by the lower federal courts. Relying on the special "reasonable factors other than age" language found only in the ADEA the district court and the federal appeals court each ruled that disparate-impact claims were categorically unavailable under the ADEA.

When the older police officers appealed the Supreme Court agreed to decide whether age discrimination claims asserting disparate-impact under the ADEA

were available. Ultimately, five justices held that disparate-impact claims are available under the ADEA.

Although the Supreme Court held that disparate-impact claims are available under the ADEA, the older police officers still lost their case. The Supreme Court ruled that the officers had failed to establish the necessary elements of a disparate-impact case in order to prevail. It is the officers' failure to establish the necessary elements that is significant. The Supreme Court ruled that the officers failed to identify any specific test, requirement or practice within the city's pay plan that had an adverse impact on the older workers. Such a specific showing is a necessary element to an age-based disparate-impact case, according to the Court. Additionally, the Court ruled that the city's rationale for the pay plan was based on reasonable factors other than age. The city's expressed rationale was to make junior officers' salaries competitive with comparable positions in the market. This was a "reasonable factor other than age." The Court held that it is not enough for employees to simply allege that there is a disparate impact on workers or to simply point to a generalized policy that leads to such an impact. Rather, the Court said that the plaintiff-employee is responsible for isolating and identifying the specific employment practices that are the cause of any observed statistical disparities.

Because the older officers could not identify any specific practice that caused the statistical disparity, nor could they demonstrate that the city's reliance on seniority and rank was not unreasonable, the officers lost their case.

### **Articulating reasonable factors other than age is the key**

The city won the case because it was able to articulate reasonable, legitimate, non-age-based reasons for granting the general wage increases across the board. Thus, even if the officers could have identified a specific practice that caused a statistical disparity, they would not be able to prevail so long as the city could explain that its actions were based on reasonable factors other than age.

The lesson for all employers is now to make sure that all employment decisions can be articulated and supported by some reasonable business-related justification that makes no mention of age. For example, an employer's decision to reduce the workforce may unintentionally result in a proportionally greater adverse impact on older workers. If the employer's selection criteria are expressly based on seniority, position, experience, qualifications, or even the desire to reduce overall employment costs, such reasons would likely be seen as reasonable, legitimate factors unrelated to age.

Even with the Supreme Court's holding in this case, employees who claim age-based disparate-impact discrimination still have a heavy burden to bear in order to succeed. Nevertheless, employers should carefully scrutinize all stated rationales to assure that the rationale is reasonable and that age is never allowed to be a factor in any employment decision.

For further information please contact your local counsel or [Steve Lyman](#), [John Ryan](#), [Jon Bumgarner](#), [Kevin Stella](#), [Kevin Gfell](#) or [Dana Stutzman](#) at Hall, Render, Killian, Heath & Lyman, P.S.C. at 317/633-4884.

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[Hall, Render, Killian, Heath & Lyman](#) is a full service law firm with offices in Indiana, Kentucky, and Michigan. Since the firm was founded by William S. Hall in 1967, Hall Render has focused its practice primarily in the area of health law and is now recognized as one of the nation's preeminent health law firms.

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