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The Employment Law Lowdown

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Employers Now Bear the Burden of Production and Persuasion in ADEA Disparate Impact Cases

The United States Supreme Court has ruled that employers now have not only the burden of production but also the burden of persuasion in proving the affirmative defense of reasonable factors other than age (RFOA) in disparate impact Age Discrimination in Employment Act (ADEA) cases.

In *Meacham v. Knolls Atomic Power Laboratory*, 2008 U.S. LEXIS 5029, No. 06-1505 (June 19, 2008), thirty of the thirty-one salaried employees laid off in a reduction in force were at least forty years old. Twenty-eight of the employees sued alleging disparate treatment and disparate impact claims under the ADEA. The Supreme Court granted review of the case to address conflicting lower court decisions regarding which party carries the burden of persuasion when the affirmative defense of RFOA is raised. In a typical employment case, the employee introduces evidence of discriminatory acts. While the employer produces evidence to support its defense for its actions, the employee continues to ultimately bear the burden of persuading the jury that the employer's evidence is a pre-text to hide the discriminatory actions. Based on this analysis, the 2nd Circuit Court of Appeals placed on the *Meacham* employees the burden of persuasion in both their disparate treatment and disparate impact claims. Other courts, however, have held that the burden of persuasion as well as production should be carried by the employer in an RFOA defense.

The Supreme Court analyzed both theories and held that the RFOA defense is an affirmative defense. The Court continued that, where a party seeks the benefit of an affirmative defense, as the employer did in *Meacham*, that party not only bears the burden of production but also the burden of persuasion. As such, when an employer raises RFOA as an affirmative defense, it must not only produce evidence in support of the defense, it must also convince the jury that the defense is meritorious.

In what appeared to be an attempt to balance the equities, the Supreme Court also ruled that employees alleging disparate impact claims have the burden of "isolating and identifying the specific employment practices that are allegedly responsible" for the disparate impact. Merely pointing to a generalized policy that leads to a disparate impact will not suffice in meeting the burden with which employees are charged.

For more information on Meacham or reductions in force in general, call Leslie A. Lajewski or Steven J. Luckner.

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