

Age Discrimination:

How the Supreme Court Has Made Layoffs Even More Challenging

BY BARBARA E. HOEY, ESQ.



Planning a layoff or staff reduction is always difficult. There are business as well as human concerns, planning is often fraught with emotion, and there are potential legal issues looming in the background.

Adding to this complex landscape, in June 2008, the Supreme Court issued a decision which likely will leave employers more vulnerable to age discrimination lawsuits by workers who are terminated in layoffs. In *Meacham v. Knolls Atomic Power Laboratory*, No. 06-1505, the Court held that an employer defending against a claim that a layoff had a “disparate impact” on older employees must prove that the layoff was based on “reasonable factors other than age.” In a real sense, the Court is telling an employer that if they implement a layoff that affects a majority of older workers, they will have to prove that they *did not* discriminate—instead of requiring employees to bear that burden of proof. This sharply departs from prior precedent, renewing the need to carefully plan and to consult legal counsel when contemplating a reduction in force (RIF).

Background

The Age Discrimination in Employment Act (ADEA) prohibits discrimination against employees over 40. The ADEA contains an exemption, which allows employers to make policies or implement decisions (such as a layoff) that may negatively impact older workers, as long as the policy or decision is “based on reasonable factors *other than age*,” (now known as the “RFOA” Standard). This exemption allows employers to make policies or implement decisions

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that might have a greater impact on older employees, as long as the decision is based on some objective basis unrelated to age.

During the past few years, the Supreme Court has changed the legal landscape for ADEA claims *in favor of workers*. These changes began in 2005, when the high court issued a decision, recognizing for the first time that older

workers could bring claims based upon a theory of “disparate impact.” *Smith v. City of Jackson*, 544 U.S. 228. Under this theory, if a plaintiff (or group of plaintiffs) can prove that a policy or decision impacted older workers more heavily than younger workers, the employer must then prove that it had a “reasonable,” *non-age based* reason for the decision. The employees do not have to prove discriminatory intent or bias—they just have to show that the policy or decision had a “disparate impact.”

This is where the ADEA exemption comes into play. In *City of Jackson*, the Supreme Court clarifies an employer could defend a “disparate impact” challenge by establishing that its decision was based on “reasonable factors other than age” (the “RFOA”). Until the *Meacham* decision, once the employer articulated its RFOA, most courts held it was up to the suing employee/plaintiff to then prove that the employer’s reason was “unreasonable” or was actually based on age.

Now, under the new *Meacham* standard, the *employer* must produce evidence of both the RFOAs or “reasonable factors” it used, *and* must then prove that it relied on these factors when it made its decision to conduct the layoff.

The Meacham v. Knolls Story

The U.S. Navy funded Knolls Atomic Power Laboratory and set staffing limits for the facility. In 1996, the government mandated staffing cuts, necessitating a RIF. The company provided managers with written guidelines for the RIF, instructing them to select employees by ranking them on factors such as “performance,” “flexibility” and “critical skills.” “Flexibility” was based on whether the “employee’s documented skills [could] be used in other future assignments that [would] add value to current and future lab work.” Once the rankings were completed, the managers were to identify employees for layoff starting with those having the least seniority. After selecting the necessary number of employees for layoff, the managers were told to conduct an adverse impact analysis. A board was then supposed to review decisions “to assure adherence to downsizing principles as well as minimal impact on the business and employees.” Knolls’ general manager and counsel was to conduct a final review of the selections and conduct an impact analysis.

Significantly, Knolls did not follow its own guidelines. After managers conducted the rankings on “performance,” “criticality” and “flexibility,” 31 employees were selected for layoff, 30 of whom were over 40 years old. Despite this

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obvious disparity, a human resources manager who according to the courts, “lacked training or serious preparation,” conducted the only disparate impact analysis. There was no scrutiny by legal counsel. The company’s board reviewed the layoff decisions to determine whether they met Knolls’ business needs, but did not analyze potential age discrimination issues. These oversights would later prove to be costly.

The Litigation

The laid off employees sued under the ADEA, arguing that the RIF had an obvious disparate impact on older workers, who were harmed by the “unaudited and heavy reliance on subjective assessments of criteria like ‘criticality’ and ‘flexibility.’” Knolls defended the subjective components of the evaluations, arguing that “criticality” and “flexibility” were important in ensuring the company could carry on operations with a reduced force. The jury found for the plaintiffs, awarding \$6 million in damages. After multiple appeals in 2008 (almost eight years after the RIF) the issue landed before the Supreme Court.

The Supreme Court Decision

The Supreme Court held that if an employer seeks to defend a layoff as based on “reasonable factors other than age” it bears the burden of proving this defense.

The Court did throw a small bone to employers, by holding that the plaintiff must first “identify” and “isolate” the specific employment policy or decision that caused the “adverse impact.” The adverse impact itself is generally proven by using a statistical expert, as it was during the *Meacham* jury trial.

However, once the plaintiff proves there was a statistical disparity, the burden shifts to the employer to now prove the “RFOA” or that the factors it relied on in implementing the RIF were “reasonable” and not age-related. This can be a significant burden.

The Impact

The *Meacham* decision makes it clear that if you undertake a RIF which falls more heavily on your older workers, you may later have to prove in court that you had objective reasons for it, which were not “age-related.” While this is a change in the law, it really does not change the manner in which employers should conduct RIFs.

Meacham reaffirms that an employer must be prudent when planning and implementing a RIF. In fact, the case confirms careful preparation, use of objective criteria, and diligent documentation and review of layoff decisions will go a long way in proving that your decisions were based on reasonable factors other than age. The use of “plainly reasonable” or objective factors as criterion for layoffs will help employers in establishing a solid defense. Also, do not make the same errors Knolls did when it made its RIF decisions. If you have written guidelines, *follow them*. Finally, by all means, have your legal counsel or an expert review the RIF plan before it is finalized and implemented.

Steps for Implementing a RIF

- 1. Preparation:** Once you determine that you must conduct a RIF, do some *planning* and *preparation*.
 - (i) Document your business goals and the need for the RIF. Include reasons for conducting the layoff and the goals it seeks to attain;
 - (ii) Describe the conditions necessitating the RIF;
 - (iii) Decide how many employees it needs to layoff, or the number of positions that need to be eliminated; and
 - (iv) Document the skills that will be needed after the layoff is complete to ensure that business can continue successfully.
- 2. Review Your Written Policies**
 - (i) If the company has conducted prior layoffs, it should be aware of the criteria used and the manner in which the written policies from the prior layoff can affect the current one.
 - (ii) If there are existing policies on conducting RIFs, comply with them, because employees may rely on existing policies and bring legal challenges accordingly.
- 3. Analyze Selection Criteria**
 - (i) Where possible, use objective criteria such as length of service or seniority, job classifications, classes of employees such as eliminating temporary or part-time employees first.
 - (ii) Use existing performance reviews, rather than conducting new reviews just for the layoff. Start with employees who have had persistent performance issues, then select from the remaining employees based on their ability to perform essential tasks that will remain after the layoffs.
- 4. Train Managers and Decision Makers**
 - (i) Many managers err in laying off people, rather than targeting positions. Be suspicious when managers suggest employees who should be laid off based on subjective criteria or personal characteristics.
 - (ii) Decision makers must be trained not to consider or discuss age, sex, race, or any other protected category, and to apply the selection criteria based on neutral factors, such as skills, functions and responsibilities.
- 5. Implementing the RIF:** *Stick to the plan prepared.* One of the problems in *Meacham* was that the employer created and distributed guidelines for implementing the RIF, but failed to comply with them.

- (i) Compliance is important. Individuals who make the layoff decisions must follow the plan and adhere to the selection criteria.
- (ii) Decisions must be based on a legitimate business need that achieves documented goals.
- (iii) Keep a record of the employees selected for layoff and the reasons why they were selected.
- (iv) Document how the selected employees meet the layoff criteria, and how remaining employees contribute to business objectives.

6. Conduct an Independent Review: After the employees have been selected, but before anyone is laid off, the company *must* conduct an *independent* review of the managers' decisions. Consider forming a committee and asking legal counsel to perform a critical review of the layoff decisions.

- (i) Look at your numbers and do a statistical analysis. Look to see if there is a disparate impact or treatment of any protected class.
- (ii) Check to see if anything about the decision appears suspect. Is the oldest person in the group being terminated? The only woman? The only minority? The only employee with a disability? If any alarms sound, review that decision.

Conclusion

After planning the RIF, selecting the employees to be terminated, and conducting an objective, critical review of the selections, the company should determine who will inform the employees and the manner in which it will be done. Employees affected by the RIF should be informed in as professional and supportive a manner as possible. The employer should be able to briefly explain the basis for its decision. Employers should treat terminated employees with consideration, dignity and respect, as this will go a long way toward preventing claims and minimizing bad feelings.

Conducting a RIF that withstands scrutiny can be a difficult task, but careful planning implementation, documentation, and review today can prevent lawsuits and liability tomorrow. ▀



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Lisa M. Harris, an associate at the firm, assisted in the preparation of this article.

Two Genesee Valley Chapter Members Nominated for the ATHENA Award

Each year, the ATHENA Award is bestowed upon one local professional woman who has made significant achievements in business, community service, and the professional advancement of women. Nineteen women were named as finalists for the 2009 ATHENA Award. Two of these are human resource professionals and members of the Genesee Valley Chapter of SHRM. The two women nominated are:



- **Elaine McKenna**, area vice president at Providium Human Resource Group; and



- **Liz Waidelich**, senior vice president of human resources for Rochester Midland Corporation.

Earlier this year, **Mimi Bacilek**, president of SuccessBuilders, LLC, and former Professional Development Chair of the Genesee Valley Chapter was recognized as an ATHENA Award nominee for 2008.

Fernan R. Cepero, PHR, President of Genesee Valley Chapter, stated, "Top HR professionals are on the front lines of anticipating and addressing today's challenges by creating innovative solutions, so that organizations can achieve – and sustain – success today and in the future. Elaine, Liz, and Mimi are truly HR professionals who are on the vanguard of our profession."

Robin McConnell, Executive Director, NYS-SHRM said, "As the premiere human resources association in New York we are thrilled with the recognition that Elaine, Liz and Mimi have achieved." The Genesee Valley Chapter board and all of us at NYS-SHRM extend our heartiest congratulations to this year's nominees.