

Client Alert

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Second Circuit Affirms Jury Verdict For Age Discrimination Claim Based on Disparate Impact Theory Under the ADEA

In *Meacham v. Knolls Atomic Power Lab.*, 2004 U.S. App. LEXIS 17873 (2d Cir. Aug. 23, 2004), the United States Court of Appeals for the Second Circuit upheld a jury verdict awarding \$4.2 million dollars to seventeen plaintiffs in connection with their disparate impact claim under the Age Discrimination in Employment Act ("ADEA"). The claim was based on their employer's involuntary reduction in force ("IRIF"), which they claimed had a disparate impact on older workers.

Knolls Atomic Power Laboratory ("KAPL") is a government-funded research and development facility owned by the United States and is under contract with the Department of Energy. *Id.* at *5. In 1996, it became necessary for KAPL to eliminate the jobs of 143 of its 2,063 exempt employees in order to remain within its budget. To achieve this, KAPL implemented voluntary separation plans (including, offering separation packages and approving job transfers) in which 107 employees participated. KAPL then began to implement the IRIF to further reduce its work force to the target level. *Id.* at *6 -*7.

KAPL's IRIF plan consisted of determining which of its departments were over budget, and reducing the work force within those departments. Managers in the over-budget departments were instructed to rank their subordinates on their performance, flexibility, criticality of skill and company service. The lowest

ranking employees were identified as employees to be considered for termination under the IRIF. *Id.* at *8-*9. KAPL then performed an internal adverse impact analysis to determine whether its selection process had a disparate impact on older workers. *Id.* at *9. KAPL performed this analysis by comparing the average age of its work force before the IRIF with the average age after the IRIF, which did not yield a significant difference. *Id.* at *10, *14. Of the 245 employees identified by managers, 31 were terminated under the IRIF plan. Of the 31 employees who were terminated, however, 30 (or 98%) were over the age of forty.

Thereafter, the plaintiffs filed a consolidated action in the United States District Court for the Northern District of New York, alleging that KAPL discriminated against them based on their age because its IRIF disparately impacted older workers. *Id.* at *14. KAPL moved for summary judgment on the plaintiffs' disparate impact claim, arguing that such a claim is not cognizable under the ADEA. *Id.* at *15. The district court denied KAPL's motion without opinion. After a jury trial, the jury returned a \$4.2 million verdict for the plaintiffs. KAPL appealed.

In upholding the jury verdict, Judge Rosemary Pooler, writing for the Second Circuit panel, stated that previous Second Circuit decisions have held that disparate impact claims are viable under the ADEA. *E.g., Smith v. Xerox Corp.*, 196 F.3d 358, 364 (2d Cir. 1999); *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *Maresco v. Evans Chemetics*, 964 F.2d 106, 115 (2d Cir. 1992). Judge Pooler concluded that *stare decisis* prevented the Circuit from rejecting this principle until it was overruled by an *en banc* panel or by the United States Supreme Court. *Id.* at *28. The Second Circuit was not persuaded by KAPL's argument that the holding and dicta of *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993), which held that it is not unlawful under the ADEA for an employer to make an employment decision based on an objective factor even though such factor may be closely related to age, suggests that the Supreme Court

will ultimately reject disparate impact claims under the ADEA -- particularly because *Hazen Paper* explicitly stated that it had not resolved the issue of the viability of ADEA disparate impact claims.

Therefore, the *Meacham* decision reaffirms Second Circuit precedent, which is at odds with the majority of federal appellate courts. Of the circuits that have addressed this issue, the Second, Eighth and Ninth Circuits hold that disparate impact claims are viable under the ADEA, while the First, Fifth, Seventh, Tenth and Eleventh Circuits hold to the contrary. This issue is expected to be resolved by the Supreme Court next term in *Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003), *cert. granted*, 124 S. Ct. 1724 (2004), which held that the disparate impact theory is not available under the ADEA.

Implication of *Meacham* For Employers

The implication of *Meacham* is significant for employers doing business in New York and within the Second Circuit. Indeed, seemingly neutral employment practices and policies that have a disparate impact on employees over the age of forty may expose employers to liability under the ADEA. Given the ruling in *Meacham*, employers should carefully examine their practices and policies -- particularly in connection with the implementation of involuntary reduction in force plans -- to ensure that such methods do not result in a disparate impact on its employees over the age of forty (or any other protected class of individuals).

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Proskauer's 160-plus Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers. For more information about this practice area, contact:

Howard L. Ganz
212.969.3035 – hganz@proskauer.com

Edward Cerasia II
973.274.3224 – ecerasia@proskauer.com

Allen I. Fagin
212.969.3030 – afagin@proskauer.com

Rosetta E. Ellis
973.274.3281 – rellis@proskauer.com

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