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April 2012

The EEOC Misses the Mark with New Rule on the ADEA's Reasonable Factors Other Than Age Defense

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The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination on the basis of age and covers employees who are 40 years of age and older. The ADEA provides a statutory exception for "reasonable factors other than age."[1] Since the Supreme Court held, in *Smith v. City of Jackson*,[2] that employees could bring a disparate impact case under the ADEA, employers have been seeking guidance from the EEOC on how it would interpret the cryptic phrase "reasonable factors other than age" in the disparate impact context. In response to *Smith*, on March 30, 2012, the EEOC published its revised rule with regard to the RFOA defense. However, the hope that the Final Rule will assist employers engaged in reductions-in-force or setting workforce job qualifications seems unlikely to be realized because the new rule contradicts *Smith* and the Supreme Court's subsequent opinion in *Meacham v. Knolls Atomic Power Laboratory*.[3] Under the Final Rule, the EEOC makes it more challenging for employers to implement facially neutral employment policies that should otherwise be lawful because they are based legitimately on nonage factors.

Application of the Reasonable Factors Other Than Age Defense in ADEA claims

The ADEA recognizes discrimination claims under the theories of disparate treatment and disparate impact. The former prohibits employers from intentionally discriminating against an employee because of his or her age, whereas the latter prohibits an employer from implementing a facially neutral policy that adversely affects older workers. But the ADEA specifically precludes liability under a disparate impact theory where the "adverse impact is attributable to a nonage factor that was 'reasonable.'"[4] For example, *Smith* held that a city's decision to grant larger raises to lower tier employees was lawful, even though the policy had a disparate impact on the city's older police officers who had more seniority. That is because the policy was reasonable in its purpose to bring salaries in line with surrounding police forces and retain police officers.[5]

Importantly, so long as an employer's practices are based on reasonable factors other than age, neither the language of the ADEA nor Supreme Court precedent requires an employer to mitigate the potential harm of a practice or consider alternative practices to prevail on a RFOA defense. "Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness

inquiry includes no such requirement."[6] *Meacham* confirmed that "the business necessity test should have no place in ADEA disparate impact cases."[7]

The EEOC's Revised Regulation Contradicts Smith and Meacham and Threatens the Viability of the RFOA Defense

The EEOC's stated purpose in revising its rule on RFOA was to align the regulation with the Supreme Court's decision in *Smith*. Consistent with *Smith* and *Meacham*, the EEOC's revised rule clarifies that the RFOA defense is only applicable in disparate impact cases.[8] But the rule deviates from the statute and case law by suggesting that an employer should be liable for a facially neutral practice if it negligently or unreasonably failed to mitigate the disparate impact associated with its practice.

The regulation provides, in relevant part:

> "Considerations that are relevant to whether a practice is based on a reasonable factor other than age include but are not limited to . . .
>
> (ii) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the *extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination*;
>
> (iii) The extent to which the employer limited supervisors' discretion to assess employees subjectively, *particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes*;
>
> (iv) The extent to which the employer *assessed the adverse impact of its employment practice on older workers*; and
>
> (v) The *degree of the harm to individuals within the protected age group*, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps."[9]

These "considerations" turn the RFOA analysis into something the Supreme Court has said has no place in the ADEA. The language of the statute and the Supreme Court decisions provide that employers may lawfully implement a facially neutral employment practice, even one that has a disparate impact on older workers, so long as it is based on a reasonable nonage factor. Yet, the EEOC's revised rule suggests that employers can only prevail on a reasonable factor defense if they demonstrate that they reasonably mitigated the potential impact of their practices and trained supervisors to avoid age-based considerations and stereotypes. By including within the definition of "reasonable" whether the employer applied a policy in an age-neutral fashion effectively requires the employer to consider age in deciding whether the non-age factor is reasonable. This shrinks the defense to a size unrecognizable from *Smith and Meacham*.

When an employer is defending a facially neutral employment practice – *i.e.*, a practice based on *reasons other than* age – it makes no sense to require the employer to come forward with evidence that it considered age and age-based stereotypes in implementing the practice. As *Meacham* explains:

> [I]n the typical disparate-impact case, the employer's practice is "without respect to age" and its adverse impact (though "because of age") is "attributable to a nonage factor;" so action based on a "factor other than age" is the very premise for disparate-impact liability in the first place, not a negation of it or a defense to it. The RFOA defense in a disparate-impact case, then, is not focused on the asserted fact that a non-age factor was at work; we assume it was. The focus of the defense is that the factor relied upon was a "reasonable" one for the employer to be using. Reasonableness is a justification categorically distinct from the factual condition "because of age" and not necessarily correlated with it in any particular way: a reasonable factor may lean more heavily on older workers, as against younger ones, and an unreasonable factor might do just the opposite.[10]

It is not at all clear that these new regulations will survive judicial scrutiny.

What this Means for Employers

The EEOC's regulations are inconsistent with the ordinary language of the ADEA and the Supreme Court's decisions in *Smith* and *Meacham*. While the new regulations could be vulnerable to legal challenges, employers should nevertheless be mindful of the regulations when

implementing policies and practices that could have a negative effect on older workers. Recommended best practices include the following:

- Document the business needs and goals that serve as the basis for an employment practice or policy that may adversely impact older workers. For example, if an employer is modifying its attendance policy to curb unreliable attendance or excessive absenteeism, analyze and document how the revised policy will achieve the intended results.
- Retain evidence that drives any decision that may affect employees in a protected class, age or otherwise. For example, if employee performance is a key factor in a workforce reduction selection process, retention of accurate performance records will be critical.
- In workforce reductions, ensure that individual managers or supervisors understand the nonage factors on which they should make recommendations or selections – objective criteria are always better than subjective criteria. Then scrutinize all decisions for any veiled age bias.
- Use statistical analysis to ascertain the risk of a disparate impact on older workers. Importantly, this analysis should be conducted and reviewed before an employment practice goes into effect, not after litigation begins.

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[1] 29 U.S.C. § 623(f)(1).

[2] 544 U.S. 228 (2005).

[3] 554 U.S. 84 (2008).

[4] *Smith*, 544 U.S. at 239; 29 U.S.C. § 623(f)(1). *Smith* further explains, "We note that if Congress intended to prohibit all disparate-impact claims, it certainly could have done so. . . . The fact that Congress provided that employers could use only reasonable factors in defending a suit under the ADEA is therefore instructive." 544 U.S. at 239 n. 11.

[5] *Id.* at 242.

[6] *Meacham*, 544 U.S. at 99 n. 14 (quoting *Smith*, 544 U.S. at 243).

[7] *Meacham*, 544 U.S. at 99.

[8] 29 C.F.R. § 1625.7.

[9] 29 C.F.R. § 1625.7(e)(2) (emphasis added).

[10] *Meacham*, 554 U.S. at 96.