



FEDERAL DISTRICT COURT ENJOINS EEOC RULE ON RETIREE HEALTH BENEFITS

In our June, 2004 edition, we reported that the EEOC had approved and intended to publish a rule specifically authorizing retiree health benefit plans to coordinate plan benefits with Medicare or comparable state-sponsored health benefits without violating the Age Discrimination in Employment Act. Recently, a federal district court in Pennsylvania issued an order enjoining, or prohibiting, the EEOC from publishing or implementing the retiree health benefit regulation. *AARP v. EEOC*, No. 05-CV-509 (E.D. Pa. March 30, 2005), 2005 WL 723991. The EEOC has indicated its intent to appeal the recent ruling. www.eeoc.gov/presss/3-30-05

The EEOC's new rule-to-be was an about-face of an earlier EEOC enforcement policy adopting the ruling in *Erie County Retiree Ass'n. v. County of Erie*, 220 F. 3d 193 (3d. Cir. 2000), writ den., 532 U.S. 913, 121 S. Ct. 1247, 149 L. Ed. 2d 153 (2001). In *Erie*, the Third Circuit held that the reduction of retiree health plan benefits for Medicare-eligible retirees was age-based discrimination, unless the sponsoring employer could demonstrate "equal cost or equal benefit" or other statutory ADEA exemption. Although the *Erie County* decision itself was not applicable to employers outside of the Third Circuit (which includes Delaware, Pennsylvania, New Jersey, and the U.S. Virgin Islands), the

EEOC had supported the ruling of the Erie County court – even filing an amicus curiae brief to the appellate court urging that the plain language of the ADEA made the Medicare-based changes in retiree health plans unlawful – and then quickly adopted the ruling as part of its nationwide enforcement policy.

However, the EEOC subsequently realized that its position presented an incentive for employers to reduce or eliminate their retiree benefit plans. In August 2001, the EEOC rescinded its enforcement policy based on *Erie County*, though the court decision remained applicable in the Third Circuit. The EEOC argued that it was specifically authorized under the ADEA to make any exemption it found "necessary and proper in the public interest." The federal district court hearing the AARP's challenge, however, disagrees. Now, the Third Circuit will have an opportunity to evaluate the EEOC's post-*Erie County* position because it will hear any appeal of the recent *AARP v. EEOC* ruling.

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DISPARATE IMPACT CLAIMS AVAILABLE UNDER THE ADEA

The United States Supreme Court ruled on March 30, 2005, in a matter of first impression, that disparate-impact claims are available to employees under the Age Discrimination in Employment Act (“ADEA”). *Smith, et al. v. City of Jackson, MS, et al.*, No. 03-1160 (2005). In sum, this ruling allows employees to prevail in an ADEA claim against their employers without proving that the employer intended to discriminate based on the employee’s age. However, the Court did state that the scope of disparate-impact liability under the ADEA is limited.

Disparate-impact claims have long been available under Title VII. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the U.S. Supreme Court held that a “disparate-impact” theory of recovery was available under Title VII. Disparate-impact is a method of proving unlawful discrimination. Another method is called disparate-treatment. The basic difference is that in a disparate-treatment method of proof, the employee must show that the employer intentionally discriminated against him/her based on a protected status (e.g. age). In that case, the motive of the employer is critical. However, in disparate-impact cases, courts look to whether there was a facially neutral plan/action that had an adverse impact on an employee because of his/her protected status.

At issue in this case was the City’s pay plan for police officers and dispatchers, which gave officers with less than five years’ service proportionately greater raises than those with more seniority in order to bring the starting salaries more in line with the regional average. A group of older officers

sued the City claiming that they were adversely affected by the pay plan because of their age. The district court granted summary judgment for the City. Affirming, the U.S. Court of Appeals for the Fifth Circuit (the Circuit in which Louisiana lies) ruled that disparate-impact claims are categorically unavailable under the ADEA.

Resolving a split among the Circuits and reversing the Fifth Circuit’s holding on this issue, the U.S. Supreme Court stated that the ADEA “does authorize recovery in ‘disparate-impact’ cases comparable to *Griggs*.” However, the Court commented that the scope of disparate-impact liability under the ADEA is narrower than under Title VII. The Court mainly based this conclusion on a provision in the ADEA which allows any “otherwise prohibited” action “where the differentiation is based on reasonable factors other than age” (commonly referred to as the RFOA provision). The Court commented that in ADEA disparate-impact claims, the RFOA provision plays a principal role by precluding liability if the adverse impact was not based on age, but on some other reasonable factor. Considering the specific facts of this case, the Court found that the City’s decision to give larger raises to lower echelon employees in order to make their salaries competitive with other police forces was a decision based on a “reasonable factor other than age.”



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