

Supreme Court Clarifies Claims of Disparate Impact Under the Age Discrimination in Employment Act

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The United States Supreme Court recently clarified the burdens of proof under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, which is the federal law that prohibits age discrimination against employees who are age 40 and older. The court's decision is not good news for employers and will make it more difficult to defend against federal age discrimination claims.

Sometimes, employment decisions can be based on non-discriminatory factors, such as compensation level, and result in a disparate impact on older workers. Therefore, a “disparate impact” claim differs from a disparate treatment claim where a plaintiff would need to show that the adverse decision resulted from unlawful consideration of the worker's age. Disparate impact cases rely on statistical evidence to prove a violation under the ADEA.

In *Meacham v. Knolls Atomic Power Laboratory, Inc.*, 554 U.S. ____ (2008), the employer laid off 31 salaried workers, 30 of whom were over the age of 40. Twenty-eight of those laid-off sued under the ADEA claiming, among other things, that, statistically, results so skewed against older workers could not have occurred simply by chance.

Because it is the natural cycle for older workers to leave the workforce and younger ones to enter, the burdens of proof applicable to the ADEA are somewhat different from those applicable to other forms of discrimination (such as race or sex) under Title VII. Specifically, the ADEA states: “[i]t shall not be unlawful for an employer ... to take any action otherwise prohibited under subsections (a)(b)(c) or (e) ... where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age [RFOA]...” 29 U.S.C. § 623(f)(1).

BFOQ has been used to exclude pilots over a certain age, for example. However, at issue in *Meacham* was how RFOA should be applied to the burdens of proof in a case. For example, should the plaintiff/employee have to prove that the factor employed by the defendant/employer is unreasonable or should the employer have this burden? Also, if it is the employer's burden, is the employer required to simply produce evidence of the “reasonable factor” it relied upon to make the employment decision at issue, or should it be required to persuade the finder of fact (typically a jury) that the factor was reasonable?

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The Supreme Court ruled that RFOA is an affirmative defense and not part of the plaintiff's case. That means, once the employee has come forward with statistical evidence of disparate impact on older workers, an employer can defend by arguing it based its decision on a reasonable factor other than age. Unfortunately for employers, the court further held that the employer's burden is not to simply articulate a reasonable factor other than age, but to **persuade** the finder of fact that the factor was reasonable.

Unlike the BFOQ defense, which requires examination of whether there were other ways for the employer to achieve its goals without impacting older workers, the RFOA defense has no such additional inquiry. The factor must simply be reasonable. As the court notes, "a reasonable factor may lean more heavily on older workers, as against younger ones, and an unreasonable factor might do just the opposite." *Meacham, slip op.* at 11. The court recognized that "there was no denying that putting employers to the work of persuading fact finders that their choices are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production..." but it also recognized that the more plainly reasonable the factor, the shorter the step. The court concluded that only where the reasonableness of the factor is somehow obscure will the employer have a great deal more convincing to do.

As recognized by the court, shifting the burden to the employer and requiring the employer to persuade and not simply come forward with a reasonable factor makes disparate impact cases under the ADEA more difficult and costly to defend. When all else is equal and the scales of justice have not tipped on whether the factor utilized for the decision is reasonable, the employer will lose.