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The IADC

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United States Supreme Court Updates

By Eve Barrie Masinter

SMITH V. CITY OF JACKSON, 544 U.S. ___ (2005).

In *Smith v. City of Jackson*, 544 U.S. ___ (2005), the Supreme Court strengthened protection for older employees by recognizing a disparate-impact claim under the Age Discrimination in Employment Act ("ADEA").

Plaintiffs, 30 police officers and public safety dispatchers, filed suit alleging, *inter alia*, that the City's pay increases for new hires were discriminatory because they resulted in disproportionately smaller pay raises for older employees. Thus, plaintiffs alleged, employees were adversely affected based on their age, in violation of the ADEA. The district court granted summary judgment in favor of the City. The Fifth Circuit affirmed, holding that disparate-impact claims are categorically unavailable under the ADEA. Although the Supreme Court, through eight Justices (Chief Justice Rehnquist took no part in the decision) affirmed the summary judgment in favor of the City on different grounds, in a 5-3 decision, the Court recognized a disparate-impact claim under the ADEA.

Justice Stevens, writing for the majority and joined by Justices Ginsburg, Breyer and Souter, focused on the similarity between the language in Title VII and the language in the ADEA: "we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." Citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971),

which was decided four years after the ADEA was enacted, the Court noted the "remarkable similarity" between the language in Title VII and the language in the ADEA and held that both acts prohibited "actions that deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee." [emphasis in original]

The Fifth Circuit and Justice O'Connor's concurrence both relied on the RFOA ("reasonable factor other than age") provision of the ADEA in their argument that the ADEA barred disparate-impact claims. The RFOA provision provides that an employer may take an action otherwise prohibited "where the differentiation is based on reasonable factors other than age discrimination." 29 U.S.C. §623(f)(1). The majority opinion, however, held that the existence of the RFOA provision is proof that Congress intended there to be a disparate-impact claim. The Court explained that in disparate-treatment cases, the RFOA provision is unnecessary; disparate treatment requires discriminatory intent, which is always absent if a decision is based on a reasonable factor other than age. Thus, the RFOA provision would be superfluous unless it had a role in disparate-impact cases:

> It is, accordingly, in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was "reasonable."

The existence of the RFOA provision, however, also has another consequence, the Court held; it shows that Congress intended the scope of ADEA disparate-impact claims to be narrower than disparate-impact claims under Title VII. The majority based this conclusion not only on the RFOA provision but also on the fact that Congress amended Title VII with the Civil Rights Act of 1991. The 1991 amendments expanded Title VII coverage of disparate-impact claims in response to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). The amendments did not, however, amend the ADEA; thus, the Court held "*Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."

Despite recognizing ADEA disparate-impact claims in *Smith*, the majority concluded that the City's conduct was acceptable under the RFOA provision. Specifically, the majority held that it was the employee's responsibility to isolate and identify specific employment practices that are the cause of the statistical disparity and that plaintiffs "have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers." Because the City enacted their pay raise system for the purpose of bringing salaries in line with those of neighboring police forces, their employment action was based on a reasonable factor other than age. Further, the *Smith* Court held that the RFOA test was less stringent than the business-necessity test in Title VII disparate-impact claims; thus, under the RFOA provision, it does not matter whether there are less discriminatory ways for the employer to achieve the results it seeks.

Justice Scalia concurred, basing his decision on deference to the EEOC's interpretation of the ADEA, pursuant to the test laid out for agency interpretation in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Justice O'Connor, joined by Justices Kennedy and Thomas, concurred in the ultimate judgment in favor of the City but disagreed with the majority's recognition of a disparate-impact claim under the ADEA: "The ADEA's text, legislative history, and purposes make it clear that Congress did not intend the statute to authorize such claims."

JACKSON V. BIRMINGHAM BD. OF EDUC. , 544 U.S. ____ (2005).

In *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. ____ (2005), the Supreme Court settled a circuit split regarding whether a private action exists under Title IX for an employee who complained about a violation and subsequently suffered an adverse employment action. While the Fourth and Fifth Circuits have both granted a right of private action for retaliation under Title IX, the Eleventh Circuit has not allowed such claims.

Plaintiff was a physical education instructor and girls' basketball coach for a public high school in Birmingham. Shortly after being transferred to a new high school in 1999, plaintiff discovered that the girls' team was not receiving equal funding and equal access to facilities and athletic equipment. After plaintiff began complaining about the alleged inequities, he began to receive negative work evaluations and was ultimately removed from his position as coach of the girls' basketball team. Plaintiff subsequently filed suit in federal district court, alleging that the Board retaliated against him in violation of Title IX. The district court dismissed for failure to state a claim upon which relief can be granted, holding that Title IX's private right of action does not include retaliation. The Eleventh Circuit affirmed the lower court's decision, relying on *Alexander v. Sandoval*, 532 U.S. 275 (2001), and held that the mere fact that the Department of Education promulgated a regulation prohibiting retaliation does not create a private cause of action and that even if it did, plaintiff was not a member of the class the statute protects.

Justice O'Connor, writing for the majority and joined by Justices Stevens, Souter, Ginsburg, and Breyer, held that Title IX's broad language encompasses a private claim for retaliation for reporting discrimination, even if the plaintiff was not actually a member of the class discriminated against. Title IX states that "no person … shall, on the basis of sex, be … subjected to discrimination under any education program… receiving federal assistance." 20 U.S.C. §1681(a). The Court held that when a person complains about sex discrimination, retaliation against him constitutes intentional discrimination on the basis of sex. It is "discrimination," the Court determined, because it is differential treatment, and it is "on the basis of sex" because it is "an intentional response to the nature of the complaint: an allegation of sex discrimination."

The Supreme Court further held that the Eleventh Circuit's narrow interpretation of the language of Title IX was contrary to other Supreme Court opinions, which have allowed broad rights under Title IX that were not explicitly mentioned in the statute. Because the statute did not mention any specific discriminatory practices whatsoever, the Supreme Court held that failure to mention retaliation does not mean that a private right of action is automatically precluded. Further, the *Jackson* Court held that because Congress enacted Title IX three years after *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), in which the Court held that the general prohibition of racial discrimination in 42 U.S.C. § 1982 included retaliation against a white man for advocating the rights of blacks, there seems little doubt that Congress expected Title IX to be interpreted similarly.

The Supreme Court attacked the conclusions the Eleventh Circuit cited in its opinion, rejecting the reasoning that Title IX does not mention retaliation as ignoring the import of the Court's holdings construing discrimination under Title IX broadly. In answer to the Eleventh Circuit's *Sandoval* analysis, the Court held that there was no need for a court even to use the Department of Education's regulation to find a private retaliation action; Title IX's prohibition against discrimination on the basis of sex is sufficient to create a private action. In response to the contention of plaintiff not being a member of the protected class, the Court concluded that plaintiff's membership was immaterial: "The

statute is broadly worded; it does not require that the victim of the retaliation … also be the victim of the original complaint."

The Supreme Court also rejected the Board's argument that Title IX, because it was enacted as an exercise of Congress' powers under the Spending Clause, can only provide a private cause of action when federal funding recipients have adequate notice of potential liability, as the Supreme Court had concluded in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). The Court held that *Pennhurst* did not apply to intentional acts that clearly violate Title IX and that, considering courts' broad interpretation of Title IX over the past 30 years, the Board "could not have realistically supposed that, given this context, it remained free to retaliate against those who reported sex discrimination."

Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, dissented, arguing that the natural meaning of "on the basis of sex" in the statute was shorthand for "on the basis of such individual's sex" and that Congress should be required to speak "unambiguously in imposing conditions on funding recipients through its spending power."

ARBAUGH V. Y&H CORPORATION AND YALCIN HATIPOGLU, 380 F.3d 219 (5th Cir. 2004), *writ granted*, 125 S.Ct. 2246 (May 16, 2005).

On May 16, 2005, the United States Supreme Court granted *certiorari* to review the Fifth Circuit's decision in *Arbaugh*, which held that Title VII's 15-employee threshold determines federal court subject matter jurisdiction and is not merely a matter going to the merits of a Title VII claim. The Courts of Appeals are split on this issue. The Fourth, Sixth, Ninth, Tenth and Eleventh Circuit Courts have held that the threshold is jurisdictional. The Second and Seventh Circuits have held that the threshold is non-jurisdictional.

The Fifth Circuit affirmed the dismissal of plaintiff's Title VII claim for lack of subject matter jurisdiction because defendant did not have the requisite number of employees to qualify as an "employer" under Title VII. The circuit court determined that the Y&H delivery drivers, as well as two owners and their wives, were not "employees" as defined by Title VII.

Arbaugh filed suit against Y&H and one of its owners under Title VII and state tort law. After a jury trial, a verdict was returned in favor of Arbaugh. The defendants filed a motion to dismiss contending that Y&H did not qualify as an "employer" because it did not employ 15 or more employees during the relevant time period. The district court vacated the jury verdict finding no subject matter jurisdiction. Arbaugh appealed this decision arguing: (1) the issue of whether defendant is an "employer" under Title VII goes to the merits of the case, not subject matter jurisdiction; and (2) the jury's verdict should be reinstated because Y&H employed 15 or more employees, as its delivery drivers, the owners, and their wives were "employees."

On the first issue, the Fifth Circuit held that it was bound by *Dumas v. Town of Mt. Vernon-Alaska*, 612 F.2d 974, 980 (5th Cir. 1980), which held that an entity's failure to qualify as an "employer" under Title VII deprives a court of subject matter jurisdiction. *Arbaugh* argued that a split existed within the Circuit, citing the Fifth Circuit's decision in *Clark v. Tarrant County*, Texas, 798 F.2d 736, 741-42 (5th Cir. 1986). The *Clark* Court held that where questions of subject matter jurisdiction are intertwined with the merits, a Title VII claim should not be dismissed for lack of jurisdiction unless the claim is frivolous or clearly excluded by prior law. The Fifth Circuit declined to follow *Clark* and held that absent a Supreme Court decision, change in statutory law, or an *en banc* decision declaring otherwise, it was bound by *Dumas*.

The Fifth Circuit then examined whether Y&H employed the requisite number of

employees. Using the hybrid economic realities/common law control test, that Court held that the drivers were not employees. It noted that the drivers owned their delivery vehicles, some of the drivers worked other jobs, and Y&H did not withhold taxes or pay social security on its drivers. The factors weighed by the court indicated that Y&H did not exercise sufficient control over its drivers.

In *Arbaugh*, the Fifth Circuit applied the Supreme Court's reasoning in *Clackamas* to determine whether the owners and their wives constituted employees under Title VII. *Clackamas v. Gastroenterology Associates*, 538 U.S. 440, 123 S. Ct. 1673 (2003). Using the *Clackamas* six-factor test (modeled after the common-law test of control), the Court noted that the owners and their wives shared Y&H's profits, losses, and liabilities, and the Company could not fire any of them. There was no evidence that the wives were supervised in their job duties or that they reported to anyone "higher" in the organization. Thus, the Fifth Circuit held the owners and their wives were not employees.

Recall that in *Clackamas*, the Supreme Court was tasked with deciding whether physician-shareholders of a professional medical corporation were employees within the meaning of the Americans with Disabilities Act ("ADA") for purposes of determining whether the corporation was a "covered entity" (i.e., one employing 15 or more "employees") under the statute. The Supreme Court reversed the Ninth Circuit's holding that any use of the corporate form, including a professional corporation, "precludes any examination designed to determine whether the entity is in fact a partnership." Instead, the Supreme Court followed the EEOC's position that the common-law test of control determines whether one is an employee. The *Clackamas* Court articulated six factors relevant in determining whether a shareholder-director is an employee: (1) whether the organization can hire or fire the person or set rules and regulations for the person's work; (2) whether, and to what extent, the organization supervises the person's work; (3) whether the person reports to someone higher in the organization; (4) whether, and to what extent, the person is able to influence the organization; (5) whether the parties intended the person to be an employee, as evidenced in written agreements or contracts; and (6) whether the person shares in the profits, losses, and liabilities of the organization. Although the Court surmised that the factors as applied appeared to lead to the conclusion that the shareholders-directors were not employees of the clinic, it declined to make that pronouncement and remanded the case to the Ninth Circuit for consideration under its announced factors.

This Supreme Court term appears to include some interesting employment law cases. As with the last term, we will likely see both an expansion and contraction of rights.