SMITH V. CITY OF JACKSON, MISSISSIPPI
544 U.S. 228 (2005)

OPINION BY: STEVENS

Justice Stevens announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, and an opinion with respect to Part III, in which Justice Souter, Justice Ginsburg, and Justice Breyer join.

Petitioners, police and public safety officers employed by the city of Jackson, Mississippi (hereinafter City), contend that salary increases received in 1999 violated the *Age Discrimination in Employment Act of 1967 (ADEA)* because they were less generous to officers over the age of 40 than to younger officers. Their suit raises the question whether the "disparate-impact" theory of recovery announced in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), for cases brought under *Title VII of the Civil Rights Act of 1964*, is cognizable under the ADEA. Despite the age of the ADEA, it is a question that we have not yet addressed. * * *

On October 1, 1998, the City adopted a pay plan granting raises to all City employees. The stated purpose of the plan was to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability." On May 1, 1999, a revision of the plan, which was motivated, at least in part, by the City's desire to bring the starting salaries of police officers up to the regional average, granted raises to all police officers and police dispatchers. Those who had less than five years of tenure received proportionately greater raises when compared to their former pay than those with more seniority. Although some officers over the age of 40 had less than five years of service, most of the older officers had more.

Petitioners are a group of older officers who filed suit under the ADEA claiming both that the City deliberately discriminated against them because of their age (the "disparate-treatment" claim) and that they were "adversely affected" by the plan because of their age (the "disparate-impact" claim). The District Court granted summary judgment to the City on both claims. The Court of Appeals held that the ruling on the former claim was premature because petitioners were entitled to further discovery on the issue of intent, but it affirmed the dismissal of the disparate-impact claim. Over one judge's dissent, the majority concluded that disparate-impact claims are categorically unavailable under the ADEA. Both the majority and the dissent assumed that the facts alleged by petitioners would entitle them to relief under the reasoning of *Griggs.*

We granted the officers' petition for certiorari, and now hold that the ADEA does authorize recovery in "disparate-impact" cases comparable to *Griggs.* Because, however, we conclude that petitioners have not set forth a valid disparate-impact claim, we affirm.

II

During the deliberations that preceded the enactment of the *Civil Rights Act of 1964*, Congress considered and rejected proposed amendments that would have included older workers among the classes protected from employment discrimination. Congress did, however, request the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." The Secretary's report, submitted in response to Congress' request, noted that there was little discrimination arising from dislike or intolerance of older people, but that "arbitrary" discrimination did result from certain age limits. Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment 5 (June 1965), reprinted in U. S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act (1981), Doc. No. 5 (hereinafter Wirtz Report). Moreover, the report observed that discriminatory effects resulted from "[i]nstitutional arrangements that indirectly restrict the employment of older workers." *Id.*, at 15.

In response to that report Congress directed the Secretary to propose remedial legislation, and then acted favorably on his proposal. As enacted in 1967, § 4(a)(2) of the ADEA, now codified as 29 U.S.C. § 623(a)(2), provided that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . ." Except for substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of that provision in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII). Other provisions of the ADEA also parallel the earlier statute. Unlike Title VII, however, § 4(f)(1) of the ADEA, contains language that significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (hereinafter RFOA provision).

III

In determining whether the ADEA authorizes disparate-impact claims, 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. *Northcross v. Board of Ed. of Memphis City Schools,* 412 U.S. 427, (1973) *(per curiam).* We have consistently applied that presumption to language in the ADEA that was "derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Our unanimous interpretation of *§ 703(a)(2) of Title VII* in *Griggs* is therefore a precedent of compelling importance.

In *Griggs*, a case decided four years after the enactment of the ADEA, we considered whether *§ 703 of Title VII* prohibited an employer "from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify [black applicants] at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of

a longstanding practice of giving preference to whites." Accepting the Court of Appeals' conclusion that the employer had adopted the diploma and test requirements without any intent to discriminate, we held that good faith "does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.

We explained that Congress had "directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Ibid.* We relied on the fact that history is "filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. * * *

We thus squarely held that *§ 703(a)(2) of Title VII* did not require a showing of discriminatory intent.[5]

While our opinion in *Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view, we have subsequently noted that our holding represented the better reading of the statutory text as well. Neither *§ 703(a)(2)* nor the comparable language in the ADEA simply prohibits actions that "limit, segregate, or classify" persons; rather the language prohibits such actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's" race or age. Thus the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.

Griggs, which interpreted the identical text at issue here, thus strongly suggests that a disparate impact theory should be cognizable under the ADEA. * * *

The Court of Appeals' categorical rejection of disparate-impact liability, like Justice O'Connor's, rested primarily on the RFOA provision and the majority's analysis of legislative history.

* * *

The RFOA provision provides that it shall not be unlawful for an employer "to take any action otherwise prohibited under subsectio[n] (a) . . . where the differentiation is based on reasonable factors other than age discrimination . . . ." In most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place. See *Hazen Paper,* 507 U.S., at 609 ("[T]here is no disparate treatment under

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[5] The congressional purposes on which we relied in *Griggs* have a striking parallel to two important points made in the Wirtz Report. Just as the *Griggs* opinion ruled out discrimination based on racial animus as a problem in that case, the Wirtz Report concluded that there was no significant discrimination of that kind so far as older workers are concerned. Wirtz Report 6. And just as *Griggs* recognized that the high school diploma requirement, which was unrelated to job performance, had an unfair impact on African-Americans who had received inferior educational opportunities in segregated schools, the Wirtz Report identified the identical obstacle to the employment of older workers. * * *

the ADEA when the factor motivating the employer is some feature other than the employee's age"). In those disparate-treatment cases, such as in *Hazen Paper* itself, the RFOA provision is simply unnecessary to avoid liability under the ADEA, since there was no prohibited action in the first place. The RFOA provision is not, as Justice O'Connor suggests, a "safe harbor from liability," since there would be no liability under *§ 4(a)*.

In disparate-impact cases, however, the allegedly "otherwise prohibited" activity is not based on age. 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." Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion.

* * *

The text of the statute, as interpreted in *Griggs,* the RFOA provision, and the EEOC regulations all support petitioners' view. We therefore conclude that it was error for the Court of Appeals to hold that the disparate impact theory of liability is categorically unavailable under the ADEA.

* * *

[Although the plurality held that a lawsuit could be brought under the ADEA based on the disparate impact theory, it concluded that the petitioners in this case did not meet the requirements for bringing that cause of action, so the plurality affirmed the judgment of the Court of Appeals.]

JUSTICE O'CONNOR, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

Disparate treatment . . . captures the essence of what Congress sought to prohibit in the [Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." In the nearly four decades since the ADEA's enactment, however, we have never read the statute to impose liability upon an employer without proof of discriminatory intent. I decline to join the Court in doing so today.

I would instead affirm the judgment below on the ground that disparate impact claims are not cognizable under the ADEA. The ADEA's text, legislative history, and purposes together make clear that Congress did not intend the statute to authorize such claims. Moreover, the significant differences between the ADEA and *Title VII of the Civil Rights Act of 1964* counsel against transposing to the former our construction of the latter in *Griggs v. Duke Power Co.*

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I

A

Our starting point is the statute's text. * * * neither petitioners nor the plurality contend that the first paragraph, § 4(a)(1), authorizes disparate impact claims, and I think it obvious that it does not. That provision plainly requires discriminatory intent * * * petitioners look instead to the second paragraph, § 4(a)(2), as the basis for their disparate impact claim. But the petitioners' argument founders on the plain language of the statute, the natural reading of which requires proof of discriminatory intent. Section 4(a)(2) uses the phrase "because of ... age" in precisely the same manner as does the preceding paragraph - to make plain that an employer is liable only if its adverse action against an individual is *motivated* by the individual's age. * * *

II

The legislative history of the ADEA confirms what the text plainly indicates - that Congress never intended the statute to authorize disparate impact claims. * * *

III

The plurality and Justice Scalia offer two principal arguments in favor of their reading of the statute: that the relevant provision of the ADEA should be read *in pari materia* with the parallel provision of Title VII, and that we should give interpretive weight or deference to agency statements relating to disparate impact liability. I find neither argument persuasive.

A

The language of the ADEA's prohibitory provisions was modeled on, and is nearly identical to, parallel provisions in Title VII. Because *Griggs, supra,* held that *Title VII's § 703(a)(2)* permits disparate impact claims, the plurality concludes that we should read *§ 4(a)(2) of the ADEA* similarly.

* * *

To be sure, where two statutes use similar language we generally take this as "a strong indication that [they] should be interpreted [similarly]." But this is not a rigid or absolute rule, and it "'readily yields'" to other indicia of congressional intent. Indeed, "'the meaning [of the same words] well may vary to meet the purposes of the law.'" Accordingly, we have not hesitated to give **[*261]** a different reading to the same language--whether appearing in separate statutes or in separate provisions of the same statute--if there is strong evidence that Congress did not intend the language to be used uniformly. See, *e.g., General* **[***435]** *Dynamics, supra, at* 595-597,("age" has different meaning where used in different parts of the ADEA); *Cleveland Indians, supra, at* 213, ("wages paid" has different meanings in different provisions of Title 26 USC); *Robinson v. Shell Oil Co.,* 519 U.S. 337, 343-344 (1997) ("employee" has different meanings in different parts of Title VII); *Fogerty, supra, at* 522-525 (*Copyright Act*'s attorney's fees provision has different meaning than the analogous provision in Title VII, despite their "virtually identical language"). Such is the case here.

First, there are significant textual differences between Title VII and the ADEA that indicate differences in congressional intent. Most importantly, whereas the ADEA's RFOA provision protects employers from liability for any actions not motivated by age, Title VII lacks any similar provision. In addition, the ADEA's structure demonstrates Congress' intent to combat intentional discrimination through *§ 4*'s prohibitions while addressing employment practices having a disparate impact on older workers through independent noncoercive mechanisms. There is no analogy in the structure of Title VII. Furthermore, as the Congresses that adopted *both* Title VII *and* the ADEA clearly recognized, the two statutes were intended to address qualitatively different kinds of discrimination Disparate impact liability may have a legitimate role in combating the types of discrimination addressed by Title VII, but the nature of aging and of age discrimination makes such liability inappropriate for the ADEA.

* * *

Even venerable canons of construction must bow, in an appropriate case, to compelling evidence of congressional intent. In my judgment, the significant differences between Title VII and the ADEA are more than sufficient to overcome the default presumption that similar language is to be read similarly.