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April 29, 2005

**BY FEDEX**

Hon. Jose L. Linares, U.S.D.J.  
United States District Court  
for the District of New Jersey  
M.L. King Jr. Federal Courthouse  
50 Walnut St.  
Newark, NJ 07101-0999

**Re: *Engers, et al. v. AT&T and AT&T Mgmt. Pension Plan, C.A. 98-3660 (JLL/RJH)***

Dear Judge Linares:

This is to advise your Honor that the Supreme Court's recent decision in *Smith v. City of Jackson*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 1536 (March 30, 2005), directly affects Judge Politan's June 29, 2000 dismissal on the pleadings of two of the Plaintiff class' age discrimination claims. Dkt. # 61-62. Judge Politan ruled that "The ADEA forbids disparate treatment but not disparate impact." Slip Op. at 13; 2000 U.S. Dist. LEXIS 10937 \* 17. Applying this rule, Judge Politan found that "the gravamen of the First and Second Claims for Relief is that the new Plan has the effect of discriminating against older employees when implemented. Thus, the First and Second Claims are actually disparate impact claims inasmuch as the essence of the claims is that the new Plan adversely "impacts" the older employees.... Therefore, plaintiffs' First and Second Claims for Relief must be dismissed." Slip Op. at 14; 2000 U.S. Dist. LEXIS 10937 \*18.

*Smith v. City of Jackson* holds by a 5-3 majority (Chief Justice Rehnquist did not participate) that "the ADEA does authorize recovery in "disparate impact" cases comparable to *Griggs [v. Duke Power]*." 125 S.Ct. at 1540. The Court found that the EEOC regulations "have consistently interpreted the ADEA to authorize relief on a disparate-impact theory" and that the "text" of the ADEA "focuses on the effects of the action on the employee rather than the motivation of the action of the employer." 125 S.Ct. at 1542 and 1544. The Court recognized that employers can still defend against disparate impact claims by proving that the discrimination is based on a reasonable factor other than age ("RFOA"). 125 S.Ct. 1543-45. The EEOC's regulations establish, however, that an RFOA cannot be one that uses age as a "limiting criterion." 29 C.F.R. 1625.7(c) ("When an employment practice uses age as a limiting criterion" the RFOA defense is "unavailable").

The First and Second Claims have been repled in each of the Plaintiff Class' amended Complaints to ensure that they were preserved for appeal or reconsideration. The Court may review them by examining the Fourth Amended Complaint at Docket Entry #232.

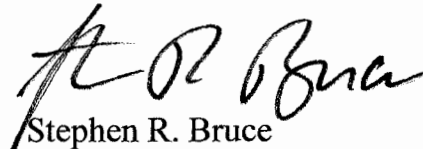
Judge Orlofsky's decision in *Bryant v. New Jersey DOT*, 998 F.Supp. 438, 441 (D.N.J. 1998), finds that "courts have not hesitated to vacate orders of dismissal based upon subsequent Supreme Court decisions." The opinion observes that this:

"conserves judicial resources and promotes justice.... Surely no constructive purpose would appear to be served by this Court's staying with a demonstrably incorrect result, when an appeal from such decision appears almost certain to compel its reversal based on new and controlling authority."

Id. at 442; accord *Zichy v. Philadelphia*, 590 F.2d 503, 508 (3d Cir. 1979).

In view of the fact that this Court is already considering the parties' cross motions for summary judgment, Plaintiffs suggest that the filing of a motion to reconsider based on *Smith v. City of Jackson* be deferred until this Court has the opportunity to rule on the pending motions. Plaintiffs bring this issue to the Court's attention in the event that the Court wants to proceed differently.

Respectfully submitted,



Stephen R. Bruce

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