

## **U.S. Supreme Court Concludes “Reasonable Factors Other than Age” Exemption is an Affirmative Defense for which Employers Defending Disparate Impact Claims Under the ADEA Bear the Burden of Proof**

### **Breaking Developments In Labor and Employment Law 06/26/08**

On June 19, 2008, in *Meacham v. Knolls Atomic Power Laboratory*, the U.S. Supreme Court held that an employer defending a disparate-impact claim under the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. §621 *et seq.*, bears the burden of persuasion (that is, the burden of persuading the trier of fact of the defense’s merit) when asserting the “reasonable factors other than age” (“RFOA”) affirmative defense under §623(f)(1). Citing prior cases under the Fair Labor Standards Act and the Equal Pay Act, the Court held that Congress intended to place the burden of proving a statutory exemption to ADEA liability, such as the RFOA defense, on the party asserting the defense.

The *Meacham* case arose from the scoring system that the employer, Knolls, used to determine which employees to lay off during a reduction in force. Prior to making its lay-off decisions, Knolls scored its employees on “performance,” “flexibility,” “critical skills,” and years of service. Knolls ultimately laid off 31 employees, 30 of whom were at least 40 years old. Several laid off employees sued Knolls alleging that the subjective scores for “flexibility” and “criticality,” over which the managers had the most discretion, had a disparate impact on older workers that could not have occurred by chance. Knolls asserted an RFOA defense. By the time the case reached the U.S. Supreme Court, the only remaining issue was whether the ADEA placed the both the burden of production, as the Court had already held in prior ADEA cases, and the burden of persuasion, on Knolls, as the party asserting the reasonableness of its layoff selection criteria.

### **Congress Intended to Place the Burden of Proof on Employers to Show that Their Challenged Policies are Reasonable when the Policies have a Disparate Impact on Older Workers**

Plaintiffs argued, and the Court agreed, that Congress clearly intended to place the burden of proof on employers by offering employers a “reasonable factors other than age” defense. Sections 623(a) through (c) and (e) of the ADEA contain the general prohibitions against age discrimination, while Section 623(f)(1) creates an exemption for employer actions “otherwise prohibited” by the ADEA, but only if those actions are “based on reasonable factors other than age.” In *Meacham*, the Court concluded that Congress must have intended to make the RFOA

exemption an affirmative defense, with the burden of proof resting on employers, because the RFOA defense appears in a separate section of the ADEA than the ADEA's prohibitions on age discrimination. The Court also noted that it was impossible to look at the text and structure of the ADEA and conclude that the RFOA defense "works differently" than the "bona fide occupational qualification" defense, which the Court has previously held is an affirmative defense on which employers bear the burden of proof. "We have to read it the way Congress wrote it," concluded Justice Souter.

### **What This Means for Employers**

Although the U.S. Supreme Court's decision is consistent with longstanding Ninth Circuit precedent, it is a good reminder to employers that they must be able to articulate and prove the reasonableness of their policies when those policies have been proved to have a disparate impact on older workers. The *Meacham* opinion acknowledged that the burden on employers can be significant, but that it might not be as onerous as employers fear. Specifically, the *Meacham* court opined that "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group."

In addition, the Court made clear that plaintiffs cannot prevail merely by pointing to a generalized policy that leads to a disparate impact. Instead, employees still must isolate and identify the specific practices that are allegedly responsible for any proven statistical disparities between an adverse impact on older workers and an adverse impact on younger workers.

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