



## Difference in Pay Between Employees Over 40 and Employees Under 40 and ADEA

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The United States Supreme Court has been asked to review a case that may have impact on the terms of compensation for police officers throughout the United States. The case (*Smith, et al. v. City of Jackson, MS, et al.*) involves a request by senior officers for the City of Jackson, Mississippi, and the police department for the City of Jackson, Mississippi. Plaintiffs/Petitioners allege that the City violated the Age Discrimination in Employment Act (ADEA) by adopting a pay policy that has a disparate impact on employees who are 40 years of age and older. The ADEA makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privilege of employment, because of age.”

Disparate impact claims—such as the claims at issue in this case—do not depend on the motivation of the employer. Under a disparate impact theory, an employee must demonstrate that an employer’s plan or policy adversely affects them in a way that favors the younger employees.

Plaintiffs/Petitioners are police officers and public safety officers employed by the City of Jackson, Mississippi and its police department. Petitioners are all at least 40 years of age.

What happened is that the City recalibrated their employee pay scale by adopting a Performance Pay Plan. The new scale progresses from Step 1 to Step 5 in 1/2 step increments, with each 1/2 step corresponding to a defined pay range. The Pay Plan initially assigned employees with fewer than 5 years of service to Step 1 and employees with 5 or more years of service to Step 1.5. Each employee was entitled to at least a 2% pay raise from his or her pre-Pay Plan salary. If the initial assignment failed to increase the employee’s salary by at least 2%, the employee was then placed in the lower 1/2 step that resulted in at least a 2% increase from his or her previous salary. Employees whose pay was already higher than the minimum salary in the Step 5 range received only a 2% raise.

As a result, Petitioners alleged that the Pay Plan had a disparate impact on employees who are aged 40 or older by providing them with proportionately smaller wage increases than were granted to employees under the age of 40.

The Trial Court dismissed the action, stating that the ADEA did not allow for claims of disparate impact, although acknowledging that the Circuit Courts that have considered the issue are split. A divided panel of the Court of Appeals affirmed the Trial Court’s Decision. The Court acknowledged a similarity between Title VII and ADEA, but stressed that ADEA allows employers to differentiate between employees based upon “reasonable factors other than age.”

*The question presented is whether such a claim is outright prohibited or should the Court allow the claim to go forward and make a determination whether there is a reasonable factor other than age for the business necessity exception.*

If the Court reverses, the Court will simply say that the case should go forward, the evidence should be presented, and a determination made whether this is an exception or whether it qualifies as a business necessity. All parties would like the Supreme Court to take this case and render its decision. The issue presented is whether the Court should grant Cert to resolve the five-to-three Circuit conflict over whether disparate impact claims are cognizable under the Age Discrimination in Employment Act. If the answer is yes, the case will go back for a decision on the merits. If the Court says they are not cognizable, then cities can continue to have these types of pay plans.

This is to keep you updated and rest assured that we will continue to monitor this case.

**Dated: 06/29/04**