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Reductions in Force: The Supreme Court Escalates The Legal Risks

While economists debate whether the United States is in a recession, there is no doubt that business conditions have greatly deteriorated as a result of the subprime crisis, high oil prices, and increasing inflation. There also can be no doubt that as employers consider possible reductions in force (“RIFs”) in response, the Supreme Court’s decision in *Meacham et al. v. Knolls Atomic Power Laboratory*, No. 06-1505, 553 U.S. ___ (June 19, 2008), has greatly increased the legal risk from RIF decisions. In *Knolls*, the Court held in a 7-1 decision that employers bear the burden of *proving* a legitimate non-discriminatory reasonable factor other than age when a RIF has an adverse or disparate impact on employees 40 years of age or older.

Case Overview

Knolls is a federal contractor working on naval nuclear reactors and training. Knolls was ordered by the federal government to reduce its workforce. To determine which employees should be laid off, Knolls directed its managers to rate employees on three factors: performance, flexibility and critical skills. The scores on these three factors, along with a fourth factor, years of service, were then used to select those to be laid off. According to the Court, 30 of the 31 employees to be laid off were at least 40 years old, the initial threshold for coverage under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* (“ADEA”). The employees filed an ADEA charge with the Equal Employment Opportunity Commission (“EEOC”) and ultimately a law suit based on both disparate treatment and disparate impact claims.

A disparate impact claim alleges that the ADEA is violated if an employment policy that is neutral on its face (here, the four-factor selection criteria) has a statistically significant adverse or disparate impact when applied to over-40-year-old employees versus younger employees. Plaintiffs relied on a statistical expert who argued that managers had the greatest discretion in evaluating the flexibility and criticality factors and that the results for these two factors showed the strongest statistical ties to selection of the older employees. After trial, a jury ruled for Knolls on the treatment claim and for the plaintiffs on the disparate impact claim. The U.S. Court of Appeals for the Second Circuit first affirmed on appeal.

That was not the end of the case, because the Supreme Court vacated

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that judgment in light of its decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005). *Smith* held that employees pursuing age discrimination claims could rely on the disparate impact theory like employees alleging race, sex, or other claims of discrimination. The Court had earlier cast some doubt on whether the different situations of individuals covered by the ADEA would permit use of the disparate impact theory (see *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)). In *Smith*, the Supreme Court cited the Reasonable Factor Other Than Age (“RFOA”) ADEA affirmative defense as protecting employers from liability for many regular employment practices. Under the RFOA analysis, an employer need not choose the employment practice with the least disparate impact of available alternatives, as is true in a business necessity defense to, e.g., a race or sex adverse impact claim. The *Smith* Court held only that the employer must select an alternative which is “not unreasonable.” Because the Court found the practice in *Smith* was “unquestionably reasonable,” it had not addressed how the RFOA defense interacts with the usual business necessity defense requirement in other disparate impact discrimination claims where the burden of proving the business necessity defense is on the employer (see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

The Supreme Court’s decision in *Smith* thus caused the Second Circuit to reverse its first decision in *Knolls* because it had applied a “business necessity” standard rather than a “reasonable” test in assessing *Knolls*’ reliance on the four selection factors.

The Supreme Court reversed the Second Circuit’s second decision in favor of *Knolls* and held that an employer raising a RFOA affirmative defense to an ADEA disparate impact claim must *both* introduce evidence of its RFOA (*i.e.*, bear the burden of production) *and* persuade the trier of fact of the reasonableness of the RFOA factor(s) (*i.e.*, bear the burden of persuasion).

What This Means For Employers Contemplating Right Sizing Activities

The Court’s decision unequivocally requires employers to be able to *prove* the reasonableness of the factors it uses to reach employment decisions that have an adverse impact on older workers. As *Knolls* shows, litigation results in some cases can turn on whether the employees suing the employer, or the employer, bear the burden of persuasion.

While prudent employers have always exercised care in reaching decisions on RIFs, the *Knolls* decision unequivocally places an even higher premium on doing so. Key employer actions to prevent ADEA liability for implementing a layoff should include the following, among others:

- Select factors to be used for layoff decisions with great care and review their potential defensibility with experienced counsel.
- To the maximum extent feasible, make such factors turn as much as possible on more objective or measurable indicia.
- Thoroughly train managers who will apply RIF factors to employees to make their decisions as objective as possible and to note specific facts supporting their rankings.
- Remind all involved to avoid any inadvertent comments that might be cited as evidence of age animus.



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- Have a committee composed of individuals who represent various protected groups, obviously including those protected under the ADEA, make or review proposed RIF decisions.
- Working with experienced counsel to maximize attorney client privilege claims, assess the potential statistical impact of proposed RIF decisions to see if they would produce adverse impact on the basis of age, race, sex or other protected status.
- If the proposed RIFs would produce adverse impact, work with counsel to assess the defensibility of the decisions and the process of reaching them or whether further consideration would be appropriate.
- Preserve all information supporting the decisions made so that the process can be defended if necessary and to prevent any issues concerning preservation and production of electronically stored evidence (ESI) in the event of litigation concerning the RIF.

Precisely at a time when the economy may force employers to make more RIF decisions, the Supreme Court has made defending such decisions decidedly harder for employers. Proper planning, processes, legal review and execution are absolutely essential for any employer contemplating a RIF and are critical to avoid liability under the ADEA in light of Court's *Knolls* decision.

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If you have any questions on *Meacham v. Knolls Atomic Laboratory*, reductions in force or other employment or labor issues, please contact Frank C. Morris, Jr. at (202) 861-1880, fmorris@ebglaw.com, at the Firm's Washington, D.C. office.

(Editor's note: Frank C. Morris is author of the book [Current Trends In The Use \(& Misuse\) of Statistics In Employment Discrimination Litigation.](#))

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