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U. S. Supreme Court Rules in Three Employment Cases

On June 19, 2008, the U. S. Supreme Court announced decisions in the following three cases of significance to employers:

1. Employer Must Prove Defense That Disparate Impact Due to Non-Age Reason

Meacham v. Knolls Atomic Power Laboratory. The U. S. Supreme Court ruled on June 19, 2008, that an employer has the burden of proof when it invokes the statutory affirmative defense of “reasonable factors other than age” in defending against a disparate impact claim under the Age Discrimination in Employment Act (“ADEA”). Meacham v. Knolls Atomic Power Laboratory, No. 06-1505, 2008 U.S. LEXIS 5029 (June 19, 2008). The Court’s decision applies only in an ADEA disparate impact case where the employer premises its position on the statutory defense.

The ADEA provides a statutory exemption from liability in a disparate impact case for an employment decision based on “reasonable factors other than age” (29 U.S.C. § 623(f)(1)). In Meacham, the Supreme Court held (in a 7-1 decision, without Justice Breyer) that this is an affirmative defense for employers, and “the burden of persuasion falls on the ‘one who claims its benefits.’” *Id.* at *17. Consequently, employers “must not only produce evidence raising the defense, but also persuade the factfinder of its merit,” i.e., that the factor relied upon was a “reasonable” one for the employer to be using. *Id.* at *6.

Key Facts and Points of Law

Plaintiffs brought a disparate impact claim under the ADEA, alleging that the selection criteria used by their employer in a reduction-in-force resulted in older workers being chosen for termination on a statistically disparate basis (30 of 31 employees selected for layoff were age forty or over). The Second Circuit Court of Appeals overturned the jury’s verdict for the plaintiffs on the basis the plaintiffs had the burden to establish that the factors relied upon by the employer were not reasonable, and they had failed to meet that burden.

The Supreme Court overruled the Second Circuit, and clarified its prior decision in Smith v. City of Jackson, 544 U. S. 957 (2005), which had found disparate impact claims actionable under the ADEA. Following City of Jackson, the Second and Tenth Circuits held that the employee bears the burden of establishing that the factors underlying the employment action were not reasonable. The Court’s decision in Meacham overrules the Second and Tenth Circuits.

Implications for Employers

- The Court’s ruling only applies where a specific employment practice or policy is found to have a disparate impact on older workers and the employer invokes the statutory affirmative defense under the ADEA that the disparity is due to “reasonable factors other than age.”

- The burden rests on the employer to establish that its selection of a specific practice or policy was a “reasonable” one, not that it was the best choice, the choice with the least disparate impact or the correct decision. There is a danger, however, that triers of fact may extend the concept of reasonableness to a more expansive second-guessing of personnel decisions.
 - The Court’s decision does not change the law in an ADEA disparate impact case on the following: the statistical disparity still must be significant and plaintiffs still must isolate a specific practice or policy alleged to have caused that disparity. Those are substantial threshold burdens on the plaintiff, and they remain intact (no weak statistics, no generalized allegations).
 - The Court’s decision does not change the law that applies in the overwhelming majority of employment discrimination cases: the employee always has the ultimate burden of proof, the burden of proof never shifts to the employer and, at most, the employer has a burden of production.
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2. Age as a Factor for Determining Benefits Not Facially Discriminatory

Kentucky Retirement Systems v. EEOC. On June 19, 2008, the U. S. Supreme Court also ruled that the use of age as a factor for determining benefits in a retirement or benefits plan does not constitute automatic age discrimination under the Age Discrimination in Employment Act (“ADEA”). Kentucky Retirement Systems v. EEOC, No. 06-1037, 2008 U.S. LEXIS 5032 (June 19, 2008). In a 5-4 decision, the Court reversed the Sixth Circuit Court of Appeals and held that a retirement plan, which treated workers differently based on pension status, was not discriminatory. The Court held that disparity under the plan was based on pension status (a combination of age and years of service) – not age or age-related stereotypes.

Key Facts and Points of Law

Kentucky’s state-wide retirement plan for police officers and other “hazardous position” workers who became disabled was structured so that comparable employees who had the same number of years of service, but different ages, could receive dramatically different benefits. The age criterion was explicit in the retirement plan. The EEOC filed suit, alleging that in calculating the retirement benefits owed to disabled workers, the state used age in a way that disadvantaged older workers.

Implications for Employers

- Based on the Court’s decision, the law in the Second, Sixth, Seventh, Eighth, and Ninth Circuits, which previously found that the use of age as a trigger for benefits in a retirement plan is facially discriminatory, will change.
 - Existing retirement plans that use age as one of multiple conditions of pension eligibility and treat workers differently in light of their pension status remain lawful under the Court’s decision. Employers have discretion in constructing plans as long as they do not make decisions based solely on age.
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