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Landmark Second Circuit decision dismisses adverse impact age discrimination claims and jury verdict against KAPL, Inc. and Lockheed Martin

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In a complete and dramatic reversal of an earlier multi-million dollar jury verdict and judgment in favor of a class of employees laid off in a 1995 reduction in force or “RIF” at the Knolls Atomic Power Laboratory in Niskayuna, New York, the U.S. Court of Appeals for the Second Circuit has now ruled in favor of the defendants (KAPL, Inc., Lockheed Martin Corp., and John Freeh, KAPL’s former General Manager), and ordered the plaintiffs’ “adverse impact” age discrimination claims dismissed in their entirety. The Second Circuit’s August 14, 2006 decision in *Meacham v. KAPL, Inc.*, (“*Meacham II*”), is a landmark case for employers (in New York and elsewhere) confronted with the need to reduce their workforces through involuntary means, including company-wide layoffs which are frequently based, at least in part, on the subjective judgments of company managers.

The court’s decision in *Meacham II* overrules prior Second Circuit precedent in this area and creates new law helpful to employers in cases alleging unintentional, adverse impact age discrimination under both federal and New York State anti-discrimination laws. The Second Circuit’s decision in *Meacham II* also provides employers and their managers with a much clearer road map to follow when making difficult decisions about which employees to layoff in an involuntary RIF, or “IRIF.”

The Second Circuit has now made it clear in its 2-1 decision in *Meacham II* that age is different than race, sex, and national origin discrimination in a number of important ways. As explained in the court’s majority opinion: “[a]ge, 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, and . . . as a result, certain employment criteria [like “flexibility” and “criticality of skills”] that are routinely used may be reasonable despite their adverse impact on older workers as a group.” And, if an employer can show that the steps it took and the criteria it considered along the road to a group layoff were reasonable ones, and the plaintiff/employees cannot prove otherwise, the



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employer wins, as a matter of law, the Second Circuit has now held in *Meacham II*.

Importantly, under *Meacham II*, this is the result even where the selection procedures and safeguards against discriminatory treatment adopted by the employer are not perfect or “foolproof.” The majority of the court in *Meacham II* has also now made it clear that this same result should be reached in an adverse impact age discrimination case even where the employer’s layoff or other challenged personnel decisions are based on the subjective judgments of managers and supervisors, at least when the managers and supervisors making the decisions “are in day-to-day supervisory relationships with their employees,” and even when the final “bottom line” results of the employer’s selection process end up unintentionally looking “startlingly skewed” against older workers.

Background Facts Related to the IRIF, the Trial and *Meacham I*

The *Meacham* case started in 1995 when KAPL, a Lockheed Martin subsidiary, adopted a plan to reduce staffing levels at its Niskayuna Laboratory by implementing an involuntary layoff. Thirty-four (34) “exempt” salaried employees were ultimately selected for layoff based on their managers’ documented assessments on a matrix of each employee’s comparative years of company service, past performance, “flexibility,” and “criticality.” These selections were reviewed by human resources, higher Laboratory management and KAPL’s general counsel before being finalized to ensure that the established layoff procedures were followed and that the selections were consistent with KAPL’s business needs and the critical skills needed to do the Laboratory’s work.

Twenty-eight (28) of the employees laid off brought suit against the defendants under State and federal laws alleging they were selected for layoff in the IRIF intentionally because of their ages. Even if not intentionally discriminatory, the plaintiffs alleged that the layoff procedures used by the KAPL defendants unfairly and negatively impacted older workers (those 40 and over) protected by the Age Discrimination in Employment Act (“ADEA”).

In support of these claims, the laid off employees pointed to the numbers, including statistical evidence showing that thirty (30) of the thirty-one (31) exempt employees selected for layoff in the IRIF were over the age of 40 and thus protected by the ADEA. It was this “startlingly skewed” age distribution of laid-off employees that caused the jury who decided the case, then the federal Magistrate Judge who affirmed the verdict, and the Second Circuit panel in *Meacham I* to initially find for the plaintiffs on their adverse impact age discrimination claims (even though the jury’s verdict and the courts completely exonerated the KAPL defendants of any intentional age bias or disparate treatment).

In *Meacham I*, decided in August 2004, a three-judge panel, in a decision written by Circuit Judge Rosemarie Pooler (the lone dissenter in *Meacham II*), upheld the lower court’s decision which affirmed the jury’s adverse impact verdict and denied the KAPL defendants’ post-trial motions to overturn it. Still convinced that their actions were reasonable and certainly not unlawful, the KAPL defendants next took their case to the U.S. Supreme Court where they asked the high Court to stay the judgment and issue a writ of certiorari seeking to overturn the lower court’s decisions, as well as the jury’s adverse impact findings.

On November 10, 2004, Supreme Court Justice Ruth Bader Ginsberg granted the KAPL defendants’ request for an emergency stay of the judgment, which had awarded nearly \$6

million in damages to the plaintiffs. Then, on April 4, 2005, the Supreme Court granted the petition for a writ of certiorari filed by the KAPL defendants' attorneys at Nixon Peabody LLP, vacated the Court of Appeals' decision in *Meacham I*, and remanded the case to the Second Circuit for reconsideration in light of the Supreme Court's March 2005 decision in *Smith v. City of Jackson*. In that case, the Supreme Court ruled, in a decision written by Supreme Court Justice John Paul Stevens, that an adverse impact age discrimination claim could indeed be stated under the ADEA, but that personnel actions based on "reasonable factors other than age" are beyond the reach of the ADEA even in an adverse impact case.

Meacham II Adopts and Clarifies a New "Reasonableness" Standard

Following remand of the case back to the Second Circuit for reconsideration and the filing of supplemental briefs by the parties and various "friends of the court," including the Equal Employment Opportunity Commission ("EEOC"), the AARP, and the National Employment Lawyers Association ("NELA") representing the plaintiffs' bar, it took more than one full year for the Court of Appeals to issue its decision in *Meacham II*. But in the decision finally issued on August 14 by the same three-judge panel that decided *Meacham I*, the court and two of the judges on the panel (Circuit Judges Jacobs and McLaughlin) completely reversed their prior decision.

This change of course resulted largely from the Supreme Court's intervening decision in *City of Jackson*, which cast doubt on the rationale behind the Second Circuit's earlier decision in *Meacham I*. As explained by Circuit Judge Jacobs writing for the majority in *Meacham II*: **"In light of *City of Jackson*, it is clear that [the Second Circuit's prior decisional law in this area] is no longer good law insofar as it holds that the 'business necessity' test governs ADEA disparate impact claims."** Under that test, the Second Circuit had previously held, the employer had the burden of showing that its employment practices had a legitimate business justification, but once that showing was made, the plaintiffs could still win in an adverse impact case if they could persuade the jury that other tests or selection devices, without a similar undesirable effect, would also serve the employer's legitimate interests.

The court in *Meacham I* had concluded that the plaintiffs had satisfied this burden of proof at trial by convincing the jury that there were alternatives available to the KAPL defendants that might not have produced the same "startlingly skewed" results against older workers. This conclusion, however, and the whole rationale for the decision in *Meacham I*, has now been expressly disavowed and rejected by the majority decision in *Meacham II*. As explained in the majority opinion in *Meacham II*: **"That analysis is untenable on this remand because, in *City of Jackson*, the Supreme Court held that the 'business necessity' test is not applicable in the ADEA context; rather, the appropriate test is for 'reasonableness,' such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals."** According to the *Meacham II* majority opinion, the KAPL defendants satisfied their burden under this new, less rigorous "reasonableness" standard; the plaintiffs did not.

A number of other significant points (and there are many) made by the majority in *Meacham II* deserve specific mention here. First, the EEOC and other "friends" of the plaintiffs who submitted briefs to the Second Circuit on remand urged the court to hold that the

“reasonable factors other than age” or “RFOA” defense is an affirmative defense that employers must not only plead but also prove. The majority in *Meacham II* rejected this argument, finding instead that an employer’s burden of demonstrating “reasonableness” in an adverse impact age discrimination case is merely one of producing evidence to justify its actions or the challenged layoff criteria and is not a burden of persuasion. Persuading the jury that the employer’s actions are unreasonable remains the plaintiff’s ultimate burden of proof at all times.

Also of note is the Second Circuit’s reaffirmation in *Meacham II* that no court can sit “as a super-personnel department” and that “[c]ourts are generally less competent than employers to restructure business practices.” Just as significant is the majority’s express acknowledgment in *Meacham II* that there is no one right way of structuring an IRIF. As explained by Judge Jacobs writing for the majority: **“The range of reasonable personnel systems is wide in a fluid and adaptive economy”** and although “[t]here may have been other reasonable ways for [KAPL] to achieve its goals . . . ‘the one selected was not unreasonable.’”

Some Important Lessons Learned

For the KAPL defendants, and for other employers faced with a similar business need to make belt-tightening personnel reductions, these judicial sentiments and the clearer road map given to employers by the Second Circuit’s decision in *Meacham II* are long-awaited and welcomed indeed. Of course, this is not to say that the layoff procedures adopted by the KAPL defendants prior to the IRIF could not have been improved upon and that there are not important lessons to be learned from *Meacham II*.

Prudent employers considering any kind of involuntary reduction in force and looking to avoid this kind of protracted, expensive, and uncertain litigation would be well advised to set clear and, wherever possible, objective standards for managers responsible for evaluating employees being considered for layoff; train those managers responsible for ranking employees for selection not only on the IRIF procedures but also on the employer’s non-discrimination policies; establish multi-level review procedures of all layoff selections; and carefully monitor the managers’ implementation of any IRIF procedures. As the majority recognized in *Meacham II*, even where subjective selection criteria are utilized, preventing or restricting arbitrary decision-making by individual managers, and putting “substantial” measures in place “to prevent such arbitrary decision-making and ensure that” any layoffs satisfy legitimate business needs are critical steps indispensable to a showing of “reasonableness.” In the end, it was just such “substantial” measures that saved the day and won the case for the KAPL defendants.

Additionally, prudent employers considering or implementing involuntary reductions-in-force should also make sure that they perform and review the results of appropriately drawn and designed adverse impact analyses for age (as well as for race, sex, and other prohibited types of discrimination covered by the EEOC’s Uniform Guidelines on Employee Selection Procedures). All adverse impact analyses should be performed by well-trained human resource professionals or experts experienced in conducting and explaining such analyses. And, employers should retain competent experts and legal counsel experienced with such matters at an early stage, and before litigation ensues, to ensure that they are closely

following the road map provided in both *Meacham II* and *City of Jackson* and the rapidly evolving standards being adopted by the courts in this complex area of the law.

Throughout the appeals taken to the Second Circuit and the U.S. Supreme Court, the KAPL defendants were all represented by Nixon Peabody attorneys Margaret Clemens (of Rochester) and John Higgins (of Albany). Mr. Higgins also served as lead counsel for the KAPL defendants during the trial.

For additional details about the facts and history of this long-running case, and about the decisions in both *Meacham I* and *Meacham II* or other employment law matters, please contact either Margaret Clemens (at 585-263-1453 or mclemens@nixonpeabody.com) or John Higgins (at 518-427-2704 or jehiggins@nixonpeabody.com), or your Nixon Peabody attorney.

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