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Trials&TRIBULATIONS

Burden on employer to establish defense under the ADEA

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Daily Record Columnist

In a June 19 decision that significantly impacts the vast majority of employers contemplating a reduction in force, the U.S. Supreme Court in *Meacham v. Knolls Atomic Power Laboratory* addressed the employer's burden of proof under the Age Discrimination in Employment Act (ADEA).

Specifically, the court tackled the issue of whether an employer bears both the burden of production and persuasion for the defense that the employer's conduct was "based on reasonable factors other than age," and, therefore, was not unlawful, 29 U.S.C. § 623(f)(1). The high court reversed the Second Circuit's arguably employer-friendly decision below, 416 F.3d 134 (Second Cir. 2006), and said the employer does carry both burdens in establish that its actions were reasonable.

The ADEA prohibits discrimination against an individual because of his or her age with respect to any term, condition or privilege of employment, 29 U.S.C. § 623(a). It also protects those aged 40 and older, *id.* at § 631(a), and applies to employers with 20 or more employees, *id.* at § 630(b).

Historically, the ADEA applied to covered employees who were treated differently because of their age, referred to as disparate-treatment cases. In 2005, the Supreme Court held that the disparate-impact claim, long available under Title VII, likewise is available under the ADEA. *See Smith v. City of Jackson,* 544 U.S. 228 (2005).

The employer in *Meacham,* Knolls Atomic Power Laboratory, is a private company that maintains nuclear-powered warships. The company is funded by the U.S. Navy and the Department of Energy, which ordered Knolls to reduce its workforce in 1996. Although many employees accepted a buy-out offer, 30 extraneous positions remained.

In order to determine which employees to retain, Knolls asked its managers to score subordinates based on performance, flexibility and critical skills, Slip Op. at 2. These scores were combined with an employee's years of service and, ultimately, 31 salaried employees were laid off. Thirty of these employees were at least 40 years old. Given this statistical configuration, it is not surprising that 28 sued, raising claims under the ADEA concerning both disparate-treatment and disparate-impact.

At 29 U.S.C. § 623, the Act prohibits discrimination by employers (subsection a), employment agencies and labor organizations (subsections b and c) and the publication of employment notices or applications that indicate age-based preferences or limitations (subsection e). The statute also sets forth exceptions to liability, referred to by the court as the "five affirmative defenses," Slip Op. at 5. Two of these are found in Section 623(f)(1): "It shall not be unlawful for an employer ... to take any action otherwise prohibited under subsections (a), (b), (c) or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age," 29 U.S.C. § 623(f)(1).

The Supreme Court previously has noted that the "bona fide occupational qualification" defense, or BFOQ, is an affirmative defense that must be pleaded and proven. *See City of Jackson,* 544 U.S. at 233, n. 3; *Western Air Lines Inc. v. Criswell,* 472 U.S. 400, 414-419, and nn. 24, 29 (2005). The court found, therefore, that the exemption for conduct "where the differentiation is based upon reasonable factors other then age," or RFOA, also is an affirmative defense.

Although this analysis seems straightforward, its application to the relatively new disparate-impact form of liability under the ADEA becomes challenging. As the Supreme Court notes, "in the typical disparate-impact case, the employer's practice is 'without respect to age' and its adverse impact (though 'because of age') is 'attributable to a nonage factor'; so action based on a 'factor other than age' is the very premise for disparate-impact liability in the first place, not a negation of it or a defense to it," Slip Op. at 11.

In a disparate-impact case, the employer's practice is not age-specific, but ultimately it disproportionately impacts covered employees. Generally, a plaintiff will allege a non-age related factor as part of his or her disparate-impact claim, therefore an employer establishes a RFOA defense by showing that the factor used by the employer was reasonable.

The court suggests its ruling does not grant a free pass to disparate-impact plaintiffs. Citing *City of Jackson,* the court notes that such a plaintiff may not merely allege a disparate impact and shift the burden to the employer to establish an affirmative defense. Instead, the plaintiff must "isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities," Slip Op. at 15.

Still, the court acknowledges an affirmative defense is more diffi-

Continued ...

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Continued ...

cult, and more costly, for an employer to litigate effectively. Any blame for increased cost, according to the court, must be laid squarely with Congress, which "both creat[ed] the RFOA exemption and wr[ote] it in the orthodox format of an affirmative defense," *id.* at 16.

Employers must take care to analyze all factors used when laying off employees, or when taking any action that impacts the terms or conditions of employment for its workforce. If those factors have a greater impact on employees aged 40 and older — intended or not — they must be reasonable.

Meacham also serves to remind practitioners of the importance of pleading and proving affirmative defenses. Consistent with F.R.C.P. 8(c), a practitioner must ensure this newly-illuminated affirmative defense is pleaded in defense of an ADEA claim. If, in a pending case, an answer fails to plead a RFOA defense, now would be a good time to seek leave to amend the pleading under F.R.C.P. 15(a)(2). If the court-ordered deadline to amend has expired, the *Meacham* decision likely constitutes good cause for the amendment of the scheduling order under F.R.C.P. 16(b)(4).

Perhaps the most telling lesson of all, sadly, is the enormous amount of time and, presumably, money that could be spent over an issue of statutory construction the court suggests is practically academic. This was not the first trip to the Supreme Court for the plaintiffs in *Meacham.* Initially, a jury found for them on the disparate-impact claim, but not on the disparate-treatment claim. The Second Circuit affirmed, and the Supreme Court vacated the judgment and remanded for further proceedings in light of its decision in *City of Jackson,* 544 U.S. 228. On remand, the Second Circuit found in favor of Knolls. The Supreme Court's reversal last month remands the case for further proceedings consistent with its opinion; therefore, the action that began in the Northern District of New York in 1997 now, more than 10 years later, returns to the Second Circuit.

Just like the contents of the nuclear reactors serviced by Knoll personnel, ADEA lawsuits can have a significant half-life, the length of which is yet to be determined.

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