



# Supreme Court Places Greater Burden on Employers Defending Age Claims

Insights

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**June 19, 2008** - The Supreme Court held that an employer sued under the Age Discrimination in Employment Act (ADEA) has the burden of establishing the reasonableness of its explanation for a suspect employment practice. This ruling carries significant adverse consequences for employers, exposing them to greater risk of liability under the ADEA when decisions are made to reorganize or reduce their workforces. *Meacham v. Knolls Atomic Power Laboratory*.

## Background

The ADEA prohibits employers from taking any action which would "in any way . . . deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age," if the employee is 40 years old or older. In drafting the law, Congress recognized that, unlike traits protected by Title VII such as race or religion, age can sometimes have a correlation to job performance. Accordingly, Congress included a provision in the ADEA offering a valuable defense for employers, stating that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on a reasonable factor other than age."

In an earlier case, the Supreme Court held that the ADEA permits "disparate impact" claims where a specific employment practice (such as a layoff) has the effect of adversely harming older workers even though there was no intent to discriminate. In *Smith v. City of Jackson*, the Court noted that the "reasonable factors other than age" (usually abbreviated as RFOA) provision in the ADEA was an important safeguard against employer liability. But since the Court held that the employment practice in *Smith* was "unquestionably reasonable," it did not decide who had the burden of persuasion on the RFOA issue.

Disparate impact cases under discrimination laws are typically governed by a three-step analysis. Under this traditional approach, an employee must first identify a specific employment practice and establish that this practice is discriminatory. Second, the burden shifts to the employer, which may then offer a legitimate "business necessity" for the practice. Third, the burden shifts back to the employee to show that the demonstrated business necessity either does not support the employment practice or that an equally effective alternate practice would have been less discriminatory.

Because *Smith v. City of Jackson* did not address which party has the burden of persuasion on the RFOA issue, it also left open the issue of how and to what extent the RFOA provision affects the traditional "business necessity" analysis.

### **Facts of the Case**

Knolls Atomic Power Laboratory designs nuclear propulsion systems for the US Navy. Budget cuts forced Knolls Atomic to reduce the size of its workforce by about five percent. After an initial round of voluntary job reductions, the company determined that additional job eliminations were necessary. It implemented an "involuntary reduction in force" using a matrix method that ranked employees based on objective factors – such as performance and years of service – as well as subjective factors, such as flexibility and criticality. The employees with the lowest scores were targeted for job elimination. Before making a final decision, Knolls Atomic analyzed the targeted employees for disparate impact under factors such as race and gender, but no similar analysis was performed for age. Of the 31 workers laid off, 30 were over the age of 40 and therefore protected by the ADEA.

Twenty-eight workers eventually filed suit against the company alleging disparate impact under the ADEA. A jury found Knolls Atomic liable and awarded the employees \$6 million. On appeal, the U.S. Circuit Court of Appeals for the 2nd Circuit affirmed the jury verdict.

The Supreme Court agreed to consider the case but remanded it to the 2nd Circuit for reconsideration in light of its ruling in *Smith v. City of Jackson*. On remand, a divided 2nd Circuit reversed the jury verdict and held in favor of the company, finding that the Supreme Court's emphasis on RFOA in the *Smith* case had modified the traditional three-step analysis by replacing the "business necessity test" with a "reasonableness test." Significantly, the 2nd Circuit also held that the burden of persuasion regarding the reasonableness test rests with the employee. The Supreme Court agreed to decide one simple question with far-reaching implications: which side has the burden of persuasion regarding the RFOA issue?

### **A Troubling Ruling for Employers**

The Court ruled that the RFOA defense is an affirmative defense, which means that employers now carry the burden both to produce evidence supporting the defense *and* to persuade the jury that the defense has merit.

The Court rejected the use of the "business necessity" test in ADEA disparate impact cases, holding that the test has no place in this type of litigation. The Court reasoned that it would be wasteful and confusing to apply both a business necessity test and the RFOA defense. Accordingly, the employee must establish that an employer's business practice had a disparate impact among older workers, and the employer must then prove that any disparate impact was based on reasonable factors other than age.

The Court deflected anticipated criticism of its ruling by maintaining that an employee cannot simply show a disparate impact, but rather must show the specific practice that caused the disparate

impact. Critics of the decision will point out that in many cases this will be a hollow distinction and that the employer is presumed to be liable and must therefore carry the primary burden of proof.

### **What Does This Mean For Employers?**

As a result of this ruling, employers sued under the ADEA will have a more difficult time avoiding liability. Ironically, although the ADEA was intended to have a narrower scope of liability than Title VII, this ruling does not appear to support that intent. The result, as the Court even recognized in its opinion, is that ADEA cases will be harder and costlier for employers to defend. Accordingly, there will likely be an increase in the number of disparate impact claims brought under the ADEA, as well as an increase in the number of cases where the employee prevails.

In a broader context, the heightened prospect of liability may create a chilling effect on employers who are considering the implementation of strategies designed to streamline their workforce in light of changing market conditions. Employers would be well served to ensure that lay-off decisions and other RIFs do not affect workers over 40 in a disproportionate manner.

For additional information on how this ruling may affect your business, please contact your regular Fisher Phillips attorney.

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