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In a closely followed and widely anticipated decision, the U.S. Supreme Court recently held that employers bear the burden of proving a legitimate, nondiscriminatory "reasonable factor other than age" in defending a disparate-impact claim under the Age Discrimination in Employment Act (ADEA). The impact of the decision is anticipated to make it easier for older workers to establish that they were subjected to age discrimination, particularly in instances where disproportionate numbers of employees age 40 or older lose their jobs in a reduction in force (RIF). Given the current economic climate – which may continue to force employers to make more RIF decisions – this decision is likely to give employers pause.

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More Age Discrimination Cases on the Horizon? Supreme Court Raises Bar on Employer's Defense in ADEA Cases

By Peter C. Leung and Richard L. Sloane

Overview

Near the end of its term, the U.S. Supreme Court held that employers defending disparate impact claims under the ADEA, with the defense that the decision was based on a reasonable factor other than age (RFOA), bear both the burden of production and the burden of persuasion to demonstrate that the factors the employer relied upon in making a decision to lay off employees were reasonable. *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008). The *Meacham* Court settled a dispute between federal circuits. Previously, the Ninth Circuit Court of Appeals placed both the burden of production and the burden of persuasion on employers. By contrast, the Second Circuit Court of Appeals had placed the burden of persuasion on employees to show that the factors relied upon by employers in making a RIF decision were unreasonable. While the *Meacham* ruling is not seen as a major surprise throughout the business community, one thing is clear: the bar has been raised on employers defending decisions to reduce their workforce under the ADEA.

Background

The federal government contracted with Knolls Atomic Power Laboratory ("Knolls") in the maintenance of the nation's fleet of nuclear-powered warships. The United States Navy and the Department of Energy jointly fund Knolls' operations, deciding which projects it should pursue, and setting annual staffing limits. Among other projects, Knolls designed naval nuclear reactors and trained Navy personnel to use them.

In 1996, the government ordered Knolls to reduce its workforce. After more than 100 employees accepted the company's voluntary buy-out offer, Knolls was left with an additional 31 jobs to cut through an involuntary RIF. Knolls instructed its managers to evaluate employees on three scales – "performance," "flexibility," and "critical skills." Those scores were combined, and added to a score for years of service, and the totals determined which employees would be laid off. A group of 245 out of 2,063 eligible employees were evaluated for the involuntary RIF.

Performance scores were based on the employees' two most recent appraisals. However, for flexibility and criticality scores, managers were provided with limited guidance, and they had substantial discretion to arrive at subjective evaluations.

Of the 31 employees laid off, 30 were at least 40 years old. Twenty-eight of the laid off employees sued, asserting disparate treatment (discriminatory intent) and disparate impact (discriminatory result) claims under the ADEA and state law. In short, in a disparate-impact ADEA case, plaintiffs identify a policy or decision that has a statistically significant adverse impact on older employees, demonstrate that the employer had equally effective and less discriminatory alternatives available, and argue that the employer's failure to adopt a less discriminatory alternative constitutes age discrimination.

The plaintiffs relied on a statistical expert's testimony to show that "results so skewed according to age could rarely occur by chance" and that the scores for flexibility and criticality, over which managers had the most discretion, had the firmest statistical ties to the outcomes.

At the district court level, the plaintiffs prevailed on their disparate-impact claim (but not on their disparate-treatment claim), and a jury awarded plaintiffs more than $5 million in damages. In 2004, the U.S. Court of Appeals for the Second Circuit initially affirmed the district court's decision on "business necessity" grounds, finding that the employees had alleged at least one alternative, nondiscriminatory method for achieving the reduction in force without having a disparate impact on older workers.

In 2005, the U.S. Supreme Court vacated and remanded the case to the Second Circuit in light of the Supreme Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005). In *Smith*, the Court held that an employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals. Thus, a plaintiff could bring an age discrimination claim based on a disparate impact claim, but the employer need not prove "business necessity" in order to challenge the plaintiff's *prima facie* age discrimination case. Rather, the employer only needs to demonstrate that its decision was based on a reasonable factor other than age.

Accordingly, the Second Circuit majority concluded that its prior ruling was "untenable" because it had erroneously applied the "business necessity" standard rather than a "reasonableness" standard. In reversing its earlier decision, the Second Circuit placed the burden on the plaintiffs to demonstrate that Knolls' reasons for the layoff determinations were unreasonable – which the Second Circuit concluded the plaintiffs could not satisfy.

This shifted the case back to the Supreme Court, which held that an employer raising a RFOA affirmative defense to an ADEA disparate impact claim bears both the burden of production and the burden of persuasion. Not only must the employer introduce evidence of a reasonable factor other than age, it also must persuade the trier of fact of the reasonableness of the RFOA factors.

In reaching this conclusion, the *Meacham* Court noted that the "business necessity" test previously applied had "no place in ADEA disparate-impact cases" – concluding that it would entail a "wasteful and confusing structure of proof."

The Supreme Court was aware of the gravity of its decision, and it acknowledged valid concerns by employers. By placing the burden of persuasion for an RFOA defense on employers, it might "encourage strike suits or nudge plaintiffs with marginal cases into court." Yet, the Court attempted to assuage some of these concerns by holding that it is not enough for an ADEA plaintiff merely to point to a generalized policy that has a disparate impact on older workers. Rather, consistent with prior holdings (including *Smith and Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 656 (1989)), a plaintiff must "isolate[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities." The *Meacham* Court argued that to identify a specific practice is not a trivial burden for a plaintiff, and where an employer's RFOA defense is clearly reasonable, the employer should not have a significantly higher burden of proof than it did prior to this decision.

Nonetheless, the *Meacham* Court recognized the substantial impact of its decision. Justice Souter, writing for the majority, acknowledged that "there is no denying that putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production; nor do we doubt that this will sometimes affect the way employers do business with their employees." Yet, the Court concluded that such concerns need to be directed to Congress – the Court simply had the task to read the ADEA "the way Congress wrote it."

Implications and Recommendations

During each year over the past decade, between 15,000 and 20,000 individuals initiated ADEA lawsuits. As the country's workforce continues to age, the pool of potential ADEA plaintiffs continues to expand.

Even under ideal economic conditions, the *Meacham* decision would be noteworthy. Under deteriorating economic conditions as the country is currently experiencing – where the number of involuntary reductions in force is expected to grow – this decision may prompt more lawsuits to challenge underlying rationales for layoffs.

Meacham unquestionably requires employers to revisit the approach taken when making layoff decisions. Specifically, employers might consider some or all of the following:

- Identify and document reasons for a potential reduction in force.
- Consult counsel so that, to the greatest extent possible, RIF factors will hinge on objective and measurable criteria. Carefully evaluate the weight assigned to each RIF factor.
- Create and train a diverse management oversight committee – including members protected under the ADEA – to ensure the objectivity of each proposed RIF decision.
- Keep good records, and preserve them to support decisions made in the layoff process. Such records will be of critical importance in the event of ensuing litigation.
- Ensure that performance evaluations are conducted and will withstand scrutiny since performance evaluations most likely will be used in RIF decisions. Accordingly, review personnel files to ensure that employees receive performance appraisals at regular and consistent intervals (*e.g.*, annually, semi-annually). Such appraisals must employ consistent standards and objectively identifiable bases for evaluation throughout the organization.
- Train managers regarding the application of RIF factors to maximize the likelihood that decisions will be made based on objectively defensible evidence.
- Consult a statistician. After identifying potential RIF factors, work with a statistician and/or legal counsel to conduct an impact analysis on the current workforce. If the proposed RIF would result in an adverse impact, work with counsel to determine the defensibility of such decisions and the corresponding decision-making processes. If necessary, modify the RIF factors and/or revise the weight assigned to each factor.
- Revisit your company policies and procedures – and, if necessary, revise them.

Without question, *Meacham* raises the bar on employers in defending ADEA disparate-impact claims. However, employers contemplating the execution of an involuntary RIF

can reduce potential ADEA liability through proper planning, statistical evaluation, documentation, and legal review.

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