



RECENT SUPREME COURT DECISIONS ON “DISPARATE IMPACT” LIABILITY

Within the last year the Supreme Court of the United States has issued two important decisions in employment law, specifically in the context of actions that may cause a “disparate impact” on a “protected class” of people even where they may be no intent to discriminate. The first case, *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395, concerned a disparate impact claim in the context of alleged age discrimination, while the second case, *Ricci, et. al. v. DeStefano, et. al.*, No. 07-1428 (June 29, 2009), concerned disparate impact and attempts to correct such impacts in the race discrimination context. In both cases, the Supreme Court ruled in favor of the employees who had sued their respective employers. Yet, it is difficult to glean any further consistent theme from the decisions. Although the Court in both decisions articulated its philosophy of adhering literally to statutory language, literal meaning begged the question in the *Ricci* case. The *Ricci* case in particular shows that policy oriented reasoning is inescapable even amongst an alleged “strict constructionist” majority. Meanwhile, it appears that employers have born the brunt of the current Court’s methodology.

***Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395**

In *Meacham*, plaintiff along with some fellow employees brought a disparate impact claim against their employer, Knolls, under the Age Discrimination in Employment Act (ADEA). Knolls had reduced its work force in a process that required managers to score their employees on “performance,” “flexibility,” and “critical skills” to determine who would be laid off. In the end, 30 of the 31 employees let go were at least 40 years old. The apparent disparate impact upon older workers gave rise to the plaintiffs’ age discrimination claim.

The Second Circuit found for Knolls on the grounds that a “reasonableness” test should be used to evaluate the employer’s actions and that the employees had failed to demonstrate that Knolls’s actions were unreasonable. The Supreme Court reversed, however, ruling that the burden lies with the employer, not the discharged employees, to prove that the layoff decisions were reasonable when confronted with claims of disparate impact against older workers.

A traditional textual analysis of the ADEA brought the Court this conclusion. Generally, a party asserting an affirmative defense carries both the burden of production and persuasion. In this case, the Court noted that the ADEA provides for an exception for actions otherwise prohibited by the statute, such as those that cause a disparate impact, when they are based on reasonable factors other than age. The Court also noted that this exception was listed in the statute along with “affirmative defenses.” Accordingly, the Court determined that “reasonableness” amounted to an affirmative defense under the ADEA, leaving the employer with the burden of not only producing evidence of reasonable factors other than age but also persuading the fact finder of their merit.

Ricci, et. al. v. DeStefano, et. al., No. 07-1428 (June 29, 2009)

By contrast, the Court recently divided itself sharply over the issue of disparate impact and remedial measures in the context of race. This case arose out of the City of New Haven's decision to reject the results of a test designed to determine eligibility for promotion within their fire department. When the results came back, all of the firemen eligible for promotion were white, except for one Hispanic. None were black. The City rejected the test results based on the race of those who passed because it feared it could possibly have been sued under a disparate impact theory by those black candidates who failed the exam. Unfortunately, the City learned that there often is no way to avoid litigation. Upon learning of the City's rejection of the test results, the firefighters who passed brought a Title VII discrimination claim against the City, alleging that rejection of the test results solely on the basis of race demographics constituted unlawful race discrimination, regardless of the remedial motive behind the action. The Court agreed and found that the City's rejection of the test results based on the racial makeup of those who passed constituted unlawful race discrimination under Title VII.

As in the Meacham case, the Court justified its decision upon its purported strict adherence to the text of the statute. The Court explained Title VII outlaws employment decisions based on race and that, absent some defense, the City could not simply reject the test results because of the racial backgrounds of those who passed. The Court refused to find a "good faith" exception to race discrimination based on the City's attempts to avoid disparate impact on minorities where Congress had not provided one. But the purported adherence to the language of the statute does not fully explain this reasoning. The statute, for example, also outlaws employment actions that result in disparate impacts on protected classes, even when those actions that cause such impact are devoid of discriminatory intent. The statute also provides for remedies for those employees who suffer those disparate impacts, including legal claims against their employers for damages and other forms of relief. As the dissenting opinion noted, the plain language of the statute provides for employers to take remedial action so as to avoid potential disparate impacts against protected classes. According to the dissent, rejecting the test scores did nothing other than allow the City to comply with the disparate impact sections of the very same statute the majority purported to interpret literally when ruling against the City.

Tension in the Law

Bottom line, the "literal" language of Title VII creates a tension in the law. As the Ricci case shows, an employer who uses race to make a decision to avoid liability under the disparate impact provisions of Title VII can find himself liable under the disparate treatment provisions under the same statute. Indeed, the Ricci majority conceded that a prima facie case for disparate impact liability against the City existed after the test results came in, as the winning candidates were nearly all white. However, the Court found that mere fear of litigation alone cannot justify a race based employment decision. Rather, according to the 4 Court, the employer must at least have a "strong basis in evidence" that it in fact would truly be subject to disparate impact liability in the event a lawsuit is filed before it can use race as a basis to reject promotion test results. The Court determined that a lesser standard would simply open the door to race based employment decisions based on potentially specious claims.

What does this mean?

Both these important decisions place employers in difficult positions. Under the ADEA, employers must come close to having to prove a negative while under Title VII the Court has deprived employers of any avenue to avoid litigation, as any action taken to avoid disparate impact claims can now be the basis for disparate treatment claims.

About the Authors:



Robert B. Smith

Bob leads the Non-Profit Organizations and [College & University](#) practice groups. He specializes in the defense of claims against nonprofits and charitable institutions and organizations and provides counsel concerning complex issues including governance; regulatory compliance, employment, business affairs and ethics issues. Comments welcome at RSmith@nkms.com.



Christopher T. Vrontas

Chris leads the [Employment Practice Group](#) at *Nelson Kinder Mosseau & Saturley, P.C.* Mr. Vrontas represents a number of local companies as well as national and international businesses in matters involving employment discrimination and wage claims, covenants not to compete, intellectual property matters, and other business disputes. Comments welcome at CVrontas@nkms.com.



Nelson Kinder Mosseau & Saturley PC
ATTORNEYS AT LAW

Boston Office - Two Oliver Street - Boston, MA 02109 - 617.778.7500 - Fax 617.778.7501
Manchester Office - 99 Middle Street - Manchester, NH 03101 - 603.647.1800 - Fax 603.647.1900
Portland Office - Two Monument Square - Portland, ME 04101 - 207.347.6901 - Fax 207.347.6902