

## Ageing Baby Boomers: The Next Wave of Employment Litigation - Disparate Impact Analysis for Age Discrimination Claims

By Bob Sebris and Nichole Chiappini

Paraphrasing Paul Revere: “*The Boomers are coming! The Boomers are coming!*”

We have all been bombarded with information about the growing impact of the (*my*) graying “Baby Boomer” generation. In 2004, “Boomers” (ages 45-60) comprise about one-third of the American workforce. Reviewing the state of our national economy or Social Security fears, pundits point out that Boomers are today working to older ages or returning to work after initial forays into the world of retirement. The **outcome**: a rapidly growing class of protected workers (individuals over 40) who intend to keep working. The **dilemma**: a job market that is tight, with employers that have to make difficult recruiting or retention decisions. The **risk**: increased discrimination claims by this expanding pool of older workers. In that regard, the U.S. Supreme Court just enlarged the federal employment law rights for older workers. It recently held that age discrimination claims based on “disparate impact” (not just “disparate treatment”) are permissible under the federal Age Discrimination in Employment Act (ADEA).

**Discrimination Theories Snapshot.** Under Title VII of the Civil Rights Act of 1964, it has long been clear for claims other than age (race, religion, sex, etc) that an employer must be wary of both disparate treatment and disparate impact situations. Under **disparate treatment** claims, an employer is liable for intentional acts of discrimination. Under **disparate impact** cases, an employer can be liable for otherwise neutral work practices that lead to protected class statistical imbalances in the workplace. Simply put, treatment cases turn negative on motive, and impact cases turn on statistical results of employment practices. Despite the scope of Title VII, it was not certain whether disparate impact principles also applied under the ADEA. The court answered.

**ADEA and Disparate Impact.** In *Smith v. Jackson, Mississippi*, the court ruled that disparate impact analysis applies to federal age claims. This case arose because workers over 40 were upset that a new pay scale gave more senior workers with greater years of service lower annual pay increases than it provided for more junior, younger workers. (The scale was designed to help recruit in new candidates at the lower ranks, but it was disadvantageous to older workers.) While the court endorsed the disparate impact analysis, it excused the pay practice at issue.

Two-Prong Analysis. Writing for the majority, Judge Stevens shaped the new ADEA test for review:

- First, a party must isolate and identify the specific employment practices that allegedly cause observed statistical imbalances. In other words, the cause of the disparate impact must be established so that the “myriad of other innocent practices” are not unfairly attacked.
- After identifying the relevant practices and their impact, the employer may defend by showing the practices were “**based on reasonable factors other than age.**”

**ADEA DEFENSE: “Reasonable Factors” - Not A “Business Necessity” Test.** While our own Ninth Circuit and the U.S. Equal Employment Opportunity Commission (EEOC) have long recognized that disparate impact rules apply under the ADEA, there was a split between different Circuit Courts of Appeals. Further, the “reasonable factors” defense was not clear. Thankfully, the Supreme Court put to rest the idea that an employer might *only* be able to defend against a disparate impact age complaint if its practices were supported by *business necessity*. This stricter, more demanding, test was specifically rejected by the Court, as in contrast it endorsed the more flexible “*reasonable factors*” test. As the Court wrote:

While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the *reasonableness inquiry provides no such requirement.* (Emphasis added.)

Consequently, an employer concerned with a possible age impact situation under the ADEA does not have to search for the practice with the least discriminatory results. Rather, it only needs a reasonable basis for its practice.

**Washington State Law—Age and Disparate Impact Cases?** Employers in Washington State must continue the analysis further! Federal law guidance is helpful, but not controlling under Washington State law. Our state discrimination statute, RCW 49.60, and related case law age discrimination protections have been around for decades. And, our state courts have already applied both disparate treatment *and* disparate impact tests to age claims. However, unlike the recent U.S. Supreme Court ADEA holding in *Smith*, under Washington law an employer’s defense to disparate impact cases does not currently turn on reasonable factors other than age. Instead, our courts have thus far noted that an employer must present either a “business necessity” justification *or* establish that the practice complained of has a “**manifest relationship**” to the position in question. Through years of case interpretations, it appears that our State Supreme Court has drawn the manifest relationship test from the U.S. Supreme Court’s landmark *Griggs* case (1971), and also indicated that it is a less strict test than business necessity. Endorsing our Ninth Circuit’s view on this, it has seemingly indicated that under the manifest relationship analysis, business practices that significantly serve an employer’s legitimate business interests are defensible.

**What Does This All Mean?** The Supreme Court’s *Smith* ruling on the ADEA is very helpful today, as growing numbers of Baby Boomers will be affected by all sorts of employer human resources practices. There is no doubt that personnel management systems—pay, hiring, retirement, retention—that all affect older workers in a statistically different way are now potentially suspect (disparate impact). However, if an employer has a reasonable business (or manifest relationship) basis for its action, it will not be liable under the ADEA (or state law). Of course, employers are still responsible for intentional discriminatory acts (disparate treatment)

**Employer Preventative Practice Considerations.**

- Always base human resources management decisions on bona fide reasons—ideally business necessity, but no less than reasonable factors/manifest relationship to the practice in question.
- Never make management decisions grounded on perceptions about age, instead of abilities of workers.
- When designing workforce compensation systems, have legitimate reasons for recruitment, reward, and retention purposes.
- When planning “down-sizing,” analyze statistical impact on different age groups in risk management assessment reviews.
- Remember that high-risk age group decisions can be insulated by special Older Workers Benefit Protection Act (OWBPA) group release waivers.

This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations.



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