Disparate treatment vs. Disparate impact

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Agenda

- Critical Legislative Updates
  - FLSA
- Disparate Impact Discrimination
  - What is it?
  - Case law examples
  - EEOC examples

Critical Legislative/Court Update:

- FLSA Salary Basis Increased:
  - $844/week July 1, 2024 – Texas court did NOT block
  - $1,128/week (probably more) January 1, 2025
  - Increase every 3 years
  - Still must meet duties test

Disparate Treatment vs. Disparate Impact Discrimination:

What is the difference between disparate treatment vs. disparate impact discrimination?

Disparate Treatment – direct or overt discrimination

Disparate Impact - is a facially neutral rule, policy, plan, whatever that has an adverse impact on a protected class, without any legal justification. NO INTENT NEED BE PROVEN.

Results in substantially different rate of selection in hiring, promotion or other employment decision which works to the disadvantage of members of a protected class. What is "substantially different?" (Proven through statistics.)

- **Often looks at 80% rule – but not exclusive method of determining disparate impact.**
- **The proportion of a protected (minority) group with respect to an unprotected (majority) one, given a positive outcome, should be more than 80%.**

Disparate impact is most commonly found with:

- **Tests – physical, skills-based, educational based and/or intellectual**
- **Layoffs**

HOT BUTTON ISSUES:

EEOC says AI disparate impact discrimination is an enforcement issue.

- **AI "learns" from historical information or the people who input information – all of which may contain biases that AI will "learn" from and incorporate.**

DOL is concerned about AI making erroneous assumptions about who is/is not entitled to OT.

Disparate Impact – the Start of it All……

Griggs v. Duke Power Company (U.S. Supreme Court 1971)

Historical framework – Title VII was a recent law. This was one of the first Title VII cases to make it to the Supreme Court.

Traditionally, Duke Power maintained segregated workspaces. “Negroes were employed only in the Labor Department, where the highest paying jobs paid less than the lowest paying jobs in the other four "operating" departments, in which only whites were employed.” (Direct language from Supreme Court opinion – shows the “times.”)

Title VII is passed, and Duke Power decides to implement certain tests on the same date Title VII takes effect. It imposed a requirement preliminary to employment in the operating departments or transfer, of having a high school diploma or passing certain intelligence or aptitude tests. These were general tests that were not related to aptitude for the particular job, but lower courts considered the tests legal under Title VII of the Civil Rights Act as long as they were not intended or used to discriminate.

What did the Supreme Court say?

Disparate Impact:

Waisome v. Port Authority of NY/NJ – 2nd Circuit

For promotion, a port authority police officer had to pass: 1.) written test; 2.) oral exam; 3.) social/psychological problem-solving test.

617 candidates – 508 white; 64 black; 45 in other groups.

Written test passed: 455 white; 50 black. This translated into white candidates having a passing rate of 89.57 percent and black candidates having 78.13 percent passing rate.

Oral exam passing rates: white: 57.58%; black: 67.35%

Problem-solving exam passing rates: white: 94.37% and black: 94.17%

Ultimate promotions rates: Promotions made from the eligible list from the "top down" in scores resulting in 78 white promotions and 5 black promotions over 3-year span.

Disparate Impact:

Ricci v. DeStefano – U.S. Supreme Court 2009

Test to promote firefighters to various ranks

City (New Haven, CT) paid an outside research/testing Illinois firm $100,000 to develop and implement test. Test based off job descriptions of firefighter lieutenants/captains. Test contained both a written and oral examination. Test reflected a reading level of 10th grade or below. Firefighters given 3 months to study. Test conducted by experts in this field who were not from Connecticut.

77 candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics.

41 candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics.

City threw out test results and would not promote anyone because of disparate impact

Hispanic firefighters who passed test sued for Title VII discrimination because City threw out results.

What did the Supreme Court say?

Disparate Impact:

Meacham v. Knolls Atomic Power Laboratory – Supreme Court 2008

Layoff of 31 individuals; 30 over age 40.
ADEA – Age Discrimination in Employment Act

Determining factors:

- Performance
- Years of service
- Flexibility
- Criticality of skills

Trial court found in favor or employees as did Circuit Court on appeal.

What did the Supreme Court say?

An employer defending a disparate-impact claim under the ADEA bears both the burden of production and the burden of persuasion for the “reasonable factors other than age” (RFOA) affirmative defense
Take away for employers! Use counsel with layoff decisions.

EEOC Example 1:

A police department decided to require applicants for patrol positions to pass a physical fitness test to be sure that the officers were physically able to pursue and apprehend suspects, it should know that such a test might exclude older workers more than younger ones.

Nevertheless, the department's actions would likely be based on an RFOA if it reasonably believed that the test measured the speed and strength appropriate to the job, and if it did not know, or should not have known, of steps that it could have taken to reduce harm to older workers without unduly burdening the department.

Questions and Answers on EEOC Final Rule on Disparate Impact and "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act of 1967 | U.S. Equal Employment Opportunity Commission

EEOC Example 2:

A nursing home decided to reduce costs by terminating its highest paid and least productive employees. To ensure that supervisors accurately assessed productivity and did not base evaluations on stereotypes, the employer instructed supervisors to evaluate productivity in light of objective factors such as the number of patients served, errors attributed to the employee, and patient outcomes.

Even if the practice did have a disparate impact on older employees, the employer could show that the practice was based on an RFOA because it was reasonably designed and administered to serve the goal of accurately assessing productivity while decreasing the potential impact on older workers.

EEOC Example 3:

The same employer asked managers to identify the least productive employees without providing any guidance about how to do so. As a result, older workers were disproportionately rated as least productive.

The design and administration of the practice was not reasonable because it decreased the likelihood that the employer's stated goal would be achieved and increased the likelihood that older workers would be disadvantaged. Moreover, accuracy could have been improved and unfair harm decreased by taking a few steps, such as those discussed in Example 2.

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Thank You