

Disparate Impact Analysis Under the ADEA and Title VII Testing Claims

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Class-based claims for “unintentional” job discrimination predicated on the disparate impact theory of recovery are relatively uncommon, at least as compared to the volume of disparate treatment litigation. Therefore, while the analytical paradigm governing disparate impact claims is largely statutory and well established, case law of recent vintage is somewhat sparse. In an unusual flurry of disparate impact activity at the appellate level, the Second Circuit recently issued two significant decisions in this area within a period of three days. Those decisions form the backdrop for this brief review of the oft-neglected, but never forgotten, disparate impact model.

In the first of its two rulings, *Meacham v. Knolls Atomic Power Lab a/k/a/ KAPL Inc.*, 2006 WL 2338174 (2d Cir. Aug. 14, 2006), the Court, reversing a jury verdict for plaintiffs, held that a class of employees affected by a reduction-in-force could not meet their burden of proof on disparate impact claims under the Age Discrimination in Employment Act (“ADEA”) (1) by merely evidencing a selection method with less disparate impact in keeping with the “business necessities” test, and (2) absent proof that the employer’s proffered legitimate business justification was “unreasonable.” Later in the same week, the Court of Appeals issued its decision in *Gulino v. New York State Education Department*, 460 F.3d 361 (2d Cir. 2006), vacating the district court’s grant of summary judgment in defendants’ favor on

Title VII race-based disparate impact claims, providing compulsory judicial considerations, and remanding for further deliberation as to whether standardized testing required for public school teacher certification is “job-related.” These decisions illustrate the decisive importance of defendants’ specific burdens under the disparate impact models applicable in the ADEA context (adducing any reasonable justification) as compared to Title VII’s “business necessity” defense, and provides much-needed guidance on the particularized analysis associated with testing validation.

Meacham v. Knolls Atomic Power Lab a/k/a/ KAPL Inc.

In 1995, KAPL, a Lockheed Martin subsidiary, selected thirty-one employees for layoff, thirty of whom were over the age of forty, as part of an involuntary reduction-in-force. Selections were based on the employees’ length of service and managerial assessments of past performance, “flexibility” and “criticality of skills.” The selection decisions were reviewed by human resources, the general manager, and the compliance manager to ensure proper procedures were followed and the company maintained a smaller staff malleable enough to carry out multiple elements of intricate laboratory work.

In *Meacham I*, twenty-eight of the employees filed suit alleging disparate impact claims under the ADEA. Based in large part on a “startling” statistical disparity unfavorable to ADEA-covered workers, the jury awarded plaintiffs almost \$6 million in damages, and the Second Circuit affirmed. However, the U.S. Supreme Court vacated the Court of Appeals’ decision in light of its recent ruling in *Smith v. City of Jackson*, 544 U.S. 228 (2005) and remanded the case for further consideration. *City of Jackson* validated adverse impact claims under the

ADEA but held that personnel decisions based on “reasonable factors other than age” (“RFOA”) were beyond statutory protection. In drawing a distinction between ADEA and Title VII disparate impact litigation, the Supreme Court noted that Congress did not amend the ADEA in the Civil Rights Act of 1991, which expands disparate impact liability under Title VII, and made the observation that “age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual’s capacity to engage in certain types of employment.” *City of Jackson*, 544 U.S. at 240.

On remand, the Second Circuit distinguished the “business necessity test” it applied in *Meacham I* and the “reasonableness” standard announced by the Supreme Court, ultimately reversing its previous decision and dismissing the case. In *Meacham I*, the court applied familiar Title VII disparate impact analysis cemented in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) and extended to the ADEA by the Second Circuit in *Smith v. Xerox Corporation*, 196 F.3d 358 (2d Cir. 1999). Specifically, after plaintiff established a prima facie case by demonstrating a statistically significant adverse impact caused by the challenged employment practice or selection device, the employer must produce evidence of a legitimate business justification for the practice in question. Then the burden shifts back to the plaintiff to persuade the jury that defendant’s proffered reason does not meet the “business necessity” test -- that is, either the practice fails to serve legitimate employment goals or alternative selection criteria would serve the tendered interests without discriminatory effect. Under this analysis, the court found plaintiffs met their burden by demonstrating that the “flexibility” and “criticality” factors considered in the RIF selection process were

too subjective and could have been more particular.

In *Meacham II*, the court, in keeping with the Supreme Court’s guidance, abandoned its previous analysis in light of *City of Jackson*’s holding that the proper standard under the ADEA is not “business necessity” but rather “reasonableness.” If the non-age related factor is reasonable, it need not have the least disparate impact. Further clarifying the reasonableness standard, the court, agreeing with a recent Tenth Circuit decision, rejected the RFOA’s status as an affirmative defense employers must prove, finding the burden is merely one of production. The burden of persuasion remains with the plaintiffs at all times. This determination comports with *City of Jackson*’s holding that pre-1991 *Ward’s Cove* Title VII disparate impact analysis remains applicable to the ADEA.

Turning to the facts of the case, the court concluded that although the RIF selection process may not have been ideal, defendants acted reasonably in (1) setting selection standards, albeit primarily subjective, to be used by managers in evaluating employees with whom they had day-to-day supervisory contact, and (2) monitoring implementation of the RIF. Certainly the “startlingly skewed” percentage of protected employees selected for layoff was relevant to plaintiffs’ prima facie case, but it was not necessarily probative of whether the defendant’s justification was reasonable. Boding well for employers, the Second Circuit reaffirmed the proclamation that “we are not a super-personnel department” and commented that “[c]ourts are generally less competent than employers to restructure business practices.”

Gulino v. New York State Education Department

Compared to defendants' lighter burden under the ADEA, employers facing Title VII disparate impact challenges to testing procedures are confronted with both the more stringent "business necessity" test and validation requirements. In *Gulino v. New York State Education Department*, plaintiffs, African-American and Hispanic public school educators, challenged certain standardized tests – the Core Battery Test and the Liberal Arts and Sciences Test ("LAST") - as discriminatory. Full-time permanent teachers in New York had to pass LAST to obtain initial certification. LAST is administered on a pass/fail basis and tests basic college-level skills through a multiple choice section and a "Written Analysis and Expression" essay section. To pass, a test taker must answer roughly two-thirds of the multiple choice questions correctly and score three out of a possible five points on the essay. Scoring was cumulative, however, such that poor performance in one section may be offset by stellar performance in another. Generally, all test-takers performed worse on the essay portion of the exam. Plaintiffs maintained that the State Education Department and the New York City Board of Education's use of these tests had a disparate impact on minority job seekers in violation of Title VII. Overall, the average pass rate for whites ranged from 91-94%, for African-Americans from 51-62%, and for Hispanics from 47-55%.

After a lengthy trial, the district court ruled in defendants' favor, finding that plaintiffs presented sufficient statistical data to make out a prima facie case, but this was overcome by persuasive "business necessity" evidence establishing that the exams were used to ensure individuals had the skills necessary to become public school teachers. The Core Battery Test was

deemed "job-related" and thus adduced valid. Although defendants failed to establish "formal validity" for LAST, the district court, relying on *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), held that this test was likewise job-related because of: (1) the importance of essay writing skills among education professionals; (2) the weight of the essay portion of the test; and (3) the fact that a majority of plaintiffs would have passed the test but for the essay. Plaintiffs appealed the decision.

As an initial matter, the Second Circuit addressed defendants' immunity from liability, finding the state Education Department is not an "employer" under Title VII, and thus dismissing claims against it. On the other hand, because the Board of Education hires and compensates teachers, it was deemed potentially liable. Turning to the merits of the remaining claims against the Board, the Court agreed that plaintiffs established a prima facie case of disparate impact, but rejected the trial court's determination that defendants sufficiently rebutted plaintiffs' proffer with evidence that the challenged practice was "job-related" as the term is used interchangeably with "business necessity."

Employers are permitted to use tests resulting in a disparate impact so long as they are a reasonable measure of job performance. Testing validation draws from both expert testimony and EEOC Guidelines distinguishing between tests that measure content ("hard" job skills) and those that measure constructs (softer abstract qualities), the latter being more difficult to shore up. In addition, a five-factor common law test for content validity was laid out in *Guardians Association v. Civil Service Commission of New York*, 630 F.2d 79, 93-94 (2d Cir. 1980): (1) test-makers conducted a suitable job analysis; (2)

reasonable competence was used in constructing the test; (3) content of the test is related to the content of the job; (4) content of the test is representative of the content of the job; and (5) there is a scoring system that usefully selects from among the applicants who can best perform the job.

The Second Circuit found the district court erred in its failure to apply the *Guardians* test, and further rejected the district court's interpretation of *Watson* as standing for the proposition that the Supreme Court "lowered the bar" for defendants in Title VII disparate impact cases by eliminating the need for formal test validation. The Court of Appeals clarified that *Watson* illustrates a few outlying examples where formal validation is not necessary, i.e. the use of subjective evaluations by supervisors or selection based on safety issues surrounding drug use, but is inapposite to standardized testing cases. Because the district court did not complete a validation analysis, and the record was devoid of evidence on this point, the Court vacated the judgment for clear factual error and remanded for further consideration in light of its findings.

Specifically, the Second Circuit, focusing on the essay portion of the test, found the lower court's conclusions clearly erroneous because: (1) minority candidates averaged lower on both the multiple choice and the essay sections and thus would have failed at a higher rate anyway; (2) an individual could pass the essay but not a multiple choice section and vice versa; and (3) the compensatory nature of the scoring regime allows a better performance on one section to offset a poor performance in another and, therefore, the whole test, and not just one portion, must satisfy the job-relatedness test. Finally, the Court addressed the fact that both defendants either destroyed or failed to maintain records regarding LAST validation, remanding with the instruction

that while "vague and unsubstantiated hearsay" is not enough standing alone to prove job-relatedness, first-hand accounts of those involved in the validation process and expert testimony could be sufficient.

Both of these decisions provide helpful insight to those litigating disparate impact claims. *Meacham II* provides a distinct road map for employers to follow when making RIF decisions based on multiple criteria in order to reduce the likelihood of ADEA disparate impact liability. *Gulino* reaffirmed and clarified the particularized considerations employers should assess, and cautionary steps to take, when utilizing testing procedures in the workplace.