


# U.S. Supreme Court further interprets ADEA

*The Court parsed a fine distinction between an employer's pension policies that take age into account and favor younger employees versus directly taking age into account and discriminating against older employees.*

**By Frank P. Sarro**

On June 19, 2008, the United States Supreme Court issued two important decisions interpreting the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. section 621 *et seq*. The Supremes gave employees a boost with *Meacham v. Knolls Atomic Power Laboratory* (2008) 128 S.Ct. 2395, holding that employers must bear both the burden of production *and* persuasion when the employer claims it relied on reasonable factors other than age for policies that have a disparate impact on older workers. *Meacham* actually represents a middle ground between (1) holding employers to a higher burden of proving "business necessity" for apparently discriminatory policies and (2) placing the burden on the employee to prove a negative (that the employer's conduct was unreasonable or unnecessary).

*Meacham* makes perfect sense because a natural interpretation of the ADEA's text leaves no doubt that the statute's reference to "reasonable factors other than age" (RFOA) sets forth an affirmative defense for employers to prove. ADEA sections 623(a), (b), (c) and (e) set forth the general prohibitions against age discrimination. All of these sections are subject to a separate provision, section 623(f), that creates exemptions for employer practices "otherwise prohibited under subsections (a), (b), (c), or (e)." Section 623(f) provides, "It shall not be unlawful for an employer… to take any action otherwise prohibited under subsections (a), (b), (c), or (e) … where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."

When a statute refers to an exception, the burden of proof usually falls on the party who wants to take advantage of the exception. "When a proviso… carves an exception out of the body of a statute … those who set up such exception must prove it." (*Javierre v. Central Altagracia* (1910) 217 U.S. 502, 508.) In addition, the High Court had already decided in 2005 in *Smith v. City of Jackson* (2005) 544 U.S. 228, 233 n.3, that the BFOQ clause establishes an affirmative defense against claims of disparate *treatment*.

It is thus not surprising that the Court took the next consistent step in deciding that the RFOA clause (BFOQ's neighbor) constitutes an affirmative defense for employers to prove in disparate *impact* cases. Although never mentioned in *Meacham*, it is also obvious that employers would have better access to their own internal thought processes and motivations than an employee who could only guess and wonder why 30 out of 31 laid off employees happened to be 40 years of age or older.

*Meacham* is almost as interesting in its alignment as its holding. It is a 7-1 decision in which the lone dissenter is Justice Thomas (who still does not think that the ADEA even covers disparate impact claims). Justice Scalia concurred in the judgment because he thought the Court should simply defer to the EEOC's prior interpretation that RFOA is an affirmative defense. Justice Breyer recused himself for some unknown reason (probably his stock holdings again).

### The Supreme Court both giveth and taketh away

The Supreme Court giveth and the Supreme Court taketh away. Handing a victory to employers, the Court in *Kentucky Retirement Systems v. E.E.O.C.* (2008) 128 S.Ct. 2361, once again parsed a fine distinction between an employer's pension policies that take age into account and favor younger employees versus directly taking age into account and discriminating against older employees. The rules regarding eligibility for retirement and disability retirement benefits given to Kentucky's "hazardous position" workers (such as policemen and firemen) were fairly complicated and seemed to favor younger workers by imputing to them years of service they never worked. The employer claimed that this disparate impact was innocent because its actual motivation was to come up with a formula that paid disabled retirees almost as much as "normal" retirees.

The idea was that it was equally heroic for a policeman or fireman to become prematurely permanently disabled in the line of duty as it was for any other hazardous worker to have escaped injury and normally retired. (Most disabled employees who could no longer work were younger than older workers who retired after 20 years of service without a debilitating injury. One way to equalize the benefits was to artificially inflate the dis-

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abled employees' years of service, since ultimate benefits paid out were always proportional to years of service whether paid as disability retirement or normal retirement. The employer did this by adding to an employee's actual years of service, the number of years that she would have had to continue working to become eligible for normal retirement benefits, adding no more than the number of years the employee had previously worked. An employee was eligible for "normal retirement" if she worked at least 20 years or if she turned age 55 after working only five years.)

Along came Charles Lickteig who, rather unusually, kept working even after becoming eligible for full retirement at age 55 and who, unfortunately, became disabled and retired at age 61. A straightforward application of the employer's idiosyncratic pension rules resulted in not imputing any additional years of service when calculating his benefits. The *Kentucky* decision may simply be another example of how bad facts make bad law. Combine a strange fact pattern with the employer's complicated pension rules, and you get a tangled mess in which the Supremes overruled both the EEOC's and the Sixth Circuit's determinations that this was illegal age discrimination.

Even though *Kentucky* deals a blow to employees and makes it harder to prove age discrimination in some cases, the Supreme Court's focus properly was on the central issue in all discrimination cases: What really motivated the employer's actions? The ADEA forbids an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." (29 U.S.C. section 623(a)(1).) Even though pension benefit decisions rely on age, and even though this employer's disability benefits paradoxically favored younger disabled retirees over older disabled retirees, the Court found that the employer was innocent of any illegal age discrimination.

Unfortunately for employees, *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604 paved the way for a rather strained interpretation that firing a 62-year-old employee less than six months away from pension vesting does not violate the ADEA. While *Hazen Paper* acknowledged that pension status depends upon years of service, and years of service go hand in hand with age, it insisted that *pension status* and *age* are two "analytically distinct" concepts and that an employer can easily "take account of one while ignoring the other." (*Id.* at p. 611.) In other words, heartlessly firing an employee to prevent him from receiving a pension is not a dismissal "because… of age."

*Hazen Paper* justified this by reasoning that a firing based purely on pension status (related to years of service) is not the type of evil the ADEA was designed to eradicate since such a dismissal (1) is not based on a "prohibited stereotype" of older workers, (2) did not produce any "attendant stigma" to those workers, and (3) was not "the result of an inaccurate and denigrating generalization about age." (*Id*. at pp. 610-613.) However the Court may wish to rationalize it, the fact remains that the *Hazen Paper* employee lost both job and pension and the Court concluded that such a severe result did not violate the ADEA, although it did violate section 510 of ERISA.

Likewise, the Court precluded Lickteig from any recovery in *Kentucky*, ultimately concluding that his pension status was not a "proxy for age" in part because the employer's rules were so complex that no age bias could be discerned. The plan's disability rules track Kentucky's normal retirement rules by imputing only those additional years of service needed to bring the disabled worker's total to 20 or to the number of years that she would have worked had she worked to age 55. Thus, the disability rules' purpose is to treat a disabled worker as though she had become disabled *after*, rather than *before*, becoming eligible for normal retirement.

Age factors into the disability benefits calculation only because normal retirement rules, themselves, permissibly consider age. The plan treats disabled employees as if they had worked up to the point where they would be eligible for a normal pension. Even though in doing so, many years of service are added to younger employees' benefit calculations that are never added to older employees' calculations, the disparity, according to the High Court, turns upon pension eligibility and is held to be not illegally motivated by age discrimination.

Almost guiltily, the Court emphasized that *Kentucky* is a special case of differential treatment based on "pension status," and that it in no way unsettles the rule that a statute or policy that facially discriminates based on age suffices to show disparate treatment under the ADEA. All these rather esoteric distinctions were endorsed by an odd majority led by Justice Breyer, who wrote the opinion, joined by Chief Justice Roberts and Justices Stevens, Souter and Thomas. Justice Kennedy filed a dissent (joined by Justices Ginsburg, Scalia and Alito) that forcefully argues that the ADEA is violated when an employer makes age a factor in an employee benefit plan in a formal, facial, deliberate, and explicit manner, that systematically and foreseeably results in younger disabled workers receiving higher pension benefits than older disabled workers.

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