No. 07-1559

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri, St. Louis Division
The Honorable E. Richard Webber, Judge

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rules 26.1 and 29(c), *Amici Curiae* Equal Employment Advisory Council and Chamber of Commerce of the United States of America disclose the following:

1. The Equal Employment Advisory Council and Chamber of Commerce of the United States of America have no parent corporations and no subsidiary corporations.

2. No publicly held company owns 10% or more stock in the Equal Employment Advisory Council or Chamber of Commerce of the United States of America.

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The Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* with the consent of all parties. The brief urges the court to reverse the district court's ruling and thus supports the position of Defendant-Appellant Allstate Insurance Company before this Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes more than 310 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the

Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621 *et seq.*, and other equal employment opportunity statutes and regulations. As employers, and as potential targets of employment discrimination charges and lawsuits, EEAC's and the Chamber's members have a substantial interest in the proper application of the "disparate impact" theory of discrimination under the ADEA following the Supreme Court's decision in *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), holding that a disparate impact claim is cognizable under section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2). In particular, the issues presented in this matter – namely, whether a disparate impact cause of action can be maintained under the ADEA on behalf of *former* employees and, if so, what is the proper statistical analysis for evaluating such a claim – are extremely important to employers.

Both EEAC and the Chamber members' interest in this issue is rooted in important, practical concerns. First, the district court's misapplication of a disparate impact analysis to hiring has direct and far-reaching implications for employers. Conscientious employers hitherto have avoided collecting age data from employment applicants, in an effort to avoid even the implication of age

discrimination. If hiring decisions were vulnerable to challenge under a disparate impact theory, employers would be forced to inquire as to the age of every applicant and conduct constant, complex, and difficult if not impossible analyses of the age-related demographics of their selection criteria.

Second, as a result of aging and normal career advancement patterns, older workers as a group tend to hold higher-level, higher-paid, and longer-established positions of employment, and to have different levels of experience and different kinds of skills and abilities, than their younger counterparts. Because of these natural correlations, innumerable business decisions and practices, even though age-neutral in intent, inevitably tend to impact older workers differently than younger ones. Some of these decisions and practices work to the older workers' advantage; others tend to benefit younger workers. The district court's incorrect interpretation of the disparate impact theory, which resulted in improper group-to-group comparisons in this case, would severely impair the ability of EEAC and Chamber members and other employers to manage their businesses.

EEAC and the Chamber have substantial interest in, and familiarity with, the issues and policy concerns presented to the Court in this case. Because of their experience in these matters, EEAC and the Chamber are well-suited to brief the Court on implications of the issues extending beyond the immediate concerns of the parties.

STATEMENT OF THE CASE

For years, Defendant-Appellant Allstate Insurance Company (Allstate) had both employee and independent contractor agents who sold the company's products. Allstate stopped hiring any employee agents in 1990. In November 1999, Allstate announced its business decision to reorganize its sales force by eliminating all employee agent relationships as of June 2000 in order to consolidate its agent force within the "Exclusive Agent" independent contractor program, its most productive program at the time. As part of the change, Allstate terminated the employment of all of its employee agents, giving them several post-termination options including moving to the independent contractor program or taking severance pay. *EEOC v. Allstate Ins. Co.*, No. 4:04-cv-01359-ERW, slip op. at 2 (E.D. Mo. Oct. 19, 2006).

In September 2000, months after terminating all of its employee-agent relationships, Allstate adopted a policy that former employee agents would not be eligible for rehire sooner than one year after their contract terminations or after all severance payments had been received, whichever was later. Slip op. at 2-3. The policy applied to all former employee-agents. *Id.*

The Equal Employment Opportunity Commission (EEOC) sued Allstate under the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621 *et seq.*, claiming that the Company's "moratorium" on rehiring the former

employee-agents had an adverse impact on older workers and was not based on reasonable factors other than age. The EEOC and Allstate filed cross motions for partial summary judgment. Slip. op. at 1. Among other things, Allstate argued that since this case involves former, not current, employees who applied (or would have applied) for employment, it is a hiring case to which 29 U.S.C. § 623(a)(1) applies. Pointing out that the U.S. Supreme Court held in *Smith v. City of Jackson* that 29 U.S.C. § 623(a)(1) does not provide a cause of action under the disparate impact theory, slip op. at 7-8, Allstate argued that the EEOC's action must fail as a matter of law.

Even if the disparate impact theory were available in this case, Allstate contended, the EEOC had failed to show discrimination under that theory. Specifically, Allstate argued, because the policy applied to 100% of its former employee-agents regardless of age, EEOC did not show that former agents over the age of 40 were disadvantaged by the policy at a substantially disproportionate rate than former agents under age 40. Slip. op. at 18.

The district court rejected Allstate's arguments, and instead treated the matter as a quasi-termination case stemming from the Reorganization Plan, which had gone into effect when the agents were current employees. Slip op. at 11-13. Viewing the case as one falling under 29 U.S.C. § 623(a)(2) rather than 29 U.S.C. § 623(a)(1), the district court ruled that the disparate impact theory was available

to the EEOC in this case. *Id.* at 15. The court further ruled that the EEOC's statistical analysis – which compared former employee-agents over and under forty, and former agents to current, non-agent employees – was appropriate and sufficient to show a disparate impact based on age. *Id.* at 16-18. After the district court certified its decision for interlocutory appeal, Allstate filed a petition for interlocutory appeal with this Court, which granted the petition.

SUMMARY OF ARGUMENT

The U.S. Supreme Court's decision in *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 232 (2005), while holding that the "disparate impact" theory of discrimination was available under section 4(a)(2) of the Age Discrimination in Employment Act (ADEA), stated specifically that the theory is *not* available in hiring cases under section 4(a)(1). By erroneously mischaracterizing the instant case as involving termination, rather than hiring, the court below improperly extended the disparate impact theory under the ADEA to potentially cover allegations of age discrimination in hiring.

Compounding its error, the district court then used the wrong statistical analysis to conclude that disparate impact discrimination indeed had occurred. Rather than utilizing the accepted methods of comparison adopted by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which compare the *impact* of a

particular criterion or practice on a protected group with the *impact* on those outside the protected group, the district court merely compared the number and percentage of employees over 40 in the group of former employees affected by the "no rehire" policy with the number and percentage of employees in the same group who were under 40, and also compared the average age of those in that group with the average age of Allstate's workforce. An appropriate analysis of the impact of the "no rehire" policy would have shown that 100% of the employees in the group covered by the policy were affected by it, so that there was no disparate impact.

The district court's erroneous application of the disparate impact theory to a hiring case imposes substantial burdens on employers. For good reason, employers typically do not collect age data on applicants, and thus lack critical information to defend against an ADEA disparate impact challenge to their hiring practices. The district court's mistaken statistical analyses further compound the burden.

ARGUMENT

I. BECAUSE THIS CASE INVOLVES AN ALLEGATION OF HIRING DISCRIMINATION, THE DISPARATE IMPACT THEORY IS UNAVAILABLE UNDER THE SUPREME COURT'S DECISION IN *SMITH v. CITY OF JACKSON*

A. Cases Involving Discrimination In Hiring Cannot Be Brought Under The ADEA On A Disparate Impact Theory

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, makes it unlawful for an employer:

> (1) 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 privileges or employment, because of such individual's age;
>
> (2) 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; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a). In *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 232 (2005), the Supreme Court ruled that the "disparate impact" theory of discrimination is available under 29 U.S.C. § 623(a)(2). Noting that the language of § 623(a)(2) "is identical to" comparable language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, the Court concluded, as it had in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), with respect to Title VII, that the language permits a disparate impact lawsuit that "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." 544 U.S. at 236 (footnote omitted).

While concluding that the disparate impact theory was available under § 623(a)(2), however, the Court stated unequivocally that the disparate impact theory is *not* available under § 623(a)(1). 544 U.S. at 236 n.6. Responding to Justice O'Connor's dissent, the majority of the Court pointed out the "key textual differences" between § 623(a)(1), "which does not encompass disparate impact

liability," and § 623(a)(2), which does. *Id.* The first section, the Court explained, focuses on "the actions of the employer with respect to the targeted individual," while the second "makes it unlawful for an employer 'to limit . . . his *employees* in any way that 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.'" *Id.* (quoting 29 U.S.C. § 623(a)) (emphasis in original).

Indeed, the plain language of § 623(a)(2), when compared with the similar language in Title VII, further confirms that the disparate impact theory is unavailable in hiring cases. Title VII's comparable language states that it is unlawful for an employer "to limit, segregate, or classify his employees *or applicants* for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . ." 42 U.S.C. § 2000e-2(a)(2) (emphasis added). The words "or applicants" are missing from the selfsame language in the ADEA.

Since only § 623(a) (1), and not § 623(a) (2), prohibits discrimination in hiring, and the disparate impact theory is not available under § 623(a) (1), it follows that the disparate impact theory is not available in ADEA cases alleging discrimination in hiring, such as the case at bar. Accordingly, extending the ADEA disparate impact theory to include challenges to employment selection and

hiring procedures would be contrary to the plain language of the Act and the Supreme Court's decision in *Smith*.

B. Since The Instant Case Involves Allegations Of Hiring Discrimination, The Disparate Impact Theory Is Not Available

Concluding that "the facts of this case do not fit squarely into either section of the ADEA," slip op. at 13, the court below sought to shoehorn this case into § 623(a)(2) by using the affected individuals' status as *former* Allstate employees. The district court constructed an artificial link between the Reorganization Plan, under which the individuals' employment was terminated, and the "no rehire" policy which prevented them from being hired into other positions at Allstate for a limited period of time in the future.

The shoe, however, does not fit. Section 623(a)(2) speaks specifically of employees, not *former* employees. Any former employee-agents who may have sought new positions with Allstate were, at most, applicants for those positions; the fact that they were once Allstate employees gives them no special legal status. Moreover, there is no indication that any of these applicants actually would have been the best qualified candidate and thus would have been hired by Allstate even absent the "no rehire" policy. This is not a case in which former employees would have been assured new jobs had it not been for the "no rehire" policy. Since the individuals involved in this case were merely applicants, and since § 623(a)(2)

covers only employees, the disparate impact theory is unavailable here. Accordingly, the decision of the district court should be reversed.

II. EVEN IF THE DISPARATE IMPACT THEORY WERE AVAILABLE IN THIS CASE, THE COURT BELOW USED THE WRONG STATISTICAL ANALYSIS TO REACH THE CONCLUSION THAT DISCRIMINATION OCCURRED

Assuming for the sake of argument that the disparate impact theory under § 623(a)(2) could be applied to this case, the district court's incorrect application of the theory led to its erroneous conclusion that disparate impact against the protected class could be proven.

Under the disparate impact theory, as articulated by the Supreme Court in *Griggs* and later in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), a proper disparate impact analysis compares the *impact* of a particular criterion or practice on a protected group with the *impact* on those outside the protected group. 490 U.S. at 650-51. In *Griggs*, for example, to determine whether a high school diploma requirement disproportionately excluded African-Americans from certain jobs, the Court compared the percentage of African-Americans who had completed high school with the percentage of nonminorities who had done so, concluding that the significantly lower percentage of African-Americans than nonminorities led to the requirement's disparate impact. 401 U.S. at 430. In other words, the Court compared the ratio of those within the protected class who did and did not meet the challenged qualification to the ratio of those outside the protected class.

Similarly, in *Ward's Cove*, the Court rejected a Ninth Circuit ruling that plaintiffs challenging a company's hiring practices had made out a prima facie case, calling the appeals court's comparison of the high percentage of non-white workers in lower-paying cannery jobs to the relatively low percentage of nonwhite workers in higher-paying non-cannery jobs "nonsensical." 490 U.S. at 651. Noting "'that the . . . comparison . . . fundamentally misconceived the role of statistics in employment discrimination cases,'" 490 U.S. at 650 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977)), the Court said that the "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market" or, if labor market statistics are unavailable, "certain other statistics – such as measures indicating the racial composition of "otherwise-qualified applicants" for at-issue jobs -- are equally probative for this purpose." *Id*. at 650-51.

The court below used two analyses – both of them wrong – for its determination that Allstate's "no rehire" policy had an adverse impact on individuals in the class protected by the ADEA. First, the district court looked at the percentage of former employee-agents (the entire group of individuals affected by the rule) who were over 40 (over 90%) as compared to those under 40 (under 10%). Slip op. at 18. The court also looked at the total percentage of Allstate

employees affected by the policy who were over 40 (23%) as compared to Allstate employees affected by the policy who were under 40 (2.7%). *Id.*

Given that Allstate stopped hiring into the employee-agent positions in 1990 and that all employee-agents were terminated under the Reorganization Plan, it comes as no surprise that a large portion of this group was over 40. Leaving that aside, the district court's approach is simply backwards and, accordingly, nonsensical, for the same reasons the percentages of cannery and non-cannery workers were immaterial in *Ward's Cove*.

A proper analysis of the *impact* of the policy would calculate what percentage of members of the protected class were adversely affected by the policy and compare it with the percentage of similarly affected individuals outside the protected class. Here, both groups experienced exactly the same effect. The "no rehire" policy precluded 100% of the former employee-agents over 40 and 100% of the former employee agents under 40 from being hired into other Allstate jobs. There is no disparate impact.

The court below also perceived disparate impact incorrectly on the basis that "the average age of employees subject to the rehire policy was 51.1 years old compared with the average age of Allstate's entire workforce which was 39.4 years old." Slip op. at 18. Again, the district court's comparison is completely irrelevant. As noted, it is no surprise that the employee-agents as a group were

mostly over 40, given that Allstate had not even hired into that group in ten years. Allstate's entire workforce, moreover, cannot be an appropriate group for comparison since the rest of the workforce, not being employee-agents, were not part of the Reorganization Plan at all.[1]

As in *Ward's Cove*, the lower court's method of calculating disparate impact reflects a fundamental misunderstanding of just what that theory of discrimination entails. Accordingly, the decision of the lower court should be reversed.

III. THE DECISION OF THE DISTRICT COURT SHOULD BE REVERSED BECAUSE ITS ERRONEOUS CONCLUSIONS IMPOSE SUBSTANTIAL BURDENS ON EMPLOYERS

A. For Good Reason, Employers Do Not Collect The Age Data That Would Be Essential To Defending Against A Claim Of Disparate Impact In Hiring

By erroneously extending the ADEA to cases involving disparate impact in hiring, and compounding its error by making the wrong statistical comparisons, the court below unwittingly imposed substantial burdens on employers.

First, ADEA disparate impact hiring claims, if they were cognizable, would be virtually impossible for even the most conscientious employer to defend. Unlike race and gender, employers do not collect age information from applicants

[1] This Court's decision in *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983), provides no support for the district court's analysis, for at least two reasons. In *Leftwich*, this Court compared only the pre- and post-average age of the teaching faculty affected by the challenged reorganization. Here, the court below made a different comparison, and the reorganization itself is not at issue.

for employment, for good reason. The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607, specifically require employers to collect race and gender data for purposes of determining the adverse impact of their selection procedures by race and gender. 29 C.F.R. § 1607.4(A). The Uniform Guidelines explicitly do *not* apply to the ADEA and do not require such data collection with respect to age. 29 C.F.R. § 1607.2(D).

Indeed, the EEOC itself frowns mightily on employers asking applicants for age-related information. The EEOC's own regulations, while conceding that "[a] request on the part of an employer for information such as 'Date of Birth' or 'State Age' on an employment application form is not, in itself, a violation of the Act," go on to say that

> because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination based on age, employment application forms which request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act.

29 C.F.R. § 1625.5. The regulations go on to advise that any employer asking for age-related information on an employment application also should provide a lengthy advisory about the statutory prohibition against age discrimination. *Id*. Similar language appears in the EEOC's regulation on age and employment advertisements. 29 C.F.R. § 1625.4.

Given the agency's suspicious attitude towards pre-employment inquiries about age, it is not surprising that many conscientious employers typically do not ask for date of birth or other age-related information before extending an offer of employment. With no legal mandate, and a regulatory promise from the enforcement agency to "closely scrutinize" any such inquiries, most employers have concluded that the best approach is simply not to ask – particularly because age in and of itself is rarely if ever relevant to the selection process.

For these reasons, employers simply do not keep the data that they would need in order to monitor for potential adverse impact in hiring on the basis of age. Accordingly, extension of the adverse impact theory to hiring situations would force a sea change in current practice, forcing employers to solicit the ages of all applicants for employment in order to assure their hiring decisions are not disproportionately impacting older workers – and ironically, risking the ire of the EEOC. Furthermore, because age is a constantly evolving personal characteristic, to fully monitor every conceivable age disparity, an employer would have to make repeated statistical comparisons of the impact of each selection criterion on applicants of every age, making the analyses not merely inconvenient but well nigh impossible.

Once an applicant is hired, employers typically solicit date of birth for recordkeeping purposes, particularly for benefits enrollment. For this reason, once

the Supreme Court's *Smith* decision made the disparate impact theory available for challenging certain decisions with respect to employees, employers already had the data to do proactive critical self-analyses of those decisions should they choose to do so. While such analyses are far from simple, since each employee's age steadily increases rather than being an immutable characteristic, at least the data is there with which to make a start.

Since they do not collect such data on applicants, employers lack the most critical tool with which to defend effectively an ADEA disparate impact challenge to their hiring practices. Given the salient reasons employers have for not collecting such data, and the fact that the ADEA does not provide a cause of action for disparate impact in hiring in any event, EEAC respectfully submits that the decision below should be reversed.

B. Using Irrelevant Statistical Analyses To Determine Employer Liability Further Increases The Burden On Employers

It nearly goes without saying that the decision below must be reversed because it completely misapprehends the nature of the statistical analysis used to determine disparate impact for employment discrimination purposes. Making employers liable for so-called disparate impact discrimination under inapposite statistical analyses simply makes no sense.

Moreover, if employers are forced to conduct analyses under the convoluted principles announced by the district court in order to assess their potential liability, the additional burden will be untenable. As discussed earlier, simply comparing the number of workers over 40 and under 40 in a given group in which all members are equally affected by a challenged criterion says nothing about the *impact* of the criterion itself. The group in this case is a particularly good example, given that no new employees had been hired into that group since 1990 – and that, given the normal operation of the labor market, new hires into that group over that nine-year period likely would have provided the younger workers who would have balanced the equation. In any event, forcing employers to make irrelevant comparisons by age between individuals who are affected in precisely the same way by the identical employment decision makes no sense and merely adds to the burden already imposed on employers by the district court's decision.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit that the decision below should be reversed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief *Amici Curiae* Of The Equal Employment Advisory Council And Chamber Of Commerce Of The United States Of America In Support Of Defendant-Appellant And In Support Of Reversal complies with Fed. R. App. P. 32(a)(7)(B) and pertinent provisions of Eighth Circuit Rule 28A. The brief has 4,140 words, from the Interest of the *Amici Curiae* through the Conclusion, according to the word processing program Microsoft Word 2003. A 3 ½ inch diskette containing this brief in .pdf format has been filed with the Court. It has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2007, two (2) paper copies of, and one (1) computer disk (per party) containing, this Brief *Amici Curiae* Of The Equal Employment Advisory Council And Chamber Of Commerce Of The United States Of America In Support Of Defendant-Appellant And In Support Of Reversal were sent via first-class U.S. Mail, postage prepaid, on this day to each of the following:

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