

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ALVIN RICCIARDI, et al.	:	
Plaintiffs,	:	
v.	:	No. 03-CV-5285
	:	
ELECTRONIC DATA SYSTEMS CORP.,	:	
Defendant.	:	

MEMORANDUM ORDER

Presently before the court is a Motion to Dismiss the Complaint filed by the Defendant and the memoranda in support of the motion and in opposition thereto filed by counsel for the parties. Defendant's primary contention in the motion was that a cause of action does not exist under the Age Discrimination in Employment Act of 1967 (ADEA), premised upon disparate impact. Also, Defendant argues that if such a cause of action is authorized Plaintiff insufficiently pleaded the cause of action because of an alleged failure to identify the specific discriminatory employment practice challenged. The Supreme Court has recently determined that the ADEA does provide a cause of action based upon the disparate impact of an employment practice on older workers. Smith v. City of Jackson, _____ U.S. _____, 125 S.Ct. 1536 (2005). However, the Court determined that to state a disparate impact cause of action Plaintiff must identify the specific employment practice that caused the disparate impact. It is significant that Smith was not decided at the motion to dismiss stage of the proceedings, but rather on summary judgment when the record established that Plaintiff could not prevail because the age differentiation was based on reasonable factors other than age.

Further, Defendant contends that Count I of the Complaint filed herein contains only a general attack on the employment practice procedure and is not sufficiently particularized and therefore must be dismissed pursuant to Smith. A fair reading of the Complaint discloses that it does in fact identify a modified employment practice in Defendant's Performance Management Process (PMP) that is challenged as arbitrary. Said employment practice allegedly establishes a nationwide classification system of employees placed in categories designated 1-5, those in classifications 4 and 5 being subject to termination. The system is said to arbitrarily assign workers to categories by an evaluation process participated in at times by persons who are without specific

knowledge of the performance of the employees. It is further alleged that the system in place when Plaintiff was terminated was primarily concerned with meeting the quotas assigned to categories 4 and 5 and not the identification of employees of satisfactory performance and contribution to the company. The allegations of the Complaint are sufficient to meet the particularized requirement of Smith. Accordingly, Count I of the Complaint sufficiently alleges a disparate impact cause of action and will not be dismissed.

Defendant also challenges the legal sufficiency of the class action allegations contained in the Complaint. Plaintiff argues that the charge filed with the Pennsylvania Human Relations Commission (PHRC) and the Equal Employment Opportunity Commission (EEOC) does not contain the class allegations now relied upon by Plaintiff. The discharge questionnaire completed by Plaintiff and submitted to the PHRC did in fact contain adequate class allegations. However, the formal complaint prepared by the PHRC representative and signed by Plaintiff did not include the class allegations set forth in the questionnaire. At this stage of the proceeding, on the limited record before me, it would be inappropriate to dismiss or strike the allegations. An opportunity must be given to the parties for discovery on issues such as notice to Defendant and prejudice, if any, to Defendant. Defendant has not cited to any controlling authority for the proposition that failure of the administrative charge to contain class allegations justifies dismissal. Accordingly, I will deny the motion to dismiss and/or strike the class action allegations without prejudice to Defendant reasserting the issue at a later time.

Also, Defendant moves to strike Count II of the Complaint which seeks a declaration:

A) That the Release of all claims signed by the Plaintiff and all others similarly situated is not in compliance with the Older Workers Benefit Protection Act.

B) That the Release of all claims signed by the Plaintiff and all others similarly situated be declared null and void.

Plaintiff has made clear in his response to the motion that he does not seek monetary damages for a violation of the Older Workers Benefit Protection Act, but simply a declaration as to the validity of the Release Plaintiff anticipates Defendant will assert as a defense to Count I. I will limit relief on this count to declaratory relief and therefore will deny the motion to dismiss Count II.

In accordance with the above **IT IS HEREBY ORDERED** this 24th day of October 2005 that Defendant's Motion to Dismiss Counts I and II of the Complaint is **DENIED**. Also, Defendant's Alternative Motion to Dismiss the Class Allegations of the Complaint is **DENIED**.

IT IS FURTHER ORDERED that Defendants shall file an Answer to Plaintiff's Complaint within 15 days of the date of this Order.

IT IS FURTHER ORDERED that the Deputy clerk shall schedule a pre-trial conference in this matter after November 15, 2005.

BY THE COURT:

Clifford Scott Green, S.J.