

Client Alert

A report
for clients
and friends
of the Firm June 2008

Supreme Court Places Burden On Employers In Age Bias Disparate Impact Cases

On June 19, 2008, the U.S. Supreme Court issued an important decision, making it easier for older workers to prove that they were subjected to age discrimination. Given the economic downturn, and the resulting uptick in layoffs, this age-bias ruling is likely to trigger an increase in age discrimination lawsuits, particularly where disproportionate numbers of employees age 40 or older lose their jobs in a reduction in force.

In *Meacham et al. v. Knolls Atomic Power Laboratory et al.*, No. 06-1505, the United States Supreme Court held, in a 7-1 ruling, under the Age Discrimination in Employment Act (ADEA), that an employer defending a disparate impact claim on the basis of a reasonable factor other than age (RFOA) bears both the burden of production and the burden of persuasion in showing that the factors the employer relied upon in selecting those employees to be laid off were reasonable. In so ruling, the Supreme Court resolved a conflict dividing the federal appellate courts where the U.S. Court of Appeals for the Ninth Circuit had placed these burdens on the employer, whereas the Second Circuit had placed the burden of persuasion on the employees to show that the factors relied upon by the company were unreasonable.

Background and Lower Courts' Decisions

The federal government contracts with private companies, such as Knolls Atomic Power Laboratory ("Knolls"), to do certain work maintaining the country's fleet of nuclear powered warships. In or about 1996, the government ordered Knolls to reduce its workforce. Knolls conducted an involuntary reduction in force (RIF) resulting in the layoff of thirty-one employees, thirty of whom were over 40 years of age or older. Twenty-eight of the terminated employees filed suit asserting a disparate impact claim under the ADEA.

The selection of employees was based on a matrix, where managers ranked employees from zero to ten on performance, flexibility, and criticality of their skills. The managers could also give an employee up to ten points for company service. After completing this process, a review board, and then the general manager and general counsel, reviewed the managers' decisions. On behalf of the employees, a statistician testified that it was extremely unlikely that Knolls' termination decisions with respect to age happened by chance, and that the scores for "flexibility" and "criticality," over which managers had the most discretionary judgment, had the firmest statistical ties to the outcome.

Before a jury at the district court, and a 2004 panel of the Second Circuit, plaintiffs prevailed by showing that the criteria for layoff used by Knolls failed the "business necessity" test because the results demonstrated a disparate impact on account of age where 30 of the 31 employees selected for layoff, out of 245 workers considered, were age 40 or older. In addition, plaintiffs showed that there existed alternative criteria that could have achieved the same results without disadvantaging a protected group.

After Knolls sought *certiorari*, the U.S. Supreme Court vacated the judgment and remanded for further proceedings in light of its then recent decision, *Smith v. City of Jackson*, 544 U.S. 228 (2005). In that case, the high court ruled a plaintiff could bring an age discrimination claim based on a disparate impact theory but that an employer need not prove "business necessity" in order to rebut a plaintiff's *prima facie* case of age discrimination, rather the employer only had to demonstrate that its decision was based on "reasonable factors other than age." On remand, the Second Circuit *reversed* its earlier decision and this time ruled in favor of Knolls. The Second Circuit majority found its prior ruling "untenable" because it had erroneously applied the "business necessity" standard rather than a "reasonableness" test, and then placed the burden of persuasion on the Meacham plaintiffs to demonstrate that Knolls' reasons for the layoff selections were *unreasonable*, a burden the plaintiffs could not carry. In finding for Knolls, the Second Circuit set the stage for the Supreme Court's landmark ruling.

The Supreme Court Decision

The Supreme Court's six judge majority, in an opinion authored by Justice Souter, held that where an employer differentiates between employees based on factors other than age, the employer bears the burden of proof, demonstrating that the criteria utilized were reasonable. In so ruling, the Court analyzed the ADEA's statutory language. The Court noted that the ADEA prohibits employers from discriminating against individuals age 40 or over because of age but creates an exemption for employer actions "otherwise prohibited" by the ADEA ". . . where the differentiation is based on reasonable factors other than age . . .". 29 U.S.C. § 623(f)(1).

The Court compared the RFOA exception to the bona fide occupational qualification (BFOQ) exception, an ADEA exemption the Court had already determined was an affirmative defense, placing the burden of persuasion on the party claiming its benefits – employers – and found it "impossible to look at the text and structure of the ADEA and imagine that the RFOA clause works differently from the BFOQ clause next to it."

Reasoning further, the Court noted that the "otherwise prohibited" language prefacing § 623(f)(1) "refers to an excuse or justification for behavior that, standing alone, violates the statute's prohibitions." Inclusion of such language, Justice Souter reasoned, was intended by Congress "as a clear signal that a defense to what is 'otherwise prohibited' is an affirmative defense, entirely the responsibility of the party raising it."

In reading the RFOA exemption as an affirmative defense, placing the burden of persuasion squarely on the employer, the Supreme Court also ruled that the business necessity test has "no place in ADEA disparate-impact cases . . ." reasoning that it would create a "confusing structure of proof."

At the same time, the Court took note of the concerns raised by *amici*, who contended that placing the burden of persuasion for an RFOA defense on employers "will encourage strike suits or nudge plaintiffs with marginal cases into court," by stating that "a plaintiff falls short by merely alleging a disparate impact" and "is obliged to do more," such as by identifying "the specific employment practices that are allegedly responsible for any observed statistical disparities."

In a telling refrain, Justice Souter commented: "there is no denying that putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend . . . nor do we doubt that this will sometimes affect the way employers do business with their employees." These valid concerns the Court suggested "have to be directed at Congress which set the balance where it is We have read it the way Congress wrote it."

Implications for Employers

No one likes layoffs. Given the large numbers of layoffs implemented by employers over the last twelve months, not to mention those on the horizon due to deteriorating economic

conditions, this decision may encourage dissatisfied employees who are older to challenge the underlying rationales for their respective layoffs. Assuming a disparate impact can be shown in the reduction in force, employers will now bear the burden of demonstrating the reasonableness of their decisionmaking. *Meacham* makes clear that this means something more than merely articulating a rationale for the action taken, it means convincing a factfinder that there was a justifiable reason for laying off the age-protected employee, while retaining a co-worker doing the same job who happens to be non-age protected.

While there are different approaches to making layoff selections, a systematic approach can reduce the potential risks that even the Supreme Court noted are real. Some steps to consider would include, but are not limited to, the following:

- creation of a diverse management oversight committee to ensure the objectivity of each layoff;
- identify and document the reasons for the downsizing;
- identify the criteria (objective and subjective) used for selecting participants, assign appropriate weight to each and document reasons for the selection decisions;
- assuming performance is one of the criteria to be used, carefully assess and identify how performance will be measured and weighed, being mindful that supervisors' past performance appraisals of employees may be at odds with their present day assessments;
- consider your company policies;
- consult a statistician; and
- consult counsel.

In the wake of *Meacham*, employers who have been sloppy in documenting and applying a systematic approach to their personnel actions, may be vulnerable to disparate impact age claims.

If you have concerns about your businesses' practices, particularly concerning reductions in force, please don't hesitate to reach out to Proskauer's Employment Law Counseling and Reduction In Force Practice Groups which are comprised of seasoned practitioners who have guided scores of businesses through workplace changes, reductions in force, and restructurings. Partnering with our clients, Proskauer attorneys work diligently in coming up with creative business solutions that address today's human resources challenges and tomorrow's opportunities. As always, if you have any questions regarding this Client Alert, please contact your Proskauer relationship attorney or any of the attorneys listed below.

BOCA RATON • BOSTON • CHICAGO • LONDON
LOS ANGELES • NEW ORLEANS • NEW YORK • NEWARK
PARIS • SÃO PAULO • WASHINGTON, D.C.

Client Alert

The Proskauer Rose Employment Law Counseling and Training Practice Group is a multidisciplinary practice group throughout the national and international offices of the Firm which advises and counsels clients in all facets of the employment relationship including compliance with federal, state and local labor and employment laws; review and audit of employment practices, including wage-hour and independent contractor audits; advice on regulations; best practices to avoid workplace problems and improve employee satisfaction; management training; and litigation support to resolve existing disputes.

For more information about this practice area, contact:

New York:	David H. Diamond 212.969.3775 – ddiamond@proskauer.com Fredric C. Leffler 212.969.3570 – fleffler@proskauer.com Marc A. Mandelman 212.969.3113 – mmandelman@proskauer.com
Newark:	Lawrence R. Sandak 973.274.3256 – lsandak@proskauer.com John P. Barry 973.274.6081 – jbarry@proskauer.com
Boston:	Mark W. Batten 617.526.9850 – mbatten@proskauer.com
Washington, D.C.:	Lawrence Z. Lorber 202.416.6891 – llorber@proskauer.com
New Orleans:	Charles F. Seemann, III 504.310.4091 – cseemann@proskauer.com
Los Angeles:	Anthony J. Oncidi 310.284.5690 – aoncid@proskauer.com Arthur F. Silbergeld 310.284.5624 – asilbergeld@proskauer.com
Boca Raton:	Allan H. Weitzman 561.995.4760 – aweitzman@proskauer.com

We would like to acknowledge Labor & Employment Law Associate Preston M. Strosnider for his significant contributions to this Alert.

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.

© 2008 PROSKAUER ROSE LLP. All rights reserved. Attorney Advertising.

You can also visit our Website at www.proskauer.com